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IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

RICHARD McDONNELL, et al,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	No. 44,597
	)	
CITY OF COLUMBIA, MISSOURI, et al	)	
	)	
	)	
Defendants	)	

JUDGEMENT

The Court, having heretofore heard evidence herein, and the cause having been finally submitted on the pleadings and proof adduced and taken under advisement by the Court, now on this 18th day of January, 1964, the cause is again taken up by the Court for decision and adjudication, and having reviewed and considered the evidence and being fully advised in the premises, the Court finds the issues in favor of defendants and against plaintiffs on Count I of plaintiffs' petition, and further finds the issues in favor of defendants and against plaintiffs on Count II of plaintiffs' petition, and further finds the issues In favor of defendants and against plaintiffs on Count III of plaintiffs' petition.

It is, therefore, ordered, adjudged and decreed that plaintiffs' petition and Counts I, II and III thereof be dismissed and that all costs should be taxed against plaintiffs.

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

RICHARD McDONNELL, et al,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	No. 44,597
	)	
CITY OF COLUMBIA, MISSOURI, et al	)	
	)	
	)	
Defendants	)	

COURT'S MEMORANDUM

During the course of oral argument before the Court on May 9, an objection was made to Mr. Collins' attack on the defendants' motion with reference to a "surplus" fund mentioned in the last paragraph of Section 7, on Page 12, of the 1948 bond covenants ordinance, on the ground that there was no pleading to justify the submission of such issue. The objection was over-ruled at the time because the court had not had the opportunity to review the pleadings and ascertain whether or not any issue had been raised with reference to this particular fund. A review of the pleadings and the evidence convinces me that this is not an issue in the case and I now reverse my ruling and sustain de-fendants' objection to the argument with reference to it.

Under the 1948 bond covenant ordinance, Plaintiffs' Exhibit "3", the City of Columbia became obligated to the holders of the 1948 bonds to create and maintain out of a "Water and Electric Light Fund" certain separate funds, as follows:

(a) the "Water and Electric Operation and Maintenance Fund;"

(b) the "Water and Electric Revenue Bond Fund;"

(c) the "Water and Electric Revenue Bond Reserve Fund;' and

(d) the "Water and Electric Depreciation Fund."

The ordinance further provided that if any surplus remained in the Water and Light Fund, after making the deposits required by the funds listed as "a", "b", "c" and "d" above, might be used for any purpose as directed by the Council, except that 25% of such surplus retained shall be used only for redemption of the 1948 bonds or extension and improvement of the water and electric works.

Under the pleading and the evidence, insofar as plaintiffs rights as bondholders are concerned, no issue is presented relating to funds "a", "b" or "c", or the disposition of any surplus in the Water and Light fund.

Vigorously contested, however, was the manner of the Maintenance and operation of the Water and Electric Depreciation Fund.

The amount to be maintained in the fund was to "be determined according to a formula or formulas heretofore or hereafter established by the Burns & McDonnell Engineering Company of Kansas City, Missouri, or by some other nationally recognized consulting engineer or engineers," and said funds were to be expended "only for unusual and extraordinary repairs and replacements of the water and electric light works and for emergency expensed of said works."

The evidence shows that on December 17, 1959 (Plaintiffs' Exhibit "4") Lutz & May Company of Kansas City, Missouri, a "nationally recognized consulting engineer" firm established a "formula" for determining the amount to be paid into this fund And recommended the amounts to be accumulated annually. The

fact that the depreciation schedule originally set up by Burns & McDonnell was used and incorporated into its recommendation does not render this recommendation any the less a "formula" as contemplated by the ordinance.

The burden is on the plaintiffs to show that this fund was NOT expended "only for unusual and extraordinary repairs and replacements of the water and electric light works and for emergency expenses." Plaintiffs have not sustained this burden. The only showing made is that some of the fund was spent for "capital outlays." The fact that an expenditure is a "capital outlay" does not in and of itself mean that it is not also an "unusual and extraordinary" replacement or in fact that it is not an "emergency expense."

