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July 16, 1953

Honorable Leverett Saltonstall, Chairman
Committee on Armed Services
United States Senate

Attention: Mr. William H. Darden,
Professional Staff

My dear Mr. Chairman:

Reference is made to a letter dated May 22, 1953, signed by Mr. William H. Darden, presenting two questions relative to the acquisition of land by the armed services under Public Laws 155 and 534, 82d Congress, and two questions relating to the general authority of the armed services to acquire land, and requesting the views of this Office thereon.

The first question is as to whether this Office would take exception to the acquisition of land at the Naval Air Station, Willow Grove, Pennsylvania, under the authority of Public Law 155, 82d Congress, 65 Stat. 336, 345, assuming that the Committee on Armed Services of the Senate and of the House of Representatives approved the pending project in accordance with the requirements of section 601 of that act, 65 Stat. 365, and assuming further that an appropriation therefor is available.

Section 201, Title II, of Public Law 155, authorizes the Secretary of the Navy, under the direction of the Secretary of Defense, to establish or develop naval installations and facilities "by the construction, conversion, installation, or equipment of temporary or permanent public works, including buildings, facilities, appurtenances, and utilities," as set out therein, the authorization for each installation stating clearly the construction authorized thereby. Several of these individual authorizations specifically include land acquisition, whereas most of them do not. The particular authorization in question is as follows: "Naval Air Station, Willow Grove, Pennsylvania: Additional aviation facilities, \$5,335,000." (65 Stat. 345) Since some authorizations in the act specifically include the acquisition of land and the Willow Grove authorization and others do not, application of the maxim of statutory interpretation, "expressio unius est exclusio alterius," makes it quite clear that the latter authorizations were not intended to cover the acquisition of land.

B-115456

Also, the hearings on various bills to authorize certain construction in military and naval installations clearly indicate that both the Committee on Armed Services, House of Representatives, and the witnesses representing the military establishment were of the opinion that specific inclusion of land acquisition in an authorization for a particular installation was necessary in order to permit land acquisition at such installation. On pages 1656 and 1657 of the Hearings before the Committee on Armed Services, House of Representatives, 82d Congress, on H.R. 4524, a related bill to H.R. 4914 which ultimately became Public Law 155, the following discussion of this matter appears:

"Colonel GRIGGS. There is some vacant land that could be utilized for the purpose of building additional warehouses at Brookley Field. We contemplate that in the arrangement of the field according to a master plan which is being formulated at this time, that it may be necessary—we are not quite certain—to acquire a little additional land around the installation now, but not very much, sir.

"The CHAIRMAN. Well, it doesn't make a bit of difference what it is. Your items must show that the money is going to be spent for what the item says in the book. Now I certainly hope that it doesn't run through other items, that the item says one thing but it includes others. You wouldn't be authorized land there. There is nothing in the law in reference to acquiring any land. So if you have to have any land, you better put it in the law. Don't try to take any warehouse money and buy some land, because the act will read, 'Airfield pavements, operational facilities, aircraft maintenance facilities, utilities, and storage facilities, \$11,380,000.' We couldn't even interpret that operating facilities would justify land after you have broken down like you have in this book. So if you have to have any land, we better write it in the bill that you have to have some land, instead of making you use items for one purpose in the book and actually applying it to some other purpose. Now we must not have any kind of doings like that.

"Colonel GRIGGS. Mr. Chairman, I would like to make a statement that nowhere else in this book is there any item that would come near that, because the land that is necessary to be acquired is so stated and made a part of the request separately.

"The CHAIRMAN. I see. It is not even stated in the book. If you want to buy this land, the committee would say, 'Where did you get the authority?' Well, you would say, 'We didn't have the authority. We took a little warehouse money and bought it.' You must

B-115456

not do that. We must put the cards on the table. If there isn't any objection, we will include the word 'land' in that item.

"Mr. TONE. How much land would be involved, Colonel?"

"Colonel GRIGGS. Only a few acres.

"The CHAIRMAN. Now let that be thoroughly understood. Because we are relying upon each one of these services when they break this down to use the money exclusively for that purpose. Then if they have to change, they must come back to this committee and tell us about these various things. Because the flexibility is not given to buy something that is not set out, unless we write it in the bill. Without objection, we approve \$11,380,000 for this air material base."

Likewise, in the hearings before said Committee on H.R. 7694, a bill similar to those referred to above, there appear on pages 4022, 4028, 4510, 4511, and 4519, statements by both witnesses and committee members bearing out the same opinion.

Accordingly, the authorization for additional aviation facilities at the Willow Grove Naval Air Station as contained in Public Law 155 properly may not be construed as including authority for the acquisition of land at Willow Grove.

Question No. 2 is as follows:

"Do Sections 401 (a), Public Law 534, 82nd Congress, and 501 (a), Public Law 155, 82nd Congress, constitute 'general authority' for the acquisition of land?"

Section 501(a) of Public Law 155, 82d Congress, 65 Stat. 363, provides as follows:

"The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, under the direction of the Secretary of Defense, are respectively authorized, in order to establish or develop the installations and facilities as authorized by this Act, to acquire lands and rights pertaining thereto, or other interests therein, including the temporary use thereof, by donation, purchase, exchange of Government-owned lands, or otherwise, without regard to section 3628, Revised Statutes, as amended. When necessary, construction of a public works project authorized by this Act may be commenced prior to approval of title to the underlying land by the Attorney General as required by section 355, Revised Statutes, as amended."

B-11956

Section 401(a) of Public Law 534, 82d Congress, 66 Stat. 624, is identical with the above provision except that the words "authorized by Title I, II and III of this Act" are substituted for "authorized by this Act".

Public Law 534, like Public Law 155, is an act authorizing certain construction at military and naval installations. This act likewise contains lists of authorizations and specifies for each installation listed the exact items authorized thereby. Here again, some of the individual installation authorizations include specific authority for land acquisition while most of them do not. It does not seem reasonable to assume that the Congress would include in the same act both specific authorizations for land acquisition at stated installations and a general authorization permitting land acquisition anywhere, since the general authorization would render the specific authorizations previously granted in that act mere surplusage. Accordingly, this Office concurs with the Committee's position that the sections here in question should not be regarded as general authorizations for land acquisition, but as merely permitting such procurement, where otherwise authorized in the respective acts, without regard to the advance-payment prohibition contained in section 3648 of the Revised Statutes, and as permitting the commencement of construction thereon without obtaining prior approval of title to the land by the Attorney General as required by section 355 of the Revised Statutes.

In reaching this conclusion, this Office has not overlooked the indications in the legislative histories of Public Laws 155 and 534 that the sections here in question were intended to be given the same construction as similar sections in prior authorization acts and the statement in House Report No. 1851 on S. 2440, 81st Congress, subsequently enacted as Public Law 564, approved June 17, 1950, that "Section 401 of the bill identical with the sections here in question authorizes the acquisition of land and interests therein when necessary to accomplish the construction authorized in this bill, authorizes advance payments to be made in connection with such acquisition without regard to section 3648, Revised Statutes, and, in connection with the construction for the special-weapons project, authorizes commencement of construction prior to approval of title to such lands by the Attorney General as is normally required by section 355, Revised Statutes. * * * Consideration also was given to the discussion on page 4637 of the Hearings before the Committee on Armed Services, House of Representatives, 82d Congress, on H.R. 7694, wherein it was indicated that the Department of the Air Force viewed this provision as new substantive authority which would authorize the acquisition of land when needed for an approved project even if the project

B-11556

authorization did not include land acquisition. However, it is to be noted that the Committee did not specifically approve the opinion expressed by the Air Force, and, indeed, one member stated that such opinion was "a considerable departure from our normal idea about authorizing the acquisition of land." Also, on page 1784 of the Hearings before the Committee on H.R. 4524 it was stated that the section in question was "the authority to initiate work and make advance payments" which, of course, is substantially in accord with the opinion expressed by this Office hereinabove. In view thereof, and particularly in the light of the emphasis placed by both the Committee and the witnesses upon the absolute necessity for including land acquisition in the individual installation authorization in order to authorize the acquisition of land--with no indication that either the Committee or the witnesses believed that the acts contained any general land acquisition authority--as set forth in the answer to question one, *supra*, together with the manifest absurdity of holding that a single act contains both specific authorization for acquisition of land at certain of the listed installations and general authority which would permit such acquisition at any and all of the listed installations, the conclusion set out above is believed to be the only one that logically could be reached.

The third question presented is as follows:

"In what circumstances do the Acts of August 18, 1890, as amended, (50 U.S.C. 171) and of August 12, 1935, as amended, (10 U.S.C. 1343) constitute authority for land acquisition in instances where the acquisition is not otherwise authorized by law?"

