Local Government–County Home Rule and the 1970 Missouri Constitutional Amendment

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VIII. Conclusion

Missouri courts have applied a variety of tests for determining the validity of covenants not to compete. The result has often been to confuse the attorney called upon to draft such a covenant as to what must or must not be included therein. Although the balancing of a myriad of factors is involved, the courts should find such a covenant valid and enforceable only if it is found to be reasonable as to the covenantee, the covenantor, and the public. The resulting flexibility will become even more important in the future as the courts will be forced, in the absence of adequate statutory regulation, to deal with new attempts to limit competition contractually. By concentrating on the general concept of reasonableness, Missouri courts can avoid the temptation to rely on mechanical rules and place more emphasis on the equities involved in the given case.

Harold William Hinderer III

LOCAL GOVERNMENT—COUNTY HOME RULE AND THE 1970 MISSOURI CONSTITUTIONAL AMENDMENT

I. Introduction

Missouri is credited with giving municipal home rule its start in 1875, and is one of at least seventeen states that authorizes all or some counties to adopt a home rule charter. These states have done so in an attempt to create governmental authority which can “span the metropolitan area from city to suburb and unify the resources of the area with metropolitan wide responsibility.” Problems of pollution, traffic control, sewage and waste disposal, water and utility supply, health care, and welfare financing require effective uniform county solution, without the delay of obtaining approval from the state legislature. This feature is thought to be embodied in county home rule. Home rule under a charter government can serve as:

[B']oth a political symbol and a legal concept. As a political symbol it serves as a rallying point for those who support local autonomy without undue interference by the state government. As a legal concept its basic function is to distribute power between the state and local governments.

N.Y.2d 293, 296 N.Y.S.2d 354, 244 N.E.2d 49 (1968). To be completely safe, however, the draftsman should include a clause saying that the liquidated damages provision is not intended to be in lieu of equitable relief.

1. Mo. Const. art. IX, § 16 (1875).
3. Id.
The Missouri constitution requires counties to be grouped into four classes\(^6\) and the legislature has done so, basing the classification on assessed valuation.\(^6\) The constitution provides that the organization and powers of each class of county shall be defined by uniform general laws,\(^7\) but it further provides that counties with a population of 85,000 or more may frame and adopt a home rule charter form of government.\(^8\)

The primary goal of county home rule is to give counties a certain level of local autonomy by enabling them to act without prior authorization from the state legislature. Prior to 1970, the charter county's source of power was embodied in article VI, section 18 (c) of the Missouri constitution:

The charter may provide for the vesting and exercise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county shall perform any of the services and functions of any municipality, or political subdivision in the county, except school districts, when accepted by vote of a majority of the qualified electors voting thereon in the municipality or subdivision, which acceptance may be revoked by like vote.

This section was amended in 1970 and now reads as follows:

The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision, except school districts, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county may contract with any municipality or political subdivision in the county and perform any of the services and functions of any such municipality or political subdivision.

The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision, except school districts, throughout the entire county within as well as outside incorporated municipalities; any such charter provision shall set forth the limits within which the municipalities may exercise the same power collaterally and coextensively. When such a proposition is submitted to the voters of the County the ballot shall contain a clear definition of the power, function or service to be performed and the method by which it will be financed.

This amendment has ostensibly given charter counties more and broader powers in dealing with county problems and providing county services.

St. Louis County adopted the charter form of government in 1950,

\(^5\) Mo. Const. art. VI, § 8.
\(^6\) § 48.020, RSMo 1969.
\(^7\) Mo. Const. art. VI, § 8.
\(^8\) Mo. Const. art. VI, § 18(a).
and Jackson County did likewise in 1970. Five other Missouri counties now have sufficient population to qualify for charters and two more seem on the verge of qualification. There has also been a recent movement for a constitutional amendment lowering the population requirement to 80,000. Because of this increase in the number of counties eligible for charter rule, section 18(c) of the Missouri constitution should become increasingly important. This comment will attempt to analyze problem areas solved and possibly created by the 1970 constitutional amendment to section 18(c).