Under the issues as submitted by the pleadings and evidence, plaintiffs have failed to show that the City of Columbia has not performed its obligations under the 1948 bond covenant ordinance to plaintiffs as holders of a 1948 bond.

Some contention was made in oral argument that certain "in lieu of taxes" payments were considered an operation expense and could be paid out of Fund "(a)". The evidence does not show that this has been done. If it is contemplated, it will be illegal and should not be done. Such payment is not an operation expense of the utility. The City recognizes this as evidenced by Mr. Nickolaus' argument before the Court on May 9th, where he states: "I don't care what figure you would use, when you talk about in lieu of taxes, you're talking about some formula because like Mr. Collins says, they're not taxes, they're just a method of calculating a withdrawal."

Under Section 102 of the Charter, the City Council is charged with the responsibility of raising from the operation of the Water and Electric Light Works of the City, sufficient revenues to provide funds for 6 purposes, vis:

> to pay the cost of operation and maintenance of said works in good repair and working order, and
>
> to pay the principal of and interest on all revenue bonds of the City payable from the revenues of said works, and
>
> to provide and maintain the adequate depreciation fund for the purpose of making renewals and replacements, and
>
> to provide a fund for the extension, improvement, enlargement and betterment of said works, and
>
> to pay the interest on and principal of any general obligation bonds issued by the City to extend or improve said works, and
>
> to pay into the general revenue fund of the City annually an amount substantially equivalent to that sum which would be paid in taxes if the water and electric light works were privately owned.

The Council must provide sufficient revenues from the operation of the utility to provide money for ALL of these funds. There is no order of priority allowed; that if there was not sufficient money for all funds, then 1, 2, 3 and 4 must be maintained and 5 and 6 not. The mandate is that the City Council shall "fix, establish, maintain and provide for the collection of such rates, fees and charges" as will "provide revenues sufficient to raise enough money to provide for these funds."

Therefore, whatever amount of money is necessary to pay the cost of operation and maintenance of the utility, to pay the principal and interest on revenue bonds, to provide a depreciation fund, to provide for extension, improvement, enlargement and betterments of the utility, to pay principal and interest on certain general obligation bonds, and to pay "an amount substantially equivalent to that sum which would be paid in taxes" if the utility were privately owned, MUST be provided by the City Council, and they must set the "rates, fees and charges" at such an amount that will provide the money necessary for ALL of these funds.

It is clear, therefore, that the amount "substantially equivalent to that sum which would be paid in taxes" if the utility were privately owned is merely a figure to be determined by the City Council, and whether it includes an amount equivalent to federal and state income taxes and state, county and school district taxes, or whether it be limited solely to city taxes that private utility would pay is irrelevant. Whichever amount the City determines must be raised by the operation of the utility. If it is the position of the City that the "amount substantially equivalent to that sum which would be paid in taxes" by a private utility should include federal and state income taxes, etc., then the Council will simply have to set the rates, fees and charges for the services of the utility at an amount as will provide such funds.

In the closing argument before the Court on May 9, Mr. Nickalaus pinpointed this very clearly, when in commenting on the "in lieu of taxes" feature of the case, he stated that the Charter

Commission "wanted to establish a formula that would be determinative at any one time as to how much money, during any one year, the City Council could withdraw from the utility. Now this is easily calculated and it's calculated every year by our accountants--it's in every one of the audits, and this is a set, determinate fund which will vary from year to year, depending on the tax rates that are established and the gross business of the utility, taxable income, and I think this is the only reason."

There is nothing in the evidence that indicates that the City Council has not in obedience to the mandate of the Charter provided for and maintained the 6 funds heretofore mentioned.

Plaintiffs have failed to show that the City has defaulted in its obligations to plaintiffs as citizens and taxpayers of the City of Columbia.

It is significant to note that there is nothing in the evidence casting a doubt on the integrity of the City's credit nor insinuating that the 1948 bonds are not sound. Plaintiffs apparently had confidence in them, alas they would not have invested their money in the bond.

Judgement should be in favor of the defendants and against plaintiffs, and the costs in the case should be taxed against plaintiffs.

