FIRST CLASS COUNTIES:
SEWER DISTRICTS:

Sewer districts formed in St. Louis County should be formed according to the provisions of Sections 249.430-249.660, inclusive, RSMo 1949.

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November 5, 1952 11-6-52

Honorable C. W. Detjen
Assistant County Counselor
St. Louis County Law Department
Courthouse
Clayton, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "Hon. John J. McAtee, County Counselor of St. Louis County, has asked me to write to you for an opinion as to whether the provisions of Chapter 249, R. S. Mo. 1949, Sections 249.010-Section 249.420, relating to sewer districts in counties having less than 400,000 inhabitants, and Sections 249.430-Section 249.660, relating to sewer districts in counties having more than 400,000 inhabitants and less than 700,000 inhabitants, are (or either of them) effective so far as the creation of new sewer districts in St. Louis County is concerned.
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> "When enacted, Sections 249.010-Section 249.420 applied to St. Louis County, and Sections 249.430-Section 249.660 applied to Jackson County, but St. Louis County now has a population in excess of 400,000, according to the 1950 Federal Census. There are, of course, a number of sewer districts in existence in St. Louis County which were formed under the first mentioned statutes and we assume that they will continue to be governed by the provisions of those statutes, so long as they are not repealed by the legislature.

> "In the future, however, if the statutes are still in effect, we assume that sewer districts in St. Louis County would have to be formed under the provisions of Sections 249.430-Section 249.660.
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> "The question as to whether either of the sewer district laws is still in effect, at least so far as the creation of new districts is concerned, involves construction of Article VI, Section 8 of the Constitution of Missouri, which provides that counties shall be organized and classified by General Laws; the number of classes not to exceed four, and the organization and powers of each class to be defined by General Laws, so that all counties in the same class shall possess the same powers and be subject to the same restrictions. The Section further provides that a law applicable to any county shall apply to all counties in the class to which such county belongs.
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> "If these sewer district statutes may be considered as statutes relating to the organization and powers of the county, it would seem that they are no longer in effect in view of the legislature's failure to amend them to apply to First Class Counties.
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> "Will you kindly let us have your opinion as to the extent these two laws are applicable to St. Louis County at the present time, if at all?"

Your request embodies two questions, the first of which is the applicability of certain statutes to the construction of sewers in St. Louis County; the second of which is the constitutionality of the aforesaid statutes.

In regard to your first question, it would seem to be clear that any sewer districts which are, in the future, formed by the County Court in St. Louis County, would have to be formed under Sections 249.430-249.660, inclusive, RSMo 1949.

Section 249.440, RSMo 1949, states that it and ensuing sections are applicable to counties which have a population of not less than 400,000 and not more than 700,000. In your letter you inform us that St. Louis County has a population of more than 400,000. We take judicial notice of the fact that St. Louis County does not have a population exceeding 700,000. Therefore, it is apparent that St. Louis County comes within the purview of Sections 249.430, et seq., supra.

We now face the problem of whether the sections above referred to are valid since the effectuation of the new Constitution of Missouri on July 1, 1946. If they are invalid, it is because Section 249.440 sets up a county classification contrary to Section 8, of Article VI, of the New Constitution of Missouri.

Section 249.440, RSMo 1949, states:

> "The county court in any county in this state now having or which may hereafter have a population of not less than four hundred thousand inhabitants nor more than seven hundred thousand inhabitants, in which is located an unincorporated village or residence district in which main and submain sewers have already been constructed or hereafter may be constructed or deemed necessary, shall have power to establish sewer districts, and to provide for the construction of sewers therein, and to pay the costs thereof by levying special assessments against the lots, tracts or parcels of ground in said sewer districts, and to issue special tax bills evidencing such assessments."

Section 8, of Article VI, of the New Constitution of Missouri states:

> "Classification of counties-uniform laws.- Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall

> not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

In order to conform the law of this state to the provisions of Section 8, of Article VI, of the Constitution of 1945, the General Assembly of Missouri enacted Committee Substitute for House Bill No. 476, Section 1, (now Section 48.020, RSMo 1949) which reads:

> "All counties of this state are hereby classified, for the purpose of establishing organization and powers in accordance with the provisions of section 8, article VI, Constitution of Missouri, into four classes as follows:
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> "Class 1. All counties now having or which may hereafter have an assessed valuation of three hundred million dollars and over shall be in the first class.
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> "Class 2. All counties now having or which may hereafter have an assessed valuation of fifty million dollars and less than three hundred million dollars shall be in the second class.
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> "Class 3. All counties now having or which may hereafter have an assessed valuation of ten million dollars and less than fifty million dollars shall be in the third class.
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> "Class 4. All counties now having or which may hereafter have an assessed valuation of less than ten million dollars shall be in the fourth class."

