AIRPORTS:
BI-STATE DEVELOPMENT:
CITIES:
COUNTIES:
ZONING:

The mere zoning of land as "Small Farm" by the City of Fenton would not preclude (1) the City or County of St. Louis, (2) the City and County acting jointly, or (3) the Bi-State Development Agency from condemning such land for airport purposes.

OPINION NO. 286

December 14, 1964

FILED
286

Honorable Robert O. Snyder
State Representative
241 East Argonne Drive
Kirkwood 22, Missouri

Dear Mr. Snyder:

This is in answer to your recent request for an opinion of this office asking whether land zoned for Small Farm in the City of Fenton, Missouri, a city of the fourth class in St. Louis County, could be condemned for airport purposes by (1) the City or County of St. Louis, (2) a joint City-County operation, or (3) the Bi-State Development Agency.

(1) The operation of airports by cities and counties is controlled by Sections 305.170 and 305.180, RSMo, respectively. Section 305.190, RSMo, states that the acquisition of land is a public necessity for which cities, villages, towns, and counties have the right to acquire property for an airport by eminent domain, if necessary. It is here set out:

> "Any lands acquired, owned, controlled, or occupied by such cities, villages, towns or counties for the purposes enumerated in sections 305.170 and 305.180 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."

Subsection 1 of Section 305.200, RSMo 1959, sets out the procedure under which property can be acquired, using the power of condemnation if necessary, and is here set out:

> "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."

Subsection 3 of this Section reads in part as follows:

> " . . . Provided, that no airport or landing field shall be established or located in any county, city or city under special charter in violation of any plan or master airport plan or zoning regulation restricting the location of an airport or landing field adopted by the planning commission of any such county, city or city under special charter."

However, this proviso relates only to zoning regulations or a master airport plan restricting the location of an airport. The mere zoning of property for "small farms" or otherwise is not what is contemplated by the statute. Hence, unless there were such a plan or regulation, which in terms relates to the location of airports, and the opinion request does not so state, then the proviso would have no effect at all upon the right of the city or county to establish the airport as contemplated. There is also a serious question as to whether this proviso, which relates to the location of an airport, is valid as within the following title to the act (H.B. 420, 62nd General Assembly, Laws 1943, page 326):

> "AN ACT repealing Section 15125 of Article 3 of Chapter 123 of the Revised Statutes of Missouri, 1939, relating to the acquisition of real and personal property and easements or uses therein for airport purposes by counties, cities or cities under special charter, by purchase or condemnation and enacting a new section in lieu thereof to be known as Section 15125 relating to the same subject."

(2) A joint City-County operation could be established under Sections 70.210-70.320, RSMo 1959, as amended, which authorize designated political subdivisions of this state to cooperate for the purpose of acquiring and operating any public improvement or facility.

Section 70.240, RSMo 1959, controls the manner by which land may be acquired for any such improvement or facility, and is here set out:

> "The parties to such contract or cooperative action or any of them, may acquire, by gift or purchase, or by the power of emient domain exercised by one or more of the parties thereto in the same manner as now or hereafter provided for corporations created under the law of this state for public use, chapter 523, RSMo, and amendments thereto, the lands necessary or useful for the joint use of the parties for the purposes provided in section 70.220, either within or without the corporate or territorial limits of one or more of the contracting parties, and shall nave the power to hold or acquire said lands as tenants in common."

Thus, a city and a county acting jointly would have the same powers as that of a city or county acting alone.

(3) The Bi-State Development Agency was created in 1949 by compact between Missouri and Illinois, with the consent of the Congress. This compact constitutes a contract, and its obligations may not be impaired by either state. Article III of the compact (set forth in Section 70.370, RSMo) and particularly as expanded by Section 70.373, RSMo, and its complementary Illinois law, Ch. 127, Section 63s - 9, Illinois Revised Statutes 1959, expressly grants power to the Bi-State Agency to acquire airports. The Agency is granted the right to condemn property for this or any other purpose of such Agency, the only limitation on such grant of power (other than those mentioned in Section 70.373, which are not here relevant), being that it shall not take property of the state, county, city, borough, village, or other political subdivision without the consent thereof. Thus, no municipality would have the right to thwart the plans of the Agency by zoning regulations which might limit the right of the Agency to operate an airport, or other authorized facility, at such place or places as in its discretion the Agency deems desirable for the proper development and welfare of the District. The zoning restrictions are

completely inoperative insofar as the Bi-State Agency is concerned, in respect of its right to establish and operate an airport at the place or places it deems proper for the District, even if the zoning restriction in question should be construed otherwise to bar airports in the area in question. Of course, if the city actually owned any part of the area sought to be taken by the Agency for airport purposes, the compact would preclude the exercise of the power of eminent domain with respect to such city-owned property (Article III of the Compact, Section 70.370, RSMo.)

The overwhelming weight of authority is that zoning ordinances are inapplicable to governmental agencies where the use of the property is pursuant to a governmental function. 61 ALR 2d. 988. Dysart v. City of St. Louis, 321 Mo. 514, 11 SW2d 1045, refers to "the governmental nature of the function" of operating an airport. Cases referred to in the A.L.R. annotation, which specifically relate to airports, have held that zoning ordinances are inapplicable to the use by political subdivisions of property for airport purposes, the use thereof being to subserve public purposes.

Zoning ordinances are primarily intended to regulate the use of private property. Moreover, most of the cases take note of the fact that where the power of eminent domain is granted to acquire property for particular purposes, such as airport operations, a municipality or other local subdivision has no power to restrict the exercise of such power of eminent domain, and hamper and impair the exercise thereof by zoning regulations, particularly in the absence of any express language to such effect. In State ex rel. St. Louis Union Trust Company v. Ferriss, 304 SW2d 896, 900, our Supreme Court quoted with approval from State ex rel. Helsel v. Board of County Commissioners of Cuyahoga County, Ohio, Com. Pl. 1947, 79 N.E. 2d 698, a case involving an airport, which had held that municipal zoning restrictions could not limit or prevent the public use for which the land was taken and thereby restrict the exercise of the power of eminent domain.

The only limitation upon the exercise of the right of eminent domain by cities and counties in this state is that contained in the proviso of Subsection 3 of Section 305.200, RSMo 1959, which, if valid, would bar the establishment of an airport or landing field contrary to the provisions of the zoning regulations or master plan restricting the location thereof. As noted above, your letter does not indicate that any such restriction, within the meaning of the proviso, has been adopted or is in effect. In any event, however, none of the provisions of this subsection are in anywise applicable to the Bi-State Development Agency.

Honorable Robert O. Snyder

CONCLUSION

Therefore, it is the opinion of this office that the mere zoning of land as "Small Farm" by the City of Fenton would not preclude (1) the City or County of St. Louis, (2) the City and County acting jointly, or (3) the Bi-State Development Agency from condemning such land for airport purposes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas E. Eichhorst.

Very truly yours,

Thomas F. Eagleton

THOMAS F. EAGLETON
Attorney General