

A financial report of J. A. Warren, Bookkeeper of the Street Department, for the year ending December 31, 1923, was read and ordered filed.

The monthly report of R. E. Nitschke, City Sexton, for the month of January was read and ordered filed.

The Council then adjourned.

*J. A. Warren*  
City Clerk

REGULAR MEETING OF THE CITY COUNCIL:

Austin, Texas, February 21, 1924.

The Council was called to order by the Mayor. Roll call showed the following members present: Mayor Yett, Councilmen Avery, Haynes, Nolen and Searight, 5; absent, none.

The Minutes of the last meeting were read and Councilman Haynes moved that same be adopted. Motion prevailed by the following vote: Ayes, Mayor Yett, Councilmen Avery, Haynes, Nolen and Searight, 5; nays, none.

The following opinion of J. Bouldin Rector, City Attorney, was read and ordered recorded, by the following vote: Ayes, Mayor Yett, Councilmen Avery, Haynes, Nolen and Searight, 5; nays, none:

"Austin, Texas, February 20, 1924.

The City Council,  
Austin, Texas.

Gentlemen:

I have been directed by your Honorable Body to give you my views on the validity of the certain contracts made last July with several coal companies, for furnishing lignite to the city.

It appears that these contracts were intended to be renewals of contracts made with these companies on October 1st, 1922, and that the drafts of these renewals were submitted by Mr. Avery to the other members of the City Council, and that it was agreeable to these other members that Mr. Avery should attend to the execution of same, and that thereafter the Mayor did execute same in his official capacity. It also appears that no formal action of the City Council as a body was taken on these matters, and that the minutes fail to show any record thereof.

By way of parenthesis, please let me state that drafts of these contracts, prepared by some one else, were submitted to me at my office by Mr. Avery. I examined these drafts, approved them as to form, and handed them back to Mr. Avery on the same occasion that he handed them to me. This was the only time that I saw these contracts until several months later, after the question of their legality was suggested. I had heard nothing further from these contracts until Mr. Nolen made the motion to instruct me to ascertain their legal status. Had I been present at any session of the City Council at which the contracts were to be considered, or had I been consulted with reference to the manner of their execution, I should have advised a formal and strict compliance with the terms of the charter and any



pertinent ordinances, as I always try to do. And allow me to add further, that at the time of this short conference with Mr. Avery above referred to, I suggested bonds for the faithful performance of these contracts, and was assured by him that bonds would be furnished.

The City Charter provides that action of the City Council shall be had by yea and nay vote, and that same shall be called and recorded. It further provides that every ordinance or resolution making or authorizing the making of any contract shall be complete in the form in which it is finally passed, and remain on file with the City Clerk for public inspection at least one week before the final passage or adoption thereof. It has been urged by the attorney for the McAlester Fuel Company that there is an ordinance requiring that all fuel awards shall be predicated upon bids therefor, and that no contract shall extend beyond the current year, and that bonds must be executed to cover the contracts awarded.

I have given the matters referred to me as thorough an investigation as the time and my other city engagements would allow, and I have been impressed with the importance of candidly and correctly advising you.

Primarily, I assume that it will be conceded that the City has the power to contract for the purchase of lignite for its fuel purposes. For the purpose of this opinion, it may be conceded that the City Council failed to observe the formalities required by the charter and ordinances, and that it has irregularly and improperly exercised its power in the manner in which the execution of the contracts were attempted to be authorized, and that the Mayor was not authorized, under the facts, to execute the contracts; but these matters become immaterial, in so far as they might affect the present legal status of the contracts, in view of the conclusion that I have reached.

As I understand the facts, duplicate copies of these contracts were signed by the Mayor and the proper officers of the respective companies and each party retained its copy, and upon the effective dates of said contracts the companies began delivering to the City lignite in the quantities demanded by the city and at the price specified, and that ever since said time these companies have complied in all respects with the terms of said contracts. In addition, it has been represented to me that this city is the largest user of lignite in the state, and that its consumption annually of this fuel reaches an enormous tonnage; and further, that these companies have so arranged their operations and organizations as to take care of the city's large demands, and that in order to fulfill such demands they have incurred considerable expense and have refused other connections for their output.

I will not burden this communication with a brief of the law authorities upon which I have based my conclusion, but any interested party may have access to such brief in my office.

I have found the law of this matter to be, that although a municipal corporation cannot be estopped by its ultra vires acts, there is, nevertheless a broad distinction to be observed between an irregular exercise of a granted power, and the total absence or want of power; and the rule is, that a city

may be estopped just as an individual, where right and justice may require, where the act or contract relied on to create an estoppel was within its corporate powers, although the method of exercising the power was irregular or unauthorized.

In other words, if the city may lawfully make a contract for the purchase of fuel, although the formalities provided by the charter for the making of contracts be not formally observed or not observed at all, nevertheless, if the city recognizes and indicates to the other party by its acts that the contract between them actually exists, and induces and compels by such conduct a performance of the terms of the contract by the other party, and receives the benefits therefrom, paying without question the consideration for such benefits throughout a considerable part of the term of such contract, and the contracting party has placed itself in a position to comply with its obligations under the contract and if denied the further operation of the contract injury would result to such party, in these events, it will undoubtedly be held that the city has ratified its unauthorized acts in entering into the contract originally, and will be estopped from denying its existence.

This being the law as I have found it, it is my opinion that the city has ratified what here will be conceded to have been the irregular and unauthorized acts of its officers in originally executing the contracts, and that the city, in view of the foregoing, would be estopped from denying that it had contracts with these companies ; but this conclusion applies only to the questions raised as to the procedure and manner of executing these contracts.

