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April 12, 1989

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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Eminent Domain

Dear Madam and Sir:

The issue you have requested our office to address is whether the City of Kellogg may exercise eminent domain over territory outside its municipal boundaries to build a gondola. The City of Kellogg may not condemn property outside its boundaries unless there is explicit or necessarily implied statutory authority. The City of Kellogg has no such authority.

Introduction

The powers of a municipality, including the right to exercise eminent domain, emanate from the legislature. "Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it." Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517 (1980). According to the Idaho Supreme Court, "a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature. . . ." Id. The Idaho Constitution does not mention eminent domain in relation to municipalities. See Idaho Constitution art. 1, § 14 (right of eminent domain is "subject to

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the regulation and control of the state"); art. 11, § 8 (reserving right of legislature to condemn incorporated companies). Therefore, the resolution of the issue depends on a statutory analysis of the authority granted the municipalities by the legislature.

Idaho Code §§ 50-1030(c) and 50-303.

The legislature granted the municipalities the power of eminent domain in Idaho Code § 50-1030(c), which permits any city the power "[t]o exercise the right of eminent domain for any of the works, purposes or uses provided by this act, in like manner and to the same extent as provided in section 7-720, Idaho Code." Idaho Code § 50-1030(c) addresses the uses for which the municipal power to condemn may be exercised; it does not address the issue of jurisdictional restraints on the municipality's power to condemn. The statute that permits a city to maintain recreational property outside its territorial limits is saliently silent on the municipal power to condemn. Idaho Code § 50-303, which is part of the act contemplated in Idaho Code § 50-1030(c), states: "Cities are hereby empowered to create, purchase, operate and maintain recreation and cultural facilities and activities within or without the city limits and regulate the same. . . ." The power to own property outside the city limits, pursuant to the authority of Idaho Code § 50-303, however, does not necessarily imply the power to acquire that property by eminent domain under the authority of Idaho Code § 50-1030(c). See, City of Aurora v. Commerce Group Corp., 694 P.2d 382, 385 (Colo. Ct. App. 1984) (authority to own property outside municipal limits does not give city power to condemn property outside its boundaries); Sterkel v. Mansfield Board of Education, 175 N.E.2d 64, 67 (Ohio 1961) (school district had authority to purchase or lease property either within or without the district but it had no authority to condemn property outside its territorial limits).

The issue presented is not whether the gondola is one of the "works, purposes or uses" of Idaho Code § 50-1030(c) (for purposes of this analysis, the gondola project is assumed to meet the public use criterion). Rather, the issue is whether a city has the power to condemn property outside its boundaries. On this issue, Idaho Code §§ 50-1030(c) and 7-720 are silent.

The City of Aurora faced the same issue currently before the City of Kellogg. In Aurora, the city attempted to condemn for public use approximately six miles of stream fishing rights, which were located 130 miles from the city limits in another county. The trial court dismissed the petition to condemn and the city

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appealed. The city relied on a statute that stated, inter alia, "Any city . . . may acquire, sell, own, exchange and operate public recreational facilities . . . either within or without the corporate limits of such city. . . ." Id. at 385. The Colorado Appellate Court held that "[t]he right to condemn private property, if not expressly granted by statute, can only be found through necessary implication." Id. at 384. The Colorado court refused to find the necessary implication, noting that "[t]he more reasonable construction of these sections is that the General Assembly intended to permit municipalities to acquire and to operate recreational facilities within or without their boundaries, but that they may take such facilities by condemnation only within their borders. This construction is consistent with the compelling state interest in preserving inter-governmental harmony, jurisdiction, and integrity." Id. at 385-86 (emphasis original).

