MUNICIPAL CORPORATIONS: Discussion of rights of foreign municipal corporations to acquire real property for airport purposes in Missouri and incidental matters relative thereto.

FILED
22

April 26, 1946

3/24

Mr. Hugh Denney, Director
Missouri State Department of
Resources and Development
State Office Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your letter requesting an official opinion of this office, and reading as follows:

> "Supplementing our request of September 18 regarding the legality of a Missouri city purchasing land in Illinois for airport purposes, we now have need for an opinion on the legality of a city outside of Missouri acquiring land in this state for airport purposes. I would, therefore, appreciate an opinion on the following questions:
>
> "1. Is it legal for a municipality outside the State of Missouri to own airport property in Missouri?
>
> "2. Will this property be tax exempt?
>
> "3. Can the municipality desiring to buy airport property in Missouri use the condemnation laws of Missouri to acquire such property?
>
> "4. Will the present zoning restrictions or future zoning restrictions apply to said airport property?
>
> "5. Can the municipality owning airport property in Missouri levy a fuel tax for the maintenance and upkeep, development, and improvement of the airport property?"

I.

Consideration of the authority of a municipal corporation to acquire and hold real property for airport purposes outside the corporate limits of such municipal corporation must necessarily be guided by the constitutional and statutory provisions of each state relative thereto. However, the general rule, as stated in McQuillin on Municipal Corporations, 2nd Ed., Sec. 1210, appears to be:

> "Notwithstanding earlier rulings to the contrary, including dicta, * * * it is believed that the rule, supported by the weight of authority as well as by the better reasoning, is that a municipal corporation, where not expressly prohibited, may purchase real estate outside of its corporate limits, for legitimate municipal purposes, * * *."

This is the rule in Missouri, as appears from the opinion of the Missouri Supreme Court in Hafner v. City of St. Louis, 161 Mo. 34, wherein the court said:

> " * * * In our opinion the mere directory power of the charter, as to the right of the city to purchase, hold and receive real estate, outside of the corporate limits of the city, for particular designated purposes, should not be construed as an absolute limitation upon the general power conferred upon the city under section one of the statute concerning corporations above cited, to purchase and hold real estate <u>wherever located</u>, when it becomes necessary for the purposes of the corporation. The necessities of the city, under the statute, constitute ample warrant for the purchase of land <u>wherever located</u>, for other purposes than those designated in its charter. * * * "
> (Emphasis ours.)

Assuming, but not determining, that the constitutional and statutory provisions relating to the power of acquisition of real property by municipal corporations in the states adjoining Missouri are in accord with the majority rule as expressed in the quotation from McQuillin on Municipal Corpora-

tions, cited supra, we next are confronted with the question of whether or not there exists in either the Constitution or statutes of the State of Missouri any provision to prohibit such acquisition of real property in this state.

It is well settled that the State of Missouri has the power to refuse any foreign corporation, whether municipal or private, the right to acquire and hold real property within the territorial limits of this state, and if such prohibition has been declared to be the public policy of this state by virtue of constitutional or statutory provisions declaratory of such public policy, then, without regard to the authority of the foreign municipal corporation to acquire real property herein, such power could not be exercised.

In the case of Langdon v. City of Walla Walla, 193 Pac. 1, the Supreme Court of Washington had for consideration the legality of the issuance of certain city bonds, the proceeds of which were to be used for the construction and maintenance of a water supply system for the City of Walla Walla, but which entailed the acquisition of real property outside the State of Washington and in the State of Oregon. The contention was made that the City of Walla Walla had no authority to acquire real property outside its own corporate limits, and further that even if it had such power which it might exercise within the territorial limits of the State of Washington, such power did not extend to the acquisition of real property located outside the State of Washington and inside the State of Oregon. After upholding the right of the City to acquire real property beyond its corporate limits, the court said with respect to the second contention:

> "The state of Oregon may, of course, if it so choose, withhold from the cities of this state the right to acquire property in that state, just as it may withhold such right from any other foreign corporation, but that does not argue that this state has not given to its cities such power of acquisition and ownership of property as will enable them to acquire property in Oregon by consent of that state. * * * We conclude, then, that the city of Walla Walla does possess in its proprietary capacity the power to acquire and own in the state of Oregon, so far as it may be necessary for it to acquire such power from the state of Washington. Whether or not and to what extent the city may be able to exer-

> cise such power in the state of Oregon is, of course, a question to be decided under the laws and Constitution of that state. * * * "

We have not found any express prohibition in either the Constitution or laws of the State of Missouri as would prohibit a foreign municipal corporation from acquiring and holding airport property in this state. At first blush, it might be thought that Section 5 of Article XI of the Constitution of 1945 might have that effect. We quote, in part, from the constitutional provision mentioned:

> "No corporation shall engage in business other than that expressly authorized in its charter or by law, nor shall it hold any real estate except such as is necessary and proper for carrying on its legitimate business; * * * "

It seems to be the declared public policy of the State of Missouri that the acquisition and holding of real property by municipalities for the operation thereon of airport facilities is a part of the legitimate business of such corporations. This has been a subject of legislative consideration and as a result thereof the General Assembly has enacted several statutes relative thereto. We direct your attention particularly to Section 15122, R. S. Mo. 1939, reading as follows:

> "The local legislative body of any city, including cities under special charter, village or town in this state is hereby authorized to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, alone or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft either within or without the limits of such cities, villages, or towns, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

As a matter of fact, the Legislature has declared that such real property so owned and held is real property taken and used for "public use" by its specific declaration to that effect in Section 15124, R. S. Mo. 1939, reading as follows:

> "Any lands acquired, owned, controlled or occupied by such cities, villages, towns or counties for the purposes enumerated in sections 15122 and 15123 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."

