Minutes of a Regular Meeting of the City Council

Austin Tex., July 18, 1887.

Hon. J.W. Robertson, Mayor, presiding.


The minutes of the last meeting of the City Council were adopted as printed.

Alderman Well presented a petition from citizens of the Seventh ward asking that a hydrant be located on San Jacinto Street, between Twelfth and Thirteenth Streets, for the purpose of protecting property in that vicinity in case of fire. The petition was referred to the Committee on Water & Gas.

Alderman Schuber, for the Street Committee, presented a report on a petition from citizens requesting the improvement of the sanitary condition of the gutters on East Seventh Street, between Congress Avenue and East Travis, which favors the paving of the gutters so as to prevent the gathering of water in the street. The report was adopted.

Alderman Schneider, of the Police Committee, presented reports on the Marshal's reports for the months of April and May, stating that he had examined them and that they are correct. No action was taken on the reports.

The City Attorney was granted a leave of absence for ten days from July 27, 1887.

On Compliance with a motion which was adopted at the last meeting of the City Council, the City Attorney submitted the following opinion:
And Communication from the City Treasurer:

Austin, July 14, 1887.

To the Honorable City Council:

Gentlemen—In response to a resolution of your honorable body, requesting my opinion as to the validity of an Ordinance of the City of Austin, entitled "An Ordinance providing for the establishment of a new Cemetery for the City of Austin, to be known as Greenwood Cemetery, and providing for the purchase of land therefor," approved July 21, 1887, I beg to submit that I have given the questions involved my careful consideration, and, after a thorough examination of all accessible authorities, have reached the conclusion that the Ordinance in question is void, because the City Council did not possess the power under the Constitution of the State and Charter of the City, to pass it; and, for this reason, the notes executed pursuant to said Ordinance do not constitute a valid claim against the City. The Charter of the City does not expressly confer on the City Council the power to issue negotiable promissory notes for any purpose whatever; and therefore to sustain this Ordinance it is necessary that such power should exist by implication, as it is a well-settled rule of law that a Municipal Corporation can exercise only such powers as are expressly conferred by its Charter, and such as are necessarily implied from the powers that are granted. The only authority given the City Council by the Charter to establish and regulate Cemeteries is found in Section 49, Article 6, of that instrument, which is as follows:

"To establish Cemeteries within or without the City Limits of the City, and to regulate the Same."

I doubt not that under the authority to establish Cemeteries the Council had the power to require the land necessary to effectuate that object, but I do not think that it had the implied power to issue interest-bearing negotiable notes.
Hitherto. The latter reason is certainly not necessarily incident to the former, nor is it essential to the present objects and purposes of the Corporation.

Moreover, there are other reasons, which, in my opinion, are absolutely conclusive of this question.

First—The Ordinance in question is in violation of the Constitution of the State. By the terms of the Ordinance, the Mayor is authorized and required to issue and deliver interest-bearing notes of the City of Austin, aggregating $16,000.

During the unpaid purchase, money of the land bought for the use of the City for Contingent Purposes. The Ordinance makes no provision to assess the City to pay the interest or pay the debt, nor does it provide for a sinking fund to be used in the ultimate redemption of these obligations.

Section 1, Article 17, of the Constitution of Texas, which relates to cities having more than 10,000 inhabitants, among other things, provides: "No debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon, and create a sinking fund of at least 2 per cent, thereof." That these notes, if valid, would constitute a debt, seems too clear to require argument; therefore, the Ordinance under which they were issued is void because not in conformity to the requirements of the Constitution.

Second—The notes, in my opinion, would, if valid, constitute a part of the bonded indebtedness of the City, and, therefore, they are invalid, if at the time they were issued, the City Council had no power under the charter to increase the bonded indebtedness. In other words, if at the time these notes were given, there was outstanding a bonded indebtedness as large
as the City Council could legally do, then this addition to that indebtedness would of necessity be void.

