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## Municipal Law in Missouri

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# MUNICIPAL LAW IN MISSOURI\*

T. E. LAUER\*\*

In recent years the United States has experienced the pressure of a quickly expanding population and the problems arising out of an increasingly urban way of life. The basic changes in our society have been severe; municipal law as a result has become one of the most active and dynamic fields in the legal system, both with respect to legislation and to adjudication. Missouri has not escaped the national trend. During the period under study, from April 1962 until September 1963, approximately fifty appellate court decisions dealing with municipal law were reported; some of these have far-reaching ramifications. In addition, the 1963 session of the Missouri General Assembly enacted important legislation dealing with the powers and functions of municipalities.

## I. LEGISLATION BY MUNICIPALITIES

Section 77.080, RSMo 1959, relating to cities of the third class, provides that ordinances must be passed by bill, and "no bill shall become an ordinance unless on its final passage a majority of the members elected to the council shall vote therefor, and the ayes and nays shall be entered on the journal."<sup>1</sup> In *City of Independence v. Hare*<sup>2</sup> the holder of a special sewer tax bill brought an action to enforce the lien of the tax bill. The defendants asserted that the tax bill was void and uncollectable because the journal of the Independence city council meeting at which the ordinance levying and assessing the sewer tax was passed did not record the ayes and nays, although it showed all twelve members to have been present. The circuit court directed a verdict for the holder of the tax bill; defendants filed a new trial motion and the city of Independence asked leave to

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\*This article contains a discussion of selected Missouri court decisions appearing in volumes 357 to 370, inclusive, of the South Western Reporter, Second Series.

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1. See also §§ 73.170, .190, RSMo 1959 (first class cities); § 75.180, RSMo 1959 (second class cities); § 78.580, RSMo 1959 (third class cities with city manager government); § 79.130, RSMo 1959 (fourth class cities); § 80.110, RSMo 1959 (towns and villages).

2. 359 S.W.2d 33 (K.C. Mo. App. 1962).

intervene, alleging that a majority of the council had in fact voted in favor of the ordinance, and praying for leave to amend the journal nunc pro tunc to show the ayes and nays. Both the new trial motion and the city's motion were overruled; all parties appealed, defendants from the adverse judgment and the city and holder of the bill from the denial to intervene. The Kansas City Court of Appeals held that the defendants' appeal was meritorious, in that the requirement that the ayes and nays be shown upon the journal was mandatory. However, the court also found merit in the argument that the city should have been allowed to intervene, due to the fact that the validity of the ordinance was a matter affecting the public interest.<sup>3</sup> Because it would not be "a change in the record but rather an expansion to show in detail the actual vote,"<sup>4</sup> the nunc pro tunc amendment of the journal was within the court's discretion. The judgment was reversed and the cause remanded to allow intervention and a hearing on the merits as to amendment of the journal.

Conflict of interest can be a serious problem on the municipal level, as well as in the state and national capitals. One of the most troublesome problems arising out of an alleged conflict of interest upon the part of a city councilman or alderman is whether, in the absence of controlling legislation, the courts will hold that judicial propriety extends to a consideration of the conflict as affecting the validity of an ordinance or regulation.<sup>5</sup> The question was raised in *Coffin v. City of Lee's Summit*,<sup>6</sup> where a judgment was sought declaring a rezoning ordinance void because two of the six members of the board of aldermen had in its passage a "direct, personal, financial or pecuniary interest." The ordinance rezoned a tract of 140 acres from a residential classification to one which would permit quarrying. The tract was owned by Union Construction Company, which engaged in quarrying, rock-crushing and similar activities. One alderman was president of and owned one-third of the stock of a ready-mix concrete company; Union Construction owned the balance of the stock.

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3. Citing § 507.090(3)(4), RSMo 1959, giving the court discretionary power to allow intervention by a governmental subdivision when the validity of an ordinance or regulation affecting the public interest is in question. Mo. R. Civ. P. 52.11(c)(4) is similar.

4. 359 S.W.2d at 37.

5. For a general view of the decisions from other states in cases involving zoning matters, see Annot., 71 A.L.R.2d 568 (1960), which indicates that in most states where the question has been considered, the courts have declined to inquire into the motives of municipal legislators.

6. 357 S.W.2d 211 (K.C. Mo. App. 1962). In the opinion, Judge Hunter reviews at length the leading decisions from other states.

The concrete company operated from Union's place of business, although the opinion is silent as to the scope and nature of the relationship between the two companies. The other alderman was employed as a truck driver for a concern which hauled materials for both the ready-mix company and for Union Construction. The circuit court found that the interest of the aldermen was such as to invalidate the rezoning ordinance as being against public policy. On appeal, the judgment was reversed. The Kansas City Court of Appeals, in an opinion by Judge Hunter, acknowledged that the question was one of first impression in Missouri, but found it unnecessary to decide whether the courts would act where a conflict existed on the part of an alderman discharging a legislative function, for the reason that the evidence fell "short of demonstrating that either of the two Aldermen had a direct financial interest in the passage of the ordinance."<sup>7</sup> Moreover, any other interest the aldermen may have had was not direct, but "indirect and remote," and insufficient to compel the court, in the public interest, to determine whether the ordinance should be struck down.<sup>8</sup>

Three decisions involved the use of the initiative and the referendum in municipal legislation. In *State ex rel. Sessions v. Bartle*,<sup>9</sup> a mandamus action was brought in Kansas City to compel submission to the voters of an ordinance, proposed by initiative petitions, which would have classified various positions held by city employees and established salary scales for these positions. It was estimated that the ordinance would increase city salaries by as much as \$500,000 per year. The measure provided no means for raising the additional revenue to meet this expense. The Missouri Supreme Court affirmed a judgment for defendants, holding that the proposed ordinance was in effect an appropriation measure and therefore violated Article III, Section 51 of the Missouri Constitution: "The initiative

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7. *Id.* at 217.

8. Viewed from the groves of academe, the conflict of interest problem appears to be a very real and serious one, and the courts have by and large been far too timorous in their approach to it. Certainly it is difficult to believe that the city council or other legislative body could or would effectively police itself, and the futility of depending upon the response of the electorate at the ballot box has been all too often demonstrated. As to the hallowed notion of separation of powers, it should be noted that this is a doctrine which is all but completely judge-made, and that its extension beyond the legislature to municipal bodies is wholly unwarranted. Certainly the city council is not a branch of government coordinate with and equal to the courts; this much, at least, is plainly set forth in *State ex inf. Dalton v. Harris*, 363 S.W.2d 580 (Mo. 1962), discussed *infra* at note 27.

9. 359 S.W.2d 716 (Mo. 1962).

shall not be used for the appropriation of money other than of new revenues created and provided for thereby. . . .”

A more vexing problem of the initiative was presented in *State ex rel. Powers v. Donohue*,<sup>10</sup> where an amendment to the St. Louis County zoning ordinance was proposed by the initiative process.<sup>11</sup> In an en banc opinion by Judge Hollingsworth, the supreme court acknowledged that the Missouri Constitution reserves to the people the use of the initiative,<sup>12</sup> but held that in this case the initiative was further defined and restricted by the Charter of St. Louis County and by the ordinances enacted thereunder setting forth the procedures to be followed in zoning matters. The use of the initiative to propose ordinances, said the court, is subject to the same restrictions which are placed upon the council in the passage of similar ordinances.<sup>13</sup> The court set out a number of St. Louis County Charter provisions relating to the initiative, the classification of zoning law amendments as emergency measures, the powers of the county council relating to zoning, and the functions of the planning commission relating to zoning ordinances. Further, county ordinances requiring notice and a hearing in all zoning law changes by the county council were quoted; the court clearly felt that these restrictions upon the council's power to act applied also to ordinances proposed by the initiative. The court concluded that the notice and hearing requirement had not been met in this case, and therefore the proposed ordinance, if enacted by a vote of the people, would be void.

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10. 368 S.W.2d 432 (Mo. En Banc 1963). Procedurally, the decision involved two consolidated actions; the litigation had begun in circuit court as a mandamus proceeding to compel the ordinance to be placed upon the ballot, and a peremptory writ of mandamus had issued. Thereupon defendants and intervenors appealed, and at the same time filed in the Missouri Supreme Court an original action to prohibit the trial court from enforcing the writ of mandamus. The supreme court consolidated the actions for hearing.

11. The dispute arose out of a rezoning by the St. Louis County Council of 225 acres from a residential classification to a heavy industrial classification to permit quarrying. Opponents of the rezoning first sought to use the referendum procedure to challenge the council's action, but abandoned the referendum (probably due to St. Louis County Charter provisions denying the use of the referendum as to emergency measures, including zoning ordinance amendments) and circulated the initiative petitions which gave rise to the mandamus action.

12. Mo. CONST. art. III, §§ 49-52. The constitutional provisions pertain specifically to the use of the initiative to propose statutes and constitutional amendments; to what extent the provisions apply to legislation by units of local government has not been fully established. Cf. *Kansas City v. McGee*, 364 Mo. 896, 269 S.W.2d 662 (1954).

13. Citing *Baum v. City of St. Louis*, 343 Mo. 738, 123 S.W.2d 48, 50 (1938): “Restrictions on the power of the Board of Aldermen of a city to enact ordinances are as a rule applicable to proposals under the initiative provisions.”