_____

Special Judge

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

RICHARD McDONNELL, et al,

Plaintiffs

vs.

No. 44,597

CITY OF COLUMBIA, MISSOURI, et al

Defendants

JUDGMENT

The Court, having heretofore heard evidence herein, and the cause having been finally submitted on the pleadings and proof adduced and taken under advisement by the Court, now on this 18th day of January, 1964, the cause is again taken up by the Court for decision and adjudication, and having reviewed and considered the evidence and being fully advised in the premises, the Court finds the issues in favor of defendants and against plaintiffs on Count I of plaintiffs' petition, and further finds the issues in favor of defendants and against plaintiffs on Count II of plaintiffs' petition, and further finds the issues in favor of defendants and against plaintiffs on Count III of plaintiffs' petition.

It is, therefore, ordered, adjudged and decreed that plaintiffs' petition and Counts I, II and III thereof be dismissed and that all costs herein be taxed against plaintiffs.

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

RICHARD McDONNELL, et al,

Plaintiffs

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CITY OF COLUMBIA, MISSOURI,
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Defendants

COURT'S MEMORANDUM

During the course of oral argument before the Court on May 9, an objection was made to Mr. Collins' attack on the defendants' action with reference to a "surplus" fund mentioned in the last paragraph of Section 7, on Page 12, of the 1948 bond covenant ordinance, on the ground that there was no pleading to justify the submission of such issue. The objection was overruled at the time because the Court had not had the opportunity to review the pleadings and ascertain whether or not any issue had been raised with reference to this particular fund. A review of the pleadings and the evidence convinces me that this is not an issue in the case and I now reverse my ruling and sustain defendants' objection to the argument with reference to it.

Under the 1948 bond covenant ordinance, Plaintiffs' Exhibit "2", the City of Columbia became obligated to the holders of the 1948 bonds to create and maintain out of a "Water and Electric Light Fund" certain separate funds, as follows:

(a) the "Water and Electric Operation and Maintenance Fund;"

(b) the "Water and Electric Revenue Bond Fund;"

(c) the "Water and Electric Revenue Bond Reserve Fund;" and

(d) the "Water and Electric Depreciation Fund."

The ordinance further provided that if any surplus remained in the Water and Light Fund, after making the deposits required by the funds listed as "a", "b", "c" and "d" above, might be used for any purpose as directed by the Council, except that 25% of such surplus retained shall be used only for redemption of the 1948 bonds or extension and improvement of the water and electric works.

Under the pleadings and the evidence, insofar as plaintiff's rights as bondholders are concerned, no issue is presented relating to funds "a", "b" or "c", or the disposition of any surplus in the Water and Light Fund.

Vigorously contested, however, was the manner of the maintenance and operation of the Water and Electric Depreciation Fund.

The amount to be maintained in this fund was to "be determined according to a formula or formulas heretofore or hereafter established by the Burns & McDonnell Engineering Company of Kansas City, Missouri, or by some other nationally recognized consulting engineer or engineers," and said funds were to be expended "only for unusual and extraordinary repairs and replacements of the water and electric light works and for emergency expenses of said works."

The evidence shows that on December 17, 1929 (Plaintiff's Exhibit "F") Burns & May Company of Kansas City, Missouri, a "nationally recognized consulting engineer" firm established a "formula" for determining the amount to be paid into this fund and recommended the amounts to be accumulated annually. The

fact that the depreciation schedule originally set up by Burns & McDonnell was used and incorporated into its recommendation does not render this recommendation any the less a "formula" as contemplated by the ordinance.

The burden is on plaintiffs to show that this fund was NOT expended "only for unusual and extraordinary repairs and replacements of the water and electric light works and for emergency expenses." Plaintiffs have not sustained this burden. The only showing made is that some of the fund was spent for "capital outlays." The fact that an expenditure is a "capital outlay" does not in and of itself mean that it is not also an "unusual and extraordinary" replacement or in fact that it is not an "emergency expense."