For the purpose of analysis, charter counties should be compared with statutory counties.

II. THE STATUTORY COUNTY
A. Organization And Magnitude of Power

The organization of the government of all Missouri counties, except for the two charter counties, is a creature of state statute. The county court is the basis of county government, performing both legislative and executive or administrative functions. One important administrative function is the review of the budget of each county department. Although it is called a court and its officials are called judges, the county court performs no judicial function. The court is composed of three or fewer judges who are elected officials. Other major elected administrative officials in statutory county government are the clerk, collector of revenue, assessor, treasurer, prosecuting attorney, sheriff, coroner, recorder of deeds, surveyor, and highway engineer.

Statutory counties may exercise only those powers granted to them by the state. This principle has become known as Dillon's Rule, which was expressed in Lancaster v. County of Atchison. Dillon's Rule states that the only powers which counties may exercise are: (1) those granted in express words; (2) those necessarily or fairly implied in or incident

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10. Buchanan County (86,915), Clay County (123,702), Greene County (152,929), Jefferson County (105,647), and St. Charles County (92,986) all qualify for charters. Boone County (80,911) and Jasper County (79,852) almost meet the population requirement. 1973-1974 OFFICIAL MANUAL, STATE OF MISSOURI at 1164.

The University of Missouri-Columbia, Governmental Affairs Newsletter, Vol. VII, Issue 3, at 2 (1972), indicates that Jefferson County voters narrowly rejected a charter proposal, Buchanan County was in the drafting process and readying for a vote, and Greene County was circulating petitions for a charter commission. St. Charles County voters defeated a charter proposal on May 6, 1975. St. Louis Globe Democrat, May 7, 1975, at 12B, col. 2.

11. Senate Joint Resolution No. 17 was introduced in the 78th General Assembly by Senators Marshall and Wiggins, calling for a constitutional amendment lowering the population requirement to 80,000. Amendments were also proposed to sections 18(b) and 18(f) of article VI. See pt. IV, § E of this comment, infra.

12. § 49.010, RSMo 1969.


14. 352 Mo. 1099, 180 S.W.2d 706 (1944).
to the powers expressly granted; or (3) those essential to the declared objects and purposes of the county—i.e., powers that are indispensable and not merely convenient. If there is reasonable doubt about a county having a particular power, the courts resolve the doubt against the county. Because of the rule, the county must look to the state legislature for its power, and the power must be clearly stated or implied beyond reasonable doubt.

The legislature has distributed these powers among the four classes of counties, with some statutes pertaining to one or more counties and some pertaining to all. The index to Vernon's Annotated Missouri Statutes indicates some twenty pages devoted to indexing legislation for the City of St. Louis and St. Louis County. Although St. Louis County has had a home rule charter since 1950, much of the state legislation has been passed at the county's request, apparently as a precautionary measure. This indicates at least some amount of uncertainty as to what powers charter counties may exercise independent of authorizing legislation.

The restrictive nature of a statutory county's power has been at least partially responsible for the formation of many special districts in Missouri. As of 1968, Missouri was eleventh in the nation in number of local government units. Missouri contained 2,918 units, consisting of school districts, townships, counties, municipalities, and 734 special districts. Forming a special district is often the only feasible method of obtaining a desired service, although such a district may also be formed in order to avoid the constitutional limitation an debt or to finance a project of countywide interest. Whatever the reason for formation, special districts are very cumbersome and often stand in the way of more comprehensive treatment of a problem.

B. The Case Law

The fact that statutory counties, under Dillon's Rule, possess no powers except those conferred by statute has resulted in a less than voluminous amount of case law concerning the exercise of powers by statutory counties. Although the cases which have been decided seem quite reasonable, the question remains as to why there have been so few decisions. There are at least two possible reasons for this. It could

15. Missouri Has Too Many Local Governments, 24 J. Mo. B. 499 (1968). Missouri had 57% of all road districts in the United States. A charter county, St. Louis County, had 153 units of government, with 32 special districts. Id. at 499, 500.