Viewed in the light of the foregoing, we conclude that no prohibition exists under the Constitution or statutes of the State of Missouri against the acquisition of real property for airport facilities in this state by a foreign municipal corporation, if the power to so acquire and hold real property for that purpose is conferred upon such foreign municipal corporation by the Constitution and statutes of the state of its incorporation.

One further question might present itself as corollary to the above discussion, namely, whether or not such foreign municipal corporation would be required to comply with the laws of the State of Missouri regulatory of foreign corporations doing business in this state. We have examined "The General and Business Corporation Act of Missouri," found in Laws of 1943, pages 410-491, inclusive, and have come to the conclusion that such foreign municipal corporations would not be required to register and obtain a license. We direct your attention to Section 96 of the Corporation Act, which reads, in part, as follows:

> "A foreign corporation <u>organized for profit</u>, before it transacts business in this State, shall procure a certificate of authority so to do from the Secretary of State. * * *"
> (Emphasis ours.)

Inasmuch as the foreign municipal corporation necessarily would not be "organized for profit," we have reached the conclusion stated.

II.

With respect to the question as to whether or not such real property will be exempt from taxation under the laws of Missouri, we direct your attention to Section 6 of Article X of the Constitution of 1945, reading as follows:

> "All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

"Political subdivisions," as used in the first clause of the above quoted constitutional provision, must necessarily refer to political subdivisions incorporated or formed under the Constitution or laws of the State of Missouri, and therefore the exemption afforded therein to property owned by political subdivisions of the State of Missouri could not be extended to real property owned by a foreign municipal corporation. We believe this to be particularly true in view of the fact that the real property held in this state by such municipal corporation is held or owned by the corporation in its proprietary rather than its governmental capacity. That such is the nature of the holding of such real property in this state by a foreign municipal corporation appears from the opinion of the Supreme Court of Washington in the case of Langdon v. City of Walla Walla, cited supra, wherein that court said:

> "The suggestion that, to allow a city of this state to acquire property of the nature here in question in another state would, in effect, be an assumption of extra-territorial jurisdiction, we think is wholly without force, <u>in view of the fact that the city's ownership of such property situated outside its own territorial limits, whether within or without this state, is only the ownership and control over such property in the city's proprietary capacity.</u> * * *"
> (Emphasis ours.)

A quite similar situation was presented in State ex rel. Taggart, et al. v. Holcomb, et al., 85 Kan. 178, 116 P. 251, 50 L.R.A., N.S., 245, Ann. Cas. 1912D, 800 (writ of error denied Kansas City v. State ex rel. Taggart, 226 U. S. 599, 33 S. Ct. 112, 57 L. Ed. 375), wherein the court said:

> "And so it may be said here that, when a city of the state of Missouri comes into Kansas, it comes as a private party and brings with it none of the prerogatives of sovereignty. The general rule is that all property, not expressly exempted, is taxable, and the fact that the state does not tax itself and its municipalities to obtain revenue for itself is no reason why a foreign municipality, who is here in the capacity of a private proprietor, and whose property receives protection from the state, should contribute nothing towards that protection or should escape paying the taxes imposed upon other owners of property. It is clear that the exemptions from taxation, provided for the state and for cities and municipalities of the state, are only declaratory of the immunity that would be granted on fundamental principles of government, and that the cities and municipalities referred to in the statute and Constitution are those of our own state.
>
> "The fact that municipalities of another state, which becomes proprietors in Kansas, are not accorded exemption from taxation, is no basis for the claim that the interpleader is denied the equal protection of the laws or deprived of property without due process of law in violation of the federal Constitution." (Emphasis ours.)

We, therefore, conclude that such property would not be exempt from taxation imposed under the laws of the State of Missouri.

III.

