ST. LOUIS:
FLOOD CONTROL:
COOPERATIVE AGREEMENTS:
LEVEES:

St. Louis in contract with United States for flood control project may sign contract providing city will provide lands and easements for the project, will hold the United States free from damages, and maintain and operate the flood control works after completion.

July 3, 1957

Honorable William A. Geary, Jr.
Representative, 14th District
5367 Queens Avenue
St. Louis 15, Missouri

Dear Mr. Geary:

This is in answer to your request for an official opinion from this office which reads as follows:

> "The citizens of St. Louis, in the Bond Issue election of May 26, 1956, voted the sum of $7,547,000.00 as the City's share of a proposed Mississippi River flood control program, the remaining cost to be borne by the Federal Government. In accordance with Federal legislation (33 U.S. C.A., 701 c et seq.), the City, as local sponsor of this project is required to furnish assurances satisfactory to the Secretary of the Army that it will
>
> a) provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project.
>
> b) hold and save the United States free from damages due to construction works.
>
> c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.
>
> "I would appreciate receiving an opinion from your office whether the City of St. Louis has legal authority under constitutional, statutory and charter provisions to acquire lands by eminent domain for levee and flood control purposes. Also whether the City has necessary legal

> authority to provide the assurances outlined in (b) and (c) above. In addition the proposed levees and flood walls will necessitate construction of new sewers, drainage and pumping facilities, which upon completion will be turned over to the Metropolitan St. Louis Sewer District for operation and maintenance. I would likewise appreciate your opinion whether the assurances required from the City in regard to acquiring land, and saving the United States free from damages due to construction work may extend to that portion of the work involving sewage, drainage and pumping facilities."

In 1936, Congress passed a Flood Control Act, 33 U.S.C. 701a et seq. One of its purposes is, in cooperation with the states or political subdivisions thereof, to construct levees and dams as protection against damaging flood waters. It provided, among other things, that no state or political subdivision thereof would receive any aid or assistance from the Federal government (hereinafter referred to as the Government) unless they made assurances satisfactory to the Secretary of the Army that they will:

> a) provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project;
>
> b) hold and save the United States free from damages due to the construction works;
>
> c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.

We understand the City of St. Louis (hereinafter referred to as the City) proposes to cooperate with the Government in constructing levees and dikes which will extend the entire length of the eastern boundary of the City. The dikes and levees are to protect the adjacent areas from a flood stage of 52 feet. The total cost of the project will exceed $100,000,000, and the City will provide $7,547,000.00 of this cost. The citizens of the City voted this sum at a bond issue election on May 26, 1956.

That the City can enter into contracts or cooperative agreements with the Government or its agencies, is not subject to doubt. Article VI, Section 16, Constitution of Missouri (1945), provides, among other things, that "any municipality or political subdivision of this state may contract and cooperate --- with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law." (Emphasis ours.) This constitutional grant was further implemented by Section 70.220, RSMo 1949, which authorizes the City to contract and cooperate with a duly authorized agency of the United States "provided, that the subject and purpose of any such contract or cooperative action made and entered into by such municipalityoor political subdivision shall be within the scope of the powers of such municipality or political subdivision." (Emphasis ours.) We shall later determine whether the assurances required of the City are "within the scope of the powers" of the City.

In addition to the foregoing, Section 70.330, RSMo 1949, authorizes the City, among other things, to contract and cooperate with the United States over lands "which are subject to injury by such overflow, or which may require the building of such sewers."

Before we determine whether the City can assure the Government, it will "provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project," we deem it necessary to ascertain the authority of the City to acquire lands by eminent domain for levee and flood control purposes to protect its citizens from damaging flood waters.