From a practical point of view the decision may be sound; there may exist cogent reasons for not permitting zoning amendments by the use of the initiative procedure. But viewed legally, from a consideration of the charter provisions and ordinances involved, the decision is based upon questionable grounds.<sup>14</sup> In the first place, there appears to be nothing in the Charter of St. Louis County which prevents zoning amendments from being enacted by use of initiative proposals.<sup>15</sup> Consequently, the only bar

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14. In this connection, the reasoning of Judge Eager's concurring opinion may provide a more acceptable basis for the decision:

I would prefer to put this holding upon the basic fact that the respondents are attempting to accomplish by indirection that which they are specifically prohibited from doing directly; that is to say, they may not create any amendment to the zoning ordinance by referendum, but in fact and in substance they are here seeking a referendum upon the enactment of the prior ordinance. 368 S.W.2d at 439.

But would this reasoning be valid if the initiative petition had not been seeking to undo a recent zoning amendment by the county council?

15. In its opinion, the court cited several county charter provisions, and italicized portions thereof, but did not make it clear which, if any, of these provisions prevented the use of the initiative for zoning matters, either expressly or as a matter of implication. Nor does it appear that the charter provisions dictate such a result. The provisions cited by the court were:

(1) Article VII, § 77, which reserves to the people "the power to propose and enact or reject ordinances and amendments to this Charter, independent of the Council." This article provides that the referendum shall not be employed in emergency measures, but places no limitation upon the use of the initiative.

(2) Article III, § 18, defining emergency ordinances to include zoning ordinance amendments. Again, this relates to the limitation on the referendum.

(3) Article III, § 22, authorizing the council by ordinance to engage in planning and zoning. The court may have felt that this provision placed zoning exclusively within the power of the council; but this is a strained interpretation, for within § 22 are enumerated all other subjects upon which the council may legislate. It would be an absurdity to insist that the initiative may only be used upon matters over which the council has the power to legislate, and then to argue further that because the charter says that the council shall "have, by ordinance, the power" to zone, that therefore this language should be read to mean that the council's power to zone is exclusive. Nor is the argument helped by the language that existing laws relating to planning and zoning shall remain in force "until superseded by ordinances of the Council." Plainly the purpose of this clause is to retain existing laws during the period between the adoption of the charter and the time the council could effectively function; it should be given interim effect only, and since the council thereafter did act, the clause has fulfilled its purpose.

(4) Article V, §§ 57 and 58, establishing the planning commission and providing that it should have the powers and duties provided by law, or by ordinance; further, "No ordinance relating to zoning which is contrary to the recommendation of a majority of the members of the Planning Commission shall be adopted by the Council except by an affirmative vote of five members of the Council." This may provide the strongest argument to be found within the charter against the use of the initiative in this case. But note that it does not provide expressly that all zoning ordinances be submitted to the planning commission, nor does it provide that the recommendation of the planning commission is a prerequisite to the adoption of such an ordinance. These requirements are present, if at all, only through indirection. Compare *Baum v. City of St. Louis*, 343 Mo. 738, 123 S.W.2d 48 (1938),

to employing the initiative in this case must have been the failure to comply with the notice and hearing requirement—a requirement which would effectively prohibit the use of the initiative in all zoning amendments for the reason that *only* the county council and planning commission may act to satisfy the requirement as it appears in the ordinance. And considering the nature of the initiative process, even substantial compliance with the notice and hearing requirement is clearly impossible. In short, the provisions of an ordinance enacted by the council (and which could therefore presumably be repealed by the council) are said to impose a restriction upon the council which must be met not only by the council in making zoning changes, but also by any initiative proposal which would amend the zoning ordinance.

Two objections to this may be raised. First, *Baum v. City of St. Louis*,<sup>16</sup> the decision cited in support of the proposition that restrictions upon the council are restrictions upon the initiative procedure, dealt not with a limitation contained in an ordinance enacted by the governing body, but with a limitation in the charter; the opinion speaks in terms of “restrictions on the *power*” of the council. (Emphasis added.) Plainly the court there was speaking of limitations over which the municipal governing body had no control.<sup>17</sup> Second, if the right to the initiative has been reserved to the people in both the state constitution and in the county charter, it seems anomalous to permit the county council to destroy this right by ordinance, through establishing a procedure with which no initiative petition can comply.

The decision in the *Donohue* case may be correct if, aside from the

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where the charter expressly provided “No ordinance for public work or improvements of any kind, or repairs thereof, shall be adopted unless prepared and recommended by the board of public service. . . .” Nor should the requirement of an affirmative vote by five council members be held to bar the initiative. Against this argument, which is made by heaping inference upon implication, stands the relatively clear directive in the constitution and the charter reserving to the people the right to propose legislation and ordinances. Unless this right is to become nugatory, the courts must be willing, wherever possible, to give it the broadest possible interpretation and application.

16. *Supra* note 13.

17. In the *Baum* case, the initiative petition proposed an ordinance “for the acquisition of a five cent fare municipal mass transportation system.” However, under the city charter the St. Louis Board of Aldermen had no authority to adopt such an ordinance unless it had first been recommended by the board of public service. Since no such recommendation had been made, it was held that the initiative, which was required to be exercised in accordance with the charter, could not be used.

charter and ordinances, there exist inherent limitations arising from the nature of zoning amendments which would prohibit the use of the initiative process. While it is clear that cities<sup>18</sup> and non-charter counties<sup>19</sup> are required by statute to give notice and grant a hearing in proceedings for zoning amendments, it has been held that the constitutional grant of power to a charter county, such as St. Louis County, takes precedence over the legislative power;<sup>20</sup> therefore the statutory requirements are not binding upon St. Louis County. On the other hand, if due process required notice and a hearing in all zoning amendment proceedings, then clearly the initiative procedure could not be used for such amendments, since it would be plainly impracticable, if not impossible, to include these matters at a stage of the initiative process.<sup>21</sup> However, this question was not raised by the court in the *Donohue* case, and seems not to have arisen in any other Missouri decision.<sup>22</sup>

The use of the referendum procedure to submit to the voters of Kansas City an ordinance enacted by the city council for the purchase of equipment to be used in adding fluorides to the city water supply was considered in *State ex rel. Whittington v. Strahm*.<sup>23</sup> Referendum petitions were presented to the city clerk, and when she failed to act upon them, a mandamus

18. §§ 89.050, .060, RSMo 1959.

19. See, e.g., §§ 64.140, .271, .640, RSMo 1959.

20. *Casper v. Hetlage*, 359 S.W.2d 781 (Mo. 1962); *State ex inf. Dalton v. Gamble*, 365 Mo. 215, 280 S.W.2d 656 (En Banc 1955).

21. The purpose of notice and hearing in proceedings to adopt or to amend zoning ordinances should be considered. Clearly these legislative or quasi-legislative proceedings are in no sense adjudications; the affected property owner has a right to be notified of the impending change and to speak out in favor thereof or opposition thereto. But unlike judicial proceedings, although there is a right to speak, there is no guarantee that the speaker will be listened to (or heard). The legislative nature of the process is at least partly political, and the determination of the governing body need not be supported by a preponderance of the evidence, but only by substantial evidence upon the whole record. Would not the property owner be as well protected by the public notice required to be given of the election, combined with his opportunity to take the matter to the people to be heard? Clearly if the ordinance is adopted, but is unreasonable, the safeguards of judicial review remain.

22. In *Dewey v. Doxey-Layton Realty Co.*, 3 Utah 2d 1, 277 P.2d 805 (1954), cited in the *Donohue* opinion, it was held that the initiative process did not apply to a zoning amendment; but in that case the notice and hearing requirement was imposed by statute, and clearly limited the *power* of the local governing body to act, whereas in *Donohue* notice and hearing were imposed by an ordinance coequal to the ordinance proposed. Several cases have, however, suggested that notice and hearing are basic requirements, even in the absence of statute. See, e.g., *Wood v. Town of Avondale*, 72 Ariz. 217, 232 P.2d 963 (1951); *Berrata v. Sales*, 82 Cal. App. 324, 255 Pac. 538 (Dist. Ct. App. 1927); *Makrauer v. Board of Adjustment*, 200 Okla. 285, 193 P.2d 291 (1948).

23. 366 S.W.2d 495 (K.C. Mo. App. 1963).



action was brought to compel her to examine and certify the petitions. The city clerk asserted that the ordinance was administrative and not legislative in character, and therefore the referendum procedure did not apply to it. The Kansas City Court of Appeals held that the Kansas City Charter specifically enumerated those matters not subject to the referendum and that this ordinance was not among the matters exempted;<sup>24</sup> further, there was no basis in the charter for distinguishing between "administrative" and "legislative" ordinances. The judgment of the trial court in favor of the respondent was reversed and the cause was remanded with directions to issue the writ of mandamus.

## II. COUNCILMEN, OFFICERS AND EMPLOYEES

A common provision in constitutions and charters is that a legislative body "shall be sole judge of the qualifications, election and returns of its own members."<sup>25</sup> Where such provisions are found in a constitution, the courts will not entertain an action challenging the qualifications of a legislator.<sup>26</sup> However, where, as in St. Louis, a city charter provides that the board of aldermen "shall be the judge of the qualifications of its members," what attitude should the courts take toward a judicial action challenging such qualifications? The question was raised, and answered, in *State ex inf. Dalton v. Harris*,<sup>27</sup> a quo warranto action challenging the right of respondent to serve as an alderman after he had ceased to be a resident of the ward from which elected, in violation of the Charter of the City of St. Louis. Respondent invoked the charter provision that the board of aldermen was the judge of his qualifications and denied that the court had jurisdiction to act. The circuit court dismissed the petition, but the Missouri Supreme Court reversed, holding that the St. Louis board of aldermen is not a coordinate branch of government with the courts,<sup>28</sup>

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24. The court said at 366 S.W.2d at 497-98:

These exempted matters are: (1) any emergency ordinance; (2) any ordinance calling for any election; (3) or for the submission of any proposal to the people; (4) any ordinance making any appropriation for the payment of principal or interest in the public debt; (5) or for current expenses of the city government; (6) any general appropriation ordinance; and (7) any ordinance relating to any public improvement to be paid for by special assessment.