The question of the authority of a municipal corporation to acquire by condemnation real property to be used for an airport in the State of Missouri is one which we think would be largely controlled by the principle of law set forth in the case of County Court of Wayne County v. Louisa & Fort Gay Bridge Co., Inc., 46 F. Supp. 1. In that action the State of West Virginia was seeking to condemn a toll bridge for public purposes, located partly in West Virginia and partly in Kentucky, in the absence of any permission or agreement with the State of Kentucky or the owner of such bridge, and in the

absence of any special authorization of Congress. We quote from the opinion in the case:

> "Plaintiff claims that it is authorized by the State of West Virginia to condemn the whole of this bridge by virtue of Chapter 27, of the Acts of West Virginia, Second Extraordinary Session, 1933, W. Va. Code, Ch. 17, Art. 17, Secs. 30-32. It claims that under the doctrine of comity between the several states, that it may exercise the right of eminent domain upon property located in Kentucky, provided no law of Kentucky forbids such condemnation, and provided it is ready and willing to pay to the owners of that private bridge the just compensation for the property taken. I see no merit in either of these contentions.
>
> "The power of eminent domain is an attribute of sovereignty. Within its own jurisdiction each state possesses such sovereign power. But no state can take or authorize the taking of property located in another state. Each state holds all the property within its territorial limits free from the eminent domain of all other states. To argue that the people of West Virginia have any inherent right to take property located in Kentucky from a citizen of that state, is to assert that the sovereignty of West Virginia extends to some extent over the soil of Kentucky. 'To state the proposition is to refute it.' McCarter v. Hudson County Water Co., 70 N.J.Eq. 695, 65 A. 489, 498, 14 L.R.A., N.S., 207, 118 Am. St. Rep. 754, 10 Ann. Cas. 116; 18 Am. Jur. 645, 29 C.J.S., Eminent Domain, Sec. 19, p. 805; Grover Irrigation & Land Co. v. Lovella Ditch, etc., Co., 21 Wyo. 204, 131 P. 45, L.R.A. 1916C, 1275, Ann. Cas. 1915D, 1207. A state cannot own or acquire property in another state without its consent. Dodge v. Briggs, C.C., 27 F. 160; State of Georgia v. City of Chattanooga, 264 U.S. 472, 44 S. Ct. 369, 68 L. Ed. 796; Klein v. City of Louisville, 224 Ky. 624, 6 S. W. 2d 1104, 1108. * * *
>
> " * * * No such authority has been given by Congress for the condemnation of the Louisa

> and Fort Gay bridge, and neither the State of Kentucky nor the owner of the bridge has consented thereto. Comity between these adjoining states cannot supply that high and drastic power of condemnation. Comity is a courtesy which one state extends to another by enforcing the laws of such other state when it is proper to do so, and such law is not contrary to the public policy of the state. Comity will not be exercised, when to do so, the state would be violating its own laws, or inflicting injuries on some one or more of its citizens."

We are unable to discover any constitutional or statutory authorization which would grant to a foreign municipal corporation the right to invoke the powers of eminent domain to acquire such property, and in the absence of such consent having been granted, we conclude that such foreign municipal corporation could not avail itself of the condemnation laws of the State of Missouri.

IV.

With respect to your question relating to zoning restrictions with reference to airports owned in the State of Missouri by foreign municipal corporations, we believe that there can be no question but that such restrictions must apply. It has been held that sovereign states possess jurisdiction to control the air space above their territories as being essential to the safety of their inhabitants. It has also been held that any use of the air space over land which is injurious to the land or impairs or interferes with the possession or enjoyment thereof is unlawful. See Smith v. New England Aircraft Co., 170 N. E. 385, 270 Mass. 511, 69 A.L.R. 300; also Guith v. Consumers Power Co., 36 F. Supp. 21.

With these principles in mind, it becomes apparent that zoning regulations and restrictions are a proper exercise of the sovereign power of the State of Missouri, and all airports operated within the territorial limits of the state will necessarily be subjected to such regulations and restrictions.

V.

Your fifth query is somewhat indefinite as to whether it is intended to levy the fuel tax, mentioned therein, upon sales made on the real property owned by the foreign municipal corpo-

ration in the State of Missouri, or whether such tax is to be levied within the territory of the foreign municipal corporation within its own corporate limits in the state of its creation.

As has been pointed out previously in this opinion, the acquisition and holding of the real property by the foreign municipal corporation in this state is and will be in its proprietary capacity, and not in its governmental capacity. Such being the case, the taxing power of the foreign municipal corporation cannot extend to territory located within the State of Missouri. It is elementary that the authority to impose taxes by any governmental body is restricted to the area over which it exercises governmental control. In view of the great diversity of laws and Constitutions of states adjoining the State of Missouri, which would necessarily control the authority of any particular foreign municipal corporation to levy any particular tax, we deem it inadvisable to attempt in this opinion to cover that phase of your inquiry completely.

CONCLUSION

In the premises, we are of the conclusion:

(1) That no constitutional or statutory prohibitions exist in the State of Missouri which would preclude the acquisition and holding of real property in this state by a foreign municipal corporation for airport purposes.

(2) That such real property, when so acquired and held, will not be exempt from taxation under the laws of the State of Missouri.

(3) That the right of eminent domain may not be exercised by a foreign municipal corporation in acquiring such property in the State of Missouri, under present constitutional and statutory provisions.

(4) That existing and future zoning restrictions and regulations of the State of Missouri will be applicable to such property.

(5) That such foreign municipal corporation may not levy any taxes within the State of Missouri.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR