BONDS:
SCHOOLS:
CITIES, TOWNS & VILLAGES:
INTEREST:

1. House Bill No. 2 invalidates contracts entered into prior to the effective date of said bill which call for the private sale of bonds by a school district in which the interest rate will exceed six percent where such bonds had not been issued as of the effective date of said bill. 2. A contract entered into prior to the effective date of House Bill No. 2 between a city and a private party calling for the sale of bonds with an interest rate of six percent or less, subject to an escalation in the event of a rise in the Dow-Jones Bond Index or a similar national bond yield index, is invalid when the effect of the escalation clause would result in the issuance of bonds at private sale with an interest rate in excess of six percent subsequent to the effective date of House Bill No. 2. 3. "Reasonable notice," as the term is used in House Bill No. 2, constitutes that notice which is reasonably calculated to inform the general public that bonds with interest rates in excess of six percent are to be offered at public sale.

OPINION NO. 76

March 2, 1970

FILED
76

Honorable William C. Phelps
State Representative, District 4
5016 Grand
Kansas City, Missouri 64112

Dear Representative Phelps:

This is in response to your request for an opinion concerning the effect of House Bill No. 2, as enacted and passed by the First Extraordinary Session of the 75th General Assembly. Specifically, your request entailed the following questions:

> 1. Does House Bill No. 2 invalidate a contract entered into prior to the effective date of said bill for the private sale of bonds by a school district in which the interest rate will exceed six percent?
>
> 2. Does House Bill No. 2 invalidate a contract entered into prior to the effective date of said bill for the private sale of bonds by a city in which the interest rate by reason of an escalation clause will exceed six percent?
>
> 3. What constitutes "reasonable" notice of public sale within the meaning of House Bill No. 2?

I.

With respect to your first question, you have informed us that several school districts had entered into contracts prior to the effective date of House Bill No. 2 for the private sale of bonds by a school district in which the interest rate would exceed six percent, said contracts calling for the issuance and deliverance of bonds after the effective date of House Bill No. 2. Under the existing law prior to the effective date of House Bill No. 2, school districts could issue bonds at private sale with a maximum rate of interest of eight percent. See Attorney General Opinion No. 436, dated October 9, 1969. (copy attached). However, House Bill No. 2, which became effective ninety days after adjournment of the First Extraordinary Session (Attorney General Opinion No. 454, November 4, 1969, copy attached), provides that ". . . any and all bonds including revenue bonds hereafter issued under any law of this state by any . . . school district, . . . shall be negotiable and may bear interest at a rate not exceeding six percent per annum, . . . anything in any proceedings heretofore had authorizing such bonds or in any law in this state to the contrary notwithstanding. Such aforementioned bonds may bear interest at a rate not exceeding eight percent per annum if sold at public sale after giving reasonable notice of such sale, . . ." It is clear from the language of House Bill No. 2 that the legislature did not intend to allow school districts to issue bonds at private sale subsequent to the effective date of House Bill No. 2 at interest rates exceeding six percent. House Bill No. 2 specifically provides that bonds issued subsequent to the effective date of said bill must be sold at public sale after giving reasonable notice of such sale if they bear interest at a rate exceeding six percent with a maximum rate of eight percent. Therefore, any bond bearing interest in excess of six percent issued by a school district subsequent to the effective date of House Bill No. 2 must be sold at public sale after giving reasonable notice of such sale, regardless of any contractual arrangements to the contrary.

The question arises as to the constitutionality of the above requirements of House Bill No. 2 in view of the impairment of contract clauses of both the United States Constitution and the Missouri Constitution, Article I, Section 10 of the Constitution of the United States and Article I, Section 13, Mo.Const. However, with respect to the constitutional prohibitions against impairment of contract, it has been said that ". . . the State . . . continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' . . ." Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 434-435, 78 L.Ed. 413, 54 S.Ct. 231 (1934). For additional discussion on this point, see 16 C.J.S., Constitutional Law, Section 281, page

1284 and the cases cited therein. "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts. . . ." Home Building & Loan Association v. Blaisdell, Id. at 437. Since bond issues by the various political subdivisions of this state are necessary in order to build and maintain public utilities and services necessary to the health, safety, and well-being of the citizens of this state, legislation on the subject of bonds comes within the meaning of the term "police power."