If the City Council should agree with me in the foregoing conclusions and should determine to continue the contracts, irrespective of what may follow in this communication, then I would respectfully urge that proper bonds be required of the lignite companies, as was done in the preceding transactions with them. The city is under contract with its customers to furnish water, light and power to them, and if it should default in such respects, or if it should fail in its municipal duty to furnish protection against fire, and damages should ensue, and it should be shown that such damages were caused by the city's failure to provide necessary fuel to operate its plant, there might be recovery for such damages. Therefore, the strong necessity for bond to indemnify at least against any such possibilities, apart from the other potential advantages of bond.

I would also respectfully suggest that an ordinance or ordinances be drawn to the effect that all departmental purchases and contracts involving labor other than employment, amounting to say, \$500.00 and more, be predicated upon public bids therefor, and be evidenced by written contracts formally acted upon by the entire City Council.

In connection with my investigation of the above matters, please allow me to further advise you that on February 18, Mr. Mendell, attorney for McAlester Fuel Company, addressed me a communication, supplementing his former letter of which you are already advised, which communication pointedly called my attention to a provision of the charter which prohibits any member of the City

Council from being directly or indirectly interested in any work, business or contract, the expense, price or consideration of which is to be paid by the city, and that all contracts in violation of such provision shall be void.

I have given my most careful consideration to this provision on account of its extreme gravity, in that, if applicable to the present matter, it would not only void the contracts but vacate the office of a member of the City Council. The language of this provision is not sufficiently clear to me to determine with any degree of certainty whether or not the statements of Mr. Avery that he is employed by the companies now furnishing lignite to the city but has no interest in the city contracts, would bring him within the inhibitions of the above provision, and besides, I am not a judicial officer and should not be called upon to determine this phase of the question.

However, independent of the charter provisions, the courts will set aside a contract on the ground of public policy, if it should be shown that the acceptance of private employment by an officer conflicts with his public duties, and it becomes immaterial whether the acceptance of such employment is without fraud and without prejudice to the interests of the tax payers.

In conclusion, I would respectfully suggest that an ordinance be passed to require all persons or corporations having transactions with the City, which involve the payment of money out of the public treasury, to first disclose by affidavit whether or not any official or employee of the city is directly or indirectly in the employ or otherwise directly or indirectly interested in the business of such person or corporation. This would only express by ordinance what has always been a sound public policy.

Very resepectfully,

(Sgd) J. Bouldin Rector,  
City Attorney."

Councilman Haynes introduced the following resolution:

WHEREAS, Lots 9 and 10 in Block 4 were assessed on the roll of unren-  
dered property to "Unknown Owner" for the taxes of 1922, amounting to \$94.00  
interest, \$16.45 and penalty, \$4.70, a total of \$115.15; and

WHEREAS, Mr. A. J. Zilker, who is now the owner, proposes to pay the  
taxes and interest, amounting to \$110.45, upon the remission of the penalty  
of \$4.70,

Therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

That the Assessor and Collector be and he is hereby instructed upon  
receipt of the taxes and interest, to cancel and take credit for amount of  
the penalty.

The above resolution was adopted by the following vote: Ayes, Mayor  
Yett, Councilmen Avery, Haynes, Holen and Searight, 5; naves, none.

The application of the Gulf Refining Company to erect an electric sign at their filling station at 1701 Lavaca Street was read and Councilman Searight moved that same be referred to the Safety Committee. Motion prevailed by the following vote: Ayes, Mayor Yett, Councilmen Avery, Haynes, Nolen and Searight, 5; naves, none.

The application of Drs. Scott & Gregg for permission to excavate at the corner of Brazos and Seventh Streets was read and upon motion of Councilman Searight was referred to the Safety Committee for report back to the Council. Motion prevailed by the following vote: Ayes, Mayor Yett, Councilmen Avery, Haynes, Nolen and Searight, 5; naves, none.

Upon the recommendation of the Safety Committee, the application of the English Sign Company to erect a sign at the corner of 8th Street and Congress Avenue was granted by the following vote: Ayes, Mayor Yett, Councilmen Avery, Haynes, Nolen and Searight, 5; naves, none.

The communication of J. H. Rogers, City Marshal, in the matter of the closing of domino halls was read and Councilman Avery moved that same be referred to the City Attorney for such legal action as he may deem proper. Motion prevailed by the following vote: Ayes, Mayor Yett, Councilmen Avery, Haynes, Nolen and Searight, 5; naves, none.

Councilman Nolen moved that the City Council advertise for bids for lignite, prices f. o. b. Austin, for a period of six months, said advertisement to begin ten days from this date. Motion lost by the following vote: Ayes, Councilman Nolen, 1; naves, Mayor Yett, Councilmen Avery, Haynes and Searight, 4;

x Councilman Haynes moved that the proposition of Clyde Hailey, Agent, to sell Lots 1 and 8 and west 23 feet of Lots 2 and 7, Block 1, Original City, to the City of Austin be accepted, subject to the approval of the City Attorney and all legal phases of the matters, including the title. Motion prevailed by the following vote: Ayes, Mayor Yett, Councilmen Avery, Haynes, Nolen and Searight, 5; naves, none.

The Council then recessed.

#### SPECIAL MEETING OF THE CITY COUNCIL:

Austin, Texas, February 23, 1924.

The Council was called to order by the Mayor. Roll call showed the following members present: Mayor Yett, Councilmen Avery, Haynes, Nolen and Searight, 5; absent, none.

Councilman Nolen introduced the following resolution:

WHEREAS, the existing contracts with the certain companies furnishing lignite to the City of Austin provide that lignite shall be furnished by them at the ruling price therefor; and

WHEREAS, said companies are now furnishing lignite to the City for \$1.25 per ton f. o. b. mines; and

WHEREAS, lignite is now being furnished the state institutions at the price of \$1.66 per ton f. o. b. Austin, which establishes the ruling price;