The above section, it will be noted, sets up four classifications of counties. This is in harmony with Section 8, of Article VI, of the New Constitution of Missouri, which states that "The number of classes (of counties) shall not exceed four." It will be noted further that Section 48.020, supra, classifies counties on the basis of their assessed valuation. It will be recalled that Section 249.440, supra, gives certain powers, in regard to the establishment of sewer districts, to the county courts of counties having not less than 400,000 population and not more than 700,000 population. The situation thus presented is that Section 48.020, supra, classifies counties into four classes on the basis of assessed valuation, and that Section 249.440, supra, delegates to certain counties, on a population basis, certain powers. This gives rise to two questions, one of which is: Does Section 249.440, supra, establish a fifth class of counties, in contravention of Section 8, of Article VI, of the New Constitution of Missouri, which states that there shall be only four classes of counties, and of Section 48.020, supra, which has set up four classes of counties on an assessed valuation basis; and second: Does Section 249.440, supra, contravene Section 8, of Article VI, of the New Constitution of Missouri, in that it is a special law rather than a general law, which Section 8, of Article VI, of the New Constitution of Missouri, declares shall apply to all counties in a single class.

In regard to this matter, we invite your attention to the case of State v. Kiburz, 208 S.W. (2d) 285, a case decided by the Missouri Supreme Court in December, 1947. This case was a quo warranto proceeding to determine the right of respondent Kiburz to hold the office of Highway Engineer of St. Louis County. At l.c. 287, et seq., of its opinion, the Court stated:

> "Sec. 8, Art. VI of the 1945 Constitution introduced into the organic law a new requirement with respect to legislation governing the structure of county government, and so necessitated a general overhauling of the whole body of statute law concerning that subject, for absent classification of counties (and none existed theretofore within the meaning of this constitutional provision), there could be no valid legislation governing their organization and powers, subsequent to July 1, 1946. In obedience to this

constitutional mandate, the 63rd General Assembly enacted Committee Substitute for House Bill 476, effective December 5, 1945, because of an emergency clause, which classified all of the counties of the state into four classes, basing the same on assessed valuation, and declaring such classification to be 'the foundation upon which the whole structure of county government and laws relating thereto rests.' Laws 1945, p. 1801, Mo. R.S.A. Sec. 13699.1 et seq. St. Louis County, by virtue of having an assessed valuation of three hundred million dollars, or over, as specified by Sec. 1 of the act just mentioned, concededly belongs in 'Class 1' thus created.

"(1,2) The second proviso to Sec. 8660 was in the nature of a limitation upon the power conferred upon the county court under Sec. 8655. Its object was to except something out of the terms of that grant of power. A proviso can have no existence apart from the provision it is designed to limit or qualify. So, even assuming that the later enacted classification act was sufficient to validate pre-existing Sec. 8655 as a general law defining the power of counties (with respect to the office of county highway engineer), under Sec. 8, Art. VI of the Constitution, because applicable alike to every county in the state, the proviso would have to fall because it is neither applicable to all of the counties of the state, nor to any particular class or classes of counties as defined by the classification act, and, hence, is in no sense a general law within the meaning of the constitutional provision we are considering. The circumstance that the two counties to which the proviso ever applied (St. Louis County and Jackson, each having a population of more than 50,000, taxable wealth exceeding forty-five million dollars, and adjoining or containing a city of more than 100,000 inhabitants) now comprise the whole of 'Class 1' counties, as presently constituted, would not save it.

From the above, it would appear that the Kiburz case holds that the law setting up a classification of counties on the basis of (a) population; (b) taxable wealth; (c) proximity of a city of a certain population, must fail as being in conflict with Section 8, of Article VI, of the New Constitution of Missouri, on the ground that it does not set up a county classification by a general law.

