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## Dillon Rule--a Limit on Local Government Powers, The

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## THE DILLON RULE — A LIMIT ON LOCAL GOVERNMENT POWERS

### I. INTRODUCTION

At its 41st Annual Conference, the Missouri Municipal League adopted a statement of "Missouri Municipal Policy," which asserted ". . . a need to clarify the legal powers of general purpose local governments."<sup>1</sup> The statement went on to say that ". . . the vast majority of Missouri municipalities cannot respond [to new problems] until such time as the General Assembly provides specific authority for them to act."<sup>2</sup>

These statements reflect a long-standing problem of municipal governments, especially the non-home rule localities:<sup>3</sup> the lack of complete and/or clear authority to take action to meet pressing local concerns. The problem is at least twofold. First, it has long been recognized in most states that municipal corporations are creatures of the state, exist only at the discretion of the state, have only those powers given by the state, and have no inherent powers to act absent specific statutory authorization.<sup>4</sup> In order for a municipality to act, it must find existing statutory authority or request new powers from the state. New statutory authority is needed to cope with social, economic, and physical problems that may have been unforeseen when the existing statutes were passed.<sup>5</sup> Unfortunately, purely local problems are not of pressing concern to the legislature, and the municipality is often left without authority to solve such problems.<sup>6</sup>

1. MISSOURI MUNICIPAL LEAGUE, MISSOURI MUNICIPAL POLICY 1975-1976 15 (1975).

2. *Id.*

3. Even home rule cities have had considerable problems exercising municipal powers. See Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 Mo. L. REV. 45 (1968). An amendment to the constitution was passed in 1971 in an attempt to overcome the problems set out in the Westbrook article. See Mo. CONST. art. VI, § 19(a) (1971).

4. See 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 5.00-5.01 (1975); C. RHYNE, MUNICIPAL LAW §§ 4-7 (1958); 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 10.09 (3rd rev. ed. 1966); *City of Clinton v. Cedar Rapids and Missouri River R.R.*, 24 Iowa 455 (1868); *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S.W. 197 (1888).

5. See, e.g., Salsich, *Local Government in Missouri: The Crossroads Reached*, 32 Mo. L. REV. 73, 73-78, 92-98 (1967); T. DYE, POLITICS IN STATES AND COMMUNITIES, 211-13 (1969). The Missouri Municipal League listed at least 15 areas where additional statutory authority was needed: responsibility to set responsible noise levels, to permit cities to terminate utility service for non-payment of solid waste collection charges, to allow delinquent solid waste charges as a lien against property, to receive recreation enabling legislation, to be given adequate powers to fulfill public safety responsibilities, riot powers, bond refunding, broad powers to license businesses and occupations, utility franchises, license sale of wine in food establishments, exercise extraterritorial powers of planning, zoning and building enforcement, power to adopt codes by reference, code enforcement powers, broader land development control powers, and community development powers. MISSOURI MUNICIPAL POLICY 1975-1976, *supra* note 1, at 4-29.

6. T. DYE, *supra* note 5, at 212; Westbrook, *supra* note 3, at 73-74; Sanda-

The second aspect of the problem, and the primary concern of this comment, is that even where there is a statutory grant of power to a municipal corporation, it will be strictly construed and any doubts as to the existence of the power will be resolved against the municipality.<sup>7</sup> For well over 100 years municipalities have been saddled with a rule of statutory construction known as the "Dillon Rule," which was first enunciated by Judge John Dillon of Iowa in *Merriam v. Moody's Executors*:<sup>8</sup>

[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the powers.<sup>9</sup>

The above Rule, with minor variations, has been adopted in almost every state, including Missouri.<sup>10</sup> Judge Dillion's modification of the Rule in treatises written subsequent to *Merriam* somewhat alleviated the original Rule's harshness. The word "fairly" was added to the second proviso, the word "absolutely" was deleted from the third proviso, and the words "reasonable" and "substantial" were added to the fourth proviso:

. . . second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to. . . Any fair, reasonable, doubt. . .<sup>11</sup>

The modified version of the Rule was adopted in Missouri. While the changes appear to soften the statement in *Merriam*, the practical impact of the Rule in Missouri is to limit severely the powers a municipal corporation can exercise.<sup>12</sup>

Either by name or in substance, the Dillon Rule has been soundly decried as a barrier to municipal vitality and timely, effective local action.<sup>13</sup> It has been cited as an impetus to the late nineteenth and

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low, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 655-56 (1964).

7. *Merriam v. Moody's Executors*, 25 Iowa 163 (1868).

8. *Id.*

9. *Id.* at 170.

10. The first Missouri case applying the rule appears to be *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S.W. 197 (1888), involving a home rule city. The first case applying the rule to general purpose statutory cities appears to be *City of Nevada ex rel. Gilfillan v. Eddy*, 123 Mo. 546, 557-58, 27 S.W. 471, 474 (1894).

11. 1 J. DILLON, MUNICIPAL CORPORATIONS § 89 (3d ed. 1881). This is the version adopted by Missouri, not the stricter version of the rule in *Merriam v. Moody's Executors*.

12. It has been argued that courts accepting the Dillon Rule as set forth in his treatise, especially in its later editions, have ignored Dillon's own modifications of the rule that might dramatically change the courts' approach to interpretation of the rule. S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 91 (1970). See also Sandalow, *supra* note 6, at 713 n.273.

13. See, e.g., Westbrook, *supra* note 3, at 69-70; T. DYE, *supra* note 5, at 212; Sandalow, *supra* note 6, at 653, 654.

twentieth century demands for home rule powers,<sup>14</sup> as a cause for local government "pussyfooting,"<sup>15</sup> and as a warning to city attorneys to be negative in their advice to cities seeking expanded powers.<sup>16</sup> The Rule has also been criticized as preserving the status quo at a time when quick response to change is needed on the local level.<sup>17</sup> While there are strong traditional reasons why local government power should be strictly construed, many contemporary observers believe that the Dillon Rule is an archaic and unrealistic limit on city powers.<sup>18</sup>

The purpose of this comment is to examine the form the Dillon Rule has taken in Missouri, the entities which it applies, and the Missouri cases that relate to each of the Rule's four provisos, in an effort to discover principles that will lead to a more practical understanding of the Rule.

## II. HISTORY AND DEVELOPMENT OF THE DILLON RULE IN MISSOURI

Only one year after Judge Dillon's famous decision, and without reference to it, the Missouri Supreme Court propounded a similar rule in *Ruggles v. Collier*:<sup>19</sup>

Corporations [municipal] differ from individuals. They have no powers except such as are expressly granted in the charters, and such as are auxiliary or necessary to the proper exercise of the powers conferred; and all statutes or charters creating corporations are to be strictly construed. . . . They can exercise such powers and such only as contained therein.<sup>20</sup>

It appears that *Ruggles* expressed the then current view of the powers of *private* corporations and applied it to public municipal corporations. Ironically, in the years since *Ruggles*, there seems to have been a judicial acceptance of expanded private corporate powers, but not of expanded municipal corporate powers. In *Mutual Bank & Trust Co. v. Shaffner*<sup>21</sup> the Missouri Supreme Court recently stated that "the settled rule is that a corporation possesses only such powers as are expressed or fairly implied in the statute by or under which it is created." However, for the purposes of private corporations, implied powers are not limited to those which are indispensably necessary to carry into effect others expressly granted, but:

comprise all that are *appropriate, convenient, and suitable* for that purpose, including as an incidental right a reasonable choice of the means to be employed in putting into practical effect this class of powers.<sup>22</sup>

14. Sandalow, *supra* note 6, at 650. NATIONAL GOVERNORS' CONFERENCE, STATES' RESPONSIBILITIES TO LOCAL GOVERNMENTS: AN ACTION AGENDA 39 (1975).

15. Sandalow, *supra* note 6, at 656.

16. Westbrook, *supra* note 3, at 72.

17. T. DYE, *supra* note 5, at 213.

18. See Sandalow, *supra* note 6, at 652; Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596, 1604-05 (1965).

19. 43 Mo. 353 (1869).

20. *Id.* at 375.

21. 248 S.W.2d 585 (Mo. 1952).

22. *Id.* at 589 (emphasis added). See also § 351.385(14), RSMo 1969, which

The overall tone of the opinion is an indication that private corporate charter powers are not as strictly construed as municipal powers.