17. The Jackson County Sports Complex Authority was created by special legislation. See § 64.930, RSMo 1969; Freilich, Robards & Wilson, supra note 9.

18. Counties were found not to possess the powers contested in County of Platte v. James, 489 S.W.2d 216 (Mo. 1973) (county had no power to impose zoning restrictions on incorporated area, even though the government of the corporate area was not functional and had not been for some time); Fulton Nat'l Bank v. Callaway Memorial Hosp., 465 S.W.2d 549 (Mo. 1971) (county hospital had no authority to endorse notes with recourse, and therefore was not liable when notes were not subsequently paid). State ex rel. Crites v. West, 509 S.W.2d
mean that the counties have enough powers under the statutes to deal with their problems. It seems more probable, however, that reported decisions are few because county officials are very reluctant to act unless clearly authorized by statute. One of the principal reasons for adopting a home rule charter is to avoid the necessity of relying wholly upon legislative authorization for power.

III. THE CHARTER COUNTY

A. Case Law Under the Prior Section 18(c)

Grants of power to charter counties have seemingly been restricted in much the same manner that powers of statutory counties have been restricted by Dillon's Rule. This restriction has been in the form of judicial decision. In State ex rel. Town of Olivette v. American Telephone and Telegraph Co. it was stated that the county charter embodies the powers charter counties may exercise, and acts beyond the powers granted or necessarily implied in the charter are void. In Schmoll v. Housing Authority of St. Louis County the Missouri Supreme Court described St. Louis County's charter as its "fundamental organic law" and said that a charter county must look to its charter for its powers.

Language in both the Jackson County and St. Louis County charters attempts to escape this restrictive interpretation of charter power by asserting that "all powers possible for a county to have under the constitution and laws of Missouri. . . ." reside in charter counties, and that powers under the charter shall be liberally construed in favor of the county. To date, no decision by Missouri courts has indicated whether such language is effective in avoiding the restrictive interpretation of charter power. There is, however, dictum in Readay v. St. Louis County Water Co. indicating that the Missouri Supreme Court was ready to

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482 (Mo. App., D. Spr. 1974) (power to dissolve a special fire protection district was not necessary to or implied from express powers given by statute).

Implied powers to carry out the contested function were found in Everett v. County of Clinton, 282 S.W.2d 30 (Mo. 1955) (power of county to operate a rock quarry was implied from the power to own real estate, construct and improve roads, and condemn rock quarries for public purposes); State ex rel. Wahl v. Speer, 284 Mo. 45, 223 S.W. 655 (En Banc 1920) (statute empowering county to incur debt to "build" a courthouse, implied spending the borrowed money for expansion of the old courthouse site); Blades v. Hawkins, 133 Mo. App. 328, 112 S.W. 979 (St. L. Ct. App. 1908), eff'd per curiam, 240 Mo. 187, 144 S.W. 1198 (1912) (power of county court to hire an accountant to examine county records was implied from express power making county court the fiscal agent of the county); Sheidley v. Lynch, 95 Mo. 487, 8 S.W. 434 (1888) (power of county to erect a courthouse at county seat implied the power to purchase the necessary land).

19. 280 S.W.2d 134 (St. L. Mo. App. 1955).
20. 321 S.W.2d 494 (Mo. 1959).
23. 352 S.W.2d 622 (Mo. 1961).
accept such language in a similar but earlier charter provision.\textsuperscript{24} If such language is deemed insufficient to avoid the restrictive judicial interpretation of charter power, a county must comply with this interpretation. This would mean that a charter county would have to amend its charter each time it wished to exercise authority not expressly or necessarily implied in its charter. This would be a troublesome procedure because each charter amendment necessitates a countywide vote.\textsuperscript{25}

It should be pointed out that statutes pertaining to a particular class of counties continue to apply to a charter county unless conflicting charter county enactments should prevail. This principle is illustrated by the \textit{Readex} case, where the St. Louis County Water Company, pursuant to an ordinance of the county council, added fluoride ions to water supplied to municipalities within the county. The Missouri Supreme Court found the county had the power to do so, but the power was not derived from article VI, section 18(c) of the constitution, because the pre-1970 version of that section did not permit counties to legislate in incorporated areas. Instead, the decision was based on a statute that authorized first class counties to enact ordinances which enhance the public health.\textsuperscript{26}

