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MEMORANDUM

To: Committee on Utilities
From: Office of Revisor of Statutes
Date: February 19, 2024
Subject: Eminent Domain Authority for Public Utilities

Overview of Eminent Domain Authority for Public Utilities

The state possesses an inherent sovereign power of eminent domain to take private property for public use. The legislature may delegate the state's power of eminent domain to public and private entities; e.g. cities,¹ counties,² school districts,³ community colleges,⁴ board of regents,⁵ turnpike authority,⁶ secretary of transportation,⁷ railroad entities,⁸ oil and gas entities for storage and waste disposal,⁹ secretary of health and environment,¹⁰ irrigation districts,¹¹ secretary of wildlife and parks,¹² airport authorities,¹³ watershed districts,¹⁴ drainage districts,¹⁵ industrial districts,¹⁶ fire districts,¹⁷ water districts,¹⁸ airports,¹⁹ municipal energy agencies,²⁰ telecommunications providers²¹.

¹ K.S.A. 26-201, 12-808a, 12-845.

² K.S.A. 19-101, 19-101a.

³ K.S.A. 72-1144.

⁴ K.S.A. 71-201.

⁵ K.S.A. 76-147.

⁶ K.S.A. 68-2006.

⁷ K.S.A. 68-413, 68-423e.

⁸ K.S.A. 66-501.

⁹ K.S.A. 55-1003, 55-1204.

¹⁰ K.S.A. 49-433.

¹¹ K.S.A. 42-705.

¹² K.S.A. 32-840.

¹³ K.S.A. 27-321, 27-331.

¹⁴ K.S.A. 24-1209.

¹⁵ K.S.A. 24-108, 24-204, 24-407, 24-512.

¹⁶ K.S.A. 19-3808.

¹⁷ K.S.A. 19-3601a, 19-3616.

¹⁸ K.S.A. 19-3502.

¹⁹ K.S.A. 3-115, 3-123.

²⁰ K.S.A. 12-895.

²¹ K.S.A. 17-1903.

The legislature has delegated the power of eminent domain to certain private corporations that serve a public interest, including public utilities holding a certificate of convenience issued by the Kansas corporation commission (KCC):

17-618. Eminent domain, exercise by sundry corporations and partnerships.

Lands may be appropriated for the use of macadam-road, plank-road, hospital corporation or association, telegraph and telephone corporations, electric, hydraulic, irrigating, milling and manufacturing corporations using power, oil companies, pipeline companies, and for the piping of gas in the same manner as is provided in K.S.A. 26-501 to 26-516, inclusive, and any macadam-road, plank-road, telegraph and telephone corporations, hydraulic, irrigating, oil company, pipeline company, gas company, partnership holding a certificate of convenience as a public utility issued by the state corporation commission, milling or manufacturing corporation using power desiring the right to dam or take water from any stream, to conduct water in canals or raceways or pipes, or to conduct compressed air in pipes, or to conduct oil in pipes or conduct gas in pipes, or transmit power or communications by shafting, belting, or belting and pulleys, or ropes and pulleys, or by electrical current, or by compressed air, may obtain such right or the right-of-way for all necessary canals, raceways, pipes, shafting, belting and pulleys, ropes and pulleys or wires or cables in manner as aforesaid; and such canals, raceways, pipes, shafting, belting, belting and pulleys, ropes and pulleys or wires or cables may be laid, carried or stretched on, through or over any land or lot, or along or upon any stream of water, using so much of the water thereof as may be needed for any of the purposes aforesaid, or through any street or alley or public ground of any city of the second or third class: Provided, That no such canal or raceway shall be located through any street or alley or any public ground of any city without the consent of the municipal authorities thereof: Provided further, That it shall be unlawful for any person or corporation to locate or construct any irrigating canal or raceway along or upon any stream of water or take and use the water of any stream in such manner as to interfere with or in any wise hinder, delay or injure any milling or irrigating improvements already constructed or located along or upon any stream of water, or to diminish the supply of water flowing to or through any established irrigating canal: Provided further, That in case of the erection of a dam, the report of the commissioners, instead of defining the quantity and boundaries of the land overflowed, shall designate particularly the height of such dam.