Section 82.240, RSMo 1949, authorizes the City to make provision in its charter to acquire lands for public use by the exercise of the power of eminent domain by condemnation proceedings for "public parks, cemeteries, penal institutions, hospitals, right of ways for sewers, or for any other public purpose, and to provide for managing, controlling and policing the same." Under Article I, Section 1 of its charter, the City is specifically given power (9) "to condemn private property, real or personal, or any easement or use therein for public use - - -," (15) "to acquire, provide for, construct, regulate and maintain and do all things relating to all kinds of public buildings structures, markets, places, works and improvements," and (35) "to do all things whatsoever expedient for promoting or maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufacture of the City or its inhabitants."

These sections of the statute and charter clearly empower the City to erect and maintain levees designed to protect the City from flood waters of the Mississippi River. The acquisition of property and construction of a levee, for the preservation and protection of the health of the people of a community is a sufficient public purpose to justify the use of the power of eminent domain. See Morrison v. Morey, Mo. Sup., 48 S.W. 629, 633 (1). That such provisions properly may be included in a City charter, and control the establishment of levees within such City, was confirmed by the Missouri Supreme Court in In re East Bottoms Drainage and Levee District, 258 S.W. 89, 91, wherein it said:

> "But we also hold that, even if said general statutes would authorize this proceeding in the absence of a provision in the Kansas City Charter on the subject, the Charter provision of Kansas City providing for such levees and drains within the city is a matter of local municipal concern, and, therefore, properly included in such charter, and controls the establishment of levee and drainage districts in said city. - - - Indeed, it may be said to be a matter of common knowledge that all cities of any considerable population in this state have from the earliest time, either by special charter or general law, been authorized to construct sewers and levees belonging to the same class of necessary local municipal improvements. - - - We must therefore rule that the charter provisions of said city relating to the establishment of levees and drains within said city are a matter of essential local municipal concern properly contained in the freeholders charter of Kansas City and prevail over the general law on the subject, if there is any difference or conflict between them."

To further buttress this argument, we think it necessary to call your attention to the fact that Section 1, of Article XVII, of the City's charter enumerates the purposes for which the City may issue bonds, and includes "river and other public improvements which the City may be authorized or permitted to make"; and after the levees and dams are constructed, the City has the duty to maintain and operate them. (Emphasis ours.) Article XIII, Section 13 of the Charter, provides that the Street Division of the Department of Streets and Sewers shall have charge of "wharves and levees."

Therefore, since the City has been expressly empowered by constitutional and statutory enactment to enter into a cooperative agreement with the Government "within the scope of its powers," and since the City is authorized by statute and its charter to acquire lands necessary for the construction of dams and levees, and since the charter of the City provides that the Street Division of the Department of Streets and Sewers "shall have charge of the repairing, cleaning and maintenance of all - - - wharves and levees," it is our considered opinion that the City, as local sponsor of a flood control project and in cooperation with the Government in the construction of said project, has the authority to assure the Government that it will

> a) provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project; and
>
> b) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.

In your opinion request, you stated that in building the levees and flood walls it will necessitate the construction of new sewers, drainage and pumping facilities which upon completion will be turned over to the Metropolitan St. Louis Sewer District (hereinafter referred to as the District) for operation and maintenance. You want to know if the two assurances from the City just mentioned may extend to that portion of the works involving sewage, drainage and pumping facilities. Before we answer that phase of your opinion request, we must digress just a moment.

Prior to July 1, 1954, the date the District took over all sewers in Metropolitan St. Louis, the City had the authority to condemn land for sewer purposes, and the Sewer Division of the Department of Streets and Sewers had charge of the repairing, cleaning and maintenance of all sewers and drains and the disposal of sewage. In pursuance of Section 30 of Article VI, Constitution of Missouri, a Board of Freeholders was created who drafted a charter for the District which was submitted and approved by the voters of the City and St. Louis County on February 9, 1954. It provided, among other things, that the District is a "body corporate, a municipal corporation, and a political subdivision of the state, with power to - - - sue and be sued, contract and be contracted with - - -." Section 3.010 of the charter of the District provides, among other things, that on July 1, 1954, the District shall have the control, possession, jurisdiction, operation, and maintenance of the existing

sanitary and storm water sewer systems of the City and County. Section 3.020 of the District's charter provides, among other things, that the district shall have the power to condemn private property for sewer purposes.