Apportionment of powers between charter counties and the state may best be analyzed in terms of: (1) the scope of a home rule county's power in the absence of express constitutional or statutory prohibition or authorization and (2) whether state or county enactments prevail when there is a conflict between them.\textsuperscript{27} A careful distinction should be made between the two situations. "It is one thing to argue that there should be no limit on . . . power in the absence of an express prohibition; it is quite another thing to argue that . . . enactments should prevail over conflicting statutes."\textsuperscript{28} The power of a charter county to act in the absence of express prohibition is still somewhat open to question because most cases have arisen in the context of a conflict between state and county enactments. When such a conflict arises, the test now used by Missouri courts was stated in \textit{State ex rel. St. Louis County v. Campbell}.\textsuperscript{29} "When a conflict occurs, the resolution thereof, as a general principle, depends

\textsuperscript{24} Article I, section 2 of the St. Louis County Charter as it then appeared stated: "The County shall have all the powers now or hereafter vested by the Constitution and laws of Missouri. . . ." The Missouri Supreme Court apparently accepted this provision by stating:

\textit{It appears, therefore, that by virtue of the constitutional, statutory, and charter provisions last above set forth, the county council was and is authorized to enact ordinances tending to enhance the health of all the residents of St. Louis County.}

\textsuperscript{25} S.W.2d at 625.

\textsuperscript{26} Jackson County Charter art. XV (1970); St. Louis County Charter art. X (1968).

\textsuperscript{27} § 192.300, RSMo 1959.

\textsuperscript{28} This analysis was used for home rule municipalities in Westbrook, \textit{supra} note 4, at 46.

\textsuperscript{29} 498 S.W.2d 833 (Mo. App. D. St. L. 1973).
on whether the functions are ‘private, local corporate functions’ or ‘governmental.’”

For example, in Casper v. Hetlage it was stated that zoning of a charter county was not a governmental matter over which the state retained control.

A governmental interest was found to exist in State ex rel. Cole v. Matthews, where it was determined that St. Louis County could not purchase voting machines from the lowest bidder. The State Board of Election Commissioners preferred another type of machine. Elections were found to be governmental in nature, and the State Board prevailed. A recent opinion of the Office of the St. Louis County Counselor concluded that the county could not require an affidavit of value to be filed with each deed recorded by the Recorder of Deeds because it was thought to be preempted by the uniform statewide system of recording which was governmental in nature.

In St. Louis County v. City of Manchester a charter county’s right to plan and zone was determined to be local in nature and was given precedence over a city’s statutory power to acquire sewage disposal facilities outside city limits. This decision is often cited for the proposition that when county planning and zoning efforts conflict with other statutes, charter counties will prevail whereas statutory counties will not. This is a result of comparing City of Manchester with State ex rel. Askew v. Kopp, where residents of a statutory county sought to prevent the City of Raytown from acquiring sewage facilities outside the city limits pursuant to statute. In Kopp the city’s statutory power prevailed. The opinion