25. Mo. CONST. art. III, § 18.

26. Cf. *Preisler v. Doherty*, 364 Mo. 596, 265 S.W.2d 405 (En Banc 1954).

27. 363 S.W.2d 580 (Mo. 1962).

28. Limiting the language of *State ex rel. Vogel v. Bersch*, 83 Mo. App. 657 (St. L. Ct. App. 1900).

but is subordinate, and "does not stand on an equality with the General Assembly as an essential part of the legislative department of this state."<sup>29</sup> Therefore, unless it clearly appeared from the charter that the board had the *exclusive* right to determine the qualifications of the aldermen, thereby divesting the courts of jurisdiction,<sup>30</sup> the quo warranto action was proper. Examining the charter language, the court concluded that no purpose was expressed to deprive the courts of jurisdiction.

*Fisher v. City of Independence*<sup>31</sup> involved an appeal by the city from an order of the Industrial Commission dismissing the claim of a city employee to enable him to pursue his common law remedies against the city. In 1929 or 1930 the city elected to bring itself within the workmen's compensation law, and in 1936 it became a self-insurer by posting a \$3,000 security deposit. However, in 1949 the Attorney General issued an opinion to the effect that the statute permitting municipalities to elect workmen's compensation coverage was unconstitutional, and the Industrial Commission notified the city that its acceptance of the act was void, and that the security deposit was being released. Early in 1950, after the Attorney General had reversed his position and issued a new opinion that the statute was valid after all, the Industrial Commission notified the city that its coverage would be reinstated upon the filing of \$10,000 security. Although the city did not post such security, nevertheless it apparently continued to believe it was a self-insurer under the workmen's compensation law. Thereafter, the claimant-employee was injured and brought a tort action against the city; the action was dismissed upon the city's motion alleging it to be covered by the law. Claimant then filed a workmen's compensation claim and was granted an award which was not satisfactory to him;<sup>32</sup> subsequently the claimant discovered that the city had not posted its security as required, and moved that the claim be dismissed. The Industrial Commission granted the motion; the city appealed and the Kansas City Court of

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29. 363 S.W.2d at 584.

30. Because the case was determined by interpretation of the charter provision, it was not necessary to consider the further, more fundamental question of whether the jurisdiction of the courts could be defeated by a charter provision.

31. 370 S.W.2d 310 (Mo. En Banc 1963).

32. The claimant was awarded \$3,683.75, but it was held by the commission that from this sum there should be subtracted \$3,069 paid the claimant as wages by the city after the injury was sustained, leaving a net award of only \$614.75. For this reason the chairman of the Industrial Commission took the position that the claimant's motion to dismiss the claim "smacks of sour grapes and should be overruled." *Fisher v. City of Independence*, 350 S.W.2d 268, 270 (K.C. Mo. App. 1961).

Appeals reversed,<sup>33</sup> holding that the city's status as a self-insurer under the law could not be terminated without formal action by the commission, including notice and hearing. The claimant then filed a motion to transfer the cause to the Missouri Supreme Court, which the supreme court granted.<sup>34</sup> In an en banc decision the supreme court upheld the Industrial Commission's determination on the ground that the commission had authority, under its rules and the law, to require the posting of \$10,000 security, and when the city failed to post such security, its self-insurance authority terminated automatically, without any notice or hearing being necessary. Further, inasmuch as the city had misrepresented that it was a self-insurer under the law, the claimant's filing of his workmen's compensation claim did not constitute a binding election on his part, and he was free to pursue his common law remedy.<sup>35</sup> In short, for a period of nearly ten years the city overlooked the fact that it had not complied with the workmen's compensation law, and this oversight destroyed the city's protection under the law.<sup>36</sup>

### III. TAXATION AND LICENSING

In 1963 the Missouri General Assembly enacted legislation authorizing Kansas City to adopt, by charter amendment and ordinance, an earnings tax of one-half of one percent per year upon compensation paid indi-

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33. *Fisher v. City of Independence*, 350 S.W.2d 268 (K.C. Mo. App. 1961).

34. Pursuant to Mo. CONST. art V, § 10; Mo. R. Civ. P. 84.05.

35. See § 287.280, RSMo 1959, providing for insurance or self-insurance by the employer: "If the employer fails to comply with this section, an injured employee or his dependents may elect after the injury to recover from the employer as though he had rejected this chapter [common law liability], or to recover under this chapter with the compensation payments commuted and immediately payable."

36. During the period under study, two other decisions touched upon the rights of city employees. In *Davis v. Long*, 360 S.W.2d 307 (St. L. Mo. App. 1962), where a suspended police officer was told that he would be restored to duty without loss in rank and without a departmental trial, but with loss of pay during the suspension, it was held that by returning to work under these conditions the officer settled and compromised his dispute with the board of police commissioners, and that he could not thereafter demand to be paid for the period of suspension. The officer's alternative would have been to stand departmental trial, in which he might have been reinstated with full pay and without reduction in rank—but in which he might also have been found guilty and dismissed from the force.

*Heusmann v. Priest*, 366 S.W.2d 42 (St. L. Mo. App. 1963), involved an appeal from a finding by the board of trustees of the St. Louis police retirement system that claimant's heart condition was not caused by an accident in the performance of his duties; the board's finding, being supported by competent and substantial evidence upon the whole record, was affirmed.

viduals and the net profits of businesses.<sup>37</sup> The Kansas City voters have since approved the necessary charter amendment, and Kansas City has joined St. Louis<sup>38</sup> in the levying of an earnings tax upon businesses and persons employed within the city. Whether in the future the General Assembly will extend this form of taxation to other municipalities is, of course, uncertain; but arguably where a substantial number of persons who are employed in a city live elsewhere, this is an equitable method of taxation.

The application of the St. Louis earnings tax to Illinois residents employed by the federal government in St. Louis was challenged in *Arnold v. Berra*.<sup>39</sup> Plaintiff filed a declaratory judgment action alleging that he was subject to Illinois taxes which duplicated the earnings tax, and that the earnings tax ordinance was void because it deprived nonresident workers of property "without any corresponding benefit," and therefore violated due process, and because it placed "an undue burden on interstate commerce." The Missouri Supreme Court, en banc, affirmed a circuit court judgment dismissing plaintiff's action; it was held that the tax was an income tax which might validly be charged to nonresidents and did not constitute either a "privilege tax" upon nonresidents, or an infringement upon interstate commerce. Further, it was pointed out that St. Louis did provide certain benefits for nonresident workers, such as fire and police protection and the use of the city's streets and other facilities.

On the other hand, in *Village of Bel-Nor v. Barnett*,<sup>40</sup> the supreme court held invalid, as an undue burden on interstate commerce, an ordinance requiring the purchase of a solicitor's license by a door-to-door magazine salesman who took orders for magazines published outside Missouri, and forwarded the orders to his employer's St. Louis office, from which they were sent on to Ohio. If the order were accepted by the employer, the magazines would be mailed by their publishers to the subscriber. The court held that the solicitor was clearly engaged in interstate commerce, and that the municipal ordinance which imposed the license tax of \$15.00

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37. §§ 92.210-300, RSMo 1963 Supp. The legislation authorizes constitutional charter cities of between 450,000 and 700,000 to levy the tax; clearly Kansas City is the only municipality which now falls, or within the foreseeable future will fall, within this class.

38. St. Louis is authorized to levy an earnings tax of one per cent. §§ 92.110-200, RSMo 1959.

39. 366 S.W.2d 321 (Mo. En Banc 1963).

40. 358 S.W.2d 832 (Mo. 1962).

was indistinguishable from ordinances which had been held invalid in prior decisions.<sup>41</sup> The principle of this and similar cases is that where a salesman solicits orders for goods to be shipped to the buyer from another state, the transaction is in interstate commerce, and local license taxes upon the salesman constitute a burden upon interstate commerce; it does not matter that local salesmen are subjected to a similar licensing requirement.<sup>42</sup>

The problem of the validity of city license taxes also arose in *City of Poplar Bluff v. Poplar Bluff Loan & Bldg. Ass'n*,<sup>43</sup> in which the city sought to collect a \$200 annual license tax under an occupational licensing ordinance which related to loan companies. Defendant was a savings and loan association operating under chapter 369, RSMo 1959. It was held that defendant was not a "loan company" within the meaning of the ordinance,<sup>44</sup> but was instead an "association" which was expressly subject to a state tax of two percent on its dividend yield, which tax was "exclusive and in lieu of all other taxes of whatsoever nature . . . except *ad valorem* taxes upon real and tangible personal property and social security, unemployment compensation and franchise taxes."<sup>45</sup> Inasmuch as the city's license tax was a tax, and the city had no power to grant or withhold franchises to savings and loan associations, the ordinance did not apply to defendant.

Chapter 155, RSMo 1959, enacted in 1959, deals with the taxation of aircraft, and provides that the state tax commission shall assess aircraft operated commercially and shall apportion such valuation to the various taxing districts in which arrivals and departures of the aircraft occur. It further provides that "when any municipality in this state owns and operates an airport outside its corporate limits, the valuation determined hereunder shall also be apportioned to said municipality."<sup>46</sup> The validity of this proviso was challenged by declaratory judgment in *American Airlines, Inc. v. City of St. Louis*,<sup>47</sup> where St. Louis had issued tax bills against

41. See, e.g., *Olan Mills, Inc. v. City of Cape Girardeau*, 364 Mo. 1089, 272 S.W.2d 244 (1954).

42. The original United States Supreme Court decision is *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887). More recent decisions dealing with solicitation in interstate commerce include *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *Breard v. City of Alexandria*, 341 U.S. 622 (1951).

