

EMINENT DOMAIN: ) Board of Permanent Seat of Government  
CAPITOL GROUNDS: ) does not have power to condemn under  
CONDEMNATION: ) Laws of 1935, pages 53-54, nor under  
general law, without special statutory  
authority.

10-2  
September 25, 1935.



Hon. Richard R. Macy  
State Treasurer  
Jefferson City, Missouri

Dear Mr. Macy:

This is to acknowledge receipt of your letter of September 16, 1935, in which you request an opinion of this Department on the questions therein submitted. Your letter of request is as follows:

"In the Session Acts of 1935, pages 53 and 54, will be found an act entitled:

'APPROPRIATIONS: Money for the purchase of land for the purpose of enlarging the State Capitol Grounds ...'

"Will you please advise me officially whether the State of Missouri may condemn the land referred to in this act, under this act, in the event the owners of the property, and the State, are unable to agree upon a purchase price."

Your question is, whether or not under the Act of the Legislature at the 1935 Session, found in Laws of Missouri, 1935, at pages 53 and 54, the State has a right

to condemn the property to enlarge the State Capitol Grounds.

We are herewith setting forth, in its entirety, said Act as follows(effective August 27, 1935):

"AN ACT authorizing the Board of Permanent Seat of Government of the State of Missouri to purchase all or any part of the parcels of ground and improvements thereon, lying between the State Capitol Building and the Governor's Mansion, and between Capitol Avenue and the public alley north thereof, in Jefferson City, Missouri, for the purpose of enlarging the State Capitol Grounds:

"Section 1. For the purpose of enabling the Board of the Permanent Seat of Government of the State of Missouri to enlarge the State Capitol Grounds, the Board of the Permanent Seat of Government is hereby authorized to purchase all or any of the parcels of ground and the improvements thereon, lying between the State Capitol Building and the Governor's Mansion, and between Capitol Avenue and the public alley north thereof, in Jefferson City, Missouri.

"Section 2. The Board of the Permanent Seat of Government shall keep accurate records of all purchases made, which records shall, among other things, contain a correct description of the lands purchased, the date purchased and the amounts paid for each parcel, and the title to all property purchased shall be taken in the name of the State of Missouri.

"Section 3. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of one hundred twenty-five thousand dollars, (\$125,000.00) or so much thereof as may be deemed necessary to purchase and landscape all or any part of the parcels of ground and the improvements thereon, lying between the State Capitol Building and the Governor's Mansion, and between Capitol Avenue and the public alley north thereof, in Jefferson City, Missouri; such purchases to be made for the purpose of enlarging the State Capitol Grounds and to make possible the ultimate ownership of all property by the State of Missouri between the present State Capitol Grounds and the grounds upon which the Governor's Mansion now stands, and such sum to be expended by the Board of Permanent Seat of Government, by and with the written consent of the Governor, when and as opportunity may exist, to purchase such parcel or parcels of ground at prices which may be deemed to be reasonable and fair."

It will be noted that the above Act is divided into three sections: Section 1 provides that the Board of Permanent Seat of Government is authorized to purchase the lands mentioned in said act; Section 2 provides that records must be kept by the Board of all purchases made; and Section 3 appropriates \$125,000 for the use of the board in purchasing the lands mentioned.

The question turns on whether the Board of Permanent Seat of Government of the State of Missouri, being unable to negotiate the purchase of the lands, would have a right to proceed to condemn same under the general condemnation statutes of Missouri.

## I.

The power of "eminent domain" has been defined to be the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare. This power is inherent in the sovereignty without any specific authority given by the Constitution. The prevailing authority is that the power to exercise the right of eminent domain is legislative.

10 Ruling Case law, Section 11, has this to say:

"Under the customary division of governmental power into three branches, executive, legislative and judicial, the right to authorize the exercise of the power is wholly legislative, and there can be no taking of private property for public use against the will of the owner without direct authority from the legislature. Riche v. Water Co. 75 Me. 91., Hamor v. Water Co., 78 Me. 127, 3 Atl. 40; Moseley v. Water Co., 94 Me. 83, 46 Atl. 809; Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526; Hayford v. Bangor, 102 Me. 340, 66 Atl. 731, 11 L. R. A. (n. s.) 940; Brown v. Water Dist., 108 Me. 227, 79 Atl. 907; Bowen v. Water Co., 114 Me. 150, 95 Atl. 779. The executive branch of the government could not, without the authority of some statute, proceed to condemn property for its own uses, and no municipal corporation or other sub-division of the state has any prerogative right to exercise the power of eminent domain."