> "In the exercise of this great lawmaking function, the state is not obstructed by a contract between one of its agencies (cities, towns, or villages) and other persons, for the reason that the state cannot alienate any of its sovereign powers which are necessary to the public welfare, or essential to the protection of the health, morals, and property of its citizens. . . ." Southwest Missouri R. Co. v. Public Service Commission, 281 Mo. 52, 219 S.W. 380, 382 (en banc 1920)

In applying this principle, it has been said that the Public Service Commission in Missouri has the power to set rates for a utility and that these rates shall prevail over rates established previously by private contract even though said rates are contrary to the ones established by private contract. See Kansas City Power & Light Company v. Midland Realty Co., 338 Mo. 1141, 93 S.W.2d 954, 958 (1936), aff'd 300 U.S. 109, reh den 300 U.S. 687. See also Metropolitan Funeral System Ass'n. v. Forbes, 331 Mich. 185, 49 N.W.2d 131, 136 (1951), wherein the Supreme Court of Michigan, in dealing with a statute regulating participation by life and accident insurance companies in the mortuary business, said:

> "The legislature, acting within the limits of its power, has enacted legislation which will lead to the termination of the employment contracts between the plaintiff and many of its employees. It has also modified the plaintiff's insurance contracts to the extent that money alone can be paid to the beneficiaries thereunder. The legislature passed corrective legislation to prevent an evil. That many contracts were altered or made unenforceable is of no consequence for no constitutional inhibition has been violated."

Therefore, it is our opinion that those provisions of House Bill No. 2 which abrogate contracts in effect at the time said act

became effective do not involve impairment of contract in the constitutional sense.

II.

In your second question, you ask if House Bill No. 2 would invalidate a contract entered into prior to the effective date of said bill for the sale of bonds by a city, said contract containing an escalation clause by which the interest rate could exceed six percent. You state that a number of cities have entered into such contracts with a fixed interest rate of six percent or less with the interest rate subject to escalation in the event of a rise in the Dow-Jones Index or a similar national bond yield index. You state that a number of cities having such contracts now wish to issue and deliver their bonds with an interest rate in excess of six percent at private sale. Since House Bill No. 2 requires a public sale of bonds by a city if the interest rate exceeds six percent, the question arises as to whether there has been an unconstitutional impairment of the above contracts by said bill.

In answer to this, it is only necessary to consider the contracts themselves. A contract entered into between a city and another party for the private sale of city bonds at an interest rate of six percent with an escalation clause calling for increased interest rates on the happening of a given event is, at least to the extent of the escalation clause, invalid. Section 108.170, RSMo Supp. 1967, which section was in effect prior to the passage of House Bill No. 2, provided that interest rates on bonds issued by cities should not exceed six percent. Therefore, escalation clauses in contracts entered into during the period of time that this section was in effect which provided for interest rates in excess of six percent are simply invalid. Likewise, a contract of this nature entered into subsequent to the effective date of House Bill No. 2 would be invalid in that House Bill No. 2 requires public sale of city bonds where the interest rate exceeds six percent. "As a general rule, a valid and enforceable contract may not arise out of a transaction prohibited by statutory law. . . . ." Greer v. Zurich Insurance Company, 441 S.W.2d 15, 26 (Mo. 1969).

III.

In your third question, you ask what constitutes "reasonable notice" of public sale as called for by House Bill No. 2. You point out that no guidelines are given in House Bill No. 2 as to what constitutes reasonable notice. It has been said that ". . . Reasonable notice is defined to be such notice or information of a fact as may fairly and properly be expected or required in the particular circumstances. . . ." State v. Aronson, 330 S.W.2d 140, 144 (St.L.Ct.App. 1959). No hard and fast rule can be laid down

in this area. Certainly, any political subdivision desiring to issue bonds with an interest rate in excess of six percent should take whatever steps are necessary in order to inform the public that such bonds will be sold at public sale. In addition, notice could be sent directly to those who customarily buy such bonds, i.e., municipal bond dealers or banks with municipal bond departments in order to insure a successful sale.

CONCLUSION

Therefore, it is the opinion of this office that:

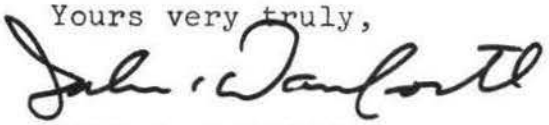
1. House Bill No. 2 invalidates contracts entered into prior to the effective date of said bill which call for the private sale of bonds by a school district in which the interest rate will exceed six percent where such bonds had not been issued as of the effective date of said bill.

2. A contract entered into prior to the effective date of House Bill No. 2 between a city and a private party calling for the sale of bonds with an interest rate of six percent or less, subject to an escalation in the event of a rise in the Dow-Jones Bond Index or a similar national bond yield index, is invalid when the effect of the escalation clause would result in the issuance of bonds at private sale with an interest rate in excess of six percent subsequent to the effective date of House Bill No. 2.

3. "Reasonable notice," as the term is used in House Bill No. 2, constitutes that notice which is reasonably calculated to inform the general public that bonds with interest rates in excess of six percent are to be offered at public sale.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 436
10-9-69, Holman

Op. No. 454
11-4-69, Phelps