

BONDS: County is authorized to hold an election for
AIRPORTS: bond issue for airport. Method of election
ELECTIONS: should follow bond election of county hospital.

July 16, 1941

Honorable James A. Finch, Jr.
Assistant Prosecuting Attorney
318 Broadway
Cape Girardeau, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion under date of July 7, 1941, which reads as follows:

"At the request and for and on behalf of the County Court of Cape Girardeau County, I am requesting an opinion from you as to the authority of Cape Girardeau County to issue bonds for airport purposes under Section 15125, Revised Statutes, 1939.

"The County Court would like to know whether or not the statute authorizes the County to issue bonds and, if so, the character of election notice to be given and under what law the election would be held, and under what law the bonds would be issued.

"The County Court is ready to issue an order calling the election, but is awaiting an opinion from you as to its power and what law should govern before the order is entered. Therefore, in view of the pendency of the situation, would appreciate a prompt opinion from you.

"The proceeds from the bonds issued by the County would be used to match a WPA grant, and since the grant has

been authorized action by the County must be taken at once if the grant is made available."

Section 15125, R. S. Missouri 1939, reads as follows:

"Private property needed by a city, including cities under special charter, village, town, or county for an airport or landing field shall be acquired by purchase if such city, village, town or county is able to agree with the owners on the terms thereof and otherwise by condemnation, in the manner provided by the law under which such city, village, town or county is authorized to acquire real property for public purposes, other than street purposes, or, if there be no such law, in the manner provided for and subject to the provisions of the condemnation law. The purchase price or award for real property acquired for an airport or landing field may be paid for wholly or partly from the proceeds of the sale of bonds of such city, village, town, or county, as the local legislative body of such city, village, town or county shall determine, subject, however, to the adoption of a proposition therefor at an election to be held in such city, town, village or county for such purpose."

If it only required a consideration of the above provision to determine the legality of such a project, we would say the County could acquire an airport. Certainly, it cannot be contended but that such was the intention of the Legislature when said provision was enacted. There is no ambiguity, therefore, no room for construction.

The above provision was enacted by the 55th General Assembly and approved on May 24, 1929. No doubt, one of the reasons for the enactment of Section 15125, supra, was as a result of two cases decided by the Supreme Court of

this state in the latter part of 1928. *Ennis v. Kansas City et al.*, 11 S. W. (2d) 1054, and *Dysart v. City of St. Louis*, 11 S. W. (2d) 1045.

In each of the above cases the Supreme Court held the cities were entitled, under their charter, to acquire airports. As previously stated, there was no such provision as Section 15125, supra, at the time of these decisions.

Judge White, in *Dysart v. City of St. Louis*, supra, held that the acquisition, improvement or development of land by the City of St. Louis for an airport is a "public purpose" within Article X, Section 3 of the Constitution of this State authorizing a levy and collection of taxes for public purposes. In so holding, Judge White quoted approvingly from an opinion of Judge Ragland at which time had not been reported:

"Municipalities are studying local conditions and commercial organizations are pressing the importance of establishing terminal airports and of providing proper lighting for landing fields, and facilities such as hangars, garages, and repair shops. The possession of the airport by the modern city is essential if it desires opportunities for increased prosperity to be secured through air commerce. Lands susceptible of improvement, as parks, playgrounds, or general recreational purposes, may be utilized and developed around the modern airport so that the municipality may bring to itself not only the advantages of air commerce but afford its citizens those other inestimable advantages of improved beautification and health-giving opportunities. It is said that there were 3,800 landing fields in the United States at the close of 1926 of which 400 were municipal. See 1927 Aircraft year Book, p. 101, et seq. In a dozen cities of the Far West (California, Oregon, etc.)

projects for new airports or improvements of existing facilities are under way at an estimated cost of more than \$8,000,000. American City, July, 1927. In these rapidly changing times, even a wise man cannot discern the needs of the future. * * * Perhaps it may not be a 'great way' into what ordinarily would be termed the 'far distant future' when the human race will be flying with wings similar to those described by Bulwer Lytton in 'The Coming Race.'" City of Wichita v. Clapp, 125 Kan. 100, 104, 263 P. 12, 14, 15.