43. 369 S.W.2d 764 (Spr. Mo. App. 1963).

44. See § 94.110, RSMo 1959, authorizing cities of the third class—which included Poplar Bluff—to levy and collect a license tax upon loan companies.

45. § 148.520, RSMo 1959.

46. § 155.050, RSMo 1959.

47. 368 S.W.2d 161 (Mo. 1963).

aircraft using the municipally owned Lambert-St. Louis Municipal Airport, which is located beyond the city limits, in St. Louis County.<sup>48</sup> The Missouri Supreme Court held that the proviso was void, in that it fixed an arbitrary and capricious situs for the taxation of aircraft by the city; the operation of the airport by the city was in its proprietary function, and provided no reasonable basis for extraterritorial taxation:

What *governmental* benefit or protection does City as a municipality with powers of local self-government supply extraterritorially to plaintiffs, airline companies, or their aircraft, which could reasonably, lawfully, and constitutionally support the extraterritorial imposition upon them of City's tangible personal property taxation?

We think there is none.<sup>49</sup>

The court emphasized that the airport was a commercial operation by the city, that the relations between the city and the airline companies were contractual in nature, and that the services offered by the city at the airport were only those that any other airport, whether publicly or privately owned, would furnish.<sup>50</sup> In declaring the proviso void, the court spoke with pointed reference to the facts of the case before it; whether there could exist sufficient facts upon which to base this extraterritorial power of taxation in any other case is, however, questionable.<sup>51</sup>

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48. The action also involved the validity of taxes levied by St. Louis County under chapter 155, RSMo 1959; the circuit court's determination that such taxes were valid was not appealed.

49. 368 S.W.2d at 165-66.

50. As to the city's argument that it supplied police protection through private guards and four St. Louis County police officers for whose services the city paid, the court pointed out that the airport was within the county's police jurisdiction, and that this extra police protection for the airport was made necessary only because of the operation by the city of "its airport business."

51. The case presented a further interesting question of local tax law. When the airlines filed their declaratory judgment action in December 1960, they paid into the registry of the circuit court the 1960 city and county taxes allegedly due, which were not at that time delinquent. By the time the circuit court rendered its judgment that the county taxes were valid, such taxes were clearly delinquent; the circuit court, however, declined to award statutory interest, penalties and other delinquent charges to the county. The supreme court reversed this determination, holding that even if it assumed that a court, "in the exercise of its equitable jurisdiction, has the power to relieve a taxpayer from the statutory delinquency penalties in the meritorious circumstances of a case," there was no sufficient ground here for the exercise of such power. 368 S.W.2d at 168. Although the taxes had been paid into the registry of the court, nevertheless St. Louis County, the taxing authority, had been denied use of such moneys during the pendency of the action.

## IV. BONDS AND INDUSTRIAL DEVELOPMENT

Where the voters have authorized a municipality to issue bonds for a specific purpose, how soon thereafter must the municipality exercise such power? In *Petition of City of St. Louis*,<sup>52</sup> sewer bonds of \$7,957,000 were authorized by the city's electorate on August 1, 1944, and within the next decade \$3,750,000 of such bonds were offered for sale. On April 16, 1962, nearly eighteen years after the authorization, the city filed its petition for a pro forma decree declaring the validity of the proposed issuance of the remaining \$4,207,000 in bonds. The circuit court issued its decree in favor of the city and the Missouri Supreme Court affirmed, holding that a mere lapse in time does not, in the absence of a substantial change in conditions, defeat the power of a municipality to issue bonds which have been authorized by the voters. Nor did the formation of the Metropolitan St. Louis Sewer District during the intervening years, to exercise jurisdiction over all existing sanitary and storm-water sewers in St. Louis, destroy the power of the city to issue the bonds.

In 1960, the Missouri Constitution was amended to enable municipalities to issue revenue bonds for the purchase or construction of industrial plants,<sup>53</sup> and to enable municipalities in counties of less than 400,000 to issue general obligation bonds for the same purpose.<sup>54</sup> Pursuant thereto, the 1961 session of the Missouri General Assembly enacted implementing legislation.<sup>55</sup> *State ex rel. City of El Dorado Springs v. Holman*<sup>56</sup> was an original mandamus proceeding in the supreme court to compel the state auditor to register and certify an issue of general obligation bonds under the constitutional amendment and the implementing legislation.<sup>57</sup> The respondent, in the role of devil's advocate, challenged the validity both of the constitutional amendment and of the legislation authorizing the issuance of such bonds, contending that the constitutional amendment had improperly submitted two amendments as one, since

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52. 363 S.W.2d 612 (Mo. En Banc 1963).

53. Mo. CONST. art. VI, § 27.

54. Mo. CONST. art. VI, § 23(a).

55. §§ 71.790-.850, RSMo 1963 Supp.

56. 363 S.W.2d 552 (Mo. En Banc 1962).

57. § 108.240, RSMo 1959, provides that before any bond issued by a municipality or other local governmental unit "shall obtain validity or be negotiated, such bonds [sic] shall first be presented to the state auditor, who shall register the same . . . and who shall certify by indorsement of such bond that all conditions of the laws have been complied with in its issue." Such registration and certification shall constitute prima facie evidence of the validity of the bond.

both the revenue bond provision and the general obligation bond provision had been coupled in a single proposal; that the title of the proposition on the ballot had exceeded twenty-five words, as a maximum set by legislation,<sup>58</sup> and did not properly describe the amendment; and that the enabling legislation was inconsistent with the constitutional amendment, in that its language was broader in several respects. The court upheld the constitutional amendment against these challenges, holding that both bond provisions were germane, and might properly be treated as a single subject,<sup>59</sup> that the twenty-five word limitation upon ballot titles is directory and not mandatory, and that the title accurately expressed in general terms the subject matter of the amendment, since it was not necessary to "descend into particularities." On the other hand, the court found some difficulty with the implementing legislation, inasmuch as the constitution provided only that industrial plants purchased or constructed with moneys derived from revenue bonds might be leased, while the legislation purported to permit municipalities to "sell or otherwise dispose of" such properties.<sup>60</sup> However, the court found that the discrepancies in the enabling legislation were not such as to affect the validity of the bonds in this case, inasmuch as the statutory provisions were clearly severable.<sup>61</sup>

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58. § 125.030, RSMo 1959.

59. This conclusion is based in large part upon the court's determination that the submission of both bonding matters in a single proposal was justified by Mo. CONST. art. XII, § 2(b): "No such proposed amendment shall contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith." Since the general subject of the proposal was the issuance of bonds for the financing of industrial development, the court held that "'matters properly connected therewith' would reasonably include provisions authorizing the issuance of different types of bonds." 363 S.W.2d at 556. While the construction is not entirely unstrained, nonetheless the question presented is a difficult one, and the court should not overturn a constitutional amendment approved by the people unless there is some very clear reason for so doing.

60. § 71.850, RSMo 1963 Supp. This section and § 71.847 were subject to the further objection that they permitted the leasing of plants for other than industrial development purposes, while there was some question as to the validity of § 71.793, which did not distinguish between municipalities authorized to issue general obligation bonds, which were restricted by Mo. CONST. art. VI, § 23(a), to those located in counties of less than 400,000, and municipalities issuing revenue bonds, which were subject to no such restriction. Mo. CONST. art. VI, § 27.

61. See also *Petition of Monroe City*, 359 S.W.2d 706 (Mo. En Banc 1962), which held that Mo. CONST. art. VI, §§ 23(a) and 27 were not self-executing and therefore the fact that the city took action to issue industrial development bonds prior to the effective date of the implementing legislation was fatal to the validity of such bond issues. *Cf. State ex rel. City of Charleston v. Holman*, 355 S.W.2d 946 (Mo. En Banc 1962), which held an emergency clause in the implementing legislation to be invalid because no true emergency existed, in the constitutional sense; therefore the legislation did not become effective immediately upon signature by the governor, but only after ninety days. See Mo. CONST. art. III, § 29.



## V. STREETS AND SEWERS

*Kansas City Terminal Ry. Co. v. Kansas City Transit, Inc.*,<sup>62</sup> was a declaratory judgment action brought to determine the respective obligation of the parties to contribute to the maintenance of certain viaducts and subways in Kansas City. Ordinances enacted in 1909 and 1911 granted Terminal Railway a 200 year franchise and required it to construct and maintain viaducts or subways for streets which it crossed; however, it was provided that any streetcar line which used the viaducts or subways should be required to pay Terminal one-half the cost thereof, plus one-half of the subsequent maintenance "for the period of such use." In 1917, Kansas City Transit, which operated streetcar lines upon some of the viaducts and subways maintained by Terminal, entered into a written contract with Terminal in settlement of all rights and obligations with respect to certain viaducts and subways, whereby Terminal agreed to pay two-thirds and Transit one-third of the cost of future maintenance thereof. Thereafter, pursuant to a 1937 ordinance, Transit substituted motorbuses for its streetcars; and Transit contended that under the ordinances and the contract, having discontinued the streetcars, it no longer was obligated to pay for maintenance of the viaducts and subways. Terminal then sought a declaration of the rights of the parties. A judgment of the circuit court in favor of Terminal was affirmed by the supreme court, en banc, which held in an opinion by Judge Hyde that the term "streetcar line" in the ordinances should not be given a narrow, technical meaning, but might include other forms of public conveyance;<sup>63</sup> this was reinforced by the language of the 1917 contract, which did not mention tracks or streetcars, but placed an unconditional duty upon Transit to pay one-third of the maintenance cost. Thus, Transit's duty did not depend upon the continued operation of streetcars, but instead upon the continued use of the viaducts and subways as a common carrier engaged in the transportation of passengers.<sup>64</sup>

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62. 359 S.W.2d 698 (Mo. En Banc 1962).