Thus, from the foregoing, it becomes apparent that the District instead of the City now has the duty to construct new sewers, drainage and pumping facilities. However, this does not prevent the City from extending the two assurances just mentioned above to that portion of the works involving sewage, drainage and pumping facilities. This latter part of the works is all an essential and integral part of the levees and flood wall. We are not unmindful of the fact that it is possible that a flood control project, without proper safeguards, could have the effect of impeding rather than improving a flood control project. It is true this latter part of the works will be connected with the district's sewer system and the District will be indirectly benefited thereby, but this works is nevertheless a part of the flood control project over which the City has jurisdiction.

Thus, we hold that the City has the authority to assure the Government that the two assurances just mentioned above may extend to that portion of the flood control project involving sewage, drainage and pumping facilities. When, after completion, this part of the works is turned over to the District for operation and maintenance, this might well be the subject of contract between the owner of the flood control project (the City) and the District. But, it does not follow that this part of the works ceases to be a part of the flood control project, or that the City loses jurisdiction over this part of the works. It would appear that the City and the District had a type of concurrent jurisdiction over this part of the project.

Your final question deals with the authority of the City to assure the Government that it will "hold and save the United States free from damages due to the construction works" and if so, whether this assurance will extend to that portion of the works involving sewage, drainage and pumping facilities. To us, it is apparent that the City can make this assurance, and further, that it can extend to all portions of the works, because as we previously stated, the sewage, drainage and pumping facilities are an essential and integral part of the flood control project.

As authority for this proposition, we call your attention to the fact that the constitutional and statutory enactments heretofore cited expressly empower the City to enter into cooperative agreements with the Government, so long as the agreements are "within the scope of the powers of the City." (In the premises, the agreements are within the scope of the powers.) However, the specific terms and conditions of such agreements are

not spelled out. In such instance, the rule is firmly established that where there is an express grant to a City without the method or details of exercising such power prescribed, the City council has authority to exercise the power granted to it in any reasonable and proper manner. (Emphasis ours.) See Dodds v. Kansas City, Mo. Sup., 152 S.W. 2d 128; Ballentine v. Nester, Mo. Sup., 164 S.W. 2d 378.

In the case of Arkansas-Missouri Power Corp. v. City of Kennett, Mo. Sup., 156 S.W. 2d 913, a municipal contract containing wage and hour provisions was attacked on the ground that the statutes regulating third class cities did not authorize them to adopt wage and hour ordinances with reference to municipal contracts. The Missouri Supreme Court, en banc, in disposing of this argument, stated at page 917:

> "The fallacy of this argument lies in the fact that it ignores the principle that where a corporation, private or municipal, is given power to perform a certain act, it is necessarily left with a large discretion as to the manner in which such act is to be performed. (Citing cases) As stated, we think it to be conceded that the City of Kennett unquestionably has power to build, own and operate a municipal power plant. It necessarily follows that it has the power to enter into a contract with a builder or construction company for the erection of such plant. The exact terms and provisions to be inserted therein must, in the nature of things, vary with the particular conditions surrounding this specific project. Such a contract must necessarily contain all reasonable provisions, not forbidden by the State or Federal Constitutions or the charter of the city or general state law, which have a tendency to effectuate the object involved."

CONCLUSION

It is, therefore, the opinion of this office that the City of St. Louis in cooperation with the federal government for a flood control project has the authority to assure the federal government that it will:

> a) provide without cost to the United States all lands, easements and rights of way necessary for the construction of the project,
>
> b) hold and save the United States free from damages due to the construction works,

c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.

It is further our opinion that the assurances just mentioned may extend to that portion of the works involving sewage, drainage and pumping facilities.

The foregoing opinion, which is hereby approved, was prepared by Assistant Attorney General George E. Schaaf.

Yours very truly,

John M. Dalton
Attorney General

By
Robert R. Welborn
Assistant Attorney General.

GES/lc/bi