The analysis used by the Colorado court also applies to the situation with the City of Kellogg. In both cases, the statutory language is similar. Idaho gives its cities the power to "create, purchase, operate and maintain recreation and cultural facilities and activities within or without the city limits"; Colorado defines the power as the right to "acquire, sell, own, exchange, and operate public recreational facilities . . . within or without the corporate limits of such city." The difference in the choice of terms for the control of the property, i.e., "create, purchase, operate and maintain" vs. "acquire, sell, own, exchange, and operate," is not legally significant. What is significant is the complete silence on the right of eminent domain. Because the Idaho statute, like the Colorado statute, does not explicitly mention the power of eminent domain, the same rationale used by the Aurora court would apply to the City of Kellogg's proposal to construct a gondola outside its boundaries. Accordingly, because the words "create, purchase, operate and maintain" do not necessarily imply the right to condemn property, Idaho Code § 50-303 does not grant the City of Kellogg the power to condemn the airspace over the City of Wardner. The City of Kellogg may of course purchase the easement, under the authority granted it by Idaho Code § 50-303, but it may not force the sale of property outside its city limits by eminent domain.

Idaho Code §§ 7-701 and 7-720.

Idaho Code § 7-720 states, in relevant part: "Any municipality at its option may exercise the right of eminent domain under the provisions of this chapter for any of the uses

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and purposes mentioned in §§ 50-1124 and 50-1125, in like manner and to the same extent as for any of the purposes mentioned in § 7-701." Idaho Code §§ 50-1124 and 50-1125 have since been recodified as Idaho Code § 50-311, and pertain to the power of municipalities to condemn property for streets, avenues, alleys, lanes, malls or commons. Those sections are not relevant.

Idaho Code § 7-701 lists the uses for which eminent domain is authorized. The only language relevant to the current issue is: "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses: . . . Public buildings and grounds for the use of any county, incorporated city or school district . . . and all other public uses for the benefit of the state or of any county, incorporated city or the inhabitants thereof." This section focuses on the purposes required before a political subdivision may exercise eminent domain; it is silent on the jurisdictional restrictions. The silence does not, however, imply the power to exceed the territorial limits of the political subdivision. The inherent power of a state to assert eminent domain stops at its boundaries; Idaho may not condemn property within the state of Oregon. See State of Georgia v. City of Chattanooga, 264 U.S. 472, 68 L.Ed. 796 (1924). Similarly, Idaho Code § 7-701 alone does not give any of the state's political subdivisions authority to condemn property outside their respective territorial boundaries.

To imply such authority would create innumerable problems. For example, if the City of Kellogg could condemn the airspace over the City of Wardner under Idaho Code §§ 7-701 and 7-720, then the statutes would also grant the city power to condemn property in Wardner for a public park. The same statutory authority relied on by the City of Kellogg would grant similar power to the City of Wardner, which could lead to a battle of condemnation suits between adjacent cities. This is clearly not the intent of the legislature in promulgating Idaho Code §§ 7-701 et seq. Rather, it is more sensible to conclude that the legislature intended the power of eminent domain be contained within the jurisdictional limits of the condemning entity.

Case Law

There is no Idaho case law directly on point. One of the most recent Idaho cases on eminent domain is Payette Lakes Water and Sewer Dist. v. Hays, 103 Idaho 717, 653 P.2d 438 (1982). In that case the condemning water district had explicit statutory authority to take any necessary property "both within and without

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the district." Id. at 719. This contrasts with the facts in the City of Kellogg, where there is no explicit statutory authority.

The issue, however, has been addressed in other jurisdictions. Those cases that allow eminent domain outside the condemnor's territory rely on statutory authority. Sende Vista Water Co., Inc. v. City of Phoenix, 617 P.2d 1158, 1162 (Ariz. App. Ct. 1980) (specific statute granting city the authority to exercise the right of eminent domain outside its corporate limits to acquire rights to provide utility services); Vickery v. City of Carmel, 424 N.E.2d 147 (Ind. 1981) (statute granting municipality eminent domain within four miles of its limits held applicable in spite of specific procedure statute stating eminent domain power applied to uses "in a municipality"); In Re Condemnation of 203.76 Acres, 245 A.2d 451, 452 (Pa. 1968) (statutory authority for eminent domain either "within or without municipality or municipalities"); Root Co. v. Montgomery County Drainage District, 584 S.W.2d 500, 501 (Tx. Civil Ct. App. 1979) (explicit statutory language granting authority to condemn property outside of the district's jurisdictional limits).

