Answer by letter-Wood

April 2, 1970

OPINION LETTER NO. 135

FILED
135

Honorable Noel Cox
State Senator
District No. 29
Ozark, Missouri 65721

Dear Senator Cox:

You have asked for my opinion as to whether the City of Nixa, a fourth class city, may condemn an easement for a sewer line across a special road district.

The Missouri Water Pollution Board has recently approved the plans for the construction of this sewer line from its initial junction point outside the Nixa city limits to the treatment plant, approximately one mile southeast of the city limits. These plans call for the sewer line to crisscross under a public gravel road for approximately 3,000 linear feet at a depth ranging from 4.37 feet to 6.88 feet below the surface of the ground. Eleven manhole covers would lie within the roadway. We presume that this road is the special road district property in question.

Real property within a special road district that is privately owned would be subject to condemnation by a city for sewer purposes.

> "The governing body of the municipality [third and fourth class cities, special charter cities, and towns and villages] shall have power to condemn <u>private property</u> for use, occupation or possession in the construction and repair of sewers, in the same manner as other property is condemned for public uses." Section 88.844, RSMo 1959 (emphasis added)

It is immaterial whether the privately owned property is within or without the corporate limits of the condemning municipal authority (Sections 88.077, RSMo, 250.010 (1), RSMo).

Special road districts are public corporations (Sections 233.025, 233.170, 233.320, RSMo 1959) which have "sole, exclusive and entire control and jurisdiction over all public highways" within their districts (Section 233.070 (1), 233.190 (2), 233.340 (3), RSMo 1959), except city streets (see enclosed opinion).

Public roads are easements or rights of ways crossing privately owned lands.

> "It is error to suppose that the land over which a public road passes belongs to the state or county. The law, for the convenience of the community, has appropriated portions of the lands of individuals to be used as public roads or highways. Subject to this use or easement of the public, the soil over which the road passes remains in the owner, in the same manner as though no appropriation of it had been made. When the land of an individual is taken for a road, whether he gives it voluntarily or sells a right of way over it by claiming and receiving compensation, he must be understood as giving to the public power over it, to an extent that will enable it to construct such a road as the laws in force at the time require or permit to be made. . . ." (Williams v. Natural Bridge Plank Road Co., 21 Mo. 580, 582 (1855))
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> ". . . Under a common-law dedication, the public acquired a mere easement. By such dedication the public had the use of the surface for a highway and so much below the surface as was necessary for a complete enjoyment of the easement. The fee to the highway (in the full sense of the term fee) was not vested in the public. . . ." (Neil v. Independent Realty Co., 298 S.W. 363, 366 (Mo. 1927))
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> ". . . the limited quantum of interest which a municipality takes in streets and alleys within its corporate limits which are dedicated to public use. Such interest is not a title in fee simple, but only an easement which

> consists of the right of the public to make use of the streets and alleys for the purpose intended by the dedication, and for no other use or purpose. Meanwhile, the fee (subject to the easement) remains in those who owned the land at the time of its dedication to public use, and in their successors in title; and if ever the streets and alleys are vacated and their public use abandoned, the original owners, or their grantees, will thereafter hold the same freed from the burden of the former public use. In other words, when there is a termination of the public use for which the dedication was made, there is a reverter of such use to the owners of the servient estate, who at all times held title subject to the right of public use. . . ." (Roy F. Stamm Elect. Co. v. Hamilton-Brown Shoe Co., 171 S.W.2d 580, 582-583 (Mo. en banc 1943))

Consequently, it is our opinion that a fourth class city may condemn a sewer line easement under a special road district road. Condemnation in this situation would be a taking of "private property" and thus within the terms of the statute empowering such cities to condemn for sewer purposes.

However, the surface of the roadway is public property, and its taking by the City of Nixa, whether for initial construction of the sewer line, or for maintenance of the sewer line through the manholes, is not in terms authorized by the statute (Section 88.844, RSMo 1959).*

In State ex rel State Highway Commission v. Hoester, 362 S.W.2d 519 (Mo. en banc 1962), the Supreme Court upheld the right of the Highway Commission to condemn property already devoted to a public use, that of a fire protection district organized under Chapter 321, RSMo, and thereby destroy the fire district's use of the property. The court emphasized that the particular condemning authority was the sovereign state, and suggested that the result would have been otherwise had the condemning authority been a municipality.

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*Contrast the statute authorizing sewer districts in counties having a population of 700,000 to 750,000 ". . . to construct any and all said works and improvements across, through or over any public highway, . . . [and] to condemn any and all rights or property, either public or private, of every kind and character necessary. . ." (Section 249.290, RSMo 1959).

> ". . . In the Moore case [190 S.W. 867], we held 'the power of a city to condemn property for street purposes is limited to private property, and does not extend to property of the state or property held by a subordinate agency of the state, for the state, as distinguished from other corporations.' . . .
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> "However, as stated in 1 Nichols on Eminent Domain, 3rd Ed., 131, Sec. 2.2: 'In the determination of the question whether or not property already devoted to a public use can be subjected to the process of eminent domain the primary factor to be considered is the character of the condemnor. If the sovereign, such as the state or the United States on its own behalf and for its own sovereign purposes, seeks to acquire such property by eminent domain, the character of the "res" as public property, generally, has no inhibiting influence upon the exercise of the power.' Likewise, it is said in 29 C.J.S. Eminent Domain 861-862, § 74 p. 861-862: 'As a general rule, property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient; * * *. However, the general rule does not ordinarily apply where the power of eminent domain is being exercised by the sovereign itself, such as the state or federal government, for its immediate purposes, rather than by a public service corporation or a municipality.'" (State ex rel State Highway Commission v. Hoester, 362 S.W.2d at 521-522) (Emphasis added)

We do not pass on the question whether a city with statutory authority to condemn only private property could condemn an easement in public property if it occasioned no material impairment or interference with the public use of the property because it is our opinion that the planned use of the public road for the sewer line construction and subsequent maintenance would constitute a material

interference with the existing public use, and that absent a statute expressly authorizing cities of the fourth class to so condemn, it cannot be done.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Opinion to Russell S. Noblet
12-29-41