*Ruggles*, which concerned the attempted delegation of a taxing power to the mayor of St. Louis, was cited as controlling in several subsequent cases,<sup>23</sup> and it appears that Dillon's version of the Rule did not enter Missouri case law until 1888. In that year the Rule, as modified in Dillon's treatise, was cited with approval in *St. Louis v. Bell Telephone Co.*<sup>24</sup> Although *Bell* involved interpretation of the charter of St. Louis, the Rule has subsequently been applied to statutes governing non-home rule cities<sup>25</sup> and other local government entities.<sup>26</sup>

Missouri courts have added "corollaries" to the Rule which impose even stricter limits on municipal action. The first of these is the "strict construction" corollary first alluded to in *Ruggles*.<sup>27</sup> In *State v. West Missouri Power Co.*<sup>28</sup> the court said:

[It is a] well established rule that legislative grants of power to municipal corporations must be *strictly construed*, and cannot operate as a surrender of legislative power, except so far as expressly delegated or is *indispensibly* necessary to the exercise of some other power which has been expressly delegated.<sup>29</sup>

The case involved granting a perpetual franchise to an electric utility to use the city streets for electric lighting purposes. The grant of the franchise was authorized by statute, but the statute did not state whether the franchise could be perpetual or only for a limited number of years. The state claimed that a perpetual grant was not *indispensibly* necessary to effect the general purpose of the statute. Acknowledging that the state was correct as to prior case law, the court nonetheless said that these decisions had been a strained rather than a strict construction of the statutory authorization. The strained construction was no longer necessitated by the public policy "to prevent the evils of monopoly."<sup>30</sup> The court said that it had not previously allowed perpetual franchises because they

says that a private corporation can "[h]ave and exercise all powers necessary or *convenient* to effect any or all of the purposes for which the corporation is formed. . . ." (emphasis added).

23. See, e.g., *State ex rel. City of Blue Springs v. McWilliams*, 335 Mo. 816, 820, 74 S.W.2d 363, 365 (En Banc 1934); *City of Nevada ex rel. Gilfillan v. Eddy*, 123 Mo. 546, 558, 27 S.W. 471, 474 (1894); *Stewart v. City of Clinton*, 79 Mo. 603, 610 (1883); *National Water Works Co. v. City of Kansas*, 20 Mo. App. 237, 242 (K.C. Ct. App. 1886); *Knox City v. Thompson*, 19 Mo. App. 523, 525 (St. L. Ct. App. 1885).

24. 96 Mo. 623, 628, 10 S.W. 197, 198 (1888), quoting 1 J. DILLON, MUNICIPAL CORPORATIONS 89 (3d rev. ed. 1881).

25. See, e.g., *State ex rel. City of Blue Springs v. McWilliams*, 335 Mo. 816, 821, 74 S.W.2d 363, 364 (En Banc 1934).

26. See notes 48-53 and accompanying text *infra*.

27. 43 Mo. 353, 375 (1869).

28. 313 Mo. 282, 281 S.W. 709 (1926).

29. *Id.* at 298, 281 S.W. at 713 (emphasis added). This statement is not, however, a correct analysis of the past cases or of the Dillon Rule. Indispensibility is *not* the test.

30. *Id.* But cf. *City of St. Louis v. Fisher*, 167 Mo. 654, 662, 67 S.W. 872, 874 (En Banc 1902).

were unregulated monopolies, but since state agencies had been given the power to regulate the utilities, "strict construction" of the statutes was no longer necessary. The case suggests that where court decisions limiting municipal power are grounded more on policy considerations than on statutory interpretation, and those policy considerations are modified or removed, the municipality has a better argument for abolishing the limit on its power.

*West Missouri* was quoted with approval in *State ex rel. Trenton v. Missouri Public Service Commission*.<sup>31</sup> In that case the court held that a franchise granted pursuant to a charter power "to provide for the lighting, cleaning and repairing of [streets, alleys, etc.]," coupled with a "general welfare" power to "pass all such ordinances as may be expedient in maintaining the peace, good government, health and welfare of the town," was sufficient to allow a perpetual franchise grant.<sup>32</sup> On the basis that in 1875 the legislature could not have considered the possibility of using electric lighting, the court expressly refused to follow a prior case that strictly construed a similar charter provision.<sup>33</sup>

Finally, in *Cablevision, Inc. v. Sedalia*<sup>34</sup> the court noted that even though the statute<sup>35</sup> expressly referred to the city's right to control telegraph, telephone, and electric light poles on its streets, it did not expressly cover cable television. Relying on *Trenton*, the court held that the grant of the franchise (which also included regulation of cable television rates) fell within the broad power to control streets.<sup>36</sup>

In the public utility area, at least as it relates to the power to control use of streets, the courts appear to have moved away from dogmatic adherence to the strict construction rule.<sup>37</sup> While it does deal only with a narrow area of the law, *Cablevision* appears to be good precedent for a broad rather than a strict construction of a power. Although there are few cases in other areas of municipal concern which would indicate a trend away from strict construction, the reasoning of *West Missouri* should apply equally well to other areas.<sup>38</sup> In fact, an argument can be

31. 351 Mo. 961, 174 S.W.2d 871 (En Banc 1943).

32. 351 Mo. 961, 974 n.2, 174 S.W.2d 871, 877-78 n.2, (En Banc 1943).

33. *Id.* at 975-76, 174 S.W.2d at 878-79.

34. 518 S.W.2d 48 (Mo. 1974).

35. § 77.520, RSMo 1969.

36. 518 S.W.2d at 52. Professor Sandalow points out that courts traditionally have given greater leeway to municipalities in the control of streets or in implying powers from the power to control streets, due in part to state constitutional restrictions. Sandalow, *supra* note 6, at 648. See *Bowman v. Kansas City*, 361 Mo. 14, 233 S.W.2d 26 (En Banc 1950); *Wilhoit v. City of Springfield*, 237 Mo. App. 775, 171 S.W.2d 95 (Spr. Ct. App. 1943). Of course, an exercise of the power to control streets may not conflict with a state statute. *City of St. Louis v. Stenson*, 333 S.W.2d 529 (St. L. Mo. App. 1960).

37. The *Cablevision* court noted, however, that cities had the power to regulate public utility charges prior to the laws creating the Public Service Commission. 518 S.W.2d at 54.

38. In *Kirkwood Drug Co. v. City of Kirkwood*, 387 S.W.2d 550 (Mo. 1965), the court broadly construed a power to tax as including inspection of a tax-

1976]

made that application of a strict construction rule coupled with the second Dillon Rule proviso ("necessarily or fairly implied in or incident to") is contradictory. If something is to be "fairly implied" it seems difficult to determine how it can also be "strictly construed."

The second corollary, which is quite similar to the first, is that ". . . where the legislature has authorized a municipal corporation to exercise a power, and prescribed the manner in which it should be exercised, any other manner of exercising the power is denied to it."<sup>39</sup> This corollary also had its genesis in *Ruggles*<sup>40</sup> and seems to have continuing vitality today.<sup>41</sup> It is a logical extension of Judge Dillon's statement that "municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature."<sup>42</sup>

The reasoning behind the second corollary is that because the statute is the charter which authorizes a city to act, the city can exercise only such powers as are set out therein, and if a specific method is set out, that method must be followed. The mode set out in the statute "expresses the measure of power."<sup>43</sup>

This corollary was modified and explained in *Bull v. McQuie*<sup>44</sup> where the court said the corollary applies "only when some *essential* step or action required by statute has not been taken."<sup>45</sup> In *McQuie* a special sewer district was given the power to hold an election to incur indebtedness in an amount not greater than a cost estimate provided by an engineer. The election was held, but due to the non-receipt of certain expected federal funds, a second election was necessitated. The issue was whether there was authority to hold the second election. Contending that "legislative intent is the polestar of statutory interpretation," the court said all *essential* steps had been taken and the second election fell within the "power essential and indispensable to the declared object and purpose of the corporation."<sup>46</sup> An earlier case with apparently contrary results, *State ex rel. Williams v. Blue Springs*,<sup>47</sup> was distinguished. The reason given was that the action Blue Springs sought to take was *ultra vires*, because there was no initial compliance with the essential step requiring

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payer's records to aid in collection of the tax, such inspections being reasonable and in accord with state policy. *Id.* at 554.

39. *State ex rel. Crites v. West*, 509 S.W.2d 482, 484 (Mo. App., D. Spr. 1974). *But cf.* *Bull v. McQuie*, 342 Mo. 851, 119 S.W.2d 204 (En Banc 1938).

40. 43 Mo. 353, 375-77 (1869).

41. *See also* *Pearson v. City of Washington*, 439 S.W.2d 756, 760 (Mo. 1969); *State ex rel. City of Blue Springs v. McWilliams*, 335 Mo. 816, 74 S.W.2d 363 (En Banc 1934).

42. *City of Clinton v. Cedar Rapids and Missouri R.R.*, 24 Iowa 455, 475 (1868).