"There is small doubt but what this prophetic vision will speedily come to pass and that within a comparatively few years the use of the airplane will be as general as that of the railroad and motor vehicle.

* * * * *

"The question of whether the acquisition and control of a municipal airport is a public purpose within the purview of the constitutional principle heretofore adverted to is obviously a new one. The courts which have had occasion to consider it have, however, answered in the affirmative. City of Wichita v. Clapp, supra; State ex rel. City of Lincoln v. Johnson, State Auditor (Neb. 1928) 220 N. W. 273; State ex rel. Hile v. City of Cleveland et al. (Ohio Ct. App. 1927) 160 N. E. 241; and no court of last resort, so far as we are advised, has ever held the contrary. Not only that, but the governmental nature of the function involved is given tacit recognition in numerous recent statutory enactments, both state and federal: Laws of Georgia 1927, p. 779; R. S. Kansas 1923, 3-110;

Public Acts Conn., 1925, ch. 249;
Laws of Mass. 1922, ch. 534, 57;
Laws of Mont. 1927, ch. 20; General
Code of Ohio, par. 15, 3677; Pa.
Act No. 328 of 1925 (Pa St. Supp.
1928, 460C-1 to 460C-3); Act 254 of
the 69th Congress (the Federal Air
Act (49 USCA 171 et seq.)). We have
no doubt as to the soundness of the
view which obtains."

In *Ennis v. Kansas City et al.*, supra, Judge
Ragland, speaking for the Court, also held that the power
of Kansas City to acquire and maintain an airport was one
which falls within the category of both a public and
municipal purpose. In so holding, the Court said:

"A reading of the provisions quoted,
in connection with the charter as a
whole, indubitably shows that it was
the purpose of the people of Kansas
City to confer upon their municipality
all of the powers that could possibly
be delegated to a city, the limitations
imposed by statutes and constitutions
considered. The power to acquire and
maintain an airport, being one which
falls within the category of both a
public and municipal purpose, as was
held in *Dysart v. City of St. Louis*,
supra, is therefore embraced within
the general grant of power to Kansas
City. The specification of the power,
'to regulate and control the location
of aviation fields, hangars and air-
craft landing places; to regulate and
control the use of all aircraft within
or over the city,' does not under the
rule of construction which the charter
provides operate to limit the general
power. Besides, the power to regulate
and control the location of aviation
fields and the uses of aircraft with-
in and over the city can no doubt be
most effectively exercised through the

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ownership and control of an airport. We accordingly hold that Kansas City is authorized by its charter to acquire and maintain an airport, and that being so authorized it can incur an indebtedness therefor through the issuance of bonds."

In the above case there was no specific provision in the charter granted the city of Kansas City to acquire airports, other than to acquire property for any public or municipal use. However, there was a provision in the charter to regulate and control locations of airfield hangars and landing places, and to regulate and control the use of all aircraft within and over the city.

While there are numerous decisions in other states holding to acquire an airport constitutes a public purpose, we deem it in view of the foregoing authorities, unnecessary to quote further authorities.

One very important thing must not be overlooked and that is Section 12, Article X of the Constitution of Missouri which prohibits an expenditure to exceed five per cent of the taxable property therein, including existing indebtedness, which provision must be strictly complied with in the particular question under consideration.

Section 12, Article X of the Constitution of Missouri partially reads as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount

including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, * * * * *."

Therefore, it is the conclusion of this department that the County of Cape Girardeau may, under Section 15125, supra, acquire an airport. However, such expenditure must come within the confines of the Constitution of the State of Missouri, Article X, Section 12.

