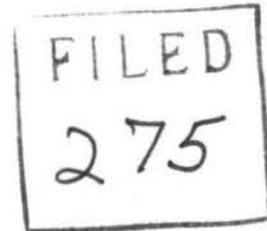


June 14, 1971

Answer by letter-Wood

OPINION LETTER NO. 275

Honorable James A. Noland, Jr.
Senator, District 33
Room 428A, Capitol Building
Jefferson City, Missouri 65101



Dear Senator Noland:

You have requested my opinion on the following question:

"A Nursing Home District, situated in my Senatorial District, held an election to issue bonds in the amount of \$388,000.00.

"The election was held in good faith and the bonding company handling the matter thought this was the statutory limit. The measure passed, after which it was determined that 5% of the total assessed valuation in the district amounted to \$374,000.00.

"\$374,000.00 would be sufficient to achieve the purposes of the Nursing Home District in its efforts to construct a new facility. However, the bonding company is concerned with the validity of the election.

"My specific question is: Is the election valid for a lesser amount than that authorized when the election was held?"

Section 198.310, RSMo 1969, authorizes nursing home districts to borrow money for stated purposes and to issue bonds for the payment thereof. The question of the indebtedness must be submitted at a special election and be approved by a two-thirds vote. Although the statute authorizes the creation of indebtedness in this

Honorable James A. Noland, Jr.

manner in an amount that does not exceed ten percent of the value of the last assessed valuation of taxable tangible property in the district, we have expressed the view in an earlier opinion (No. 33, January 30, 1964, Woolsey, copy enclosed) that because of Article VI, Section 26(a), Constitution of Missouri, 1945, this amount may not exceed five percent of assessed valuation.

In regard to the special election, the statute requires that there be notice of the election which includes the "amount and purpose of the loan" and that the election ballot ". . . shall be in substantially the following form:

(Amount and purpose of loan)

For the loan

Against the loan . . ."

(Section 198.310, RSMo)

". . . Of course, 'elections should be so held as to afford a free and fair expression of the popular will and mandatory statutory requirements must be followed', State at inf. McKittrick ex rel. Martin v. Stoner, 347 Mo. 242, 146 S.W.2d 891, 894(8); but, "'elections are not lightly set aside" and there is a vast difference in passing on the rules and regulations regarding the conduct of an election before the election is held and after.' Armantrout v. Bohon, 349 Mo. 667, 162 S.W.2d 867, 871 (8-10). 'As a general rule (in the absence of fraud), an election will not be annulled even if certain provisions of the law regarding elections have not been strictly followed.' Bernhardt v. Long, 357 Mo. 427, 209 S.W.2d 112, 116(7); Armantrout v. Bohon, supra, 162 S.W.2d loc. cit. 871." (State ex rel. Brown v. Cape, 266 S.W.2d 45, 46 (Spr.Ct.App. 1954))

The infirmity in the election inquired about in the opinion request was the erroneous statement in the ballots of the amount of the proposed indebtedness. This was assuredly a violation of the statute requiring the ballots to contain a statement of the amount of the proposed indebtedness (Section 198.310, RSMo).

". . . The well-established rule, here applicable, is that an election irregularity is not fatal to the validity of the whole return of the precinct unless made so by the statute on

Honorable James A. Noland, Jr.

the subject or unless the irregularity is such as 'probably prevented a free and full expression of the popular will.' . . ." (State ex rel. Thompson v. Arnold, 213 S.W. 834, 837 (Mo. banc 1919))

In State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 87 S.W.2d 147 (Mo. banc 1935), general obligation bonds of the sewer district were held valid against the objection that in the submission of the proposition for the authorization of the bond issue, the amount of the proposed bonds was not definitely stated. The statute there involved required,

" . . . submitting at such election a proposition to incur indebtedness by the District in an amount not greater than the estimate of the cost of constructing a system of sewers as provided in the report of the engineers.' . . ."

The challenged ballots submitted the proposition,

" . . . to incur an indebtedness of said District, of an amount not greater than Eight Hundred Thousand (\$800,000) for the purpose of constructing a system of sanitary trunk line sewers for said District; . . ."

In sustaining the election, the Supreme Court commented:

"Respondent argues that the use of the words 'an amount not greater than \$800,000' leaves to the board of trustees the opportunity to build a sewer system much less extensive than could be built with \$800,000, which might not meet the needs of the district and be unacceptable to the voters. We are not impressed with the force of this argument. . . . The system described in the engineer's report was the only system of sewers the district had or could have had in prospect. It would be an unreasonable presumption to assume that any voter did not understand that he or she was voting for or against an indebtedness to construct the proposed sewer system. The amount of indebtedness to be incurred was therefore limited to the maximum amount of \$800,000 (the engineer's estimate) and a minimum equal to the best contract price which could be obtained for the construction of the improvement specified in the engineer's report, and was stated

Honorable James A. Noland, Jr.

with sufficient definiteness in the submission to the voters." (87 S.W.2d at 155)

It is true that the above case and the present situation may differ in that the sewer district statute required, and there was in existence at the time of the election, a definite engineer's plan for the proposed construction, whereas plans and designs for the proposed nursing home might not have existed at the time of the questioned election. However, since the nursing home district now proposes to issue bonds in the amount of \$374,000.00, and to use the proceeds to construct a nursing home, we doubt that the voters have been misled or deceived although they authorized the slightly greater amount of \$388,000.00 for the same purpose.