43. *Ruggles v. Collier*, 43 Mo. 353, 377 (1869); *accord* *State ex rel. City of Blue Springs v. McWilliams*, 335 Mo. 816, 820, 74 S.W.2d 363, 365 (En Banc 1934).

44. 342 Mo. 851, 119 S.W.2d 204 (En Banc 1938).

45. *Id.* at 859, 119 S.W.2d at 207.

46. *Id.* at 858-59, 119 S.W.2d at 207.

47. 335 Mo. 816, 74 S.W.2d 363 (En Banc 1934).

the city to hold an election. Although, *McQuie* is still good law, it is unusual in its facts and it is difficult to imagine many situations where the corollary as modified can be invoked to justify the exercise of a municipal power.

### III. APPLICATION OF THE DILLON RULE IN MISSOURI

#### A. *In General*

Missouri courts have applied the Dillon Rule to all municipal corporations governed under the general statutory law,<sup>48</sup> home rule cities,<sup>49</sup> special charter cities,<sup>50</sup> the University of Missouri,<sup>51</sup> and quasi-municipal corporations such as fire protection and sewage districts.<sup>52</sup> There is some language in the cases that the Rule should be construed more strictly against special purpose districts than against traditional municipal corporations like cities.<sup>53</sup> However, the Rule has been applied uniformly and the results in the cases do not seem to depend on the type of governmental unit under scrutiny.

To determine how the Rule has been interpreted and applied it is necessary to examine each of the four provisos in the Rule in terms of its development and application.

#### B. *Express Powers*

Municipalities are given a wide variety of express powers that are located in a scattered fashion throughout the Missouri Revised Statutes.<sup>54</sup> This complicates the city attorney's initial task of determining whether there is an express power to perform the act contemplated by the city. Assuming that an express power can be found, the question then becomes whether the power is in fact what it appears to be. The city attorney must decide if the ordinance contemplated by the city falls within the "express" power. The process is not simply one of comparing the words of the ordinance to the words of the statute. The construction of the statute involves the application of both general statutory interpretation methods and the Dillon Rule.

For example, suppose a statute (or charter) gives the city power to regulate "merchants." Does this mean the city can enact an ordinance regulating "produce dealers" by classifying them as "merchants?" In *Kan-*

48. See note 10 *supra*.

49. *Id.*

50. See, e.g., *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 313, 24 S.W. 784, 787 (1893).

51. *State ex rel. Curators of Univ. of Missouri v. McReynolds*, 354 Mo. 1199, 1203, 193 S.W.2d 611, 612 (En Banc 1946).

52. See, e.g., *Bull v. McQuie*, 342 Mo. 851, 119 S.W.2d 204 (En Banc 1938) (sewage district); *State ex rel. Crites v. West*, 509 S.W.2d 482 (Mo. App., D. Spr. 1974) (fire district).

53. See, e.g., *Bull v. McQuie*, 342 Mo. 851, 857, 119 S.W.2d 204, 206 (En Banc 1938). *But cf.* *State ex rel. Curators of Univ. of Missouri v. McReynolds*, 354 Mo. 1199, 1204, 193 S.W.2d 611, 613 (En Banc 1946).

54. *Salsich*, *supra* note 5, at 75-80, 95.



*sas City v. Lorber*<sup>55</sup> the answer was affirmative. The court held that one who buys and sells is a "merchant." This is a classic example of the definitional problems that may arise in the interpretation of any legislation.

Few problems arise where the subject matter of the ordinance has been well defined in the underlying statute itself or in the case law. The city should be safe in using the commonly accepted term or definition. In *Lorber*, however, it was not clear that a produce dealer was a "merchant." Litigation was needed to clarify the issue. Although the *Lorber* court read the statute fairly, other courts have not been so generous.<sup>56</sup> Therefore, where the problem is definitional, the fear of the application of the Dillon Rule may lead a city to be overly cautious in its approach or to forego the opportunity to act at all for fear of costly litigation.<sup>57</sup>

A city cannot enlarge upon or change the meaning of a term to fit the city's needs where that term has been expressly defined by the statute.<sup>58</sup> In *Trenton v. Clayton*<sup>59</sup> the city was given power to regulate "peddlers" and that term was statutorily defined as persons who "deal in the selling of merchandise (and other articles) by going from place to place to sell the same."<sup>60</sup> The city's ordinance attempted to expand the definition of peddler to reach those persons who took orders for goods for later delivery. The regulation was held to be beyond the city's authority, both under the express power and its "general welfare" clause.<sup>61</sup> The case also indicates a judicial tendency to deny the existence of a power from other statutory sources, such as the general welfare clause, when the court is unhappy with or cannot condone the ordinance based on its primary statutory justification.<sup>62</sup>

In *Brookfield v. Kitchen*,<sup>63</sup> decided nine years after *Clayton*, the city was allowed to regulate the activities of persons under the term "mercantile agents" that Trenton could not regulate under the term "peddler." Even though the term had not been defined in the statute, as had "peddler" in *Clayton*, the court nonetheless evidenced a greater willingness to allow expanded regulation.

The foregoing cases indicate a twofold problem in determining whether a city has power to act. First, there is the substantial task of ascertaining what a term does or does not encompass. It can rightfully be said that the development of the law essentially consists of characterizing something as within or not within a category. However, combining an undefined term with a rule of construction which says fair doubts will be resolved

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55. 64 Mo. App. 604 (K.C. Ct. App. 1896).

56. *See* City of Joplin v. Leckie, 78 Mo. App. 8 (K.C. Ct. App. 1899).

57. City attorneys often are paid very small retainer fees and litigation costs would thus run much higher. *See* Cronan, *Help for the City Attorney*, 31 J. Mo. B. 394, 399 n.3 (1975).

58. *Town of Trenton v. Clayton*, 50 Mo. App. 535 (K.C. Ct. App. 1892).

59. *Id.*

60. *Id.* at 540.

61. *Id.* at 541.

62. *See, e.g.*, notes 71-74 and accompanying text *infra*.

63. 163 Mo. 546, 63 S.W. 825 (1901).

against the city creates uncertainty, the constant threat of a successful court challenge, and thus inaction. Few would maintain that this situation is a healthy one for city growth and development.

The second problem is even more fundamental. As the *Trenton* and *Brookfield* cases indicate, the city may be helpless to deal with a problem merely because the proposed solution does not fit within the previously defined boundaries of its power. In *Trenton* the court said the power to regulate the "non-peddlers" could not be found in the general welfare clause, because authority to enact such an ordinance "is not to be inferred from terms of such doubtful import."<sup>64</sup> As a result of this strict construction, Trenton was without power to deal with a situation that was only later covered by statute, long after the harm to the city's interests had been done.

An area of express powers where cities have been hampered by definitional problems of a different sort is the field of "nuisances."<sup>65</sup> State governments are given plenary power to determine what a nuisance is and what should be done about it. It would be logical (but incorrect) to assume that this power could also be given to cities. In an early case, *St. Louis v. Dreisoerner*,<sup>66</sup> a state statute protected Tower Grove Park in St. Louis. It listed several activities that could not be undertaken within a certain distance of the park. The city passed an ordinance that prohibited an activity not listed in the statute (a planning mill), unless the person engaged in the activity first obtained approval from the city. While the ordinance was held invalid because of its unreasonableness, the court said that a city had no power to suppress an activity that is not a nuisance *per se*,<sup>67</sup> and further asserted that there was no power to regulate under the police power or general welfare clause because the police power "only extends to the regulation of employments prejudicial to the public safety, health, morals and good government of the citizenry. . . ."<sup>68</sup> It was also stated that the police power cannot be used to confiscate private property for aesthetic purposes.<sup>69</sup> Clearly the court did not want the city to use the guise of another power to go beyond the express powers given in the statute. Unfortunately, the court appeared to confuse the issues of power to act and the "reasonableness" of the ordinance.

Courts demonstrate a suspicious attitude toward a city ordinance declaring an activity a nuisance when that activity is not a nuisance *per se*, even when a city is given the power to abate nuisances.<sup>70</sup> The

64. 50 Mo. App. at 541.

65. This discussion is not an exhaustive overview of "nuisance" law, but rather a brief discussion of how the Dillon Rule has been used in the field.

66. 243 Mo. 217, 147 S.W. 998 (1912).

67. *Id.* at 223, 147 S.W. at 1000.

