

COUNTIES:
ORDINANCES:
ST. LOUIS COUNTY COUNCIL:

Any ordinance defined as an emergency ordinance under Section 18 of the St. Louis County Charter can only be validly enacted by five (5) affirmative votes of the County Council.

Opinion No. 319

August 15, 1963



Honorable John J. Johnson
Missouri Senate, 15th District
11001 Eckelkamp Drive
Affton 26, Missouri

Dear Senator Johnson:

This is in answer to your opinion request addressed to this office dated July 26, 1963. Your letter reads as follows:

"On July 18, 1963, the St. Louis County Council passed Bill 195 which establishes the 1963 rate of taxes to be levied on all the real and personal property in St. Louis County.

"At the time this bill was voted on it received four (4) affirmative and three (3) negative votes. The Chairman of the Council declared it finally passed.

"Section 18 of the St. Louis County Charter provides as follows:

'Emergency ordinances shall require the affirmative vote of not less than five (5) members of the Council and shall take effect immediately upon their enactment. Emergency ordinances shall be those ordinances relating to the following:

'(1) Calling an election or providing for the submission of any proposal to the people;

Honorable John J. Johnson #2

August 15, 1963

- '(2) Appropriations for the support of the County government and the payment of principal and interest on the county's debts;
- '(3) Borrowing of funds in anticipation of taxes;
- '(4) Fixing tax rates;
- '(5) Amendments to the zoning ordinance, provided that a general revision of the zoning ordinance shall not be deemed to be an emergency ordinance;
- '(6) The immediate preservation of the public peace, health, safety and welfare, in which ordinance the emergency has been declared.'

"I respectfully request your opinion as to whether this ordinance was validly enacted under the St. Louis County Charter in view of the provisions of Section 18 as set out above.

"If your research reveals that this ordinance was validly enacted, I request your further opinion as to whether this ordinance would then be subject to the referendum provisions of the St. Louis County Charter which are embodied in Articles 17, 77, and 79 thereof.

"By opinion dated July 25, 1963, the St. Louis County Counselor ruled that the above ordinance was validly enacted although this ordinance received the affirmative vote of only four (4) members of the Council.

"You may wish to review the County Counselor's opinion in preparing the opinion requested herein."

As you suggested, we have reviewed the County Counselor's opinion dated July 25, 1963, concluding that this ordinance was validly enacted. We have also reviewed the opinion of former County Counselor Gallagher, dated November 8, 1961, which was

August 15, 1963

mentioned in the July 25, 1963 opinion. It might be noted at the outset that the zoning amendment in issue in the November 8, 1961 opinion was enacted by five members of the Council, so the question here presented was not in issue. Further, Section 18 of the St. Louis County Charter was not mentioned or construed in the November 8, 1961 opinion.

All parts of the Charter must be considered to the end that its real purpose and intent as an entire instrument will prevail. State ex rel. Moore vs. Toberman, 250 SW2d 701,705.

Section 13 of the St. Louis County Charter provides:

" . . .An affirmative vote by a majority of the members of the entire Council shall be necessary to pass any ordinance or resolution except as otherwise provided in this charter."
(Emphasis added)

Section 17 of the Charter provides:

"All ordinances except emergency measures shall take effect at the expiration of fifteen days after the date said ordinance is enacted, unless a later date therefor be fixed therein; provided, however, that if within ten days after the enactment thereof, there be filed with the County Clerk a notice signed by not less than 500 registered voters of the County stating their intention to cause referendum petitions to be circulated to submit such ordinance or any part thereof to the voters, such ordinance shall, subject to the referendum provisions of this charter, take effect 40 days after the date of its enactment unless a later date be fixed in such ordinance." (Emphasis added)

Thus, the plain purpose of Section 17 in postponing the effective date of a non-emergency ordinance is not to give those concerned a modest time in which to adjust to the new ordinance, but rather to permit the voters time in which to resort to the referendum procedure.

Section 18 of the Charter provides:

"Emergency ordinances shall require the affirmative vote of not less than five members of the Council and shall take effect immediately upon their enactment. Emergency ordinances shall be those ordinances relating to the following:

- (1) Calling an election or providing for the submission of any proposal to the people;
- (2) Appropriations for the support of the County government and the payment of principal and interest on the County's debts;
- (3) Borrowing of funds in anticipation of taxes;
- (4) Fixing tax rates;
- (5) Amendments to the zoning ordinance, provided that a general revision of the zoning ordinance shall not be deemed to be an emergency ordinance;
- (6) The immediate preservation of the public peace, health, safety and welfare, in which ordinance the emergency has been declared."
(Emphasis added.)

Section 77 of the Charter deals with Initiative, Referendum, Recall, and provides,

"The people reserve the power to propose and enact or reject ordinances and amendments to this Charter, independent of the Council, to approve or reject by referendum any ordinance of the Council except emergency measures, and to recall any elective officer."
(Emphasis added.)

August 15, 1963

Therefore, by the express terms of the Charter the people of St. Louis County, surrendered their right to referendum only for emergency ordinances, and reserved this right of referendum for all other ordinances.

In the situation presented here for an opinion, if the passage of Bill 195 by four (4) council members were a valid enactment, it would of necessity be subject to a referendum under Section 17 of the Charter. Also, under Sections 77 and 79 of the Charter this issue could not be submitted to the voters until the next primary or general election. In this factual situation, the earliest this Bill could be submitted would be August, 1964, or more than a year after consideration by the Council. Necessarily, under this view, the ultimate fate of this Bill may be shrouded in mystery until voted on by the people with consequent intervening fiscal uncertainty.