30. Id. at 836.
31. 359 S.W.2d 781 (Mo. 1962).
32. In Casper St. Louis County, being a charter county, could vest the management of the county business in some other agency than a county court. County courts, which a statutory county must utilize, must unanimously vote to rezone, pursuant to section 64.140, RSMo 1959. St. Louis County did not require a unanimous vote of its council, and in Casper it was held that such power to rezone was local in nature and was not subject to the legislative power of the state. Id. at 790. See also State ex rel. Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972) (charter county had powers pertaining to planning and zoning outside incorporated areas under old section 18(c)); Dahman v. City of Ballwin, 483 S.W.2d 605 (Mo. App., D. St. L. 1972) (charter county’s zoning power is in the public interest to promote public health and welfare).
33. 274 S.W.2d 286 (Mo. En Banc 1954).
34. St. Louis Co. Counselor Op. No. DL58-59 (July 18, 1975). The affidavit was sought to aid the County Assessor in updating countywide property values. The opinion was based primarily on Chapter 59, RSMo 1969, which pertains to Recorders of Deeds, and Chapter 442, RSMo, which pertains to the conveyance of real estate. The opinion concluded these statutes indicated “statewide” concern. It is questionable, however, whether this is really a case where the action sought by the county conflicts with and is preempted by existing statutes. In Blades v. Hawkins, 135 Mo. App. 828, 112 S.W. 979 (St. L. Ct. App. 1909), aff’d per curiam, 240 Mo. 187, 144 S.W. 1198 (1912), the power of a statutory county to hire an accountant to examine county records was implied from the express power making the county court the fiscal agent of the county.
35. 360 S.W.2d 638 (Mo. En Banc 1962). The City of Manchester sought to condemn land for such facilities pursuant to sections 71.680, 79.380, RSMo 1959.
36. 330 S.W.2d 882 (Mo. 1960).
in *City of Manchester* distinguished *Kopp*, however, because in the latter case private landowners were contesting the City of Raytown's action. No controversy between Jackson County and the City of Raytown existed.\(^{37}\)

In *Appelbaum v. St. Louis County*\(^{38}\) the county was found to have the power to acquire land for the purpose of constructing an incinerator. The land sought by the county was inside an incorporated municipality and use of the land for incinerator purposes conflicted with the municipality's zoning restrictions. With partial reliance on statutes pertaining to first class counties,\(^{39}\) the Missouri Supreme Court stated:

> The County Council has acted pursuant to these [statutory and charter] authorities, and its power with respect to enactment of ordinances which tend to enhance public health is not limited to the power conferred by Article VI, Section 18(c) of the Missouri Constitution. ...\(^{40}\)

Although the Missouri decisions do not clearly define the powers charter counties may exercise in the absence of express statutory or constitutional prohibition or authorization, a recent opinion by the Missouri Supreme Court could be construed as defining such powers. In *Flower Valley Shopping Center, Inc. v. St. Louis County*\(^{41}\) a county ordinance required shopping centers which were located in unincorporated areas and which had parking areas in excess of 200,000 square feet to provide outside security protection for shoppers. The licensed watchmen were to be employed by the shopping centers, and they were to have full power of arrest and the use of weapons. The watchmen were to be under the direction and supervision of the Superintendent of Police of St. Louis County. The ordinance was challenged on constitutional grounds. The Missouri Supreme Court, while finding the ordinance constitutional, concluded that St. Louis County lacked the authority to enact the ordinance because police protection was a matter of statewide concern. The court did not indicate whether the ordinance was preempted by existing statutes or constitutional provisions requiring police protection to be provided by the county, or whether they viewed the ordinance as an attempt to legislate in the absence of any applicable statutory or constitutional authorization. *Flower Valley* indicated that it makes no difference whether the charter county's ordinance conflicts and is therefore preempted by an existing state statute, or whether the ordinance is an attempt to legislate in the absence of any statutory authorization—in either case the test is whether the activity is of statewide or local concern. In speaking of article VI, section 18(b) of the constitution, the court stated:

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37. 360 S.W.2d 638, 641 (Mo. En Banc 1962).
38. 451 S.W.2d 107 (Mo. 1970).
39. Section 49.303, RSMo 1969, and section 64.320, RSMo 1969, authorize first class counties to acquire land by eminent domain for the protection of public health, and to construct and operate incinerators and land fills.
41. 528 S.W.2d 749 (Mo. En Banc 1975).
In our opinion, the question whether owners of private property may be compelled to provide police protection for shoppers is also one of state-wide concern and may not be addressed by counties without constitutional or statutory authority more explicit than is found in Art. VI, § 18(b).\footnote{42}

The court made no mention of section 18(c), which designates powers that charter counties may exercise. The fact that only unincorporated areas of the county were affected by the ordinance seems to indicate that St. Louis County contemplated section 18(c) when it enacted the ordinance, because “police and traffic” was one of four express areas in which counties could legislate for unincorporated areas under the earlier section 18(c). The court reasoned that allowing such action by a county could result in the apportionment of police and fire services to potentially troublesome areas, with the resulting cost being assessed to the private landowners in those areas. This policy reasoning is understandable, but the decision completely avoids the issue of whether a charter county has the authority to take such action under section 18(c).