68. *Id.*

69. *Id.*

70. Most cities have been given that power in some fashion. *See, e.g.*, § 77.530, .560, RSMo 1969 (third class cities); §§ 79.370-380, RSMo 1969 (fourth class cities); § 80.090 (1), RSMo 1969 (towns and villages).

suspicion exists even where the city does not declare the activity a nuisance, but attempts to regulate it under the guise of police powers. *Kays v. Versailles*<sup>71</sup> demonstrates the strictness with which a court can view a city action. There the city attempted to regulate the keeping of hogs in the city limits for the summer months only, under an express power to prohibit the running at large of hogs, to regulate and suppress "pigpens," and to prevent and abate nuisances.<sup>72</sup> The city did not, however, declare the keeping of hogs a nuisance. The court said that while keeping hogs might be a nuisance *per se* in a larger city, it was not such in a town of 1651 people. Furthermore, prohibiting the hogs from being kept only part of the year under the guise of police power regulation<sup>73</sup> did not make the ordinance valid, and 29 pigs on 4½ acres did not constitute a "pig pen" under the statute.<sup>74</sup> In holding that there was no power to act, the court was actually substituting its judgment for that of the city in regard to the proper scope of hog regulation. From the point of view of statutory construction, a far better result would have occurred if the court's arguments had not been directed at the issue of power to act, but rather at the reasonableness of the ordinance.<sup>75</sup>

The distinction between the authority to do acts and the reasonableness of the acts is sometimes not made clear by the courts. The initial issue for determination should be whether there is authority for a city to act. If there is no authority, the inquiry stops there. If authority is found, the next issue to be considered is the reasonableness of the act. At this stage of the inquiry, the standard of review is more favorable to the city.<sup>76</sup> Sometimes, however, the courts appear to say that there is no authority to act when in fact it is the unreasonableness of the proposed ordinance on which the decision is based.<sup>77</sup> This judicial oversight merely confuses the issue and leads to inaccurate analysis.

In summary, where nuisances or related activities are at issue, and the city attempts to regulate the activity in a strict manner,<sup>78</sup> or to

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71. 224 Mo. App. 178, 22 S.W.2d 182 (K.C. Ct. App. 1929).

72. *Id.* at 180, 22 S.W.2d at 182-83.

73. For a broader reading of the police power to regulate, see *City of Springfield v. Mecum*, 320 S.W.2d 742 (K.C. Mo. App. 1959), where a prohibition of outboard motors of greater than 6 h.p. was allowed.

74. 224 Mo. App. at 183, 22 S.W.2d at 184.

75. The scope of review is far more favorable to the city once the power or authority to act is found. See generally 1 C. ANTEAU, MUNICIPAL CORPORATION LAW, §§ 5.14-15.

76. See note 75 *supra*. See also *R.A. Vorhof Constr. Co. v. Black Jack Fire Prol. Dist.*, 454 S.W.2d 588, 594-95 (St. L. Mo. App. 1970).

77. See, e.g., *Kays v. City of Versailles*, 224 Mo. App. 178, 22 S.W.2d 182 (K.C. Ct. App. 1929). For a case where this did not occur, see *Thunder Oil Co. v. City of Sunset Hills*, 349 S.W.2d 82, 85-87 (Mo. En Banc 1961).

78. See e.g., *Kays v. City of Versailles*, 224 Mo. App. 178, 22 S.W.2d 182 (K.C. Ct. App. 1929). *But cf.* *City of Springfield v. Mecum*, 320 S.W.2d 742 (K.C. Mo. App. 1959).

prohibit the activity in full,<sup>79</sup> it is likely that the authority to act will not be found unless the authority is a nuisance *per se*.<sup>80</sup>

Perhaps the greatest problem area with regard to express powers is the interpretation of "general welfare" clauses.<sup>81</sup> A typical general welfare clause provides:

The mayor and council of each city governed by this chapter shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect and to alter, modify or repeal the same.<sup>82</sup>

The above is a broad grant of power and includes the traditional police powers. The key question is whether the general welfare clause provides a substantive, independent source of powers for cities.

The cases in most jurisdictions seem to indicate that, under the oft-used rules of *expressio unius est exclusio alterius* and *ejusdem generis*, the general welfare clause is nothing more than a useless appendage having little substantive value.<sup>83</sup> The clause merely states what is a postulate of the Dillon Rule: municipalities have the necessarily or fairly implied powers to effectuate the powers expressly given them.

Professor Antieau<sup>84</sup> suggests that Missouri may differ from the general approach, citing *St. Louis v. Schoenbusch*,<sup>85</sup> which held:

[G]eneral welfare clauses are not useless appendages to the charter powers of municipal corporations. They are designed to confer other powers than those specifically named. The difficulty in making a specific enumeration of all such powers as may be properly delegated to municipal corporations renders it necessary to confer such power in general terms.<sup>86</sup>

*Schoenbusch*, although followed in several subsequent cases,<sup>87</sup> is of ques-

79. See *State ex rel. Jack Frost Abattoirs, Inc. v. Steinbach*, 274 S.W.2d 588 (St. L. Mo. App. 1955).

80. *Id.* See also *Kays v. City of Versailles*, 224 Mo. App. 178, 22 S.W.2d 182 (K.C. Ct. App. 1929); *City of Sturgeon v. Wabash Ry.*, 223 Mo. App. 633, 17 S.W.2d 616 (K.C. Ct. App. 1929).

81. See § 77.260, RSMo 1969 (third class cities); § 79.110, RSMo 1969 (fourth class cities); § 80.090 (40), RSMo 1969 (towns and villages).

82. § 77.260, RSMo 1969.

83. I C. ANTIEAU, *supra* note 75, at § 5.07. *Ejusdem generis* means where general words are held as applying only to persons or things of the same general class as those specifically mentioned. *Expressio unius* means that where one or more things are mentioned, then there is an implication that all others are excluded. BLACK'S LAW DICTIONARY 608, 692 (4th rev. ed. 1968).

84. *Id.*

85. 95 Mo. 618, 8 S.W. 791 (1888).

86. *Id.* at 622, 8 S.W. at 792.

87. See, e.g., *Komen v. City of St. Louis*, 316 Mo. 9, 14-15, 289 S.W. 838, 840-41 (1926); *Aurora Water Co. v. City of Aurora*, 129 Mo. 540, 576, 31 S.W.

tionable precedential value because: (1) it applied to a charter city (home rule) situation at a time when charters were liberally construed;<sup>88</sup> and (2) several later cases limit the use of a general welfare clause, even though not expressly overruling *Schoenbusch* or its progeny.<sup>89</sup>

A recent case questioning the use of a general welfare clause as a substantive grant of power is *Anderson v. Olivette*.<sup>90</sup> In *Anderson* the Supreme Court of Missouri invalidated an ordinance which attempted to insure non-discrimination in the offering of housing by the regulation of real estate brokers. The court recognized that "protection of the constitutional right of citizens to be free from racial discrimination is a proper function of the police power,"<sup>91</sup> but went on to hold that the city did not have the power to regulate brokers, although it did have the power to license them. The general welfare clause could not serve as an expansion of the power to license:

The power with respect to real estate agents or brokers is to license only. Such specific grant may not be expanded to authority to license *and regulate* by reference to the general police power statutes.<sup>92</sup>

It is a frequently stated theme that a general welfare clause cannot be used to expand express powers.<sup>93</sup>

While the decision in *Anderson* was based on the premise that the legislature gave all other cities the power to regulate brokers, but denied the power by omission to third class cities, the court did undertake an extensive discussion to distinguish prior cases that appeared to allow the general welfare clause to serve as a substantive grant of power.<sup>94</sup> Although the court made no reference to *Schoenbusch*, it did discuss *State v. White*,<sup>95</sup> which relied on *Schoenbusch* and held that the general welfare clause was a substantive grant of power. The *Anderson* court indicated that the reasoning in *White* was contrary to that in *Tietjens v. St. Louis*,<sup>96</sup> which the court said expressed the proper view. Although the *Anderson* court did not expressly overrule *White*, the vitality of *Schoenbusch* and subse-

946, 954-56 (1895); *Green City v. Holsinger*, 76 Mo. App. 567 (K.C. Ct. App. 1898) (same result but *Schoenbusch* not cited).

88. See *Siemens v. Shreeve*, 317 Mo. 736, 742-43, 296 S.W. 416, 417-18 (En Banc 1927).

89. See *Tietjens v. City of St. Louis*, 359 Mo. 439, 445, 222 S.W.2d 70, 73 (En Banc 1949); Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 Mo. L. REV. 45, 67-68. See also *Anderson v. City of Olivette*, 518 S.W.2d 34, 37-39 (Mo. 1975), which applies the same reasoning to non home-rule cities.

90. 518 S.W.2d 34 (Mo. 1975).