The Supreme Court of Missouri in the case of State ex rel. State Highway Commission v. Gordon, 36 S. W. (2d) 105, 1. c. 106, speaking through Ragland, J., had this to say on the subject:

"The power of eminent domain is inherent in sovereignty and exists in a sovereign state without any recognition of it in the constitution. Constitutional provisions relating to the taking of property are but limitations upon a power which would otherwise be without limit. 10 R. C. L. 11. The right to exercise the power, or to authorize its exercise, is wholly legislative. When an agency of the state asserts that the right to exercise the power has been delegated to it, it must be able to point out a statute which in express terms or by clear implication authorizes such exercise and to the extent claimed.

As is stated in Lewis, Eminent Domain, Vol. 1, (3d ed.) Section 367:

"The power of eminent domain being an incident of sovereignty is inherent in the state government and in the several states, by virtue of their sovereignty. It does not exist in any subordinate political division or public corporation unless granted by the sovereign power \* \* \* \*. This power, with all its incidents, is vested in the legislatures of the several states by the general grant of legislative powers contained in the Constitution. From this it follows, first, that the power can only be exercised by virtue of a legislative enactment; second, that the time, manner and occasion of its exercise are wholly in the control and discretion of the Legislature, except as restrained by the Constitution. 'It lies in its discretion to determine to what extent, on what occasions, and under what circumstances this power shall be exercised.'"

And found in the same text, Section 369:

"Whether the power of eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise are questions which rest entirely with the legislature."

Section 371:

"The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist."

Quoting from the notes of 4 A. L. R. 786, the rule is stated as follows:

"The legislature must determine, in each particular case, the necessity or expediency of exercising the power of eminent domain for making public improvements. Coster v. Tide Water Co., 18 N. J. Eq. 67; Buffalo & N. Y. City R. Co. v. Brainard, 9 N. Y. 109; Valley City Salt Co. v. Brown, 7 W. Va. 195."

The question then resolves itself into whether or not the Legislature under the provisions of the above act has delegated, by the language therein used, to the Board of Permanent Seat of Government the power to condemn the lands in question. We do not find that this agency of the State, either under this statute or generally, has any

right to condemn property to enlarge the State Capitol Grounds. The Legislature has given to this Board, under this act, the power to purchase all or any of the parcels of ground and the improvements thereon, but nowhere does the act state that it has a right to condemn the lands, in event that it is unable to purchase the lands by negotiation with the owners. It might be said that the word "purchase" in its broad sense would include the word "condemn" but we think that the word "purchase" cannot be given any such meaning and it was not the intent of the Legislature to use it in its broad sense, but on the contrary to give to it its popular meaning.

## II.

As to the question as to whether the word "condemn" is included in the word "purchase," we cite the following cases and excerpts from same:

In the case of Paris Mountain Water Co. v. City of Greenville, 89 S. E. 669, 1. c. 671 (S. C.), the court had this to say:

"It is said, however, that even if the statute is unconstitutional, the Constitution itself gives the right of condemnation when it gives the right to purchase; that condemnation is purchase.

"In Cummings v. Coleman, 7 Rich. Eq. 518, 62 Am. Dec. 402, it is said:

'A general rule in the interpretation of statutes is to define the words employed by the Legislature, in their popular sense.'

"The same rule applies to constitutions (Kents Com. Vol. 4, page 441); 'A purchase in the ordinary and popular acceptance of the term is the transmission of property from one person to

another, by their voluntary act and agreement, founded on a valuable consideration.'

"Condemnation has a valuable consideration, but it is in its nature not voluntary. There may be something in the context or general surroundings to show that the word is not used in the popular sense. There is nothing in the context to show that the word 'purchase' is not used in its popular sense. The surroundings are the other way."

Also, in the case of City of Enterprise v. Smith, 62 Pac. 324, 1. c. 326 (Kans.), the court said the following:

"But in general, statutes are presumed to use words in their popular sense. Hence the technical meaning is rejected as soon as the judicial mind is satisfied that another is more agreeable to the object and intention. End. Inter. of Statutes, 74, 76. It is evident, therefore, that the word 'purchase' in the title to the act in question, was not used in the technical legal sense, because such title is not inclusive of, or cognate with the technical subject of titles to real estate by purchase, but is inclusive of and cognate with the general subject of acquisition of the title to real estate for waterworks purposes. The authorities, though few in number upon the particular question, support the ruling we make.

"In Kohl v. United States, 91 U. S. 366, 23 Law. Ed. 449, the meaning of the word 'purchase,' as used in the statute providing for the condemnation of property, was considered. The court said: 'It is true the words "to purchase" might be construed as including the power to acquire

by condemnation; for, technically, "purchase" includes all methods of acquisition other than that of descent. But generally in statutes, as in common use, the word is employed in a sense not technical, only meaning acquisition by contract between the parties without governmental interference."