63. The court also emphasized that the 1937 ordinance was expressly for the purpose of substituting motorbuses for streetcars; "it was understood and authorized that the buses were to be used for the same purpose as the streetcars." 359 S.W.2d at 706.

64. With respect to city streets, *Rentfro v. Wheelock Bros., Inc.*, 364 S.W.2d 55 (K.C. Mo. App. 1962), was an action by a property owner for damages to a Chinese elm tree growing on the parkway, or parking, in front of his house when its branches were struck and broken by defendant's truck. The court acknowledged that the property owner has certain rights in the trees growing in the parkway, and that an action for damages for their destruction could be maintained,

Two other reported cases dealt with the duties of a railroad with respect to the construction of sewers under its roadbed and with respect to the apportionment of the cost of underpasses in municipalities. *Chicago, B. & Q. R. Co. v. North Kansas City*,<sup>65</sup> held that the statutory requirement that a railroad construct sewers beneath its right of way in municipalities of less than 30,000 population, upon request of the municipal legislative body,<sup>66</sup> applied only to storm water sewers, and therefore where the municipal sewer was for storm and sanitary purposes, the railroad had no duty to engage in such construction. *State ex rel. City of Neosho v. Public Service Commission*<sup>67</sup> held, in reviewing a P.S.C. order apportioning twenty-five percent of the cost of an underpass to the railroad and seventy-five percent to the city, that there is no inflexible formula for apportioning such costs; and where the order is supported by competent and substantial evidence upon the whole record it will be upheld, even though the cost ratio is somewhat different from that which is normally set.

The control, regulation and supervision of municipal sewers and sewage disposal facilities is within the police function of the municipality; and it is axiomatic that a municipality cannot surrender, contract or bargain away its police power. Accordingly, it was held in *North Kansas City School District v. J. A. Peterson-Renner, Inc.*,<sup>68</sup> that it was reversible error to give an instruction in a condemnation action that in ascertaining the fair market value of the land the jury might consider the property owner's exclusive right, under an agreement with a municipality, to use the municipal sewage disposal plant.<sup>69</sup> Inasmuch as the municipality had no power to enter into such an agreement, the property owner had no exclusive or superior right to the use of the disposal plant, but only such rights as other citizens possessed to use the plant. Accordingly, the condemnation award could not be based upon any "right" to use the disposal plant, although the availability of sewers generally might be considered by the jury in its determination.

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but held that here plaintiff failed to establish any negligence on the part of defendant's truck driver.

65. 367 S.W.2d 561 (Mo. 1963).

66. §§ 389.670-.690, RSMo 1959.

67. 367 S.W.2d 589 (Mo. 1963).

68. 369 S.W.2d 159 (Mo. 1963).

69. The property owner, who was engaged in subdividing a large tract of land, had conveyed the sewage disposal plant to the City of Gladstone, and the city had agreed that until a specified number of sewer connections had been made by the property owner, no other connections would be permitted by the city.

## VI. TORT LIABILITY

It seems plain that the doctrine of sovereign immunity from tort liability, which extends to municipal functions of a governmental nature, is of judicial creation.<sup>70</sup> And it may be argued that what the courts create, also may they abrogate; a number of courts in other states have recently so held. The Missouri courts, however, have repeatedly taken the position that termination of governmental tort immunity is properly a matter for the legislature. This position was reaffirmed in *Fette v. City of St. Louis*,<sup>71</sup> a wrongful death action by the widow of a fireman killed while fighting a fire. The Missouri Supreme Court upheld a dismissal of the petition, stating that fire fighting is a governmental function, and therefore the immunity doctrine was applicable. The suggestion that the doctrine of immunity be abandoned, at least in the area of municipal employment, was rejected:

[W]hatever is done to change the doctrine of governmental immunity should be done by the legislature and not by the courts. . . . It will be necessary to use public funds to settle claims or pay judgments and only the legislature can properly provide for their collection by taxation, authorize expenditures for liability insurance, create methods of payments similar to workmen's compensation or establish the other safeguards. . . . Our governmental units are all now operating financially on the basis of our long established precedents and our conclusion is that we should not abolish this doctrine by judicial fiat.<sup>72</sup>

Missouri municipalities are, of course, liable for torts arising out of their proprietary functions. And while the courts have been reluctant to abolish the immunity doctrine altogether, they have shown a willingness to restrict immunity to those activities which are unquestionably governmental. Recent decisions have demonstrated that whenever there is any plausible argument for holding an activity to be proprietary, the courts have done so, and on this basis have denied immunity to municipalities. *Schweikert v. Kansas City*<sup>73</sup> is a case in point. This was an action for personal injuries and property damage caused when a city street cleaning

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70. See Comment, *Torts—Municipal Corporations—Municipal "Governmental" Tort Immunity Doctrine in Missouri*, 27 Mo. L. Rev. 224 (1962), for a discussion of the leading Missouri decisions.

71. 366 S.W.2d 446 (Mo. 1963).

72. *Id.* at 448.

73. 358 S.W.2d 425 (K.C. Mo. App. 1962).

truck with defective brakes struck the rear of plaintiff's automobile. Street cleaning is plainly a governmental function, and had the matter rested there, plaintiff could not have prevailed. However, the evidence showed that the street cleaning truck was serviced and repaired by the city maintenance garage, and that the collision could be attributed to faulty maintenance of the truck. It was held that, since the operation of a city maintenance garage is a proprietary and not a governmental function,<sup>74</sup> the defense of governmental immunity was unavailable to the city.<sup>75</sup>

Injuries resulting from defective conditions in municipal streets and sidewalks normally give rise to a number of appellate decisions each year. Most of these cases arise from a limited number of factual patterns, and are decided upon the basis of familiar principles of law. Thus in *Fields v. Kansas City*,<sup>76</sup> an action for personal injuries caused by a fall into an open manhole in an alley after dark, an order granting a new trial was affirmed because of an erroneous verdict-directing instruction that the city had a duty to maintain its alleys in a reasonably safe condition, and that it had a duty to keep the manhole covered. This instruction imposed too great a burden upon the city; properly it should have stated that the city had a duty to use ordinary care to maintain its alleys in a reasonably safe condition for travel, and it should not have stated that the city had a duty to keep the manhole covered, inasmuch as "there are other ways to keep a manhole reasonably safe for travel."<sup>77</sup> And in *Seitter v. City of St. Joseph*<sup>78</sup> the court held that whether the city was negligent in permitting a rut one and one-half inches deep and four and one-half inches wide to exist in a pedestrian crosswalk was a question for the jury under all the circumstances of the case, inasmuch as the courts will not "de-

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74. *Dallas v. City of St. Louis*, 338 S.W.2d 39, 44 (Mo. 1960): "[W]e are of the opinion that, when the city elected to own and operate a garage for the maintenance and repair of its motor vehicles, it entered the area of proprietary functions, and not governmental, and may be liable for the negligence of its employees in the operation of the garage." In that case a petition for wrongful death of a city mechanic while servicing a garbage truck was held to state a cause of action against the city.

75. See also *Myers v. City of Palmyra*, 355 S.W.2d 17 (Mo. 1962), where the court held that although street sweeping is a governmental activity, removing snow from the streets is proprietary, and therefore the immunity doctrine did not extend to a person struck by a city tractor engaged in removing snow.

76. 358 S.W.2d 96 (K.C. Mo. App. 1962).

77. *Id.* at 99. The question of proper instructions also arose in *Stratton v. Kansas City*, 362 S.W.2d 558 (Mo. 1962), an action for personal injuries resulting from a fall upon a snow-covered sidewalk.

78. 358 S.W.2d 263 (K.C. Mo. App. 1962).

termine liability or nonliability of the city, as a matter of law, solely by applying a linear measure to the depth of the street defect, without taking into account any other attendant factor or condition."<sup>79</sup> Further, citing the old maxim that "a pedestrian need not be a sidewalk inspector," the court held that whether plaintiff was contributorily negligent in stepping into the rut was also a jury question. A pedestrian was, however, held contributorily negligent as a matter of law in *Drury v. City of St. Louis*,<sup>80</sup> where on a rainy night he attempted to jump over the parkway, from the sidewalk to the street, but failed to look, and fell when he caught his foot on a low iron railing running along the sidewalk.

The construction of new streets and highways gives rise to many potentially serious municipal problems. One significant problem was manifested in *Treon v. City of Hamilton*,<sup>81</sup> where a state highway running through the city had been relocated, and a drainage ditch dug across the old route at the point where it would have joined the new highway. No lights, warning signs or barricades were placed on the old route to indicate the danger. Decedent, who was traveling through the city, drove along the old highway and was killed when his vehicle ran into the ditch which had been cut across it. The city argued that the State Highway Department had relocated the highway and dug the ditch, and that therefore no negligence on the city's part had been shown. The supreme court, however, held that the city's duty to use ordinary care to maintain its streets in a reasonably safe condition was non-delegable, and that here there was sufficient evidence to make a submissible case for plaintiff on the negligence of the city because of the failure to erect a barricade or warn travelers upon the old highway of the danger.<sup>82</sup>

*Flanigan v. City of Springfield*<sup>83</sup> was an action for damages for a temporary nuisance resulting from the operation of a city sewage disposal plant. Pursuant to a bond issue, the city constructed an activated sludge

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79. *Id.* at 265.