91. *Id.* at 37, citing *Marshall v. Kansas City*, 355 S.W.2d 877 (Mo. En Banc 1962), a case which broadly construed the police and general welfare clauses of the Kansas City Charter.

92. 518 S.W.2d at 39 (emphasis added).

93. See, e.g., *State ex rel. Smith v. Berryman*, 142 Mo. App. 373, 383, 127 S.W. 129, 133 (Spr. Ct. App. 1910).

94. 518 S.W.2d at 38-39.

95. 263 S.W. 192 (Mo. 1924).

96. 359 Mo. 439, 445, 222 S.W.2d 70, 73 (En Banc 1949).

quent cases relying thereon has been severely limited. Should the occasion arise in the future, it seems likely that the reasoning of *Schoenbusch* and *White* will be repudiated.

Whatever usefulness the general welfare clause once had as a substantive, independent source of power is now gone. While there is presently a judicial tendency in Missouri to move away from the rule of strict construction in some areas of municipal concern, the courts are not willing to go so far as to construe broadly a general welfare clause.

### C. *Necessarily or Fairly Implied Powers*

As might be expected, it is the second proviso of Dillon's Rule that has presented the most perplexing problems in determining whether a city has power to act. This proviso states that municipal corporations have ". . . those [powers] necessarily or fairly implied in or incident to the powers expressly granted. . . ."<sup>97</sup> What are those "necessarily" or "fairly implied" powers? Are they clearly discernible or must the city face a possible court test every time it acts? Just how far can the city safely go? Does the rule of strict construction apply? Unfortunately, there are no easy answers to any of the above questions, because the cases give few clear guidelines as to when an implied power will be recognized. To be safe, the city should act only if there are previous cases approving ordinances similar to that proposed. There are times, however, when the city has to act in the absence of cases directly in point. The city must then support its action on the basis of this general rule:

[W]here there is an express grant to a city without the method or details of exercising such power prescribed, the city council has authority to exercise the power granted it in any reasonable and proper manner.<sup>98</sup>

However, not all actions can be tied to *implementing* an express power, and in such cases the above rule is of little assistance.

#### 1. Implied Powers and Taxation

The second proviso of the Dillon Rule can be better understood by examining a few cases in one of the more common areas of local government concern, taxation. Variations in application of the proviso soon become apparent.

Courts construe grants of, and limitations on, taxing powers against the municipality. The power to tax is found by implication only where

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The general welfare clause of the charter may not be construed so as to enlarge the powers of a city further than is necessary to carry into effect the specific grant of power. *Id.*

97. *Quoted in State ex rel. City of Blue Springs v. McWilliams*, 335 Mo. 816, 820, 74 S.W.2d 363, 364 (En Banc 1934) (emphasis added).

98. *Dodds v. Kansas City*, 347 Mo. 1193, 1200, 152 S.W.2d 128, 131 (En Banc 1941). See also *Petition of City of Liberty*, 296 S.W.2d 117, 123 (Mo. En Banc 1956).

it is *evident* and *unmistakable*.<sup>99</sup> Thus "necessarily" or "fairly implied" seem to have no place in tax situations. In holding that an ordinance for a special tax assessment required strict compliance, the court in *Kiley v. Openheimer*<sup>100</sup> said:

[W]here extraordinary powers are conferred by statutory enactment, powers which even in their legitimate exercise are very often productive of great hardship . . . the greatest caution should attend every step.<sup>101</sup>

In the noted case of *Siemens v. Shreeve*,<sup>102</sup> involving a Kansas City ordinance imposing a license tax on architects, the court said that the city had no *inherent* power to tax and that "any delegation of the taxing power must be in *clear* and *unambiguous* terms, jealously guarded and *strictly construed*."<sup>103</sup> Although *Siemens* involved a home rule city, the same reasoning has also been applied to statutory cities.<sup>104</sup>

As *Siemens* indicates, the general rule with regard to taxes is one of strict interpretation. In addition, several older cases made it clear that strict construction of the taxing power is the court's duty.<sup>105</sup> The courts seemed particularly concerned that the city not act to impose a larger burden on the taxpayer than what seemed "fair" (whatever that might be). In *Neosho ex rel. Hanchett Bond Co. v. Kelley*<sup>106</sup> the statute allowed the taxpayer the option of paying his special assessment for street repairs in ten annual installments rather than in one lump sum. In the resolutions for the tax assessments, the city council added a clause providing that if any annual installments were not paid, then all remaining installments become due at the option of the holder. The court said that the city had no express or implied power to add the acceleration clause.<sup>107</sup> Although little explanation was given for the holding, it was clear that

99. *Wilhoit v. City of Springfield*, 237 Mo. App. 775, 789, 171 S.W.2d 95, 101 (Spr. Ct. App. 1943). For a case where the power to tax was implied, see *City of Lexington v. Lafayette County Bank*, 165 Mo. 671, 65 S.W. 943 (1901). For an excellent discussion of where the power is not implied, see *Kansas City v. Frogge*, 352 Mo. 233, 176 S.W.2d 498 (1943).

100. 55 Mo. 374 (1874).

101. *Id.* at 374-75.

102. 317 Mo. 736, 296 S.W. 415 (En Banc 1927).

103. *Id.* at 743, 296 S.W. at 417 (emphasis added).

104. See, e.g., *City of Raytown v. Kemp*, 349 S.W.2d 363, 366 (Mo. En Banc 1961). Section 71.610, RSMo 1969, says no license tax shall be imposed on a "business avocation, pursuit or calling, unless . . . [it] is specifically named as taxable in the charter . . . or unless such power be conferred by state." Apparently a charter city can meet this requirement, which is strictly construed, by incorporating by reference state statutes for non-charter cities in its charter. *General Installation Co. v. University City*, 379 S.W.2d 601 (Mo. En Banc 1964).

105. See, e.g., *City of Independence v. Cleveland*, 167 Mo. 384, 67 S.W. 216 (1902); *City of Nevada ex rel. Gilfillan v. Eddy*, 123 Mo. 546, 27 S.W. 471 (1894); *City of Chillicothe ex rel. Meek v. Henry*, 136 Mo. App. 468, 118 S.W. 486 (K.C. Ct. App. 1909).

106. 52 S.W.2d 565 (Spr. Mo. App. 1932).

107. *Id.* at 567

the court thought it unfair for the city to accelerate the debt, and therefore the court resolved its doubts as to the action's validity against the city.

In *State ex rel. George v. Dix*<sup>108</sup> a city was held to be without power to collect a tax due by means of a civil suit when the applicable statute allowed imposition of penalties for nonpayment of the tax. The court said:

[W]here the statute or ordinance wholly fails to provide a remedy an implication arises that the legislative body intended that a civil suit at law would lie for the collection of the tax, but where an adequate remedy is provided the implication must be the other way.<sup>109</sup>

In effect, the court followed the Dillon Rule corollary that where a mode of exercising power is provided to a municipality, all other methods are denied.<sup>110</sup>

Notwithstanding the previous discussion, cities do have some latitude in exercising the taxing power, and some implied powers will be allowed. In *Springfield City Water Co. v. Springfield*<sup>111</sup> the court observed that there was express statutory authority to license or tax twelve listed utilities, but no express authority to subclassify them for taxation purposes. The court held:

[The] city has power to subclassify by ordinance the subjects of taxation enumerated in the general taxing statute if there is a *reasonable* basis for doing it and nothing in the statute forbids.<sup>112</sup>

This holding is particularly liberal when it is recognized that the decision could easily have been against the power to subclassify. In a separate section, the same statute listed 200 businesses that could be licensed, taxed, and regulated, and granted to the city express power to subclassify these businesses.<sup>113</sup> If the court had applied the rule of *expressio unius*, as it often does in such a situation,<sup>114</sup> it could have readily and logically denied the city the power. Instead the court explained why *expressio unius* did not apply. The first reason was that "the maxim is a mere auxiliary rule of construction in aid of the fundamental objective, . . . the intention of the lawmakers,"<sup>115</sup> and the second reason was the statute's legislative history.

One of the more expansive readings of the license taxing power was

108. 159 Mo. App. 573, 141 S.W. 445 (K.C. Ct. App. 1911).

109. *Id.* at 576, 141 S.W. at 447.

110. If the logic of *Bull v. McQuie*, 342 Mo. 851, 119 S.W.2d 204 (En Banc 1938), were applied and the penal sanction were used to no avail, *query* whether the city could commence with civil action, because it would be *essential* to collection of the tax?

111. 353 Mo. 445, 182 S.W.2d 613 (1944).

112. *Id.* at 455, 182 S.W.2d at 617 (emphasis added).

113. *Id.* at 452, 182 S.W.2d at 615.