In the case of Griffith v. Trenton, 76 N. J. Law.Rep., page 24, it was said:

"The contention of the prosecutors is that the City of Trenton is not invested with the power to condemn their lands by force of a statute, the title of which is 'An Act to authorize cities of this state to purchase lands and erect suitable buildings for city purposes, and to sell land and buildings now used for such purposes.' \* \* \* \* \*

The ground of this contention is that the exercise of the right of eminent domain is not expressed in this title as one of the objects employed in the act."

Further quoting,

"The controverted question is whether the words 'to purchase,' in the title of this act, expressed in a constitutional sense, that it is one of the objects of the act to authorize the taking of private lands for condemnation. On behalf of the state it is argued that 'to purchase' is the equivalent of 'to acquire;' that the term 'purchase' is broad enough to include any method of acquiring real property by the act of the party as

opposed to the act of law; that in legal terminology 'purchase' means the acquisition of an estate in land otherwise than by inheritance."

In this case the court decided that the words "to purchase" meant "to buy"; and hence did not embrace the right to condemn, though it is broad enough to embrace such right, stating the following:

"The obvious purpose of this constitutional requirement, Article IV, Section 7 (P. L. 4) is to give information as to the statute to the legislators and the public, and, consequently, the title should read as it probably would be understood by unprofessional persons of ordinary intelligence."

In Words & Phrases, (2d s.) Vol. 4, page 63, the words "to purchase" are defined as follows:

"The words 'to purchase' may be construed as including the power to acquire by condemnation, yet generally in statutes, as well as by common use, the word 'purchase' is employed to denote acquisition by contract between the parties without governmental interference. Weeks v. Grace, 80 N. E. 220, 222, 194 Mass. 296, 9 L. R. A. (N. S.) 1092, 10 Ann. Cas. 1077 (citing Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449)."

Historically, we refer to the 1911 Session Acts, page 108, which was the Act creating a State Capitol Commission Board following the destruction of the State Capitol

by fire. This board was given the following power:

"If said board shall be unable to purchase the premises or any part of said premises so described by it for the additional state capitol premises, for a price or prices deemed by it to be just and reasonable, the Attorney-General shall on behalf of the State, and in its name institute in the Circuit Court of Cole County, Missouri, against the proper property owners and prosecute to a final termination an action or actions for the condemnation of said premises (including intervening streets of the City of Jefferson) to said public use contemplated by this act. Said proceeding or action to conform to the provisions of Article 2, Chapter 22 of the Revised Statutes of 1909 of this State, so far as the same may be applicable thereto."

So it will be seen that the Legislature deemed it necessary to give specific authority to the State Capitol Commission Board to condemn the needed property, in event the board was unable to purchase same.

At the time of the creation of the State Highway Commission, Laws of Missouri, 1921, 1st and 2d Extra Sessions, page 141, Section 21, express power was given to the Commission to condemn land in event of its inability to purchase or lease the necessary land for highway purposes, and was given the specific authority to exercise the right of eminent domain under the general condemnation statutes.

Also, under the law providing for a Commission to supervise the repairing, remodeling and rebuilding of State eleemosynary and penal institutions, found at page 107, Laws of Missouri, 1933-34, in almost the identical language

as used in the authority given the State Capitol Commission Board to condemn lands, the power is given the State Building Commission to condemn lands for the purpose of constructing and remodeling eleemosynary and penal institutions thereon.

It will thus be seen that in each of these cases the respective commissions and boards were given specific authority to condemn the needed properties in event they were unable to purchase same, and the Legislature authorized the respective boards to proceed under the general condemnation statutes, namely: Sections 1340 to 1349, inclusive, R. S., Mo., 1929, and amendments thereto.

In this case, if the Legislature had desired to add the power "to condemn" to the right "to purchase," it could have very easily done so, and it undoubtedly had such power.

Further, the Legislature appropriated \$125,000 to purchase the property, and in condemnation proceedings it is possible that more than that amount would be adjudged against the State for the property, and in that case there would not be sufficient sum appropriated to pay for same. We do not think that the Legislature intended to include the power of condemnation to this Board when it gave the authority "to purchase."

#### Conclusion.

From the above and foregoing, and other reasons, it is our opinion that the Board of Permanent Seat of Government neither under this Act nor under the general statute would have authority to condemn the property in question, in the event the owners of the property, and the State, are unable to agree upon the purchase price.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General

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