We also note the confusing situation which would also be presented by making the balance of those ordinances included in Section 18 of the Charter subject to a referendum if passed by a simple majority of the Council.

For example, the action of the Council calling for an election or providing for the submission of any proposal to the people, if passed by only a simple majority of the Council, would be subject to referendum. If the requisite signatures were obtained, the people then would be forced to have an election presenting only the question as to whether they wished to have an election.

The same would logically hold true for the borrowing of funds in anticipation of taxes, appropriation for the support of the county government, and amendments to the zoning. All of these measures would then be referable, with the attendant delay and confusion.

We believe the framers of the St. Louis County Charter never intended this result.

A power of a county under home rule charter to perform functions of local or municipal nature is granted by the Constitution, and is not subject to, but takes precedence over the legislative power of the State. Article IV, Section 18, Constitution of Missouri; Casper v. Hetlage, 359 SW2d 781 (1962). Those cases, therefore, dealing with State legislative procedures cannot be controlling. It is the provisions of the St. Louis County Charter that must be construed. Casper v. Hetlage, supra.

August 15, 1963

As noted above, Section 18 of the Charter provides these " * * * ordinances shall require the affirmative vote of not less than five (5) members of the Council and shall take effect immediately upon their enactment." (Emphasis added.) Section 18 then provides, "Emergency ordinances shall be those ordinances relating to the following * * *." (Emphasis added.) It is not questioned that emergency ordinances must be passed by five (5) members of the Council or that they become effective immediately upon the date of their enactment. In other words, it is not questioned that the term "shall" as used in the first two instances is mandatory, and not merely directory and advisory. Yet, to hold that an ordinance relating to one of the enumerated categories could be validly enacted by four Council members, of necessity, would mean the framers of the Charter when they stated, "emergency ordinances shall be those ordinances relating to the following:" (emphasis added), departed from their former mandatory use of the word "shall" and now intended it to be used in a directory and advisory sense. This would be a distorted construction. In the case of State v. Carr, 203 SW2d 670, the Springfield Court of Appeals, in construing the mandatory features of emergency measures applicable to the City of Springfield, noted l.c. 677:

"These provisions are mandatory in form. They are each of the essence of the enactment. If either are mandatory, and not merely directory, then it would seem that they all are."

The St. Louis County Charter, by its plain language, provides three qualities peculiar to certain ordinances: (1) They become effective immediately; (2) They must fall within one of the enumerated categories; and (3) They must be passed by five Council members.

The only limitations on the mandatory features of Section 18 are expressed in the Section itself. Subparagraph 5 provides that a general revision of the zoning ordinance should not be deemed to be an emergency ordinance. Subparagraph 6 provides that the ordinances for the immediate preservation of the public peace, health, safety and welfare, must declare the emergency. It must be, then, that all other named categories in Section 18 are deemed to be emergency by definition. This being true, they must require affirmative votes by 5 members of the Council in order to be validly enacted.

August 15, 1963

The Supreme Court of Missouri, en Banc, in the case of State ex rel. Asotsky et al. v. Regan, 298 S.W. 747, expressly recognized the impracticability of having tax measures subject to a referendum. In that case a taxpayer in Kansas City sought to hold a referendum on an occupation tax passed by the City Council. The Kansas City Charter at that time provided that such measures were emergency measures and immediately effective. The Supreme Court of Missouri held that such a measure was not subject to a referendum, and notes: 298 S.W. 747 l.c. 749

"While we have no right to construe a law by our view of its expediency, we can take that feature into consideration in attempting to ascertain what was in the legislative mind. Kansas City would be in severe financial straits if every occupation tax could be held up by referendum." (Emphasis added.)

Further support for this view is found in a concurring opinion of Judge Eager joined by Judge Leedy in the case of State v. Donohue, 368 SW2d, 432, decided June 4, 1963, which construed the St. Louis County Charter.

In that case the St. Louis County Council adopted an amendment to the zoning ordinance. The issue presented was the right of the people to propose by initiative an amendment seeking to repeal this ordinance. The majority opinion held that the petitioners had not followed the correct technical initiative procedure set up in the Charter, and it was therefore not allowed. Judge Eager, joined by Judge Leedy, of the Missouri Supreme Court concurred in the result but felt that the use of the initiative procedure was the equivalent of a referendum and noted a referendum was not allowed under the St. Louis County Charter for any amendment to the zoning ordinances. Judge Eager stated l.c. 439:

"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. I would doubt that any zoning amendment may be accomplished by initiative."

Honorable John J. Johnson #8

August 15, 1963

We find no conflict in the provision of Section 18 requiring a vote of five (5) Council members for amendments to the zoning ordinance, and Section 58 of the Charter which provides that:

"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."

These two sections are not equivalent, in that Section 58 refers to all ordinances related to zoning and Section 18 designates only those ordinances amending the zoning ordinance.

It must be, then, that the framers of the St. Louis County Charter intended that only those measures designated by Section 18 as "emergency measures" have the quality of being nonreferable. The people of St. Louis County surrendered their right of referendum in exchange for a mandatory 5 affirmative votes in the enumerated classes of ordinances contained in Section 18.

Conclusion

In answer to the question propounded in your opinion request, it is the opinion of this office that this ordinance could only be validly enacted by five (5) affirmative votes of the County Council.

The foregoing opinion which I hereby approve, was prepared by my Assistant, Robert D. Kingsland.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

RDk:df;bj