114. *See, e.g.,* *Kroger Grocery and Baking Co. v. City of St. Louis*, 341 Mo. 62, 73, 106 S.W.2d 435, 439 (1937); *Kansas City v. J.I. Case Threshing Machine Co.*, 337 Mo. 913, 930, 87 S.W.2d 195, 205 (1935); *City of St. Louis v. Boatman's Ins. and Trust Co.*, 47 Mo. 150, 154 (1870).

115. 353 Mo. at 456, 182 S.W.2d at 618.



*Kirkwood Drug Co. v. Kirkwood*.<sup>116</sup> In that case the city passed an ordinance imposing a license tax on druggists, which provided for inspection of records to assure accuracy of reporting gross earnings, on which the tax was based. In upholding the ordinance the court stated that "power to license or impose license taxes *includes* the power . . . of providing for the collection or enforcement of the payment of such fee or tax."<sup>117</sup>

The above cases indicate that courts are taking a somewhat more expansive view of the taxing power and will validate powers reasonably springing from the express powers given. However, the courts will remain wary of implying a power to tax from a statute that does not expressly give such power, even where it might be reasonable to imply the power.

Cities often charge a "fee" (as opposed to a tax) under the guise of the power of regulation, which may be granted as part of a general grant of power<sup>118</sup> or as part of a general welfare or police power statute.<sup>119</sup> Generally, courts will broadly construe "reasonable" regulatory powers if the powers can be "reasonably implied" from the express power.<sup>120</sup> Considerable weight will be given to a recitation in the ordinance that the fee is a regulatory measure, and such a fee will normally be upheld as *incidental* to the exercise of the police power.<sup>121</sup> However, a fee cannot be so large as to constitute a tax<sup>122</sup> or revenue measure. If so, courts will examine it closely and it will probably be disallowed as a taxing measure undertaken without express authority.

## 2. Implied Powers and General Welfare Clauses

As mentioned earlier,<sup>123</sup> a general welfare clause is most useful to *facilitate* the implication of an additional power from an express power, rather than serving as a substantive independent express power in itself.<sup>124</sup> There are few, if any, cases where a power has been *implied* directly from a general welfare clause.<sup>125</sup> This is probably because a general welfare clause is so broad that it could be the basis for almost any ordinance the city might pass. As a "facilitator," however, the general welfare clause

116. 387 S.W.2d 550 (Mo. 1965).

117. *Id.* at 553 (emphasis added).

118. *See, e.g.*, §§ 79.400-410, RSMo 1969.

119. *See, e.g.*, § 79.110, RSMo 1969.

120. *Wilhoit v. City of Springfield*, 237 Mo. App. 775, 789, 171 S.W.2d 95, 101 (Spr. Ct. App. 1943). *See also* *McGill v. City of St. Joseph*, 225 Mo. App. 1033, 38 S.W.2d 725 (K.C. Ct. App. 1931); *City of Plattsburg v. Peoples' Tel. Co.*, 88 Mo. App. 306 (K.C. Ct. App. 1901); *City of Lamar v. Weidman*, 57 Mo. App. 507 (K.C. Ct. App. 1894).

121. *Wilhoit v. City of Springfield*, 237 Mo. App. 775, 778, 171 S.W.2d 95, 100 (Spr. Ct. App. 1943).

122. *Id.* *See also* *Pierce City v. Hentschel*, 210 S.W. 31 (Mo. 1919), *reversing* *Pierce City v. Hentschel*, 180 S.W. 1027 (Spr. Mo. App. 1915).

123. *See* text accompanying note 83 *supra*.

124. *See, e.g.*, *Dodds v. Kansas City*, 347 Mo. 1193, 1200, 152 S.W.2d 128, 131 (En Banc 1941).

125. *Schoenbusch* and its progeny appear to support the concept that a general welfare clause is a direct grant of power. To this extent there are no powers to be implied because they are given directly, even though not expressly stated.

is quite useful in arguing for an implication of power from the express power in issue.<sup>126</sup> If nothing else, the clause is useful in arguing that the implication of power should be found.<sup>127</sup> The statute would not have been enacted if it were not to serve some purpose.<sup>128</sup>

However, courts may imply powers as "necessary" to, "incident" to, or "reasonably necessary" to implement an express power even without a general welfare clause. Two cases illustrate this approach. The first is *Dodds v. Kansas City*,<sup>129</sup> where the court said that a city has authority to exercise an express power "in any reasonable and proper manner."<sup>130</sup> This allows the city some leeway in performing functions related to or part of the power given.

The second case where an implied power was found even in the absence of a general welfare clause is *Arkansas-Missouri Power Corp. v. Kennett*.<sup>131</sup> This court said:

[W]here a corporation, private or municipal, is given power to perform a certain act, it is necessarily left with large discretion as to the method to be adopted and the manner in which such act is to be performed.<sup>132</sup>

In this case the inclusion of minimum wage and hour provisions in a contract was held to be *incident* to the power to contract. The case appears to be a very broad reading of municipal power because it contains an implication that the city might do by the express power to contract what it otherwise lacks statutory authorization to do. There were, however, extenuating circumstances in the case—impending loss of federal grant funds if the clauses were not in the contract<sup>133</sup>—which may explain why the court chose to allow the city such latitude. The implied power was also tied directly to the express power; it was a part of the exercise of that express power.

### 3. Implied Powers and the Canon of *Expressio Unius*

*Arkansas-Missouri Power Corp.* also illustrates, a method by which *expressio unius* can be limited in its normal application as a device to deny powers to cities. The court observed that the power to make wage and hour regulations had been given to second class cities. Using *expressio unius*, the court could have held that the power was denied to third class

126. See, e.g., *State ex rel. Kansas City Ins. Agents' Ass'n v. Kansas City*, 319 Mo. 386, 395, 4 S.W.2d 427, 430 (En Banc 1928).

127. See text accompanying note 82 *supra*.

128. This poses some serious questions concerning the interpretation of general welfare clauses. Assuming that the legislature was not acting in vain, the clauses must be given some meaning. If the Dillon Rule makes the general welfare clauses superfluous then why would they be enacted by the legislature if not to indicate that additional powers beyond those reasonably implied are to be granted to the cities?

129. 347 Mo. 1193, 152 S.W.2d 128 (En Banc 1941).

130. *Id.* at 1200, 152 S.W.2d at 131.

131. 348 Mo. 1108, 156 S.W.2d 913 (En Banc 1941).

132. *Id.* at 1117, 156 S.W.2d at 917.

133. *Id.* at 1113-14, 156 S.W.2d at 915.

cities like Kennett. However, the court said that the statute for second class cities did not confer power on those cities, but merely imposed restrictions on how the power was to be exercised.<sup>134</sup> The reasoning and analysis of this case has value where a court might be inclined to use *expressio unius* to deny a power that could reasonably be implied from an express power. Assuming that a power could be reasonably implied from an express power to one class of city, where it (the implied power) was expressly granted to another class of city, application of *expressio unius* could be defeated by arguing that the express power was merely a restriction on how the power was to be exercised and not an actual substantive grant of power.

#### 4. Examples of Implied Powers

Unfortunately, there are no clear-cut guidelines as to when a power will be implied. As the following illustrations show, courts have used different terminology to describe when implied powers will be found. It has been held that executing a purchase contract for a road grader "is a *necessary incident* to the power to open and improve streets;"<sup>135</sup> that there is a *fairly implied* power to borrow money and issue revenue bonds from the express power to erect and maintain buildings;<sup>136</sup> that a bridge can be built and maintained as *incident* to the power to "erect, maintain and operate waterworks;"<sup>137</sup> that the authority for a city to operate a parking garage in case the property cannot be profitably leased is of *necessity* implied from a statute authorizing issuance of bonds to acquire parking facilities;<sup>138</sup> that the right to sue and be sued by *necessary implication* confers power to settle and compromise litigation;<sup>139</sup> that a power which provides that "the city may construct and maintain sewers, drains and all works necessary for the disposition of sewage and garbage, may *reasonably be construed* to include [pumping stations] as part of the 'works necessary;'"<sup>140</sup> that the power to perform an act will be *impliedly recognized* from several sections of a statute viewed together;<sup>141</sup> that the power to construct a sewage disposal plant is *naturally appurtenant* to a

134. *Id.* at 1117, 156 S.W.2d at 917. Although *expressio unius* was not mentioned, similar reasoning and results occurred in *City of Bellefontaine Neighbors v. J.J. Kelley Realty and Bldg. Co.*, 460 S.W.2d 298, 302-04 (St. L. Mo. App. 1970).