We next direct your attention to the case of Inter-City Fire Protection Dist. v. Gambrell, 231 S.W. (2d) 193, a case decided by the Missouri Supreme Court in 1950. This was an action for a declaratory judgment to have the proper officials of Jackson County extend taxes for plaintiff, when properly certified, to include the taxable tangible property in that part of plaintiff's district extending into the city of Independence. At l.c. 196, et seq., the Court stated:

> "* * * It is further contended that 'House Bill 7 so far as it attempts to limit its application to "counties of Class One now or hereafter having a population of 450,000 inhabitants or more" is unconstitutional and void as an attempt to create an additional class of counties in violation of Article VI, Section 8, Missouri Constitution, 1945, limiting the power of the General Assembly to the creation of four classes of counties.' Appellant further says that the act is not applicable to all class one counties as St. Louis County, a class one county, is excluded. In support of these assignments appellant relies particularly upon State ex inf. Mytton v. Borden et al., 164 Mo. 221, 64 S.W. 172, 175 and State on inf. Taylor v. Kiburz, 357 Mo. 309, 208 S.W. 2d 285, 287.
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> "In the Borden case the statute under consideration in effect created an additional class of cities to which it was applicable, contrary to constitutional provisions which limited the power of the Legislature to the creation of four classes. 164 Mo. 236, 64 S.W. 175.

"In the Kiburz case, 208 S.W. 2d 285, 287, the court said: 'Sec. 8, Art. VI of the 1945 Constitution introduced into the organic law a new requirement with respect to legislation governing the structure of county government, and so necessitated a general overhauling of the whole body of statute law concerning that subject, for absent classification of counties (and none existed theretofore within the meaning of this constitutional provision), there could be no valid legislation governing their organization and powers, subsequent to July 1, 1946. In obedience to this constitutional mandate, the 63rd General Assembly enacted Committee Substitute for House Bill 476, effective December 5, 1945, because of an emergency clause, which classified all of the counties of the state into four classes, basing the same on assessed valuation, and declaring such classification to be "the foundation upon which the whole structure of county government and laws relating thereto rests." Laws 1945, p. 1801, Mo. R.S.A. Sec. 13699.1 et seq.' (Italics ours.) The Kiburz case was an original proceeding in this court to determine title to the office of highway engineer of St. Louis County. A county matter was directly involved.

* * * * *

"Appellant insists that House Bill 7 involves 'county government'; that the board of a fire protection district is organized under the direction of the circuit court of the county; that the 'county government' levies and collects the taxes certified by the district; that the directors and the treasurer of the plaintiff district are required to file bonds with the circuit clerk; and that the treasurer of the district is further required each year to file with the county clerk a detailed financial statement. These matters are not decisive. Somewhat the same situation exists with reference to school, levee and drainage districts, which are not considered a part

> of the structure of county government. See State ex rel. Reorganized School District No. 4 of Jackson County, Mo., v. Holmes, Mo. Sup., 231 S.W. 2d 185, not yet reported in the State Reports.
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> "(1) We think it apparent on the face of House Bill 7, supra, that it does not deal with 'the organization and powers' of counties. State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 337 Mo. 855, 87 S.W. 2d 147, 152. Nor does it deal with 'a law applicable to any county.' It deals with a different type of political subdivision towit, a type of municipal corporation duly organized and existing under a general law providing for its incorporation by decree of the circuit court. Laws 1943, p. 852; Laws 1947, Vol. 1, p. 432, Mo. R.S.A. Sec. 13927.58 et seq. And see Art. X, Sec. 15, Constitution of Missouri, 1945. * * *"

As we understand the above case, its holding is that the organization of a fire protection district in first class counties, upon a population basis, does not contravene Section 8, Article VI, of the New Constitution of Missouri, because it does not deal with "the organization and powers" of counties, whereas in the Kiburz case, "a county matter was directly involved."

We next direct attention to the February 1952 opinion of the Missouri Supreme Court, in the case of Collector of Revenue of Jackson County v. Parcels of Land, 247 S.W. (2d) 83. In this case the Court had under consideration the position in a first class county of "a land trust." This body known as "a land trust" is created by authority of Section 141.700, RSMo 1949, and reads:

> "There is hereby created a commission for the management, sale and other disposition of tax delinquent lands, which commission shall be known as 'The Land Trust of . . . . . County, Missouri,' and the members thereof shall be known as land trustees. Such land trust shall

> have and exercise all the powers that are conferred by sections 141.210 to 141.810 necessary and incidental to the effective management, sale or other disposition of real estate acquired under and by virtue of the foreclosure of the lien for delinquent real estate taxes, as provided in said sections, and in the exercise of such powers, the land trust shall be deemed to be a public corporation acting in a governmental capacity."

