

OPINION
54-25

May 24, 1954 (OPINION)

EDUCATION

RE: Acquiring of Site Outside of Boundaries of District

Your letter of May eleventh, relative to a proposed school site has been received and contents noted.

You state that the site that the school board for Devils Lake Special School District proposes to acquire, either by voluntary purchase or eminent domain, is located outside of, but adjacent to the City of Devils Lake and the Special School District. You state that this site has been recommended by the planning board set up by the University of North Dakota. You further state that your school board feels that this site is the best possible site for a future public school in the Devils Lake School District.

Your problem then is whether the Devils Lake Special School District has the authority under law to acquire either by purchase or otherwise and take title to real property situated outside the limits of the School District.

There is no question that a Special School District has the power under proper circumstances to acquire title to real property within the School District either by purchase or eminent domain. One of the powers given a Board of Education by section 15-2908 of the North Dakota Revised Code of 1943 is to purchase, sell, exchange, and hire school houses and rooms, lots, or sites for schoolhouses and to fence and otherwise improve them as it deems proper. Section 32-1502 of the North Dakota Revised Code of 1943 empowers a board of education to exercise the right of eminent domain in behalf of school districts, and section 32-1505 of the North Dakota Revised Code of 1943 provides that the use to which it is applied must be a use authorized by law, and the taking must be necessary to such use. There is, however, no statute in this state giving extraterritorial powers to a school district to acquire land either purchase or eminent domain.

While the courts of this state have not considered or passed on the question of whether or not municipal corporations can exercise extraterritorial eminent domain, the question has been extensively discussed by the courts of other states and you cite some of these decisions in your brief.

In addition to the authorities you mention in your brief, we find the following in McQuillin, Municipal Corporations 2d. Edition, 1943 Revision, "Property outside the state cannot be condemned, except under a specific grant from the federal government, although the right to condemn property within the state is not affected by the fact that a part of the enterprise will be another state. Likewise, a municipality cannot condemn land within the state but outside its own corporate limits unless that power has been delegated by the

state Legislature. However, it is well settled that a Legislature may delegate such power. Conceding that the purpose is a public one and the authority to condemn would exist if the land was situated within the corporate limits, it sometimes becomes a difficult question to determine whether the statutory authority to condemn inside the corporate limits extends to condemnation of property outside the limits."

Nichols on Eminent Domain 3rd. Ed. by Sackman and Van Brunt (1950) Section 2.24 states "A municipal corporation is a creature of the state designed to operate as a local government over a limited area. Generally a municipal corporation is confined to such area and is without power to acquire or hold real property beyond its area and is without power to acquire or hold real property beyond its territorial limits, unless the power to do so is expressly given by the Legislature. The right to exercise the power of eminent domain, under such circumstances, requires even more express and clear a grant than does the power to acquire by ordinary methods. The Legislature may confer upon a municipality the power to acquire and hold real property outside its territorial limits and in connection with such power may also vest it with the additional power to effect such acquisition by eminent domain."

Although the weight of authority leans toward the general principle set forth above, there is a judicial tendency toward the proposition that unless a municipality is expressly prohibited from doing so, it may acquire real property beyond its territorial limits for legitimate municipal purposes and the cases hold a municipality may exercise any power which is reasonably and necessarily implied in express powers granted to the municipality. Thus, if it becomes necessary to acquire land outside the corporate limits in order effectively to exercise a power expressly granted, such power to acquire must be implied.

The difficulty of applying the principles announced by McQuillin to the particular instance here involved is that nowhere in the statutes or judicial decisions of this state can we find any authority given a school district to acquire title to real property outside the geographical limits of the district.

Under the principles laid down by Nichols, we are confronted with the additional problem of whether or not exercise of the power of eminent domain outside of its limits is absolutely necessary to exercise of the powers and duties of school districts. It should also be noted that the cases cited by the above writers, and other authorities on the subject deal almost exclusively with waterworks, sewage disposal plants, drainage, public parks and streets.

We could find no authority in regard to the right of exercising extraterritorial eminent domain powers, either in school corporations or for school purposes other than a recent Utah case, Bertagnoli, et al v. Baken, et al. 215 P. 2d. 626, and as stated by the court in that case, "Counsel for the School Board has not cited, nor have we found, a single case in which the authority to condemn without the limits of a municipality has been inferred under circumstances substantially similar to those found in the instant case." In the above case the land lay partly within the district and partly

without, and the necessity for the taking or the use to which the tract was to be applied was not questioned. The court went on to say that in the state of Utah, Boards of Education are public municipal corporations with purely statutory powers. That the Legislature may authorize them to do anything not prohibited by the constitution, but that they have only such powers as are expressly conferred upon them, and such implied powers as are necessary to carry into effect and execute their express powers. The court further stated that the cases cited holding that municipalities could condemn land outside their corporate limits, all involved grants of power for specific purposes which would in effect be rendered worthless or seriously impaired by any other construction, and that the right of eminent domain being in derogation of the rights of individual ownership of property must be strictly construed.

In view of the nonexistence of cases holding that extraterritorial eminent domain powers may be exercised by school districts to acquire ties for building, it is our opinion that such power does exist in this state, and we, therefore, suggest that the safest and perhaps most proper method of acquiring this property would be for either the School District or the City of Devils Lake to annex the property and then proceed to acquire the land either by purchase or condemnation.

We hope that we have been of some assistance to you in solving your problem.

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