State ex rel. Kansas City v. Smith, 259 S.W. 1060 (Mo. banc 1924) ruled that Kansas City's voter approved waterworks improvement bonds were valid although separate litigation (State ex inf. Barrett ex rel. Callghan v. Maitland, 246 S.W. 267 (Mo. banc 1922)) had determined subsequent to the election on the bonds that certain city charter amendments under which the election was held were invalid. The existing city charter was held to provide sufficient authority for the election. The invalid charter amendments among other things permitted interest not to exceed six percent and the ordinance calling the bond election so provided. The existing charter only permitted five percent interest on such bonds. One of the points raised in the Smith case was that the city council could not thereafter sell waterworks bonds at four and one-half percent interest when the voters had in effect approved bonds bearing six percent interest. The Supreme Court of Missouri relied on a North Carolina decision upholding bonds in these circumstances and quoted the North Carolina court as follows:

"The people having voted for the issue of bonds at a rate not exceeding 6 per cent., it was equivalent to a vote for bonds at any less rate, as the greater includes the less." (259 S.W. at 1064)

Our Supreme Court also referred to an Illinois decision of identical holding and summarized therefrom the ". . . rule that surplusage does not vitiate that which in other respects is valid, and that surplusage is innocuous and must be disregarded." (259 S.W. at 1064).

In our opinion, authorization by the electorate for a greater principal indebtedness includes their authorization for a lesser principal indebtedness, and, to the extent that the voted indebtedness exceeds that authorized by law, it is harmless surplusage.

Honorable James A. Noland, Jr.

" . . . where an irregularity is not declared by statute to be fatal, the courts will be slow to so construe it as to disfranchise voters because of the errors of [election] officials. . . ." (State ex inf. Barrett v. Imhoff, 238 S.W. 122, 126 (Mo. banc 1922))

We cannot find a Missouri decision directly answering your question. However, decisions from other jurisdictions indicate that a majority would answer it in the affirmative.

"The fact that the limit of the amount of bonds which may be issued is fixed at a specified figure does not prevent the issuance of bonds in a lesser amount [Ky., Kan]. Where the total amount of bonds issued comes within the constitutional limits, it is immaterial that accomplishment of the purpose for which the bonds were voted would cost more than the amount of the bond issue [Ky., Fla.]. The mere fact that an order for an election or a vote of the electors [Tex.] calls for an issue of bonds beyond the constitutional or statutory limits does not prevent the issuance of bonds in an amount within the limitation. Bonds issued in excess of the constitutional or statutory limitations are void [Okla.]. According to some decisions, where the issue of bonds is partly within and partly beyond the limit, it may be sustained up to the legal limit [Ky.], but it has also been held that, prior to the issuance and sale of an issue of bonds in excess of the limitations, it will be held bad in its entirety [Okla.]." (79 C.J.S., Schools and School Districts, §361, p. 79)

A collection of digested cases from other jurisdictions appearing at 175 American Law Reports pages 848-867 reflects that the courts of eleven states (Ark., Colo., Ill., Kan., Ky., La., Mich., N.Y., Ohio, S.C., and Tex.) are of the view that bonds authorized by the voters in excess of legal limitations may nevertheless be issued within the limitations, whereas the courts of eight states (Ga., Mont., Neb., Okla., Ore., Wash., W.Va., and Wis.) have taken the contrary view.

Thornburgh v. School Dist. No. 3, 75 S.W. 81 (Mo. 1903), discussed in our earlier Opinion No. 33 of 1964, supra, ruled that a holder of bonds issued in excess of the district's constitutional

Honorable James A. Noland, Jr.

limit could not bring a suit at law upon the bonds. The court declined a request to allow judgment for that amount of the bonds which was within the constitutional limit.

". . . That course would be equivalent to the making of a new contract for the parties--not only a contract which the parties themselves did not make, but one which we have no means of knowing they would have made. The voters of the district, who were to be first consulted, might be very willing to build a new schoolhouse of a style to cost \$3,500, but unwilling to build one of a style to cost only \$1,900. . . . The school directors essayed to make a contract that they were expressly forbidden by the Constitution to make, and it is therefore wholly invalid. The argument is made that the school district got the money for these bonds, and used it in the construction of a schoolhouse, which it has ever since used, and still possesses and enjoys. If this were a suit in equity to subject the property to the payment of the money furnished to purchase it, that argument would be in place; but this is an action at law, and the plaintiff must stand or fall on the question of the validity of the contract." (75 S.W. at 86)

We do not understand the Thornburgh case to rule any further than that when bonds are sold in excess of the constitutional limitation all of the bonds whether within or in excess of the constitutional limitation are void, not that bonds authorized in excess of the limitation are necessarily void in their entirety.

