

COUNTY COURTS: Action of county court in providing for adoption and carrying out of county plan and appointing county planning commission, regulating and restricting height, number of stories, etc., of buildings dividing the unincorporated territory of county into various districts, and providing manner in which the regulations, restrictions and boundaries of the districts shall be determined, established and enforced is exercising administrative and not judicial power.

June 30, 1949



Honorable Ben W. Oliver
House of Representatives
State Capitol Building
Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading in part as follows:

"Laws of Missouri, 1945, Section 1A, page 1328, authorizes county courts in all counties of the first class to provide for the preparation, adoption, amendment, extension or carrying out of a county plan, and to create by order a county planning commission with the powers and duties set forth in the act.

"Laws of Missouri, 1945, Section 8, page 1330, then authorizes county courts in all counties of the first class to regulate and restrict by order the height, number of stories, size of buildings, etc. for 'the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties.'

"Laws of Missouri, 1941, Section 9, page 485, then provides that the unincorporated territory may be divided into districts of such number, shape and area as may be deemed best suited to carry out the purposes of the act.

"Laws of Missouri, 1941, Section 10, page 486, then provides that the county court shall provide for the manner in which such regulations, restrictions and boundaries of such districts shall be determined, established and enforced. In order to avail itself of the power conferred by

the act, the county court may request the county planning commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such commission makes a preliminary report and a proposed zoning order and holds public hearings thereon, affording persons interested an opportunity to be heard. Within 90 days after final adjournment of such hearing, the commission must make a report and submit a proposed order to the county court. The county court may then enact the order with or without change, or refer it back to the commission for further consideration.

"I would appreciate your early opinion as to whether county courts in counties of the first class may enact the orders referred to in the above sections, assuming all statutory requirements have been complied with."

The county planning and zoning law, found Laws of Missouri, 1945, page 1327, provides as set out in your opinion request in various sections for the county court to make the orders you have listed. If the power exercised by the county court is judicial, such sections are unconstitutional, but if the actions of the county court are administrative, such acts are constitutional since Section 7, Article VI of the present Constitution provides that the county court "shall manage all county business as prescribed by law and keep an accurate record of its proceedings."

The latest case of the Supreme Court dealing with the question of what constitutes judicial action by a county court is the case of State ex rel. Lane vs. Pankey, et al., No. 41324, En Banc (not yet published). In this case, the court was passing upon the action of the county court in establishing public roads under provisions of Sections 8473 to 8478, inclusive, R. S. Mo. 1939. The court said:

" * * * The new Constitution, as construed in the Rippeto case and as we now construe it, invalidates no provision of existing statutes relating to the authority of county courts over public roads except such as

purport to authorize the county court to exercise judicial power. A county court can no longer adjudge the compensation to be paid for lands to be taken for road purposes nor render judgment divesting title from the owners thereof. But such court may take all statutory steps to determine the necessity, location, width and type of construction of public county roads, to determine whether same shall be constructed in whole or in part at county expense, and, when title has been legally acquired, to perform the administrative functions of supervising the construction and maintenance of such roads."

We believe that the provisions of Section 1A, Laws of Missouri, 1945, page 1328, obviously do not involve judicial action since the necessity for the preparation, adoption, amendment, extension or carrying out of the county plan under the holding in the Lane case, supra, is administrative.

In the case of State ex Inf. vs. Loesch, 169 S.W. (2d) 675, where the county zoning law applicable to St. Louis County at the time such case was decided was under attack because of an allegation that such law delegated legislative power to the county court, it was held that the county court appointed, rather than created, a county planning commission, and obviously such power of appointment is administrative. The court, in the Loesch case, supra, pointed out that the county planning and zoning law, applicable to St. Louis County, was for all practical purposes the same as the law which at that time was applicable solely to Jackson County and which is the basis for the present county planning and zoning law, and we believe that the holdings in such case are applicable to the present law.

The power of the county court to regulate and restrict in unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, is, under the holding in the Lane case, supra, administrative rather than judicial. It is obviously county business. In the Loesch case, supra, the court said, l.c. 680:

"If it is not the county's business to look after the health and welfare of people living in the unincorporated sections of a county, whose business is it? It seems to us to be purely the business of a county and its citizens and to be so self-evident it need not be considered. * * * "

The provision that the unincorporated territory of a county may be divided into districts of such number, shape and area as may be deemed best suited to carry out the purposes of the act obviously comprehends administrative rather than judicial action.

The provision that the county court shall provide the manner in which the regulations, restrictions and boundaries of such district shall be determined, established and enforced are administrative because the penalties for violation of the act are laid down by the Legislature and the county court has the power only to implement such provisions of the act.

We do not attempt in this opinion to pass upon the question of whether or not Sections 9 and 10, Laws of Missouri, 1941, page 485, are in full force and effect under the provisions of Section 15A, Laws of Missouri, 1945, page 1327, since we presume the constitutionality of law.

CONCLUSION

It is the opinion of this department that the actions of county courts in counties of the first class, taken under provisions of Sections 1A and 8, Laws of Missouri, 1945, page 1328, and Sections 9 and 10, Laws of Missouri, 1941, page 485, are not judicial but are administrative acts, and that such county courts may at present take the action authorized by such statutes.

Respectfully submitted,

APPROVED:

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