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ATTORNEY GENERAL OPINION NO. 91- 51

DeAnne E. Hupe
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Re: Eminent Domain -- Condemnation in Cities -- Cities;
Authority to Condemn Public Property

Synopsis: K.S.A. 26-201, which delegates to cities in Kansas the right of eminent domain in general terms, does not authorize such cities to condemn property already devoted to public use, if such condemnation will substantially destroy or materially interfere with the present public use. In our opinion, the city of Derby may not condemn property in Spring Creek upon which the department of wildlife and parks currently possesses easements. Cited herein: K.S.A. 26-201; K.S.A. 1990 Supp. 32-807.

* * *

Dear Ms. Hupe:

As legal counsel for the Kansas department of wildlife and parks, you ask our opinion on whether a municipality can condemn property in which the state has a property interest.

You inform us that the specific situation involves the city of Derby which contemplates condemning property along or within Spring Creek. The Kansas department of wildlife and parks currently possesses easements encompassing portions of Spring

Creek through which the city of Derby intends to construct a sewer. You inform us that the easements were obtained pursuant to the authority of K.S.A. 1990 Supp. 32-807(f) to preserve and protect in perpetuity the natural elements and ecological and aesthetic values of the property.

Initially we note that an easement is a type of property subject to the power of eminent domain. 29A C.J.S. Eminent Domain, § 69 Easements (1965). "Property" for purposes of a state statute authorizing a municipality to acquire by eminent domain any property necessary to carry out any of its powers or functions includes real and personal property and any interest therein. McQuillan Mun. Corp. § 32.13 (Third Ed.). Therefore, the department possesses a property interest which could be asserted in a condemnation proceeding brought by the city.

The general principals relating to a city' s eminent domain authority are set forth in Weast v. Budd, 186 Kan. 249, 252 (1960):

"[E]minent domain is the right to take private property for public use without the owner's consent upon payment of just compensation. The right is an inherent power of the sovereignty and comes into being with the establishment of government and continues so long as the government endures, but its exercise may be limited by the constitution. Except as so limited, it may be exercised for any public purpose designed by the Legislature and in the manner it prescribes. While a municipal corporation has no inherent power of eminent domain, the legislature of Kansas has delegated that power to all cities of the state 'to condemn private property or easements therein for the use of the city for any purpose whatsoever'." (Citation Omitted).

Current legislative authority delegating eminent domain authority to cities is found at K.S.A. 26-201 which provides in part:

"A city shall have the right to acquire by condemnation any interest in real property, including a fee simple title

thereto: provided . . . whenever it shall be deemed necessary by the governing body of any city to appropriate private property for the use of the city for any purpose whatsoever, the governing body shall by resolution declare such necessity and authorize a survey and description of the land or interest to be condemned to be made by some competent engineer and filed with the city clerk. . . ." (Emphasis added).

Since that statute clearly authorizes a city to "appropriate private property," the issue becomes under what circumstances, if any, a municipality may condemn public property. The answer to that question was provided in 1936 by Judge McDermott writing for the Tenth Circuit in City of Norton v. Lowden, 84 F.2d 663, 665-666 (10th Cir. 1936).

"The power to take private property for public use inheres in the sovereign, is essential to the public welfare, and can neither be contracted away nor surrendered. It applies to property already devoted to one public use. However, statutes delegating to agencies of the state - municipalities, railroads, etc. - the right of eminent domain in general terms, do not authorize such agencies to condemn property already devoted to public use, if such condemnation will substantially destroy or materially interfere with the present public use. Power to destroy or materially interfere with an existing public use must be found in a specific authorization of the legislature. On the other hand, if the second public use does not substantially destroy or materially interfere with the existing public use, property may be condemned for the second public use under a statute conferring the power of eminent domain in general terms. The authorities are numerous. Many years ago Judge Pollock found this to be the law in Kansas, which he expounded in an able and exhausted opinion, frequently

cited and followed. Chicago, R.I. and P.
Ry. Co. v. Williams (C.C.) 148 F., 442."

Judge McDermott went on to note that those legal principles did no more than apply common sense to the problem:


"A city should have the right, without express legislative authority, to open a street across a single track of railway where it does not substantially interfere with the railway use; but it should not have the power, without such express grant from the sovereign, to open a street through a station house." Norton, at 666. See also Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan.App.2d 102 (1978).

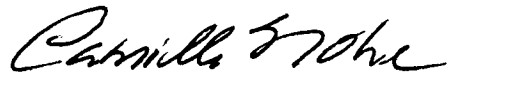
It is our understanding that installation of the proposed sewer through Spring Creek would necessitate the removal of very large, old, oak trees, the preservation and protection of which is the function of the easement granted to the Kansas department of wildlife and parks. Condemnation by the city of the easement would clearly substantially destroy or materially interfere with that present public use. Such an endeavor would be akin to "opening a street through the station house." As no statute grants specific legislative authority to the city to condemn public property already devoted to public use, the city of Derby may not condemn that property. The general grant of condemnation authority provided to cities by virtue of K.S.A. 26-201 is not sufficiently specific to authorize the condemnation of public property where that condemnation would destroy or materially interfere with the existing public use. A city "can exercise the power of eminent domain only by virtue of legislative authorization which 'should never be enlarged by implication.'" Isley v. Bogart, 338 F.2d 33 (10th Cir. 1964), citing Sutton v. Frazier, 183 Kan. 33 1958). See also 29A C.J.S. Eminent Domain, § 86 Public Property (1965), and McQuillan Mun. Corp. § 32.67 Property Already Devoted to Public Use (1991).

In conclusion, K.S.A. 26-201 which delegates to cities in Kansas the right of eminent domain in general terms, does not authorize such cities to condemn property already devoted to

public use, if such condemnation will substantially destroy or materially interfere with the present public use.

Very truly yours,


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