135. *Austin Western Road Machinery Co. v. City of New Madrid*, 185 S.W.2d 850, 853 (Spr. Mo. App. 1945) (emphasis added).

136. *State ex rel. Curators of Univ. of Missouri v. McReynolds*, 354 Mo. 1199, 1203, 193 S.W.2d 611, 613 (En Banc 1946) (emphasis added).

137. *Snip v. City of Lamar*, 239 Mo. App. 824, 833, 201 S.W.2d 790, 796 (Spr. Ct. App. 1947) (emphasis added).

138. *City of St. Louis v. Sommers*, 364 Mo. 700, 705, 266 S.W.2d 753, 756 (1954).

139. *City of St. Ann v. Buschard*, 356 S.W.2d 567, 574 (St. L. Mo. App. 1962) (emphasis added).

140. *McMurry v. Kansas City*, 283 Mo. 479, 504, 223 S.W. 615, 623 (En Banc 1920) (emphasis added).

141. *City of Richland v. Null*, 194 Mo. App. 176, 183, 185 S.W. 250, 252 (Spr. Ct. App. 1916).

power to construct "sewers and drains and connections therewith;"<sup>142</sup> that where a power is given to prevent the operation of a railroad the power can be used to impose *any conditions* in allowing operation of the railroad;<sup>143</sup> and that the power to "prevent and extinguish fires" carries with it *incident thereto* power to contract for a supply of water for that purpose.<sup>144</sup>

Few of these cases talk of powers "fairly implied" but rather speak of "reasonably," "necessarily implied," or "incident" to. Thus, while lip service is given to Dillon's statement of "fairly implied"—which would seem to be a more lenient standard—few cases speak of "fair" implication.<sup>145</sup> Apparently, a more accurate statement of the Missouri test for implied powers would be those that are "necessarily implied or incident to" the express powers. In fact, however, this terminology may be little more than a semantic exercise because the terms often describe a result, instead of a process for reaching a result.

### 5. The "Public Use" Doctrine

Assuming that a power to act might be implied either "fairly," "necessarily," or "incidentally," there is still a pitfall that should be recognized. Under the Missouri constitution, the taxing power can be exercised only for a municipal, corporate, or public purpose.<sup>146</sup> Occasionally courts have carefully distinguished between whether there is an implied power to act and whether the municipal purpose test has been met.<sup>147</sup> On other occasions, the courts have tended to confuse authority to act and the municipal purpose test.<sup>148</sup> It is easy to overlook the fact that two distinct problems are involved, because the issue of authority to act is common to both Dillon Rule problems and municipal purposes problems.<sup>149</sup> It should be remembered that the constitutional test of municipal, corporate, or public purpose must be met before the Dillon Rule questions may arise.

### 6. Summary

In Missouri it seems that an implied power will be found where it is a "necessary incident to" or "necessarily appurtenant to" the express power, when it can be "reasonably" implied from the express power, and

142. *Hall v. City of Sedalia*, 232 Mo. 344, 355, 134 S.W. 650, 652 (En Banc 1911).

143. *St. Louis & M.R.R. v. City of Kirkwood*, 159 Mo. 239, 252, 60 S.W. 110, 114 (En Banc 1900) (emphasis added).

144. *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 313, 24 S.W. 784, 787 (1893).

145. *See State ex rel. Curators of Univ. of Missouri v. McReynolds*, 354 Mo. 1199, 193 S.W.2d 611 (En Banc 1946).

146. Mo. CONST. art. X §§ 1, 3.

147. *State ex rel. Kansas City v. Orear*, 277 Mo. 303, 210 S.W. 392 (En Banc 1919).

148. *See, e.g., Taylor v. Dimmitt*, 336 Mo. 330, 78 S.W.2d 841 (1935).

149. *See, e.g., State ex rel. Kansas City v. Orear*, 277 Mo. 303, 210 S.W. 392 (En Banc 1919).

where it is not in conflict with other policies of the state—e.g., strict construction of taxation statutes.

#### D. *Essential to Declared Objects and Purposes*

Dillon's third proviso is "those [powers] essential to the declared objects and purposes of the corporation—not simply convenient—but indispensable."<sup>150</sup> This formulation raises three questions. First, are certain "inherent" powers possessed by a municipality absent statutory or charter authorization? Second, what are "essential powers" and do they differ from "inherent" powers? Third, what difference is there between "indispensable" and "convenient" powers?

##### 1. "Inherent" Powers

The general rule in most states is that a city has "no inherent powers, especially as to sovereign, governmental or legislative matters."<sup>151</sup> However, some states recognize so-called "common-law" *corporate* powers including perpetual succession, the right to sue and be sued, the power to purchase and hold lands, and the power to have a corporate seal and make by-laws.<sup>152</sup> There appears to be considerable confusion in the case law as to the difference between inherent and implied powers.<sup>153</sup> It is important to determine whether the court is referring to a power that springs from the mere fact of municipal corporate existence or to a power that is implied from an express power granted to the city.

A few Missouri cases recognize that a city may have inherent powers. In *Aurora Water Co. v. Aurora*,<sup>154</sup> it was suggested that a city might have certain inherent powers as *incidents* of its corporate being.<sup>155</sup> These powers included imposing a fine on a duly-elected official for his refusal to take office and removing a corporate officer for just cause.<sup>156</sup> Another case went so far as to say:

[T]he exercise of the police power by a city in the regulation of vocations is one of the municipal functions *necessarily and inseparably incident to its existence as a corporation*.<sup>157</sup>

This statement appears to be against the weight of Missouri authority concerning police powers because it has usually been held that the police power must be granted expressly and will not be implied.<sup>158</sup> Nonetheless,

150. See text accompanying note 11 *supra*.

151. 1 C. ANTIEAU, *supra* note 4, at § 10.11.

152. *Id.*

153. *Id.*

154. 129 Mo. 540, 31 S.W. 946 (1895).

155. *Id.* at 576, 31 S.W. at 955 (emphasis added).

156. *Id.* See also *State ex rel. Reid v. Walbridge*, 119 Mo. 576, 24 S.W. 457 (1894).

157. *Komen v. City of St. Louis*, 316 Mo. 9, 14, 289 S.W. 838, 840 (1926) (emphasis added).

158. See, e.g., *Allen v. Coffel*, 488 S.W.2d 671, 678 (Mo. App., D.K.C. 1972); *Stine v. Kansas City*, 458 S.W.2d 601, 607 (K.C. Mo. App. 1970). The same rule applies for the inherent power to tax. *Moots v. City of Trenton*, 358 Mo. 273, 214 S.W.2d 31 (1948). *But see United States v. New Orleans*, 98 U.S. 381, 393 (1879).

the quotation clearly has reference to an inherent power rather than an implied power because the opinion referred to Blackstone's original formulation of inherent corporate powers.<sup>159</sup> These powers referred to private corporations but have since been applied to municipal corporations.

Even though inherent powers have not been enumerated fully in the cases, and some doubt exists as to the current validity of the older cases,<sup>160</sup> an argument can be made that there are certain inherent powers which spring from the fact of mere corporate existence. These powers would include those mentioned by Blackstone<sup>161</sup> and, arguably, any that would be necessary to maintain a corporate existence—*e.g.*, choosing and removing officers and hiring an attorney.

In fact, however, inherent powers are a form of implied power. They are implied from the mere fact of corporate existence, and not from any specific statutory authorization as are other implied powers.

## 2. Essential Powers

While Judge Dillon may have been referring solely to inherent powers in the third proviso of his rule, the terminology employed also suggests a level of powers somewhere between inherent and those "necessarily" or "fairly implied" in, or "incident to," the express powers. These are Dillon's "essential to corporate purpose" powers. Few Missouri cases have discussed what these essential powers are and how they may differ from inherent or implied powers.

Perhaps the best understanding of what an essential power is can be found in *Bull v. McQuie*.<sup>162</sup> The case involved an election to establish a special sewer district and incur indebtedness therefore. The statute authorized *an* election to incur indebtedness not greater than the estimate of costs prepared by an engineer. The estimate was prepared, the election was held, and the bond issue passed. However, expected federal funds were not forthcoming so that the amount specified in the election was less than needed to construct the system. The district sought to hold a second election. Suit was brought to enjoin the second election, on the grounds that there was no express or implied power for a second election. The court said that the *purpose* of the district was to incur indebtedness to accomplish its objective of providing sewage facilities. The election process was secondary and the *essential* power was the right to incur indebtedness.<sup>163</sup> The power the district possessed was plenary and abided "until exhausted by the full exercise thereof."<sup>164</sup> An essential power is thus an indispensable power, one used to accomplish the purpose or objec-

159. 316 Mo. at 14, 289 S.W. at 840.

