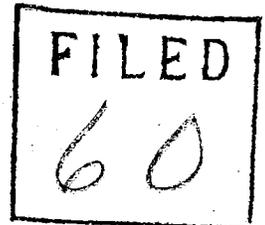


AIRPORTS:) Fourth class city can condemn land a
EMINENT DOMAIN:) reasonable distance outside corporate
CITIES OF THE FOURTH) limits to establish airports. Reason-
CLASS:) ableness of distance is question of fact.

June 10, 1947



Honorable Emory L. Melton
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Melton:

This is in reply to your letter of May 27, 1947,
requesting an opinion from this department, which reads as
follows:

"The question has arisen in this county
as to the right of a city of the fourth
class to exercise powers of condemnation
for a municipal airport, as given in
M.R.S.A. Sec. 15125.

"The proposed airport site is some 3.5
miles from the nearest point of the
corporate limits. Does the city's
condemnation powers extend this far
beyond the city limits?"

The questions presented in your letter are: first,
whether a city of the fourth class is authorized to condemn
private property outside the corporate limits for the purpose
of constructing an airport; and, second, if such authority is
present, how far outside the incorporated limits does said
power extend?

Your attention is directed to section 15122, Mo.
R.S.A., which provides that any city is authorized to establish
and operate an airport either within or without the limits of
such city. It is as follows:

"The local legislative body of any city, including cities under special charter, village or town in this state is hereby authorized to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, alone or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft either with in or without the limits of such cities, villages, or towns, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

Section 15124, Mo. R.S.A., provides that cities have the right to acquire property for the purposes set out in Section 15122, under the power of eminent domain. Said section 15124 is as follows:

"Any lands acquired, owned, controlled or occupied by such cities, villages, towns or counties for the purposes enumerated in sections 15122 and 15123 hereof shall and are hereby declared to be acquired, owned, controlled, and occupied for a public purpose and as a matter of public necessity, and such cities, villages, towns, or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public necessity."

Section 15125, Mo. R.S.A., also authorizes cities to acquire property for airports by condemnation proceedings. It is, in part, as follows:

"Any county, city or city under special charter shall have the power to acquire by purchase, property for an airport or landing field or addition thereto, and if unable to agree with the owners on the

terms thereof, may acquire such property by condemnation in the manner provided by law under which such county or city is authorized to acquire real property for public purposes, or if there be no such law, then in the same manner as is now provided by law for the condemnation of property by any railroad corporation.

* * * * *

It is clear then that cities of the fourth class are authorized to establish and operate airports both within and without their corporate limits. And since they have authority to condemn property for this purpose, it necessarily follows that the power of condemnation extends to property outside the corporate limits. In Colorado Central Power Co. v. City of Englewood, 89 Fed. (2d) 233, the Circuit Court of Appeals, for the Tenth Circuit, said at page 235:

"The fact that the company is now using the property outside the city limits to furnish its customers with electric energy is not enough to withstand the power of the city to acquire it for the purpose of establishing and operating a municipal system. A city may condemn property of a utility company in use as a part of the system which serves consumers within the city for the purpose of devoting it to a municipal plant. * *"

Also, in In Re City of Rochester, 121 N. E. 102, a New York case, the Court of Appeals said, l. c. 103:

"The respondents assert and argue that the empowerment of the common council to conclusively determine that lands, which are without the city, are necessary for municipal purposes violates the provision of the federal Constitution that no person shall be deprived of property without due process of law. Article 5, Amend. In this they err. Whether the public exigency requires the taking of private property for public

use is a legislative question, the determination of which by the Legislature is, generally speaking, final and conclusive. Whether the use for which such taking is authorized is a public use is a judicial question for the determination of the court. That the taking, in the instant case, is for a public use, is not denied. The Legislature has the right to designate officers, bodies, or tribunals to determine the question of exigency or necessity. The territorial limitations of the general authority or jurisdiction of the designated tribunal is immaterial. The state has the inherent power to take the private property it requires for the use of the public, wherever it may be located, and in the taking may act directly or through a local agency authorized to exercise its power in whole or in part. * * * * *

The right to condemn private property for public use is an exercise of the state's sovereign power and the extent of such condemnation is within the discretion of the Legislature (*Riggs v. City of Springfield*, 126 S. W. (2d) 1144). The state has the power to take the private property it requires for the use of the public wherever it may be located, and in the taking may act directly or through a local agency authorized to exercise this power. The state has authorized the cities of the state to establish and operate airports both within and without the cities and by Sections 15124 and 15125 has delegated to the cities the power of condemnation of private property for this purpose.

While the Legislature has authorized the cities to condemn private property outside the corporate limits for said purposes, an arbitrary distance beyond which such power of condemnation cannot extend, has not been set up. We submit, then, in order to render such statutes operative, that cities can exercise such power of condemnation a distance from the corporate limits which is reasonable and practicable under the particular circumstances. Whether 3.5 miles is a reasonable distance for

said purpose is a question of fact for the city authorities. This department has no means of determining the reasonableness because the facts are not presented. If said distance is determined to be reasonable under the particular circumstances existing in Barry County, the power of condemnation under the law extends that distance.

Conclusion

Therefore, it is the opinion of this department that a city of the fourth class may condemn private property a reasonable distance outside the corporate limits for the purpose of establishing, maintaining and operating an airport. It is further our opinion that whether a particular distance is reasonable is a question of fact and if determined to be reasonable under the particular circumstances, the power of condemnation extends that distance.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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