

MUNICIPAL CORPORATIONS: Ordinance may be repealed when same does not interfere with vested rights.

November 22, 1940



Mr. A. J. Caywood, Publisher
The Laclede Blade
Laclede, Missouri

Dear Sir:

We wish to acknowledge your request for an opinion under date of October 23d, as follows:

"In behalf of a number of citizens of our town as well as myself I desire an opinion from your office on the question of whether or not the City Council has the power to pass an ordinance repealing a former ordinance for the issuing of bonds, which said ordinance was ratified by the voters but the bonds never having been issued.

"The City of Laclede, acting through its City Council, passed an ordinance in 1932 providing for a special election for the purpose of submitting to the legal voters of the said city a proposition to issue bonds in the amount of \$12,000 for the purpose of providing funds for the building of an electric light system. The election was held May 3, 1932 and the proposition was ratified. Later injunction proceedings were filed by a tax paying citizen, Mr. E. B. Allen, and a temporary injunction was granted restraining the auditor from registering these bonds. Up to this present date nothing has been done toward the issuing of the bonds and since the

voting of the said bonds conditions have changed and many of the citizens now feel that it is to the interest of our community to not issue the said bonds. In the first place the amount of bonds voted was not half enough to accomplish the original purpose and, second, our town has built a new school building and has graveled its streets, incurring heavy bonded indebtedness for said improvements and, too, on account of general conditions the citizens of our community wish to cancel this issue of bonds above mentioned. Also about 1933 a part of the special tax was collected on account of the issuance of these bonds which said tax amounts to about \$900 and is impounded in one of our county banks. The taxpayers are very anxious to have this money re-distributed to the persons who paid it in.

"The City Council is also interested in canceling the bonds but is not certain whether it has the power to do so. In 1934 Mr. T. P. Burns, an attorney living in this county, gave an opinion to the City Council stating that the Council has the right to pass an ordinance repealing the said bonds and thereby declaring the whole matter at an end. I am enclosing herewith a copy of Mr. Burns' opinion and would like to have you check it over and tell me whether or not we would be performing according to the law if the City Council should pass an ordinance repealing these bonds.

"Our citizens will appreciate it very much if you will let us have your opinion in this matter in order that we may be guided by same."

The City of Laclede having a population of 644 inhabitants according to the official 1930 United States Census, we presume the same comes within the classification of cities of the fourth class. Section 6093, R. S. Mo. 1929.

Section 7030, R. S. Mo. 1929, authorizes the issuance of bonds by the board of aldermen in cities of the fourth class for electric light plants, providing assent therefor is given by two-thirds majority of the electors of the city. Said section provides in part as follows:

"Bonds may be issued for * * * light plants * * *. The board of aldermen shall have power to borrow money and issue bonds for the payment thereof, within the limits prescribed by the Constitution, for the purpose of erecting * * * electric light works, * * * or acquire the same by purchase; * * * but bonds for the purpose aforesaid shall not be issued until two-thirds (2/3) of the legal voters of such city, voting at an election held for that purpose, have assented thereto, in accordance with article 10, chapter 38, R. S. 1929."

It is readily evident from a reading of the above section that the power to borrow money and issue bonds for the construction of an electric light system is vested in the board of aldermen, and that its authority is expressed by the enactment of an ordinance. The electors may acquiesce or refuse to approve the actions of the board, in which case the board could not borrow the money or issue the bonds, but the power of the board as expressed by the ordinance still remains.

McQuillan on Municipal Corporation, Vol. 2, Section 871, page 1127, in discussing the power to repeal ordinances, states as follows:

"Specific grant of power to amend or repeal ordinances is not necessary in view of the general rule that power to enact them, unless restricted, implies power to repeal them. * * * Generally speaking, all ordinances are subject to repeal. * * * In the absence therefore of a valid provision to the contrary, the council of a municipal corporation having the authority to legislate on any given subject, may exercise that authority at will by enacting or repealing an ordinance in relation to such subject matter. * * * The efficacy of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it."

In the case of the City of Kansas v. White, 69 Mo. 26, the court said:

"By the charter, the city had authority to pass ordinances to suppress gaming. It, of course, had authority to repeal them when passed."