Under the issues as submitted by the pleadings and evidence, plaintiffs have failed to show that the City of Columbia has not performed its obligations under the 1946 bond covenant ordinance to plaintiffs as holders of a 1946 bond.

Some contention was made in oral argument that certain "in lieu of taxes" payments were considered as operation expense and could be paid out of Fund "(a)". The evidence does not show that this has been done. If it is contemplated, it will be illegal and should not be done. Such payment is not an operation expense of this utility. The City recognizes this as evidenced by Mr. Nicholas' argument before the Court on May 9th, where he states: "I don't care what figure you would use, when you talk about in lieu of taxes, you're talking about some formula because like Mr. Collins says, they're not taxes, they're just a method of calculating a withdrawal."

Under Section 102 of the Charter, the City Council is charged with the responsibility of raising from the operation of the Water and Electric Light Works of the City, sufficient revenues to provide funds for 6 purposes, viz:

to pay the cost of operation and the maintenance of said works in good repair and working order, and

to pay the principal of and interest on all revenue bonds of the City payable from the revenues of said works, and

to provide and maintain an adequate depreciation fund for the purpose of making renewals and replacements, and

to provide a fund for the extension, improvement, enlargement and betterment of said works, and

to pay the interest on and principal of any general obligation bonds issued by the City to extend or improve said works, and

to pay into the general revenue fund of the City annually an amount substantially equivalent to that sum which would be paid in taxes if the water and electric light works were privately owned.

The Council must provide sufficient revenues from the operation of the utility to provide money for ALL of these funds. There is no order of priority allowed; that if there was not sufficient money for all funds, then 1, 2, 3 and 4 must be maintained and 5 and 6 not. The mandate is that the City Council shall "fix, establish, maintain and provide for the collection of such rates, fees and charges" as will "provide revenues sufficient to raise enough money to provide for these funds."

Therefore, whatever amount of money is necessary to pay the cost of operation and maintenance of the utility, to pay the principal and interest on revenue bonds, to provide a depreciation fund, to provide for extension, improvement, enlargement and betterments of the utility, to pay principal and interest on certain general obligation bonds, and to pay "an amount substantially equivalent to that sum which would be paid in taxes" if the utility were privately owned, MUST be provided by the City Council, and they must set the "rates, fees and charges" at such an amount as will provide the money necessary for ALL of these funds.

It is clear, therefore, that the amount "substantially equivalent to that sum which would be paid in taxes" if the utility were privately owned is merely a figure to be determined by the City Council, and whether it includes an amount equivalent to federal and state income taxes and state, county and school district taxes, or whether it be limited solely to city taxes that a private utility would pay is irrelevant. Whichever amount the City determines must be raised by the operation of the utility. If it is the position of the City that the "amount substantially equivalent to that sum which would be paid in taxes" by a private utility should include federal and state income taxes, etc., then the Council will simply have to set the rates, fees and charges for the services of the utility at an amount as will provide such funds.

In the closing argument before the Court on May 9, Mr. Nicholson pinpointed this very clearly, when in commenting on the "in lieu of taxes" feature of the case, he stated that the Charter

Commission started to establish a formula that would be determinative as to any one time as to how much money, during any one year, the City Council could withdraw from their utility. Now this is easily calculated and it's calculated every year by our accountants--it's in every one of the audits, and this is a set, determinate fund which will vary from year to year, depending on the tax rates that are established and the gross business of the utility, taxable income, and I think this is the only reason."

There is nothing in the evidence that indicates that the City Council has not in obedience to the mandate of the Charter provided for and maintained the 6 funds heretofore mentioned.

Plaintiffs have failed to show that the City has defaulted in its obligations to plaintiffs as citizens and taxpayers of the City of Columbia.

It is significant to note that there is nothing in the evidence casting a doubt on the integrity of the City's credit nor intimating that the 1948 bonds are not sound. Plaintiffs apparently had confidence in them, else they would not have invested their money in the bonds.

Judgment should be in favor of defendants and against plaintiffs, and the costs in the case should be taxed against plaintiffs.

Special Judge