History: G.S. 1868, ch. 23, § 88; L. 1871, ch. 64, § 1; L. 1876, ch. 58, § 1; L. 1891, ch. 85, § 1; L. 1899, ch. 95, § 1; L. 1901, ch. 128, § 1; L. 1917, ch. 122, § 1; R.S. 1923, 17-618; L. 1947, ch. 183, § 1; L. 1963, ch. 234, § 37; January 1, 1964.

K.S.A. 26-501a generally prohibits the exercise of eminent domain for the purpose of transferring property to a private entity unless the transfer to a private entity is specifically authorized pursuant to state law. One such circumstance provided in K.S.A. 26-501b authorizes any "public utility," as defined in K.S.A. 66-104, to take property by eminent domain only to the extent that such property will be used for the operation of facilities necessary for the provision of the utility's services.²²

Any entity that is engaged in the generation, transmission or distribution of electricity is defined as a "public utility" under Kansas law.²³ To operate as a public utility in the state, an entity must first obtain a certificate of convenience and necessity from the KCC.²⁴ Once an entity obtains a certificate of convenience and necessity from the KCC, the entity has authority to operate as a public utility in the state which includes the authority to exercise the power of eminent domain for public utility purposes.²⁵

K.S.A. 66-104 specifically exempts certain entities from the definition of a "public utility" which prohibits such entities from exercising eminent domain authority. Any independent power producer that constructed a generation facility after January 1, 2001, can opt to not be defined as a public utility if the cost of such generation facility is not built into the rate base of an electric public utility.²⁶ If an independent power producer exempts itself from public utility regulation in this manner, such entity may not exercise the power of eminent domain as a public utility.²⁷

Additionally, a municipally owned or operated electric or gas utility is generally not required to obtain a certificate of convenience and necessity from the KCC to transact business as a public utility in the state.²⁸ Even though a municipal utility is not required to possess a certificate

²² K.S.A. 26-501b(b).

²³ K.S.A. 66-104 defines a public utility as "every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant or generating machinery, or any part thereof, for the transmission of telephone messages or for the transmission of telegraph messages in or through any part of the state, or the conveyance of oil and gas through pipelines in or through any part of the state, except pipelines less than 15 miles in length and not operated in connection with or for the general commercial supply of gas or oil, and all companies for the production, transmission, delivery or furnishing of heat, light, water or power."

²⁴ K.S.A. 66-131.

²⁵ K.S.A. 17-618, 26-501b(b).

²⁶ K.S.A. 66-104(e).

²⁷ K.S.A. 26-501b(b).

²⁸ K.S.A. 66-104(b). A municipal utility must obtain a certificate of convenience and necessity from the KCC for facilities and services that extend three miles or more from the corporate limits of the municipality.

of convenience and necessity to operate as a public utility, municipal utilities possesses the power of eminent domain pursuant to other state statutes, including K.S.A. 26-201, 12-808a, and 12-845.

K.S.A. 66-104 also includes a provision to expressly prohibit the use of eminent domain for the construction of wind generation facilities even if such facilities are constructed by a public utility with eminent domain authority.²⁹

Eminent Domain Procedure Act

When the power of eminent domain is exercised, proceedings must be conducted pursuant to the eminent domain procedure act found in K.S.A. 26-501 et seq. The act establishes the procedural requirements for an entity to lawfully exercise its eminent domain authority. The eminent domain process begins when an entity files a petition for the taking in the district court where the property is located.³⁰ All parties named in the petition must be notified of the proceedings.³¹ The eminent domain proceedings will commence if the court finds that the entity possesses the lawful power of eminent domain and the taking is necessary for the corporate purpose of the entity.³²

Public Use Requirement

Eminent domain can only be used to take private property for a "public use."³³ Traditional concepts of public use relate to the provision of basic and essential governmental services such as roads, sewers, water facilities, utilities and other public functions. Over time, courts have expanded and broadened the concept of public use beyond such traditional concepts to expand the concept beyond public use to a public benefit analysis.³⁴ Generally, if a public utility exercises its lawful

²⁹ K.S.A. 66-104(g).

³⁰ K.S.A. 26-502.

³¹ K.S.A. 26-503.

³² K.S.A. 26-504.

³³ K.S.A. 26-501a.