There do not appear to be any prior decisions of this Office specifically pertaining to the scope of 50 U.S.C. 171. The courts in interpreting this provision have held that it gives the Secretary of War (now the Secretary of the Army) broad powers in the selection of sites to be condemned, together with authority to determine whether the purpose for which the land is being taken is a military purpose, the necessity or expediency of the taking, and the extent of the taking. See City of Oakland v. United States, 124 Fed. 2d 959, certiorari denied 316 U.S. 679; United States v. 1,177 Acres of Land, More or Less, in Bada County, Florida, 51 F. Supp. 84; United States v. 12,918.26 Acres of Land in Webster Parish, Louisiana, 50 F. Supp. 712; United States v. Black, 167 F. 2d 167.

However, I do not read those cases as holding that the statute in question constitutes sufficient authority for the purchase of land

B-115456

where the Secretary is not otherwise empowered to acquire and pay for the land. While it has been held that the power granted the Secretary by this statute was not abrogated by a specific provision in an appropriation act that no part thereof could be expended for the purchase of real estate, and the Court therefore refused to dismiss a condemnation proceeding begun by the Secretary, the Court stated that title would not pass until compensation was made. In re Military Training Camp in Prince George County, Virginia, 260 Fed. 986. Indeed, section 3734, Revised Statutes, 40 U.S.C. 259, prohibits the expenditure of money by the United States for the purchase of any site for a public building in excess of the amount specifically appropriated for that purpose.

Accordingly, it is the opinion of this Office that this provision is procedural in nature and merely provides the method whereby land may be acquired where there exists a separate authorization to acquire and pay for such land.

The same conclusion necessarily would apply to the act of August 12, 1935, Public Law 263, 74th Congress, 49 Stat. 610, codified as sections 1343a through 1343d of Title 10 of the United States Code, which authorized and directed the Secretary of War (now Secretary of the Army) to determine the location of such additional permanent Air Corps stations and depots, as well as enlargement of existing stations and depots, as he deems essential for the effective peacetime training of the General Headquarters Air Force and the Air Corps components of overseas garrisons, and, in order to accomplish the purposes of the act, to acquire such land as he deems necessary or desirable therefor.

Question 4 requests the opinion of this Office on the thesis that Congressional authorization for construction carries implied authority to acquire the land necessary for such construction.

The Attorney General, in several instances, has expressed an affirmative opinion on this question. See 15 Op. Atty. Gen. 212, 22 id. 665, 29 id. 48, and 40 id. 69. In the case of Burns v. United States, 160 Fed. 631, the Circuit Court of Appeals, Second Circuit, held that an act authorizing construction of a sea wall included implied authority for the purchase of land "necessary to or proper for the protection of the sea wall" sufficient to overcome the prohibition in Revised Statute 3736, 41 U.S.C. 14, which prohibits the purchase of land on account of the United States except under a law authorizing such purchase, and stated that "The power to build a sea

B-115456

will implies the power to do whatever is necessary to that end." The Circuit Court of Appeals, Tenth Circuit, in United States v. Threlkeld, 72 F. 2d 464, certiorari denied 293 U.S. 620, stated in connection with an act authorizing the Secretary of Agriculture to construct and maintain roads, trails, etc., in national forests that "We think the broad authority to construct and maintain roads and other improvements includes the power to acquire land for that purpose if it is necessary because, when legislative authority to do a specified thing is conferred, power to do all those reasonably necessary to its achievement is impliedly granted." See also Polson Logging Co. v. United States, 160 F. 2d 712. The tenor of these opinions and decisions would seem to indicate that, while each individual case must of necessity be determined on the basis of the specific facts and circumstances pertaining thereto, an authorization for construction may be deemed to imply authority to acquire land therefor when such land is so necessary and essential for that construction that the acquisition thereof must have been contemplated by the Congress.

However, in the interpretation of statutes the legislative intent is the all important and controlling factor and an implication may not be read into a statute which the language of the statute does not warrant and which was not intended to be there. 50 Am. Jur. 213. For example, the inclusion in Public Law 155 of specific authority to acquire land in connection with certain projects so contrasts with the omission of such authority with respect to other projects as to require the inference that the omission must have been intended to have the opposite effect and was tantamount to a specific prohibition against acquisition of land at these installations. Furthermore, the Military Public Works Appropriation Act, 1952, 65 Stat. 764, which made funds available for carrying out the purposes of Public Law 155, contained no greater authority for the acquisition of real property for naval installations than was granted by Public Law 155. For these reasons and since no implication that the purchase of land is necessary where, as in case of Willow Grove, the project authorization is one for "additional aviation facilities" which presumably can be constructed on land already available, it is the view of this Office that there is no implied authority to acquire land for that and similar projects.

It is hoped that the above will serve the purpose of your inquiry.

Sincerely yours,

E. L. Flaht

Acting Comptroller General
of the United States

