

**MUNICIPAL AIRPORTS:  
CONDEMNATION:**

An easement in the space above the land, not included within a municipal airport site, for removal of obstructions to air travel to and from the landing field, cannot be acquired by the municipality by the process of condemnation apart from an easement in the real estate itself but may be so acquired as an easement in the real estate.

May 4, 1950



Honorable Raymond H. Vogel  
Prosecuting Attorney  
Cape Girardeau County  
Cape Girardeau, Missouri

Dear Sir:

We have your recent letter in which you request an opinion of this department, which letter is as follows:

"By City Ordinance, the City of Cape Girardeau provided for a municipal airport board under Section 15126, R.S. No. 1939, and the board has completed the construction of a Class 3 airport by improving runways, entrances, lighting the field, etc., wherein the Civil Aeronautics Administration bore part of the cost of such construction and improvements and land acquisition.

"At the end of the NE/SW runway, there is a clump of trees. The highest of these trees is 73 feet, and most of the trees are near that height. They are located from 1400 feet to 2000 feet from the end of the runway and in direct line with the runway. For certain types of air carrier operation, the CCA requires that there be a 40 to 1 glide angle maintained. This means that there must not be any obstruction within the area of the end of a runway which cause the glide angle to be lowered. In other words, for every 40 feet of travel from the end of a runway, you may only travel up 1 foot, so that these trees reduce the glide angle to something over 20 to 1.

"The airport and the trees referred to lie in Scott County, Missouri. The City of Cape Girardeau is in Cape Girardeau County.

"May I have your opinion as to whether the city may

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condemn an air easement sufficient to maintain this 40 to 1 glide angle. The City knows that it can condemn the real estate, but does it have the power to leave the real estate alone and condemn only an air space easement so that the trees referred to could either be removed or topped? I wish only to have your opinion as to whether the city may remove the trees which lie 1600 feet from the runway by condemnation without condemning the real estate on which these trees grow."

The purpose of the proposed acquisition of the desired easement as fully outlined in your letter, but briefly stated, is the removal of the obstructions or hazards to air travel to and from the landing field constituted by the presence of trees located on land not included within the landing field, and being from 1400 to 2,000 feet from the end of the runway in a direct line with the runway.

You limit your inquiry to the question as to whether or not the City may condemn an air space easement sufficient to enable it to keep the point at which the trees in question are located clear of obstructions to air travel to and from the landing field and to provide as much as a 40 to 1 glide angle for aircraft travel to and from the end of the runway without condemning the real estate on which the trees are located or an easement therein.

Before answering this question we desire first to call your attention to new Section 15125, found in the Pocket Supplement of R.S.A. Mo. 1939, the old Section 15125 having been repealed by the 62nd General Assembly, page 326, Laws Mo. 1943, and a new section bearing the same number having been enacted in lieu thereof. Said new section 15125 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.

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"The term 'property' as used in this section shall mean and include any real and personal property whether privately or publicly owned or any easement or use therein, including, but not by way of limitation, \* \* \*(Underscoring ours.)

You suggest in your letter that the City has the right to condemn the real estate on which the trees in question are located. We are of the opinion that in the light of the above quoted statute you are undoubtedly right in this conclusion.

However, you apparently draw a distinction between condemnation of an air space easement which would enable the City either to top the trees or remove them from the land, and an easement in the real estate itself.

We are of the opinion, however, that an easement which would enable the City to clear the necessary air space over the land, now occupied by the trees in question, of obstructions to air travel to and from the landing field would undoubtedly amount to an easement in the real estate on which said trees are located. In other words, the air space occupied by the trees, as well as the trees themselves, constitute a part of the real estate. In this connection we quote from Fixel on the Law of Aviation 3rd Edition, Section 47, page 55 and 56, some comments which we consider very enlightening on the subject of the ownership of the space above the land:

"The maxim that the owner of the land owns the space above the land to an indefinite height is no longer of any force.

"An owner of land may be said to own and control the airspace over his land to the height of the air usable by him either in the way of buildings or accessories of buildings estimated and fixed according to knowledge or experience deduced from usage, common sense, scientific rules and the special circumstances of the case. In U.S. v. Crosby, 66 S. Ct. 1062, the extent the owner's right in superadjacent airspace has been stated as follows:

"We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches

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of the enveloping atmosphere. Otherwise, buildings could not be erected, trees could not be planted and even fences could not be run \* \* \*. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land \* \* \*. The fact that he does not occupy it in a physical sense--by the erection of buildings and the like is not material."

We also quote from the same textbook on Aviation and from Section 54 thereof the following which we believe has direct application to the question before us:

"Air traffic rules specifically provide that except in landing and in taking-off certain minimum heights must be maintained. Low altitudes must necessarily be flown until an airplane is under way or lands, and such flights at low altitudes resulting in interference with the then existing use to which the land is put, is outside the definition of lawful flight and constitutes a trespass. This is because such flight interferes with a property right, namely, the enjoyment of property by occupants."  
(Underscoring ours.)

We are accordingly of the opinion that the air space occupied by the trees, mentioned in your opinion request, constitutes a portion of the real estate and that an easement in said air space cannot be condemned apart from the real estate.

However, new Section 15125, R.S.A. Mo. 1939, Pocket Supplement, page 326, Laws Mo. 1943, supra, provides that a city "shall have the power to acquire by purchase, property for an airport or landing field \* \* \*and if unable to agree with the landowners on the terms thereof, may acquire such property by condemnation \* \* \*."

The said section then defines the meaning of the term "property" as used therein and says that such term "shall mean and include any real and personal property whether privately or publicly owned or any easement or use therein, \* \* \*." We comment that since the right to clear the space in question of obstructions to air travel to and from the landing field is the right sought to be acquired, undoubtedly that right so sought will, if obtained, be acquired for an airport or landing field within the meaning of the statute above quoted, and that such acquisition is therefore authorized by said section, and we comment that an easement in the real estate for that purpose is undoubtedly property within the meaning of the

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definition of the term "property" in the section.

We are of the further opinion, however, that under the provisions of said section the City of Cape Girardeau may condemn an easement in the real estate near the landing field of the airport for the purpose of clearing and keeping clear of obstructions so much of said real estate (which includes the superadjacent air space) as is reasonably required for the purpose of eliminating hazards to air traffic to and from said landing field.

#### CONCLUSION

We are therefore of the opinion that the city of Cape Girardeau cannot condemn an easement for an air space for the purpose of clearing away obstructions to air traffic on land near the landing field apart from an easement in the real estate, but we are further of the opinion that an easement in the real estate itself for such purpose may be acquired by the process of condemnation.

We comment that while the task of describing in the condemnation petition the exact easement sought to be condemned and the exact real estate to be subjected to said easement may require considerable particularity in the matter of specifically what is included by the necessities incident to the 40 to 1 glide angle, stipulated by the Civil Aeronautics Commission, nevertheless, the right to acquire such easement is definitely within the intendment of the statute above cited.

Respectfully submitted,

APPROVED:

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