\section*{B. The Impact of the 1970 Amendment}

The 1970 amendment to section 18(c)\footnote{43} consists of two paragraphs, the first of which expands the legislative power that charter counties may exercise outside incorporated areas of the county. Originally authorized to legislate “pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities. . . .”\footnote{44} charter counties are no longer limited to the four listed categories but may now legislate pertaining to “any and all services and functions of any municipality or political subdivision, except school districts, in the part of the county outside incorporated cities. . . .”\footnote{45}

The second paragraph of the 1970 amendment allows charter counties to exercise power pertaining to “all services and functions of any municipality or subdivision, except school districts, throughout the entire county within as well as outside incorporated municipalities . . .”\footnote{46} This paragraph had no earlier counterpart. The prerequisites to the exercise of such countywide power are probably the most important feature of the 1970 amendment to section 18 (c).

One article suggests that countywide action cannot be taken by legislative enactment of the county because such measures must be submitted to the county voters.\footnote{47} The second paragraph of section 18(c), with reference to the exercise of countywide legislative power, reads in pertinent part:

\footnotesize{\begin{verbatim}
42. Id. at 754.
43. The amendment is set out at pt. I of this comment, supra.
44. Mo. Const. art. VI, § 18(c).
45. Mo. Const. art. VI, § 18(c) 1970 amend.
46. Id. (emphasis added).
47. Freilich, Robards & Wilson, supra note 9, at 332.
\end{verbatim}}
The charter may provide for the vesting and exercise of legislative power . . . any such charter provision shall set forth the limits within which the municipalities may exercise the same power . . . *When such a proposition is submitted to the voters of the County . . .* (emphasis added).

The initial part of the paragraph indicates such action might be taken by the exercise of legislative power by the county, but the latter part of the paragraph contemplates a countywide vote. Reading the paragraph as a whole, it rather clearly indicates that a charter amendment is necessary for any countywide measure.

St. Louis County officials also believe that countywide measures require a charter amendment. St. Louis County has made the only attempt thus far to utilize the 1970 amendment. In 1971, ordinances calling for charter amendments were passed by the county legislative body. The three proposed charter amendments were all defeated at the November 2, 1971 election. The first amendment called for 24-hour police protection for all of St. Louis County, the second for the adoption of a countywide minimum housing code, and the third for the adoption of a countywide building code.48 The charters of both St. Louis County and Jackson County were written prior to the 1970 constitutional amendment, and both charters attempt to include all powers subsequently given charter counties by statute or in the constitution.49 St. Louis County, however, required a countywide vote and did not attempt to rely on such language in its charter.

Neither Jackson County nor St. Louis County have current plans to

48. The charter amendments, if adopted, would have consisted of the following:

1) Said charter as amended would require each city, county, town or village police department in St. Louis County to provide patrol services and preliminary investigative services at all times, and create a Police Standards Commission to determine compliance with this requirement and further authorize the County Council, after hearing, to direct the County Police Department to perform such services where the responsible police department had failed to comply with this requirement, the cost of such additional services to be paid by St. Louis County, to be reimbursed by any municipality receiving such services;

2) Said charter as amended would authorize the County Council to enact and provide for the enforcement of uniform building construction codes throughout St. Louis County at the County's expense and to provide the terms on which any municipality or fire district may enforce any such code at its own expense, and would authorize any political subdivision to enact different provisions after public hearing, and would also provide for enlarging the existing Building Commission and the creation of the City Selection Committee and a Fire Safety Advisory Board;

3) Said charter as amended would authorize the County Council to enact and provide for the enforcement of a uniform housing code throughout St. Louis County at the County's expense and to provide the terms on which any municipality may adopt and enforce such a code at its own expense, would provide for a distribution of part of the County's expenditures to such municipalities, and would also provide for the creation of a Housing Code Commission and a City Selection Committee.