43 C. J., Sec. 887, p. 562, in discussing the same subject, states that:

"Subject to limitations hereinafter considered, the power of a municipal council to repeal ordinances is by necessary implication as broad as the power to enact them, * * * * *"

One of the limitations of this power to repeal is where the effect of such repeal would be to interfere with vested rights. 43 C. J., Sec. 888, p. 563, declares the rule as follows:

"The power to repeal ordinances cannot be exercised by a municipality where the effect of such repeal would be to interfere with vested rights acquired under the ordinance which it

is sought to repeal. But an ordinance may be repealed at any time before compliance with the steps necessary to render it effective, because in such case no one is deprived of any vested right * * * *"

You state that the bonds were never registered by reason of a temporary injunction having been granted restraining the auditor, and that up to the present time nothing has been done towards the issuance of the bonds. Certainly under the circumstances no one would be deprived of their vested rights by repeal of the ordinance.

In the case of State v. Hackmann, 199 S. W. 990, bonds had been issued in accordance with a statute which was repealed by an act approved April, 1917. The preliminary steps necessary to authorize the issuance of the bonds in conformity with the statute then in force had been complied with prior to its repeal but the bonds were not issued until April 29, 1917. In June, 1917, they were presented to the respondent for registration and were by him registered. Soon thereafter they were sold and paid for at their par value.

Afterwards, on June 10, 1917, the County Court called for the payment of all said bonds and in order to provide funds necessary to pay off and retire the same, prepared and executed refunding bonds. These refunding bonds were presented to the respondent, as Auditor of the State, in compliance with the requisites of the law and their registration was by him refused. This proceeding was in mandamus to require respondent as State Auditor to register the issue of refunding bonds of the county.

That the steps taken antecedent to the issue of the original bonds were in conformity with the law then in force, was conceded. Respondent, however, contended that the writ should not issue for the reason that the statute under which the original bonds were issued was expressly repealed before such bonds were actually issued, registered and negotiated.

The court in pointing out that there was no vested right impaired because it was dependent upon the contingency of the issuance of the bonds and the registration of same, said: (I. c. 991)

"As a general rule, a statute expressly repealed is thereby abrogated, and all proceedings commenced thereunder which have not been consummated are rendered nugatory unless the repealing act is modified by a saving clause. Despite the fact that the courts with that conservative spirit which looks to permanence in the law, do not favor repeals (St. Louis v. Kellman, 235 Mo. 687, 139 S. W. 443), there is, except for modifications which may be effected by a saving clause, but one unqualified exception to the rule as above announced, and that is where a vested right is involved. * * * * * However, the public nature and salutary character of these statutes will not alone suffice to render the rights they may confer, if not consummated, vested. By a 'vested right' we mean one which is absolute, complete, and unconditional (Orthwein v. Insurance Co., 261 Mo. loc. cit. 665, 170 S. W. 885), to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency (Young v. Jones, 180 Ill. loc. cit. 221, 54 N. E. 235; Bailey v. Phila., etc., R. R., 4 Har (Del.) loc. cit. 400, 44 Am. Dec. 593; Day v. Madden, 9 Colo. App. 464, 48 Pac. 1053; Royston v. Miller (C. C.) 76 Fed. loc. cit. 53). The facts do not sustain the conclusion that such a right exists here. While a right

existed which had been partly executed at the time of the repeal of the statute, it was, at best, inchoate or initiatory in its nature; its consummation being dependent upon the contingency of the issuance of the bonds and the registration of same. This being the nature of the right, it does not furnish authority for the exercise of the mandatory power of the court."

You point out, however, that about 1933 a part of the special tax was collected on account of the issuance of these bonds, which is now impounded in one of your county banks. We assume by said statement that the funds are being held separate and apart in trust by the city for the taxpayers and can be returned to them. We know no reason why, under the circumstances, same cannot be immediately returned upon the repeal of the statute.

In the case of *Loring v. City of St. Louis*, 10 Mo. Ap. 414, the court in discussing the implied obligation on the part of a municipality to refund taxes where held in trust, said (l. c. 421):

"Where a municipality has obtained money of another without authority of law, 'it is her duty,' says Chief Justice Field, in *Argenti v. San Francisco*, 16 Cal. 255, 'to refund it, not from any contract entered into by her on the subject, but from the natural obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or, if used by her, to render an equivalent to the true owner, from the like obligations. The law, which always intends justice, implies a promise."

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43 C. J., Sec. 890, p. 564, in discussing methods of repealing ordinances, states that:

"The simple and direct mode for effecting repeal of an ordinance is by a later ordinance passed by the common council, enacting that the former ordinance, describing it, is hereby repealed."

From the foregoing we are of the opinion that the Board of Aldermen of the City of Laclede may repeal an ordinance authorizing a bond issue for the building of an electric light system, which ordinance was ratified by the electorate, since to repeal same will not deprive anyone of their vested rights.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

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