160. See text accompanying notes 85-96 *supra*.

161. 1 N. BLACKSTONE, COMMENTARIES\* 475. These are the powers to have perpetual succession, to sue and be sued, to purchase lands, to have a common seal, and to make by-laws or private statutes for the better government of the corporation.

162. 342 Mo. 851, 119 S.W.2d 204 (En Banc 1938).

163. *Id.* at 858, 119 S.W.2d at 207.

164. *Id.* at 859, 119 S.W.2d at 207.

tive of the municipal corporation.<sup>165</sup> Apparently an essential power is one which might not be necessarily or fairly implied from an express power, but which is nonetheless needed to accomplish the legislative goals. It is a power derived from the spirit and purpose of a statute rather than its letter. It does not, however, fall into the inherent power category.

The concept of an essential power is elusive, but in rare instances (such as *Bull*) it can be found. The argument that a power is essential can be raised where the power might not be readily implied, and to counter the argument that the express power stated indicates that the power should be exercised in no other fashion.<sup>166</sup>

### 3. "Indispensible" v. "Convenient" Powers

Judge Dillon used the terms "indispensible" and "convenient" to describe *essential* powers. Some Missouri cases, however, have tended to confuse essential powers with implied powers. As a result, the "indispensible"—"convenient" distinction has usually been discussed in regard to implied powers. The result has been an unjustified denial of a power that could be fairly implied.

For example, in *St. Louis v. J.E. Kaime & Bro. Real Estate Co.*<sup>167</sup> the city charter gave the power to allow inspection of buildings and require owners to remove or repair them, coupled with a power to regulate real estate agents and a general welfare clause. The city sought to make agents for the owners remove or repair the buildings. The court recognized that while an extension of the regulatory power to agents would be convenient, it was not a "reasonably necessary incident" to the express power, and was not "essential" nor "indispensible" to the purposes of the corporation.<sup>168</sup>

Likewise, in *Vaughn v. Greencastle*<sup>169</sup> the city sought to purchase a park under a power to purchase land for the "benefit" of the town.<sup>170</sup> However, the statutes did not expressly confer the power to purchase the land for park purposes. The court said a park was *convenient* but not "indispensible," and thus not "essential" to the declared objects and purposes of the corporation.<sup>171</sup> The *Vaughn* analysis seems unduly harsh and confuses essential powers with implied powers. The court chose to disregard completely the possibility that purchase of a park, while not indispensable, might well be necessarily, fairly, or incidentally implied from the express power.

Both of these cases are misleading, because they suggest that for a power to be implied, it must be essential or indispensable. This is clearly not what Judge Dillon meant. A power does not have to meet both the second and third provisos of the Dillon Rule.

165. *Id.*

166. *Id.*

167. 180 Mo. 309, 79 S.W. 140 (1904).

168. *Id.* at 320, 79 S.W. at 142.

169. 104 Mo. App. 206, 78 S.W. 50 (K.C. Ct. App. 1904).

170. *Id.* at 207-09, 78 S.W. at 51.

171. *Id.* at 209, 78 S.W. at 51, (emphasis added).

### E. Reasonable Doubts Are Resolved Against The City

The final proviso in the Dillon Rule says: "Any fair, reasonable, doubt concerning the existence of power is resolved by the court's against the corporation, and the power is denied."<sup>172</sup> As a practical matter, the statement is merely additional support for a decision that has been made on other grounds—*i.e.*, the absence of express, implied, or essential powers. It is primarily window dressing, but as a substantive rule it is useful to those who wish to deny powers. It sets the tone for a decision, and might, in a close case, serve as a psychological support for the court in tipping the scales against the city.<sup>173</sup>

If the statement has any value, it would be in those few situations where it is at least arguable from the statute that authority may not exist, or where the situation is one of first impression and the authorities in other states are split.<sup>174</sup> It can also be used where the power exercised could be implied, but would be repugnant to the court for policy or constitutional reasons.<sup>175</sup> Where the statutory authority is vague or of doubtful meaning, the proviso could also be used.

For the opponent of city action, the proviso should always be considered as the last line in his argument. The proponent should claim that the proviso lacks substantive value, and is a mere repetition of what is expressly stated in the first three provisos.

## IV. CONCLUSION

The labyrinthine passages of local government law are a trap for the unwary. In the first instance, it is often difficult to find the applicable statute, if any exists. If and when the statute is found, it will then be placed under the inquisitorial glare of Judge Dillon. Unfortunately, there is little relief on the horizon. Cities still clamor for more powers, and clearer definition of existing powers.<sup>176</sup>

There is no good reason to retain the Dillon Rule. If legislative intent is indeed "the polestar of statutory interpretation,"<sup>177</sup> the Rule is an artificial limit on the legislature and local governments. At most, the Rule should be viewed as a mere "maxim" or "canon" of construction, not as a hard and fast "rule." As Professor Llewellyn has indicated, maxims are not always applied because every maxim has its opposite.<sup>178</sup> Continued adherence to the Dillon Rule also seems to conflict with Missouri statutes

172. Quoted in *Bull v. McQuie*, 342 Mo. 851, 858, 119 S.W.2d 204, 207 (En Banc 1938).

173. See, e.g., Sandalow, *The Limits of Municipal Power Under Home Rule: A rule for the Courts*, 48 MINN. L. REV. 643, 713 n.273; 2 E. McQUILLIN, MUNICIPAL CORPORATIONS § 10.19 (3d. rev. ed. 1966).

174. See, e.g., *Taylor v. Dimmitt*, 336 Mo. 330, 78 S.W.2d 841 (1935).

175. See, e.g., *Kays v. City of Versailles*, 224 Mo. App. 178, 22 S.W.2d 182 (K.C. Ct. App. 1929).

176. See note 5 *supra*.

177. *Bull v. McQuie*, 342 Mo. 851, 858, 119 S.W.2d 204, 207 (En Banc 1938).

178. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules*



which say that "all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof."<sup>179</sup>

However, from a practical standpoint, only three options seem available to the cities. First, they can request that the legislature pass a law repudiating the Dillon Rule and pass a new law saying that statutes regarding local government should be liberally construed. This approach was attempted in Judge Dillon's home state of Iowa with limited success.<sup>180</sup> The scope of the Iowa law was narrow and was intended to apply only in close cases.<sup>181</sup> Any such statute would have to be carefully drawn. Even then it might be construed to have little or no impact on the existing statutory framework.<sup>182</sup>

A second alternative open to a municipality is to become a home rule city. Unfortunately, this alternative is not available to cities of less than 5000 population.<sup>183</sup> Moreover, the Dillon Rule may still be applied in interpreting the city charter. At least until 1971, home rule status did not necessarily mean greater power to act.<sup>184</sup> However, in 1971 an amendment to the Missouri constitution was passed<sup>185</sup> which appears to compel that home rule charters be interpreted as instruments of *limitation* and not as instruments of *grant*.<sup>186</sup> As yet there have been no cases construing the amendment, and some observers believe that courts may construe it more narrowly.<sup>187</sup> If the amendment is read as its draftsmen intended, however, the Dillon Rule will be a relic of the past for home rule cities.

Finally, the only practical alternative for most small towns is to continue to cope with the Rule. Those arguing for city powers can look for exceptions to the Rule, or variations in fact or subject matter that will distinguish previous cases which might be read to hold against them. The city can also attempt to explain why the Rule is archaic or how it is inconsistently interpreted. But in the final analysis the city's efforts will be met with a long ingrained judicial approach—that of resolving doubts against the city.

KENNETH D. DEAN

179. § 1.010, RSMo 1969.

180. See *Richardson v. City of Jefferson*, 257 Iowa 709, 134 N.W.2d 528 (1965).

181. *Id.* at 717, 134 N.W.2d at 533.

182. *Id.* at 718, 134 N.W.2d at 534. The court said the new law was a mere rule of construction and did not contain a grant of power. The court also said: "[W]here the rights of litigants have vested before the amendment or construction of an existing statute by the legislature we have uniformly held we are not bound by the construction placed on the statute by the legislature." *Id.* at 717, 134 N.W.2d at 533.

183. Mo. CONST. art. VI, § 19 (1971).

184. See generally Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 Mo. L. REV. 45 (1968).

185. Mo. CONST. art. VI, § 19(a) (1971).

186. See generally Euston & Johnson, *The Status of Municipal Home Rule Charters in Missouri: Analysis of the Effect of the 1971 Constitutional Amendment*, 30 J. Mo. B. 281 (1974).

187. See, e.g., Mo. BAR C.L.E., *Local Government Law 1.14-1.15* (1975).