49. See note 21 and accompanying text *supra*.
propose any charter amendments, indicating that no judicial decision under the 1970 amendment will be immediately forthcoming. The construction and interpretation of the 1970 amendment to section 18(c) must await judicial determination, but certain issues concerning the amendment that seem likely to arise in the future will be discussed in this comment.

IV. THE 1970 AMENDMENT: ISSUES AND CONSTRUCTION
A. The County's Basic Authority Redefined?

The cases decided prior to the 1970 amendment limited a charter county's power to legislate to matters of local concern, as opposed to matters of governmental or statewide concern. The earlier section 18(c) specified four areas in which counties had legislative power: public health, police and traffic, building construction, and planning and zoning. The 1970 amendment speaks of "any and all services and functions of any municipality or political subdivision." It can be argued this changes the test for when and on what matters a county may act. The term "services" may indicate only those services which were formerly provided by a municipality, or "functions" may expand the authority to other areas. "Functions" seems to be a much broader term than "services" and may include implementing or regulating local policy rather than merely the performance of services. It is possible, however, that "services and functions" was intended to include only services otherwise awkward or impossible to fit under public health, police and traffic, building construction, and planning and zoning—the enumerated categories of the earlier section 18(c). Nevertheless, "services and functions" seem to indicate that something more was intended under section 18(c), as amended, than under the prior section.

The second paragraph of the 1970 amendment empowers charter counties to legislate countywide when approved by county vote. The last part of that paragraph states that "the ballot shall contain a clear definition of the power, function or service to be performed. . . . " Here "power" is added to "function or service." "Power" did not appear in paragraph one or in the first part of paragraph two. Such a term, when coupled with function and service, seems to indicate that the amendment changes a charter county's basic authority. Because "power" was not used in paragraph one, it could be argued that charter counties have less au-

50. Telephone interview with the Office of County Counsel of both Jackson and St. Louis Counties, July, 1975.
51. Casper v. Hetlage, 359 S.W.2d 781 (Mo. 1962); State ex rel. St. Louis County v. Campbell, 498 S.W.2d 833 (Mo. App., D. St. L. 1973).
52. In State ex rel. Cole v. Matthews, 274 S.W.2d 286 (Mo. En Banc 1954) a charter county was held not to have the power to purchase voting machines from the lowest bidder, as elections were said to be governmental in nature. If the case had arisen under the 1970 amendment to section 18(c), the result might have been different.
53. The amendment is set out at pt. I of this comment, supra.
authority when legislating for unincorporated areas. It remains an open question whether a charter county's basic authority has been altered to exceed the power of providing constitutionally required services and determining the manner in which they are to be provided. Section 18(c), as amended, provides an argument that a charter county's authority has been redefined.

B. Instrument of Grant or Limitation?

By definition, an instrument of grant gives charter counties only those powers which are specified or necessarily implied in their charters. An instrument of limitation, on the other hand, gives charter counties all powers not prohibited by the constitution or by the charter. It is clear from the language of section 18(c), as amended, that county charters are instruments of grant.

Language in Jackson County's charter states:

The county shall have all powers possible for a county to have under the constitution and laws of Missouri, as fully and completely as though they were specifically enumerated in this charter... and all powers not expressly prohibited by the constitution, or by this charter. 54

Whether this language will be successful in creating an instrument of limitation has not been answered by the courts. If the courts view such language as being ineffective in creating an instrument of limitation, county legislation that was otherwise local in nature could be invalidated if power to enact such legislation was not provided for in the county charter. 55

An argument against allowing such expansive language to create an instrument of limitation is that section 18(c) is concerned with the difficult subject of intergovernmental relations. Such matters should be defined as clearly as possible in the charter. An instrument of limitation would give a county all powers not expressly prohibited in the charter. This would arguably result in less clarity, because there would be powers existing outside the instrument.

