



STATE OF KANSAS

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April 15, 1980

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ATTORNEY GENERAL OPINION NO. 80- 92

Mr. Myrlen Bell  
City Attorney, City of Attica  
Hall & Bell  
105 North Main  
Medicine Lodge, Kansas 67104

Re: Cities and Municipalities--Public Utilities--Exercise  
of Eminent Domain for Construction of Waterworks  
System

Synopsis: The City of Attica is empowered to make improvements to its waterworks system pursuant to K.S.A. 12-856 et seq., and in so doing, may exercise the right of eminent domain granted by K.S.A. 12-867 to obtain land for such purposes within or without the city limits. The city's exercise of the right of eminent domain pursuant to K.S.A. 12-867 is not restrained by the five-mile limitation imposed under K.S.A. 12-845, since both statutes are parts of enactments of the legislature which prescribe two methods or procedures for accomplishment of the same or similar purposes.

Cited herein: K.S.A. 12-844, 12-845, 12-856 et seq., 12-862, 12-867; L. 1913, ch. 122, and L. 1953, ch. 72.

\* \* \*

Dear Mr. Bell:

You advise that because of salt water pollution, the City of Attica has found it necessary to construct new water production facilities outside of the city limits in order to maintain an adequate water supply for city residents. You indicate that the bulk of the city's current water production and production facilities are located approximately six and one-half miles north of Attica's city limits,

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and that the proposed location for new wells is approximately one mile west of the existing facility, more than five miles outside the city limits. You further advise that the city has been unable to contract for the purchase of a site for the new wells and necessary easements for pipelines. Thus, the city desires to exercise eminent domain powers in order to obtain the aforesaid proposed site and easements, which desire prompts your inquiry.

You indicate that the city seeks to make the above-described improvement to its waterworks system by authority of K.S.A. 12-856 et seq., which statutes apply to cities having a population of less than 80,000. (We are informed that the population of the City of Attica is approximately 715, according to figures compiled by the Kansas State Board of Agriculture, published October 12, 1979.) K.S.A. 12-862 empowers the city's governing body to authorize "repairs, alterations, extensions, reconstructions, enlargements or improvements of its water and sewage system . . . and issue or cause to be issued revenue bonds in payment of the cost thereof." K.S.A. 12-867 grants the power of eminent domain to "[a]ny city operating under this act . . . [within] or without the city for the purposes of this act." (Emphasis added.)

You inquire whether the City of Attica may exercise the right of eminent domain to obtain necessary sites and easements for improvements to its waterworks system on land more than five miles from the city limits pursuant to K.S.A. 12-867, or whether the city's exercise of such right is limited to land within five miles of the city limits as prescribed by K.S.A. 12-845. The latter statute is part of a 1913 enactment (L. 1913, ch. 122) applicable to cities of the second and third classes enabling such cities to "construct and maintain pipe, power, light and telephone lines and necessary ways of access . . . between the city limits . . . and the place or location of any waterworks, sewer or other public utilities." K.S.A. 12-844. K.S.A. 12-845 empowers the governing bodies of such cities to obtain land to construct pipe, power, light or telephone lines and access ways to exercise the right of eminent domain "within five miles of the city limits." (Emphasis added.)

As you have correctly noted, the statutes under which the City of Attica proposes to proceed to make the aforementioned improvements, K.S.A. 12-856 et seq., comprise an act of the legislature separate and distinct from statutes in preceding sections of Chapter 12 of the Kansas Statutes Annotated. You state that it is your opinion, therefore, that the limitations contained in K.S.A. 12-845, quoted above, do not apply to eminent domain proceedings under the act in question, pursuant to K.S.A. 12-867.

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We agree. The statutes in question, K.S.A. 12-856 et seq., originate from a 1953 act of the legislature (L. 1953, ch. 72), having no apparent relation or connection to the authority of cities granted under the above-mentioned 1913 act (L. 1913, ch. 122). In our judgment, the authority granted to cities under both acts establishes two distinct methods of procedure for achieving similar purposes, but the limitations imposed under the latter act do not restrain the exercise of authority under the former.

In Evel v. City of Utica, 103 Kan. 567 (1918), the Kansas Supreme Court reached a similar conclusion in consideration of the provisions of the above-mentioned 1913 act in comparison with other enactments granting the power of eminent domain for the same or similar purposes. The Court wrote, in pertinent part:

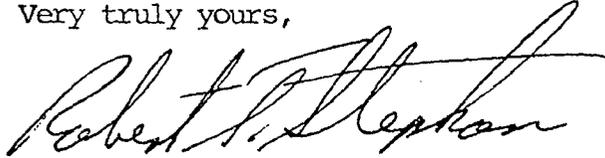
"Attention is called to another act passed in 1872, and amended in 1883, by which land may be obtained for waterworks in cities of any class, and by a different method. . . . The act of 1872 undertakes to extend the power of condemnation beyond that conferred in the act of 1871. . . . But regardless of the differences in the acts, it was competent for the legislature to provide, as has been done in several instances, two systems for the accomplishment of the same purpose. There may be good reasons why the condemnation should be made . . . in the manner prescribed in the act of 1871 in one case, and that in another a better purpose would be accomplished . . . through the procedure prescribed by the act of 1872. There is a marked difference in the two methods of procedure and, there being nothing to indicate that one act is a substitute for the other, both are deemed to be in force, and a condemnation by either of the prescribed methods will be sufficient." (Emphasis added.)  
103 Kan. at 570-571.

In consideration of all of the foregoing, we conclude that the City of Attica is empowered to make improvements to its waterworks system pursuant to K.S.A. 12-856 et seq. In so doing, it may exercise the right of eminent domain granted by K.S.A. 12-867 to obtain land for such purposes within or without the city limits. The exercise of the right

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of eminent domain pursuant to K.S.A. 12-867 is not restrained by the five-mile limitation imposed under K.S.A. 12-845, since both statutes are parts of separate and distinct enactments of the legislature which prescribe two methods or procedures for accomplishment of the same or similar purposes.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Steven Carr  
Assistant Attorney General

RTS:WRA:SC:gk