Article X, Section 12, supra, gives counties authority to issue bonds as set out in Section 15125, supra. Article X, Section 12, supra, was held to be self-enforcing in the case of State ex rel. Gilpin et al. v. Smith, 96 S. W. (2d) 40, 1. c. 42, par. 3, where the court said:

"We have already held in this opinion that section 12 of article 10 of our State Constitution is a self-enforcing grant of power permitting a county to incur an indebtedness for a county public purpose and an express statute is not necessary to give a county power to create such indebtedness."

Since this section is self-enforcing, the only procedure to follow is as set out in Section 12, Article X, supra, which provides for an election in which two-thirds of the voters must vote in favor of the increase of the debt. Section 15125, supra, appears in Article 3, chapter 123, R. S. Missouri 1939, and declares an election must be had but sets out no procedure for the election. The courts of this state have held that when special powers are conferred, or special methods are prescribed for exercise of power, the exercise of such procedure, method and power is within the maxim that the expression of one thing is the exclusion of another and the doing of a thing specified except in particular way pointed out is void. It was so held in Kroger Grocery and Baking Company v. City of St. Louis, 106 S. W. (2d) 435, 341 Mo. 62, 111 A. L. R. 589.

It has also been held by the courts of this state

that ordinarily a statute limiting a thing to be done in a particular form includes negative, that such thing shall be done in other manner. Chilton v. Drainage District No. 8, Pemiscot County, 63 S. W. (2d) 421.

In view of the holdings in the above case, and since no particular method of holding the election was prescribed by the Legislature in enacting the statute which authorized counties to issue bonds for an airport upon an election, there would be no special proceeding that the county should follow in holding the election. The procedure for a bond election to build a courthouse and county jail appears in chapter 16, Article 5, Section 3292, R. S. Missouri 1939. That procedure partially reads as follows:

"* * * * * it shall be lawful for any number not less than one hundred of the qualified voters of such county who are taxpayers therein to present to the county court of such county a petition in writing setting forth the object and purpose for which the indebtedness is desired to be incurred, and whether it is desired to issue bonds in evidence of such indebtedness, or to pay the same in a given number of years, to be stated in the petition, by the direct levy of taxes at a rate over and above the amount limited in section 11 of article 10 of the Constitution of the state of Missouri, and asking that an election be held to authorize the incurring of such indebtedness or the levying of such taxes. Upon the presentation of such petition it shall be the duty of the county court of such county at any term thereof to order that an election be held for the purpose set forth in the petition, which order shall, among other things, specify the time, place and purpose of the election. Such an election may be a special election, or it may be held on the day of any primary or general election authorized to be held by the laws of this state: * * * "

Also, in that chapter applying to a bond issue for a courthouse and jail building, or rebuilding or repairing same, Section 3294, R. S. Missouri 1939, which refers to the form of ballot, partially reads as follows:

"If the proposition submitted is to incur an indebtedness and issue bonds in evidence thereof, then such of the qualified electors as may favor incurring the indebtedness for the purpose aforesaid, and evidencing the same by the issuance of bonds, may cast a written or printed ballot at such election, in substantially the following form: 'For incurring indebtedness--Yes' and those opposed to incurring such indebtedness may cast a written or printed ballot in substantially the following form: 'For incurring indebtedness--No.' * * "

Article 1, chapter 126, R. S. Missouri 1939, provides the method and procedure of an election for a bond issue for the purpose of building county hospitals. Section 15160, R. S. Missouri 1939, which sets out the procedure for an election, follows about the same procedure as set out in Section 3292, supra, as to the form of notice and procedure. Section 15160, R. S. Missouri 1939, reads as follows:

"Whenever any number, not less than one hundred, of the qualified voters of any such county, who are taxpayers therein, shall present to the county court of such county a petition, in writing, praying the county court that an election be held to authorize the incurring of an indebtedness, and the levying of a direct tax, or the issuing of bonds therefor, for the purpose of purchasing land and building thereon a county hospital for the poor of such county, such county court, upon the presentation of such petition, may, if it so determine, at regular term thereof, and by order of record of

said court, adjudge it necessary for such county to incur an indebtedness and levy a direct tax or issue bonds therefor, for the purpose of purchasing the land and building such a hospital; such county court may, at the same term, order a special election in said county, for the purpose of providing for the incurring of such indebtedness and levying a direct tax or issuing bonds therefor. In said order for such election there shall be recited the amount and purpose of the indebtedness proposed to be incurred, and the number of years during which a direct tax shall be levied, and the amount of such direct tax on each one hundred dollars' valuation each year to pay said indebtedness; or in case of the issuance of bonds, the length of time for which bonds shall be issued, the rate of interest, the rate of increase of the tax levy to pay the interest, and provide a sinking fund to pay the bonds; and the date on which the election is to be held shall also be recited in said order of the county court."

Since no procedure for the form of the election is set out in the chapter applying to the bond issue for airports, we would suggest that you follow the procedure set out in the bond election for county hospitals. The procedure for the calling of the election is set out in Section 15163, R. S. Missouri 1939, which reads as follows:

"Said county court shall cause at least twenty days' notice of said election to be given by publication in at least two weekly newspapers, published in the county. And if there be a city in such county having election commissioners, such election commissioners shall cause at least twenty days' notice of said election to be given by publication in two daily newspapers, pub-

lished in such city. Such notice shall specify the amount of such indebtedness for which a direct tax is to be levied or bonds are to be issued, and the object and purposes thereof; and the number of years during which the direct tax shall be levied, and the amount of such direct tax on each one hundred dollars' valuation each year, to pay said indebtedness; or in case of the issuance of bonds, the length of time for which the bonds shall be issued, the rate of interest, the rate of increase of the tax levy; and such notice shall also specify the day on which the election is to be held, and the location of the polling places: Provided, that such election may be held at the same time of holding a general election for state and county officers, and in such case such election shall be conducted in all respects as state and county elections are conducted, so far as applicable."

The form of ballot is set out in Section 15164, R. S. Missouri 1939, which section reads as follows:

"The ballots to be prepared and printed for use at such election shall be in the following form:

"For incurring debt of _____ dollars for county hospital for the poor, ___ Yes.

"For incurring debt of _____ dollars, for county hospital for the poor, ___ No.

"The amount of the said indebtedness in each case shall be printed in the blank place provided therefor in the ballot aforesaid, and a ballot cast containing

"For incurring debt of _____ dollars, for county hospital for the poor, ___ Yes."

shall be taken as a vote assenting to incurring the debt and levying a direct tax or issuing bonds therefor, as the case may be, and if containing the latter ballot

"For incurring debt of ___ dollars, for county hospital for the poor, ___ No.'

"the same shall be taken as a ballot dissenting from the incurring of said indebtedness."

Of course, the form of ballot would read so many dollars for an airport. This chapter on county hospitals provides that the election shall be conducted in the same manner as provided by law for state and county elections in force at the time so far as applicable and not contrary to or inconsistent with the provisions and scope of the article. This appears in Section 15165, R. S. Missouri 1939.

In a research of the cases in which bond elections have been contested or have been construed by the court, we find that in most cases the attack has been made on the form of notice of said election given by the court or the clerk of the county court as set out in the procedure under the specific bond issue elections for specific purposes such as county jails, courthouses, county hospitals, etc.

Since no procedure has been set out for the form of election of a bond issue for an airport as set out in Section 15125, supra, there is no restriction but that the county court should follow the procedure as set out for other bond issues as nearly as practicable, and that the election should be held in the same manner as provided for state and county elections.

CONCLUSION

It is, therefore, the conclusion of this department that if an election for a bond issue was held as authorized under Article X, Section 12 of the Constitution of Missouri,

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and as authorized under Section 15125, R. S. Missouri 1939, and the procedure followed was that as set out in a bond issue election for county hospitals, the bonds would not be subject to attack on account of an illegal election.

Respectfully submitted

W. J. BURKE
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APPROVED:

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