On the other hand, in Catron v. LaFayette County, 17 S.W. 577 (Mo. 1891), the county court had issued a series of bonds for jailhouse construction during the period December, 1866 to May, 1867. The last five bonds were issued in May, 1867 and caused the entire series to aggregate \$10,508.01, whereas the statute only authorized the county to become indebted in the amount of \$10,000.00 for purposes of building a jailhouse. The Supreme Court upheld recovery by the purchaser of five of these jailhouse bonds, which bonds had been issued in January, 1867.

". . . But if, at the time they were issued and purchased, it was within the power of the court to issue them, no subsequent improper issue of bonds could impair his rights under the bonds thus legally issued and purchased by

Honorable James A. Noland, Jr.

him. The fact that the county court after he had paid his money for these bonds, and his rights under them had become fixed, issued other bonds for the same purpose, until finally they exceeded in the last issue, by a small sum, the aggregate amount which they were authorized to issue for such purpose, could in no way affect the integrity of these bonds of plaintiff issued strictly within the limits of their power. The issue for the excess only would be void. The bonds issued and delivered before the limit of the power was reached are valid, and plaintiff's were of this number. . . ." (Catron v. LaFayette County, 17 S.W. at 579)

State ex rel. City of Dexter v. Gordon, 158 S.W. 683 (Mo. banc 1913) ruled that the "last assessment" within the meaning of the constitutional provision authorizing local government indebtedness (Article X, Section 12, Constitution of Missouri, 1875) had reference to the date of the election on the question, not the date the bonds were issued. The court refused to order the state auditor to register bonds in an amount exceeding the per centum of the assessment completed as of the date of the election.

"The action of the board not being in compliance with the Constitution, and the proposed indebtedness being in excess of the prescribed limit, the bonds are void. . . ." (158 S.W. at 685)

Steinbrenner v. City of St. Joseph, 226 S.W. 890 (Mo. banc 1920) applied the same rule in approving the enjoining of a proposed municipal bond issue that exceeded the per centum of the last completed assessment at the time of the election. State ex rel. Consolidated Dist. C-4 of Caldwell County v. Holmes, 245 S.W.2d 882 (Mo. banc 1952) ruled that a change in the language of the constitutional provision for local government indebtedness in the 1945 Constitution (Article VI, Section 26(b)) did not alter the rule expressed in State ex rel. City of Dexter v. Gordon, so that the state auditor would not be compelled to register a proposed issue of school district bonds that exceeded the per centum of the assessed valuation completed at the time of the election authorizing the indebtedness. We do not believe these cases consider, or rule the question of the registrability or validity of a bond issue in an amount less than that authorized by the electorate but within that permitted by the constitutional debt limitation.

In Missouri Power & Light Co. v. City of Pattonsburg, 125 S.W.2d 20 (Mo. 1939), the utility sought to enjoin the city's construction

Honorable James A. Noland, Jr.

and operation of its own electric light plant. An election had been held in the city authorizing the issuance of \$50,000.00 in bonds for this purpose. The utility contended that at the time of the election the city's plan was to obtain the \$50,000.00 loan from the federal government and that after the election the federal authorities rejected the city's application, which resulted in the city's construction of a light plant of smaller capacity than originally intended. The utility contended that in these circumstances the new plan should have been submitted to the voters. The Supreme Court observed that the people of the city had authorized the indebtedness for construction of a light plant, that the expediency of doing so was for the people and the city officials to decide, and that there was no allegation that any fraud had been practiced on the voters or that they had been misinformed as to the true facts. The Supreme Court held that there was no reason for a court of equity to enjoin the collection of taxes to retire the bonds (125 S.W.2d at 22)

"Bonds may be issued in a lesser amount than that authorized by the election [Ark., Ky.] and at a lower rate of interest than that authorized [Tex.]. Where the electors have approved an issue of bonds in an amount in excess of that permitted by law, such approval affords sufficient authority for the issuance of bonds in an amount within the statutory limits in the absence of a showing that the latter amount would not have been voted [Colo.], so that a partial issue of such bonds in an amount within the limitation is valid [Kan.]; . . ."
(79 C.J.S., Schools and School Districts, §366, p. 106)

We think it can be seen that the resolution of your question by a court of this state would not be an easy task. We cannot, of course, predict with accuracy how the question would be thus resolved. Language of some of the earlier decisions of the Missouri Supreme Court, herein noted, would suggest that since the authorization for the indebtedness exceeded the constitutional limitation, no indebtedness has been authorized. However, as we have noted, the modern majority view appears to be that the excessive authorization is sufficient to authorize the incurring of an indebtedness within the constitutional limitation.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 33
1-30-64, Woolsey