In cases without any explicit statutory authority, the courts have implied such authority on "reasonably necessary" grounds. Significantly, in those cases the eminent domain is invariably for public utility purposes. See, e.g., Buck v. District Court for the County of Kiowa, 608 P.2d 350, 352 (Colo. 1980) (implied statutory authority for railroad to condemn lands outside its right-of-way); Augusta Water District v. White, 216 A.2d 661, 663 (Me. 1966) (eminent domain of land outside its geographical limitations is implied in the water district's statutory grants); Banks v. City of Ames, 369 N.W.2d 451 (Iowa 1985) (eminent domain for sewage treatment facility outside city limits is reasonably and necessarily implied). Other cases refuse to imply statutory authority for extra-territorial condemnation. Britt v. City of Columbus, 309 N.E.2d 412 (Ohio 1974) (state constitution strictly construed so eminent domain is limited to the municipal boundaries); Board of Township Trustees v. Lambrix, 396 N.E.2d 1056 (Ohio Ct. App. 1978) (township had no statutory authority to appropriate land inside the limits of a village located within the township).

Two instructive cases in one jurisdiction illustrate the parameters of necessary implication. The Georgia appellate court in Norton Realty and Loan Co., Inc. v. Board of Education of Hall City, 200 S.E.2d 461 (Ga. Ct. App. 1973), held that the school

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board had the power to condemn property outside its district for the construction of a needed sewer. According to the court, this power was necessarily implied.

The general doctrine that a municipal corporation can only exercise its powers within its corporate limits is founded on the fact that generally no authority is given by charter to act beyond such limits; and hence, the corporate authorities are restricted in that regard by the general rule that they can exercise only such powers as are granted by express words. The general rule is, however, subject to the qualification that a municipal corporation may also do those things which are fairly or necessarily implied in or incident to the powers expressly granted.

Id. at 464. The Norton court held that the power of eminent domain for sewage purposes necessarily flowed from its statutes: "It is clear that where the power of eminent domain is being utilized for the purpose of creating or improving a sewage system and the land taken is reasonably necessary to accomplish this end, the condemning authority may take land outside its territorial limits." Id. at 465.

This finding of necessary implication contrasts with the same court's decision in Mallory v. Upson County Board of Education, 294 S.E.2d 599 (Ga. Ct. App. 1982). In Mallory, the school district attempted to condemn property outside its jurisdictional limits to use as a high school athletic track. The Mallory court distinguished the case of Norton Realty on the "reasonably necessary" ground. Id. at 602. As the court stated, "thus, unlike the extra-territorial condemnation of a mere sewage easement to connect a county school with a municipal sanitary system, [as was the case in Norton Realty] there is nothing in the instant case to show that the construction and operation of an entire school and supporting facilities, such as an athletic track, totally outside the condemnor's territory is an undertaking 'reasonably necessary' to the full and complete exercise of its express grant of authority and control over educational matters within its jurisdiction". Id. at 602 (emphasis in original). Because the building of the athletic track outside the school district's territory was not "reasonably necessary" to the full exercise of any authority expressly granted to the condemnor, the Georgia appellate court held that the condemning school district had exceeded its authority. Id. at 603.

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The rationale of Mallory, not that of Norton Realty, would apply to the aerial easement for a gondola. The operation of a gondola, unlike a sewage easement, is not a necessary municipal function. Therefore, the City of Kellogg has no implied authority to condemn property in an adjacent municipality. Accordingly, the City of Kellogg should look to means other than eminent domain to accomplish its goal. The city could purchase the necessary easements pursuant to its power under Idaho Code § 50-303. If the landowners are not willing to sell, the City of Kellogg might consider investigating a joint exercise of powers agreement with the other political subdivisions pursuant to Idaho Code § 67-2328.

If our office can be of further assistance, please call.

Sincerely,

PRISCILLA HAYES NIELSON
Deputy Attorney General

PHN/mkf