80. 367 S.W.2d 494 (Mo. 1963).

81. 363 S.W.2d 704 (Mo. 1963).

82. The supreme court affirmed an order of the circuit court granting a new trial after a defendant's verdict because one of the city's instructions submitted that defendant was contributorily negligent if he had failed to keep his automobile "under control under the circumstances then and there existing." This instruction was erroneous as being a submission of general negligence only; it should have hypothesized the antecedent negligent act or omission of decedent which caused the loss of control. *Cf. Miles v. Gaddy*, 357 S.W.2d 897 (Mo. En Banc 1962).

83. 360 S.W.2d 700 (Mo. 1962).

treatment plant on a forty-acre tract in a rural area; the operation of the plant created hydrogen sulphide and other gases which caused noxious odors, irritated mucous tissue of the eyes, noses and throats of nearby residents, and caused discoloration and deterioration of the paint upon their houses. From a judgment for the plaintiffs, the city appealed, contending that, because plaintiffs had not shown that it was scientifically and reasonably possible for the city to have abated the nuisance, the action should have been for damages for a permanent nuisance, and not a temporary one. The supreme court affirmed the judgment, pointing out that an action for temporary nuisance is proper where there is evidence that it was "scientifically possible and reasonably practicable" for the city to have operated its plant so as to have prevented the escape of noxious gases. Here, there was testimony that the consulting engineers employed by the city had stated there would be no odor from the operation of the plant, and further that during the period complained of the plant had been operated "by guess and by gosh because certain of the control features were not operating correctly."<sup>84</sup> Under this evidence there was a jury question as to whether the city could, scientifically and practically, have operated its plant free from the odors.<sup>85</sup>

## VII. ENFORCEMENT OF ORDINANCES

From the judicial point of view, prosecutions for municipal ordinance violations are something of an unhappy stepchild. Neither wholly criminal nor wholly civil in nature, they occupy that no-man's land labeled "quasi-criminal." True, the fines and imprisonments levied by municipal courts are, from the offender's point of view, indistinguishable from those imposed by magistrate and circuit courts in criminal cases;<sup>86</sup> but inasmuch as only

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84. *Id.* at 702, 704.

85. One other noteworthy municipal tort decision was handed down. *Taylor v. Kansas City*, 361 S.W.2d 797 (Mo. En Banc 1962), was an action for personal injuries by a child who was injured when he fell backwards into an unfenced wading pool in a city park while chasing a baseball; it was held that the city is not an insurer of the safety of children in parks, but owes only a duty to use ordinary care to maintain its parks in a reasonably safe condition. This case is discussed more fully in *McCleary, Torts in Missouri, infra*.

86. Considering the nature of some of the city jails and lockups in this state, it is not surprising that offenders have been heard to express a preference for being criminally prosecuted in magistrate court over the "civil" prosecution in the municipal court; the county jail is seen by them to be a more hospitable place. On the other hand, the condition of many county jails is deplorable; some accused persons have been known to express a preference for the state penitentiary over the county jail—even in light of the fact that the minimum penitentiary sentence in their case was at least a year longer than the maximum jail sentence.

the legislature can declare certain conduct to constitute a crime, proceedings for municipal ordinance violations fall to the civil side of the spectrum. Nevertheless, in certain respects the procedure in municipal courts is subject to the same safeguards as criminal procedure.

Missouri Supreme Court Rule 37.18, relating to municipal courts, provides that "The information or complaint shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."<sup>87</sup> It is further provided that in traffic cases the Uniform Traffic Ticket shall be used;<sup>88</sup> the uniform ticket contains a number of blanks to be filled in or boxes to be marked, which describe the offense.<sup>89</sup> In *City of Raytown v. Roach*,<sup>90</sup> defendant was convicted of violating an ordinance "Prohibiting Careless, Wreckless [*sic*] and Imprudent Driving." The traffic ticket was unmarked except for the inscription "C & I ACC." The Kansas City Court of Appeals reversed the conviction, holding that no legal meaning could be given to the symbols on the ticket; but that even if the court could speculate that the charge was "careless and imprudent driving—resulting in an accident," this statement was still only a conclusion of law, and did not comply with Rule 37.18 requiring a statement of facts. The court stressed that the sufficiency of municipal court informations should be tested by the standards of civil procedure.

A somewhat similar problem was presented, but not answered, in *City of St. Joseph v. Roller*,<sup>91</sup> where the information simply charged that the defendant violated "Section 12-12, Chapter 315, Municipal Code of the City of St. Joseph . . . by then and there in said City of St. Joseph, Missouri, Violation city code Barber Law 12-12-315, at 7110 King Hill, 7:04 A.M."<sup>92</sup> The municipal court dismissed the information and the city appealed to circuit court, which sustained defendant's motion to dismiss on the ground that the ordinance was unconstitutional, although the ordinance itself was not introduced in evidence. On appeal, the Missouri Supreme Court reversed, holding that it could not take judicial notice of the ordinance,

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87. Compare Mo. R. CRIM. P. 24.01: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

88. Mo. S. Ct. RULES 37.18, 37.46, 37.1162.

89. The form of the Uniform Traffic Ticket is set out in Mo. S. Ct. RULE 37.1162.

90. 360 S.W.2d 741 (K.C. Mo. App. 1962).

91. 363 S.W.2d 609 (Mo. 1963). Cf. *City of Rolla v. Riden*, 349 S.W.2d 255 (Spr. Mo. App. 1961).

92. *Id.* at 610.

and therefore, since the ordinance itself was not in the record, the record on appeal was inadequate. The circuit court had, however, acted erroneously in declaring the ordinance unconstitutional when the ordinance was not in evidence. On the other hand, the supreme court did not advert to the sufficiency of the information in this case, although on principle, in view of Rule 37.18, it would not appear that mentioning an ordinance by number constitutes a "statement of the essential facts."<sup>93</sup>

While the information in an ordinance violation prosecution is to be construed by civil standards, and the proceeding itself is quasi-criminal, in certain respects the procedure followed must conform to the criminal code and rules. Thus where an appeal is taken from the municipal court to circuit court and a trial de novo is held, it "shall be in the nature of a criminal appeal from a magistrate."<sup>94</sup> Employing criminal procedure standards, the Kansas City Court of Appeals in *Kansas City v. Martin*<sup>95</sup> reversed a conviction of soliciting for immoral purposes on the ground that the city's verdict-directing instruction erroneously described the date of the offense as "on or about the 29th day of May," while all of the evidence related to the night of the 29th of March. This typographical error left the court in substantial doubt as to whether the defendant had not been prejudiced thereby.

The proper qualification and use of the radar speedmeter was outlined in an instructive opinion by the St. Louis Court of Appeals in *City of St. Louis v. Boecker*,<sup>96</sup> where a St. Louis attorney appealed a municipal speeding conviction. The arresting officer testified that when defendant's car passed through the beam from the speedmeter, it indicated a speed of 40 miles per hour; further, he testified that on the day of the arrest he had tested the radar speedmeter through the use of a tuning fork, but did not indicate how long prior to the arrest such test had been made. The court of appeals reversed the conviction, holding that the city had failed to sustain its burden of proving that the radar speedmeter was working properly at the time defendant's vehicle passed through the beam. Pointing out that the normal procedure used by the Missouri State Highway Patrol is

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93. *Kansas City v. Wiskur*, 343 S.W.2d 89 (K.C. Mo. App. 1961). See also *City of St. Louis v. Polar Wave Ice & Fuel Co.*, 317 Mo. 907, 296 S.W. 993 (1927); *City of St. Louis v. Ameln*, 235 Mo. 669, 139 S.W. 429 (En Banc 1911).

94. § 98.020, RSMo 1959.

95. 369 S.W.2d 602 (K.C. Mo. App. 1963).

96. 370 S.W.2d 731 (St. L. Mo. App. 1963).



to test the radar speedmeter with a tuning fork both immediately prior to use and immediately thereafter, and to run a test car through the beam twice,<sup>97</sup> the court observed that it had been unable to find a case in which the use of the tuning fork alone to test the instrument had been sufficient. Moreover, in this case since the evidence did not show when the tuning fork had been used to test the speedmeter, or even that the fork itself was accurate, the burden was not met.

Does the *Boecker* case mean that the use of a second vehicle to run through the radar beam is necessary in order properly to qualify the evidence based upon the reading from the speedmeter dial? If so, the use of the single-car radar operation is no longer practicable. However, the opinion suggests that substantiating evidence may come from the arresting officer, as where he can testify from his observation that the offending vehicle was traveling at a speed in excess of the legal limit.<sup>98</sup>

*Browning v. City of Poplar Bluff*<sup>99</sup> was an action to enjoin the enforcement of a city ordinance requiring the screening of junk yards by a fence at least eight feet high; the petition alleged the ordinance to be "void, unconstitutional and discriminatory," that the city was threatening multiple prosecutions, and that unless the injunction issued plaintiffs would suffer irreparable damage. The circuit court upheld the ordinance and denied a permanent injunction; on appeal the Springfield Court of Appeals did not find it necessary to consider the validity of the ordinance, but simply held that plaintiffs had not made a sufficient showing to entitle them to injunctive relief in any case. To justify injunctive relief, said the court, it is not only necessary that the ordinance be void, but also the complainant must plead and prove either that multiple prosecutions are threatened, or that irreparable injury to his property rights will result. Here, plaintiffs' pleading was apparently sufficient, but they failed to prove anything except a single arrest for violation of the ordinance.

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97. Citing *State v. Graham*, 322 S.W.2d 188 (Spr. Mo. App. 1959). See also Comment, *Arrest in Missouri by the Use of Radar Speedmeters*, 24 Mo. L. REV. 196 (1959).

