SCHOOLS: Board of directors of local reorganized school district may rescind order for election to authorize issuance
BUILDINGS: of bonds for borrowing money for purpose of erection of school building.

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JOHN M. DALTON

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April 16, 1953

J.C. Johnsen
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Honorable Bill Davenport
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

> "The Board of Directors of a local reorganized school district has ordered an election for the purpose of authorizing the issuance of school bonds for the borrowing of money for a building for the school. Notices of the election have been lawfully posted and have been up for several days.
>
> "They are wondering whether or not they can rescind their action and cancel the election or whether the public now has such an interest in the election and its results that they cannot revoke their acts.
>
> "I presume that the election is based on proper minute entries finding the necessity for the building program and its benefit to the school district.
>
> "May we ask your opinion on this matter at your earliest convenience. The election is set for about the 23rd of April, 1953."

The sole question here is whether the board of directors of a local reorganized school district can rescind its order calling for an election for the purpose of authorizing the issuance of school bonds for the borrowing of money for the erection of school buildings.

Authority for the board of directors to order such an election is found in paragraph 1 of Section 165.040, RSMo 1949 which reads:

> "1. For the purpose of purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose. Notice of said election shall be given at least fifteen days before the same shall be held, by at least five written or printed notices, posted in five public places in the school district where said election shall be held, and the amount of the loan required, and for what purposes; it shall be the duty of the clerk to sign and post said notices. The qualified voters at said election shall vote by ballot. Those voting in favor of the loan shall have written or printed on their tickets, 'For the loan;' those voting against the loan, the words 'Against the loan,' and if two-thirds of the votes cast on the proposition shall be for the loan, the district board shall be vested with the power to borrow money, in the name of the district, to the amount and for the purpose specified in the notices aforesaid, subject to the restrictions of section 165.043."

We would now direct attention to the 1930 case of State v. Wenom, 32 SW (2) 59. We here note that this case was based upon Section 11127, RSMo 1919, which section now is Section 165.040, supra.

The background of the Wenom case is stated by the court in its opinion at l.c. 59, as follows:

> "Mandamus begun and tried in the circuit court of Jefferson County. The trial court,

> upon the filing of the petition, issued an alternative writ which was made permanent upon final hearing, and five of the respondents below appealed. Relators are residents and taxpayers of consolidated school district No. 1 of Jefferson county and at the time of the institution and trial of this action the six men who were respondents below constituted the board of directors of said district. One of the directors made no return to the alternative writ and did not join in the appeal.
>
> "On March 18, 1922, soon after the organization of the consolidated district, a special election was held therein pursuant to call of the then board of directors, at which it was voted to authorize the board to issue bonds in the sum of $40,000 to build a 'central school building' and to purchase a school site, and by vote of the electors at the same election a specified site was selected embracing about 5 1/3 acres. The bonds have not been issued. Shortly following the special election, there was some litigation involving the organization of the district and an attempt to disorganize, which may account for the fact that the bonds were not issued immediately after the election. This suit was filed in December, 1926. Meantime, as we infer from the evidence, the personnel of the board had changed, and the present board refused to issue the bonds. The suit is to compel the board to issue the $40,000 in bonds and to acquire the site selected at the special election and to erect thereon a central high school building. The organization of the district and the regularity of the proceedings in calling and holding the special election are not here questioned."

In regard to this matter the opinion, at l.c. 61, states:

> "* * * But we are of the opinion that there was no case made by pleading or proof that

entitles relators to any part of the relief sought.

"As said above, relators proceed upon the theory that, when the voters of the district voted to authorize the loan, it thereupon became the imperative duty of the directors to issue the bonds, acquire the site selected, and erect the building, a positive mandate that left nothing to their discretion except details of carrying it out, and that, if they did have a discretion, it was not honestly exercised.

"(2) The statute pursuant to which the special election was held, section 11127, Rev. St. 1919, provides that, for the purpose of purchasing schoolhouse sites and erecting and furnishing buildings, the board of directors shall be authorized to borrow money and issue bonds for the payment thereof in the manner therein provided. It then directs how the election shall be called and conducted, and provides that, if two-thirds of the votes cast on the proposition are for the loan, 'the district board shall be vested with the power to borrow money, in the name of the district, to the amount and for the purpose specified in the notices. * * *' The further provisions of that section are not pertinent to the question under discussion. The statutory provisions specifically applying to consolidated school districts do not in terms provide for borrowing money and issuing bonds, but it has been held that they may do so under said section 11127, which applies to schools generally. State ex rel. v. Gordon, 261 Mo. 631, 170 S.W. 892. It will be observed that section 11127 is not mandatory in terms. It does not say that the board of directors shall borrow the money or that it shall be their duty to do so. We find no statutory provision using mandatory language on this subject."

At l.c. 62 the opinion states:

> "The vote, which relators say was a direction to the board, purported to do no more than the statute requiring it provides, viz. confer authority upon the board to borrow the money and issue the bonds. If a mandatory duty to borrow and use the money for the purpose for which the vote authorized it was thereby created, that mandate must be found in the statute. The terms of the latter, as we have seen, are permissive rather than mandatory. If the Legislature intended to make the duty imperative upon grant of the power, it would have been an easy matter to have inserted in the statute words indicating such intent, as in the statutes under consideration in State ex rel. v. School Directors of Springfield, supra, State ex rel. v. Cartwright, supra, and kindred cases."

The holding of the Missouri Supreme Court in this case was that even though this election had been held, and that as a result of the election the board of directors was authorized to issue bonds and borrow up to $40,000.00 for the erection of a school building, it remains in the discretion of the board whether they would do so or not. It would seem that rescinding the order for such an election before the time set for holding the election would entail a much less degree of discretion than was exercised in the Wenom case, and we believe that it is within the authority of the board of directors to set aside its order for such an election at any time before the election date.

Furthermore, there would appear to be many practical reasons why the board of directors should have this authority. Between the time when the order calling for the election was made and the time of the election, there could be many unforseen developments which would make the holding of such an election unnecessary. One of these developments could be the availability of another building which could be used for school purposes. Another such development could be a finding that the erection of such a building was unnecessary either because of decrease in the number of pupils or by reason of

a finding that buildings which were in use and which it had been believed would not be satisfactory for school purposes could be made satisfactory. It would seem clear that if, in the opinion of the board, it became unnecessary to raise additional money, that it would be folly to compel the board to go ahead and raise it anyhow, money which, even if raised, would not be used by the board. To do this would cause the unnecessary expenditure of the cost of holding such election.

CONCLUSION

It is the opinion of this department that the board of directors of a local reorganized school district may, at any time after the board has ordered an election for the purpose of authorizing the issuance of school bonds for the borrowing of money for the purpose of erecting a school building, and the time of the election, may rescind its order calling for such election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

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