³⁴ Both the U.S. Supreme Court and the Kansas Supreme Court have broadened the concept of public use to incorporate purposes beyond traditional concepts of public use. *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005) (A city can condemn property for economic revitalization activities because such activities generally serve a public purpose which is subject to great latitude in interpretation.) *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas city*, 265 Kan. 779, (1998) (Eminent domain may be used for the construction of the Kansas Speedway because the concept of public use can change over time).

eminent domain authority in accordance with the corporate purpose of the public utility, the action will comply with the public use requirement.³⁵

Just Compensation

The fifth amendment of the U.S. constitution and article 12 § 4 of the constitution of the state of Kansas prohibit the taking of private property without just compensation. K.S.A. 26-513 of the eminent domain procedure act also prohibits the taking of private property without just compensation and requires that the measure of compensation be based on the "fair market value." The fair market value is generally the value that the property would garner in an open and competitive market.

To determine fair market value in an eminent domain proceeding, the presiding judge must appoint three disinterested appraisers.³⁶ The appraisers must take an oath to faithfully discharge their duties as officers of the court.³⁷ The appraisers must refrain from any ex parte communications with the parties and must disclose any written materials provided to the appraisers by one party to the other party.³⁸

To establish the value of the condemned property, the appraisers shall examine the land and hold a public hearing to receive oral or written testimony from interested parties, including the landowner.³⁹ State law provides that the following nonexclusive list of factors shall be considered when determining the amount of compensation to a landowner:

1. The most advantageous use to which the property is reasonably adaptable.
2. Access to the property remaining.
3. Appearance of the property remaining, if appearance is an element of value in connection with any use for which the property is reasonably adaptable.
4. Productivity, convenience, use to be made of the property taken, or use of the property remaining.
5. View, ventilation and light, to the extent that they are beneficial attributes to the use of which the remaining property is devoted or to which it is reasonably adaptable.
6. Severance or division of a tract, whether the severance is initial or is in aggravation of a previous severance; changes of grade and loss or impairment of access by means of underpass or overpass

³⁵ See *Concerned Citizens, United, Inc. v. Kansas Power & Light Co.*, 215 Kan. 218, 229 (1974), holding that a Kansas public utility is vested with reasonable discretion to determine the necessity for the taking of land for its lawful corporate purposes and that such discretion will not be disturbed on judicial review unless fraud, bad faith, or an abuse of discretion is shown.

³⁶ K.S.A. 26-504; 26-506.

³⁷ K.S.A. 26-505.

³⁸ *Id.*

³⁹ K.S.A. 26-504; 26-506.

incidental to changing the character or design of an existing improvement being considered as in aggravation of a previous severance, if in connection with the taking of additional land and needed to make the change in the improvement.

7. Loss of trees and shrubbery to the extent that they affect the value of the land taken, and to the extent that their loss impairs the value of the land remaining.
8. Cost of new fences or loss of fences and the cost of replacing them with fences of like quality, to the extent that such loss affects the value of the property remaining.
9. Destruction of a legal nonconforming use.
10. Damage to property abutting on a right-of-way due to change of grade where accompanied by a taking of land.
11. Proximity of new improvement to improvements remaining on condemnee's land.
12. Loss of or damage to growing crops.
13. That the property could be or had been adapted to a use which was profitably carried on.
14. Cost of new drains or loss of drains and the cost of replacing them with drains of like quality, to the extent that such loss affects the value of the property remaining.
15. Cost of new private roads or passageways or loss of private roads or passageways and the cost of replacing them with private roads or passageways of like quality, to the extent that such loss affects the value of the property remaining.⁴⁰

The appraisers must submit an appraisers' report to the court to establish the compensation due to the landowner.⁴¹ Any party to the proceeding may file an appeal to the appraisers' award within 30 days following the entry of the appraisers' report.⁴² Such an appeal must be filed and docketed as a new civil action and the only issue to be determined in such appeal is the amount of compensation required for the taking.⁴³

Once the appraisers' report is filed, the entity that is exercising the power of eminent domain has 30 days to pay the amount provided in the appraisers' award and court costs.⁴⁴ Upon payment of such amounts to the court, absent any appeal regarding the valuation, the title or interest in the land immediately vests with the entity and possession may be taken thereof.⁴⁵ The landowner shall have 14 days to remove any personal property from the premises.⁴⁶

⁴⁰ K.S.A. 26-513.

⁴¹ K.S.A. 26-505.

⁴² K.S.A. 26-508.

⁴³ *Id.*

⁴⁴ K.S.A. 26-507.

⁴⁵ K.S.A. 26-507.

⁴⁶ *Id.*