98. The court, however, suggests that such evidence might have been supplied by the arresting officer having looked at the speedometer of his own vehicle as he pursued the alleged offender. This would not have been evidence to substantiate the radar reading, but would have been evidence of speeding at another time and place, e.g., some seconds thereafter and some feet or blocks away from the scene of the alleged offense. Rather, the substantiating evidence should have been based upon an observation of defendant's vehicle contemporaneous with the speedmeter reading.

99. 370 S.W.2d 179 (Spr. Mo. App. 1963).

## VIII. ANNEXATION

Both the legislation and the appellate litigation in the past year relating to annexation by municipalities have been concerned with the somewhat singular conditions which exist in St. Louis County.<sup>100</sup>

Legislatively, the General Assembly in 1963 modified to a substantial degree the annexation law and procedure to be followed by municipalities in first class counties which have adopted a constitutional charter for their local government—a category which at present includes only St. Louis County. Prior to the new legislation, annexation by St. Louis County municipalities was similar to that throughout the remainder of the state. Cities annexed contiguous unincorporated areas by (1) a resolution or ordinance of the governing body to annex the particular area; (2) obtaining a declaratory judgment under the Sawyers Act<sup>101</sup> that the annexation was “reasonable and necessary to the proper development of the city,” and that the city could furnish normal municipal services to the annexed area within a reasonable time; and (3) a favorable vote by the electors of the city—but not of the incorporated area<sup>102</sup>—approving the annexation.<sup>103</sup> Towns and villages extended their boundaries by a petition by the town council or village board of trustees to the county court—in St. Louis County to the County Council—which might order the boundary extension if it was found to be “just and proper.”<sup>104</sup> The foregoing annexation procedures are still followed in the state of Missouri outside St. Louis County.

Under the new legislation, the declaratory judgment provisions of the Sawyers Act apply to towns and villages, and “municipalities of whatsoever kind,” as well as to cities, in first class constitutional charter counties.<sup>105</sup>

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100. The sole exception was *City of Hannibal v. Winchester*, 360 S.W.2d 371 (St. L. Mo. App. 1962), an appeal from an interlocutory order deleting certain lands and defendants in a Sawyers Act declaratory judgment proceeding. The court held that neither the order deleting the lands and parties nor an order denying a petition by third parties to be added as defendants was appealable, particularly in view of the “deplorably unsatisfactory” record on appeal, which failed to indicate who the original defendants were, or which of them had been dropped from the suit.

101. § 71.015, RSMo 1959.

102. Persons residing in, or owning property in, the unincorporated area proposed to be annexed had no voice in the political determination as to whether the annexation should take place. Their only safeguard was through the courts, which might strike down any unreasonable or unnecessary annexation. With the exception of St. Louis County, this condition still prevails throughout the state.

103. Constitutional charter cities are the only exception to this procedure. See, e.g., *McConnell v. Kansas City*, 282 S.W.2d 518 (Mo. 1955).

104. § 80.030, RSMo 1959.

105. § 71.860, RSMo 1963 Supp.

More importantly, the voters in the unincorporated area are given a voice in the question of annexation; no annexation is valid until approved by a majority of voters both in the municipality and in the area sought to be annexed.<sup>106</sup> In addition, it is provided that in the event of a unanimous vote favoring the annexation, both in the municipality and in the unincorporated area, further proceedings are unnecessary, but the legislative body of the municipality shall extend its limits by ordinance pursuant to the vote.<sup>107</sup> Although a unanimous vote appears to be an unlikely prospect, nevertheless it is plain that in such case the legislature intended that the Sawyers Act provisions need not be followed. However, it is extremely unlikely that the General Assembly could in any case divest the courts of jurisdiction to determine the propriety of an annexation through some form of judicial proceeding or review. If the owners of all of the property in the unincorporated area cast their ballots in favor of the annexation, the possibility of a subsequent judicial attack upon the annexation is not present. But the normal case will be one where some of the property in the area proposed to be annexed will be owned by persons who do not reside in the area, and who therefore have no voice in the election. In view of the consistent attitude of the courts that annexation should be subject to some form of judicial review, it seems certain that even in the event of a unanimous election a nonresident property owner might question the reasonableness and necessity of the annexation by quo warranto, declaratory judgment or otherwise.

Turning to the appellate decisions, two cases of considerable consequence to the future development of St. Louis County were decided. Due to the metropolitan nature of St. Louis County, which furnishes municipal services and performs municipal functions in its unincorporated areas, the question

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106. § 71.870, RSMo 1963 Supp.

A nice question of statutory interpretation arises from the wording of § 71.880, which indicates that notice of the intention to annex shall be certified to the board of election commissioners "before proceeding as otherwise provided by law," as compared with § 71.015, which provides that the declaratory judgment action shall be filed "before proceeding as otherwise authorized by law or charter for annexation of unincorporated areas." Which is to be done first? Can the election commissioners refuse to post notice of the election because no declaratory judgment action has been filed? Or can the court refuse to proceed with the declaratory judgment action because notice has not been certified to the election commissioners? To resolve the issue, it might be necessary to resort to the fact that § 71.880 was enacted after § 71.015, and therefore the legislative intent was that the language "before proceeding as otherwise provided by law," as included in § 71.880, embraced § 71.015.

107. § 71.910, RSMo 1963 Supp.

has been raised as to whether the same standards for annexation by municipalities should be applied in St. Louis County as in the remainder of the state, where such conditions do not exist. The issue was raised by the county in the 1960 decision of *City of Olivette v. Graeler*,<sup>108</sup> but the supreme court in that case held that the Sawyers Act language "unincorporated area" meant just that—any area outside an incorporated municipality. The fact that the area was in St. Louis County and received the benefit of the county's services was not to be considered as controlling, although the existence of such services "should be considered and weighed along with the other evidence in the case in determining the reasonableness of the annexation."<sup>109</sup> A general statement of judicial policy was made:

The interest of the county as a community must be weighed against the claims of the city because the county's municipal powers are also provided by law and are a part of the public policy of the state. Attention should be given to the needs of the area for municipal services, whether they are adequately cared for and whether they should be supplanted by those of the city.<sup>110</sup>

In 1963, *City of Olivette v. Graeler*<sup>111</sup> again came before the Missouri Supreme Court, and a circuit court judgment declaring the annexation to be proper was reversed with directions to dismiss the petition. The court reviewed in detail the services performed by St. Louis County within the unincorporated area, observed that the county furnished "all normal municipal services" to the area, and held that "the annexation would simply impose city taxes upon the residents and property owners of the area, without the equivalent in added benefits."<sup>112</sup> Moreover, the facts showed that the area sought to be annexed was largely industrial in nature, that the area was not available for residential purposes, and that the development of the area was not attributable to the growth of Olivette, but to St. Louis County in general. The interests of St. Louis County as a community were weighed against the interests of Olivette, and the former were found to prevail: "So long as the County has an effective county organization, it should not be whittled away to a mere shell by annexations which have as their prime purpose the acquisition of more city taxes."<sup>113</sup>

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108. 338 S.W.2d 827 (Mo. 1960).

109. *Id.* at 836.

110. *Id.* at 838.

111. 369 S.W.2d 85 (Mo. 1963).

112. *Id.* at 94.

113. *Id.* at 95.

Although it is doubtful that the second *Graeler* decision will entirely inhibit future annexations by St. Louis County municipalities, it is nonetheless clear that for all practical purposes such municipalities now have a very heavy burden to meet in establishing not merely that the particular annexation is reasonable and necessary with respect to the municipality and the area to be annexed, but also that it is consonant with the interests of St. Louis County as a whole.

Another facet of annexation in St. Louis County was disclosed in *McDonnell Aircraft Corporation v. City of Berkeley*,<sup>114</sup> in which the city, operating under its constitutional charter, had annexed Lambert-St. Louis Municipal Airport and the McDonnell plant. McDonnell and the City of St. Louis filed a declaratory judgment action attacking the annexation as unreasonable and void,<sup>115</sup> and the circuit court held for petitioners and enjoined the city from exercising jurisdiction over the area in question. The Missouri Supreme Court reviewed the 7,635 pages of transcript which described the area sought to be annexed and the need for municipal services therein, and affirmed the judgment of the circuit court on the ground that there was not a sufficient showing of reasonableness to uphold the annexation. The area was already heavily developed, and could not serve as a location for future growth of Berkeley: "We cannot find that the airport area really needs municipal services from Berkeley, or that Berkeley's control would solve the problems discussed; and it obviously is not an area which Berkeley can use for commercial, industrial or residential growth."<sup>116</sup> In short, both the *Graeler* and the *McDonnell* cases indicate that municipal annexation in a metropolitan area will be judged largely from the point of view of the indigenous growth of the annexing municipality itself, rather than from the point of view of the degree of development or highest uses of contiguous unincorporated areas.<sup>117</sup>

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114. 367 S.W.2d 498 (Mo. 1963).

115. Because the city operated under a constitutional charter it did not file a declaratory judgment action under the Sawyers Act before the annexation. Nevertheless, it was held that such action was reviewable by the courts in an action brought by interested persons, and that the standards laid down in the Sawyers Act were applicable thereto.

116. *Id.* at 511.

117. With regard to annexation in St. Louis County, see also *Emerson Electric Mfg. Co. v. City of Ferguson*, 359 S.W.2d 225 (Mo. 1962), holding that an allegation by appellant city that the annexation denied by the trial court will result in a prospective tax loss to the city of more than \$15,000, does not give the supreme court jurisdiction over the appeal.