The opinion in the above cited case was written by Ellison. At l.c. 92 appears a concurring opinion by Hyde, in which Ellison, Hollingsworth, Dalton, Leedy and Conkling, JJ., concur. That opinion is:

> "I concur in the opinion of Ellison, C.J. herein. However, I think something more should be said about the constitutionality of the Land Tax Collection Act, because the ground upon which it is upheld as to this particular case leaves doubt as to its validity after July 1, 1946. My view is that this Act is in no way affected by Sec. 8, art. VI of the 1945 Constitution or by Sec. 40 (21) of art. III thereof. I think we ruled on substantially the same situation in Inter-City Fire Protection District of Jackson County v. Gambrell, 360 Mo. 924, 231 S.W. 2d 193, 197, and that this case is governed by the principles therein stated and the authorities therein cited.
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> "We held in that case that the questioned Fire District Act did not deal with 'the organization and powers' of counties. Instead we said: 'It deals with a different type of political sub-division, to-wit, a type of municipal corporation duly organized and existing under a general law providing for its incorporation by decree of the circuit court.' We held 'that the statute, House Bill 7, is not unconstitutional as "an attempt to create an additional class of counties in violation of

Art. VI, Sec. 8 of the Constitution of 1945", nor is it a statute "regulating the affairs of counties" within the meaning of paragraph 21 of Sec. 40, Art. III of the Constitution of 1945.' We have also held that a sewer district, even it wholly within a city, did not violate the similar provision of the Constitution of 1875, Sec. 7, art. 9, concerning the organization and classification of cities. State ex inf. Gentry v. Curtis, 319 Mo. 316, 4 S.W. 2d 467.

"(13,14) I think the same thing is true of the Land Tax Collection Act. It does not deal with 'the organization and powers' of counties and the Land Trust created by the Act is no part of county government. The Land Trust is a separate entity from the county; it is a public or political corporation. Spitcaufsky v. Hatten, 353 Mo. 94, 182 S.W. 2d 86, loc. cit. 108, 160 A.L.R. 990. The functions of the Land Trust go beyond county government. Its services are rendered not merely to the county but also to the State of Missouri and to every municipality, school district, road district, sewer district, levee district, drainage district and other tax districts located in the county in which it operates. It has its own official seal; 'the power to sue and issue deeds in its name'; 'the general power to administer its business as any other corporate body'; and it may convey real estate 'without in any case procuring any consent, conveyance or other instrument from the beneficiaries for which it acts.' 1943 Act, Sec. 40, Laws 1943, p. 1056, now Sec. 141.750, R.S. 1949 V.A.M.S. Thus it is completely independent of the county which may, through its county court, appoint only one of the three managing trustees. As a public corporation, it is really an agency of the State of Missouri in its governmental powers of collection of taxes, created

> for the purpose of orderly administration of tax delinquent lands to get reasonable returns for revenue, from taxation on all tax delinquent lands, to the State, its political subdivisions, the municipalities and special tax districts created by the State in the county in which it operates. I do not think this is changed by the elective features applicable to Class One Counties added by the Amendments of 1945 and 1949 (Laws 1945, p. 1926; Laws 1949, p. 602) because the organization, purposes and functions of the Land Trust remain the same. Therefore, it is my conclusion that the Land Tax Collection Act is not in conflict with either of the constitutional provisions relied upon herein and is a valid Act under the 1945 Constitution."

At this point our situation with respect to the problem which you have submitted to us would appear to be that if the sewage district law, heretofore discussed, does directly involve a county matter, that, on the authority of the Kiburz case, it must fall as being in conflict with Section 8, Article VI, of the New Constitution of Missouri, and of Section 48.020, RSMo 1949; but that if it does not deal with the organization and powers of counties, it is, on the authority of the Fire Protection District case, and the Collector of Revenue case, supra, valid. In other words, is the situation which you present more nearly analagous to the Kiburz case or to the Fire Protection District and Collector of Revenue cases?

It is our belief that the effect of Sections 249.430-249.660, inclusive, supra, is to create a situation very similar to that set forth in the Fire Protection District and Collector of Revenue cases; that it does not contravene Section 8, of Article VI, of the New Constitution of Missouri, nor of Section 48.020, RSMo 1949, supra. We therefore believe that Sections 249.430-249.660, supra, are in full force and effect.

CONCLUSION

It is the opinion of this department that sewer districts formed in St. Louis County should be formed according to the provisions of Sections 249.430-249.660, inclusive, RSMo 1949.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR, Attorney General