Section 2, article 6 of the charter provides that the bonded indebtedness of the City is limited at no time to exceed $125,000, and defines what bonds of obligation shall be regarded as bonded indebtedness. Interest-bearing warrants, as well as bonds, fall under this head. It cannot be that there is any essential difference between an interest-bearing bond, an warrant, and an interest-bearing negotiable note. This clause of the charter was intended as a restriction and limitation on the debt creating power of the City Council. By its terms the City Council is prohibited from issuing bonds and interest-bearing warrants above a stated amount, and it appears to me that it would be a palpable invasion of the plain meaning and intention of the legislature to issue an interest-bearing negotiable note when the power did not exist to issue a bond or warrant for a like purpose, as they would each have the same effect, so far as the City is concerned. This attack letter from the City Treasurer shows that at the date of the passage of the ordinance in question, the bonded indebtedness of the City was $125,000, exclusive of interest; therefore, no power existed in the City Council to increase that amount by the addition of the notes evidenced under this ordinance.

In conclusion, I regret to say that I have not been able to find any case decided by the Courts of this State involving the identical question here presented, but the opinion of the Supreme Court of Texas in the case of the City of Waxahachie vs. Brown, decided in March last, persuades me to the belief that the views here expressed will be sustained by the Courts.

Very Respectfully,
Geo. F. Pendexter,
City Attorney.
trember, Hon. Geo. L. Smidt, City Attorney.

Dear Sir - I answer to your inquiry, G. G., that the bond
ed indebtedness of the City of Austin for the
twenty first day of July, 1886, is as fol-
15 10 per cent Bonds $3,500 each $72,500
10 5 " " " " " " " " " " "$125,000

The interest on these bonds is payable
semi-annually on the first of January
and first of July, each year. The interest, if
computed (though not due) from July 1 to July 31,
inclusive, would amount to $66.66. The amount of the
10 per cent interest owing warrants outstanding
and interest accrued thereon, is $123.73, but I hold on
your amount, as a special fund, to pay these Warrants
on presentation.

Very respectfully,

J. W. Howard,
City Treasurer.

No action was taken on the question.

Alderman Walker introduced an Ordinance
appropriating the sum of $412 for the purpose
of paying off one and regular employes of the
City and City and County Hospitals, each for
the month of July, 1887. The Ordinance was read
first time, after which motion were made to
suspend the rules and place the Ordinance on its second
and third reading, and that the Ordinance be passed, all
of which were adopted by the following vote:

(Read Alderman Alexander, Anderson,
Campbell, Fisher, Graham, Jones, Odey, Platt,
Phillips, Schneider, Townsend, Walker,
Martin, Wellman and Northam-16.

Water Co. Alderman Walker presented an Ordinance repealing
and Ordinance entitled "An Ordinance authorizing a
Contract between the City Water Company of the City of
Austin", approved April 13, 1882, and all Ordinances
Supplementary thereto and amendatory thereof. In Connection
with the above, the following opinion was read,
And together with the Ordinance, referred to the Committee on Water and Gas:

Austin, Texas, July 11, 1857.

Hon. W. H. Haden, Alderman South Ward:

Dear Sir—On complaint with great reluctance for my opinion concerning the validity of the contract entered into between the City of Austin and the City Water Company on April 13, 1852, to deliver at Salivation in March last, I do not doubt that the contract under consideration would be declared void by the Courts. The grant of the privilege of furnishing water to the City of Austin and its citizens for a period of twenty years under the contract provisions is in violation of the provisions of the Constitution of Texas which inhibits monopolies. The only difference between the contract under consideration and the one declared void by the Supreme Court is that the latter covered a period of twenty-five years while the former is operative for twenty years and this difference, in my opinion, does not relieve the contract we are considering from the objections held fatal to the other.

Therefore, I have no hesitation in expressing my opinion that the City Council has no power to make the contract under which water is now being supplied to the city.

Very respectfully,

Geo. F. Pendexter,

City Attorney.

Alderman Cummings came in.

Alderman Cummings introduced a resolution authorizing the City Assessor and Collector to take Credit for $150, that amount being erroneously assessed on the property of Mr. P. H. Raiget for the year 1856. Referred to Finance Committee.

On motion the Council then adjourned.

Wilton Morris, City Clerk.