## IX. PLANNING AND ZONING

The 1963 General Assembly adopted a comprehensive planning statute which empowers all municipalities to create a city plan for the development of land use within the community, including the planning of municipal streets and public utilities.<sup>118</sup> Municipalities are specifically authorized to adopt regulations governing the subdivision of land,<sup>119</sup> and to establish building setback lines.<sup>120</sup> Moreover, after a major street plan has been adopted by a municipality, the municipality itself may not improve any subsequently dedicated street which does not conform to the plan,<sup>121</sup> and no buildings may be constructed on any lot which does not have access to an existing dedicated street, or to a street which is in conformity with the plan.<sup>122</sup> This legislation appears to have been designed to cover some areas of city planning in which the powers of municipalities under earlier statutes were either questionable or nonexistent.

A number of appellate decisions between April 1962 and September 1963 related to zoning problems, both of municipalities and counties. Several of the cases involved no novel point of zoning law, but simply presented for appellate review the question of whether the action of the city council or zoning board had been arbitrary and unreasonable; two of these decisions affirmed the action of the municipal governing body because it was not shown that the city council had acted wholly without cause,<sup>123</sup> and one upheld the action of the board of zoning adjustment where there was substantial evidence upon the whole record to support the board's

118. §§ 89.300-490, RSMo 1963 Supp.

119. § 89.410, RSMo 1963 Supp. The section deals with the planning and construction of streets and public utilities within subdivisions, and with the "dedication, reservation or acquisition of lands and open spaces necessary for public uses indicated on the city plan."

120. § 89.480, RSMo 1963 Supp. The section relates only to "major streets"—which the statute does not define—and provides that after proposed major streets have been located upon the city plan, the municipal governing body may prohibit the construction of new buildings within such street rights-of-way.

121. § 89.460, RSMo 1963 Supp.

122. § 89.470, RSMo 1963 Supp.

123. *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963) (refusal of city council to rezone ten acres from residential to commercial use was upheld because the question was "fairly debatable" and therefore court would not interfere with council's discretion); *Miller v. Kansas City*, 358 S.W.2d 100 (K.C. Mo. App. 1962) (city council's action in rezoning area from residential to commercial was upheld because it could not "be said that the city council clearly acted arbitrarily, capriciously or unlawfully, or that it did so beyond reasonable doubt").

action.<sup>124</sup> In *Numer v. Kansas City*,<sup>125</sup> on the other hand, the circuit court granted a judgment declaring void an ordinance rezoning a tract from residential to commercial use, to enable construction of a gasoline station. The Kansas City Court of Appeals affirmed the circuit court judgment, holding that there had not been a sufficient change in the neighborhood to permit such rezoning and that the rezoning was "spot zoning," wholly unrelated to any comprehensive plan.<sup>126</sup> Therefore, the rezoning was not a proper exercise of the city's police powers, as it had no relationship to the health, safety or morals "of anyone."

A novel question was raised in *City of Moline Acres v. Heidbreder*,<sup>127</sup> where in 1950 the entire area within the city was originally zoned "District A," single family residential. Thereafter a few scattered lots and tracts were rezoned for commercial purposes. The city brought action to enjoin defendants' use of a fifteen-room dwelling as a two-family residential unit, and the circuit court granted a permanent injunction. Defendants appealed to the Missouri Supreme Court, contending that the restriction of the entire municipality to a single-use district "was so arbitrary and unreasonable as to be violative of the due process clauses of the Federal and State Constitutions,"<sup>128</sup> and that the zoning ordinance had not been adopted pursuant to a "comprehensive plan." The supreme court, in an opinion by Judge Eager, reversed the circuit court judgment, declaring that the ordinance had not been enacted pursuant to the powers granted the city in chapter 89, RSMo. In reaching this conclusion, the court placed considerable emphasis upon section 89.030, providing that "the local legislative body may divide the municipality into districts." The use of the plural "districts," combined with the general concept of zoning as a division into zones, was held to amount to a legislative directive that the legislature did not intend a single-zone municipality:

We are of the view . . . that, considering these statutes as a whole, in context, and considering their aggregate purpose and intent, it

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124. *Donelson v. Board of Zoning Adjustment*, 368 S.W.2d 728 (K.C. Mo. App. 1963). This case raised the further interesting question of whether the board could appeal from a circuit court judgment which upheld the board's action, but gave different reasons for its decision than those relied upon by the board; the court held that the board could not appeal, since the judgment granted it full relief.

125. 365 S.W.2d 753 (K.C. Mo. App. 1963).

126. § 89.040, RSMo 1959: "Such regulations shall be made in accordance with a comprehensive plan. . . ."

127. 367 S.W.2d 568 (Mo. 1963).

128. *Id.* at 571.

was never intended thereby to give to a municipality the power to adopt a *one use district* zoning ordinance encompassing the whole town.<sup>129</sup>

Accordingly, the city had lacked authority to adopt such a zoning ordinance, and it followed that the attempted restriction of the use of defendants' property was void.<sup>130</sup> The decision may result in large part upon the particular wording of the Missouri zoning statute; and it may be inquired whether under this statute the city could not validly have originally adopted *two* single-family residential zones, A-1 and A-2, which differed slightly with regard to lot area, height restrictions, or front, side or rear yard requirements.

*Beckmeyer v. Beug*<sup>131</sup> involved an appeal by nearby property owners from a judgment affirming the decision of the St. Louis zoning board of adjustment to grant a permit to use certain premises in a residential zone for hotel purposes. The building had been constructed as a hotel in 1911, and was used for that purpose until 1920, when it was purchased by Principia College and used as a student dormitory until 1960. The evidence showed that the building could not be reasonably used other than as a dormitory or hotel. The St. Louis Court of Appeals affirmed the granting of the permit, holding that the decision of the board of adjustment was supported by substantial evidence, on the ground that to deny the permit would work an unnecessary hardship to the property owner; in addition, there is language in the opinion supporting the finding of the board that dormitory use, which antedated the zoning ordinance, was essentially hotel use, and therefore a non-conforming use existed.

Earlier Missouri Supreme Court decisions have established that municipalities do not have power, through zoning ordinances, to exclude public schools<sup>132</sup> or churches.<sup>133</sup> In *Urnstein v. Village of Town and Country*,<sup>134</sup> the power of a municipality to exclude private schools was raised, but

129. *Id.* at 573.

130. The court also indicated that the record did not show that the zoning ordinance had been based upon a comprehensive plan, which would have been a fatal flaw in the ordinance. However, in view of the possibly incomplete state of the record, the decision was not rested upon this ground.

131. 367 S.W.2d 9 (St. L. Mo. App. 1963).

132. *State ex rel. St. Louis Union Trust Co. v. Ferris*, 304 S.W.2d 896 (Mo. En Banc 1957). See Comment, *Missouri Municipality's Power to Zone Public and Quasi-Public Uses*, 26 Mo. L. REV. 45 (1961).

133. *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451 (Mo. 1959).

134. 368 S.W.2d 390 (Mo. 1963).



only imperfectly. The circuit court had held the ordinance void and unconstitutional as applied to plaintiff's private school. The supreme court held that in view of the inadequate record on appeal, which failed to set forth sufficient evidence to show the nature of the school involved, it could not say that there was a sufficient relationship between the general welfare and the prohibition of plaintiffs' school to justify the use of the police power in this case. The *Urinstein* case clearly must be limited to its very facts, and cannot be said to constitute a holding that private schools are immune from the zoning power of municipalities. Instead, the case points up the vital necessity of presenting an adequate record on appeal, particularly for the appellant.

A conflict between the zoning power of a constitutional charter county and the power of a municipality to construct and operate an extraterritorial sewage treatment plant was presented to the Missouri Supreme Court in *St. Louis County v. City of Manchester*.<sup>135</sup> The city, under statutory authority, had purchased a four-acre tract about a mile outside its city limits in an area which the county had zoned "B" single-family, and entered into a contract to construct a sewage treatment plant upon the tract. The county brought action to enjoin the construction, but the circuit court dismissed the petition. On appeal to the supreme court, the county emphasized that its zoning power was derived from the constitution,<sup>136</sup> and therefore was superior to the statutory power possessed by the city to construct the sewage plant.<sup>137</sup> The court, in an opinion by Judge Storckman, found it unnecessary to determine "whether the county or the city 'occupies a superior position in the governmental hierarchy.'"<sup>138</sup> Instead, the court considered the city's power in the light of the county's power to zone, and concluded that the constitutional provisions and the statutes might be harmonized by holding that the county zoning ordinances were a lawful restriction upon the city's power to locate its sewage plant in the unincorporated area of the county.<sup>139</sup>

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135. 360 S.W.2d 638 (Mo. En Banc 1962).

136. Mo. CONST. art. VI, § 18(c).

137. §§ 71.680, 79.380, RSMo 1959.

138. 360 S.W.2d at 642.

139. This conclusion was aided by § 64.650, RSMo 1959, pertaining to county zoning, which provides: "If a development or public improvement is proposed to be located in the unincorporated territory of the county by any municipality, county, public board or commission, the disapproval or recommendations of the county planning commission may be overruled by the county court, which shall certify its reason therefor to the planning commission."

Finally, the applicability of the general county zoning statute to St. Louis County was raised in *Casper v. Hetlage*,<sup>140</sup> where it was held that section 64.140, RSMo 1959, which requires a unanimous vote of the county court in class one counties to amend the county zoning ordinance, has no applicability to St. Louis County, which operates under a constitutional charter.

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140. 359 S.W.2d 781 (Mo. 1962). See also State *ex rel.* City of Creve Coeur v. St. Louis County, 369 S.W.2d 184 (Mo. 1963), which involved the same question.