C. Constitutional Conflicts

If a state statute provides the terms under which a charter county can provide countywide services, the question arises whether the statute is unconstitutional because of a conflict with sections 18(b) and 18(c) of the Missouri constitution. Section 18(b) says in pertinent part:

The charter shall provide for... the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and the county officers. ...

It can be argued that a statute allowing a charter county to provide

54. See note 21 and accompanying text supra.
55. Freilich, Robards & Wilson, supra note 9, at 388.
countywide services would be unconstitutional, because charter counties retain freedom to choose the manner in which to perform the services required by the constitution. A state statute may require the result, but where it also prescribes the manner in which the result shall be obtained, a constitutional question is presented. For example, assume that a state statute required all charter counties to provide a countywide system of mosquito control, and that the system be implemented by a Mosquito Control Supervisor who must not be a part of any other department or agency of county government. It could be argued that the statute would be unconstitutional because it dictates the manner in which the service is to be provided.

Where provisions of a county charter conflict with provisions of a charter of a city within the charter county, the question arises as to which governmental entity should prevail. For example, if a charter county enacted a uniform countywide building code and a charter city within the county persisted in utilizing a less stringent code, a constitutional conflict would be presented. The Missouri constitution provides for both charter counties and charter cities. In St. Louis County v. City of Manchester the city sought to acquire land outside the city limits for purposes of sewage disposal. The action was pursuant to statute, but was contrary to the planning and zoning provisions of St. Louis County. St. Louis County prevailed in that case, but the decision does not answer the question posed because Manchester was not a charter city. In fact, the Missouri Supreme Court declined to determine whether the county or the city "occupies a superior position in the governmental hierarchy." It would seem that in keeping with the spirit of the 1970 constitutional amendment to section 18(c), the charter county should prevail. Section 18(c) requires a countywide vote. A charter city should not be able to act contrary to the county charter when the county acts pursuant to a majority vote of the residents of the county, which includes the voters of the charter city. A contrary argument is based on the doctrine that when there is conflict between two entities of government, the smallest local unit of self government should prevail.

D. Problems of Interpretation

The last sentence of the second paragraph of amended section 18(c) states that when countywide action is submitted to a vote, the ballot shall contain "a clear definition of the power, function or service to be performed and the method by which it will be financed." It could be argued that the language having to do with the method of financing limits

56. Hellman v. St. Louis County, 302 S.W.2d 911, 916 (Mo. 1957); State v. Gamble, 365 Mo. 215, 224, 280 S.W.2d 656, 660 (En Banc 1955).
57. St. Louis County sought to enact such a provision in 1971, but was unsuccessful.
58. Mo. Constr. art. VI, §§ 18(a), 19.
59. 360 S.W.2d 638 (Mo. En Banc 1962).
60. Id. at 642.
countywide action to powers, functions, and services which incur debt and eliminates those powers, functions, and services of a regulatory nature which are enforced or carried out by an existing county office. Additional expense would undoubtedly be incurred for these regulatory functions, but the expense may be absorbed by the county operating budget and not require additional revenue measures. It seems doubtful that such a construction was intended because this would force the charter county to incur additional debt each time it attempts to implement countywide measures, and incurring such debt should not be encouraged. Moreover, because incurring additional debt usually has little voter appeal, many countywide measures would be doomed to failure in a countywide election.

The word "clear" appearing in the last sentence of the second paragraph of section 18(c) may present a point of challenge to future charter amendments. A "clear" definition of the power, function, or service to be performed and the method by which it will be financed would be difficult to present in some cases. It seems doubtful that courts would give a broad scope of review to a challenge that the ballot did not contain a "clear" definition of the proposal. The acceptance of such an argument would allow belated attacks on countywide legislation by parties who, if genuinely interested or affected, could have asked for clarification prior to submission to county vote. Another argument for a narrow scope of judicial review was stated in Windle v. Lambert.61 "The general rule is that courts will not inquire into the motives of Legislatures where they possess the power to act and it has been exercised as prescribed by law. . . ."62 By analogy, if a charter county legislature has complied with the state constitution and its own charter in enacting legislation, its enactments should be subject to the same rule.

The second paragraph of amended section 18(c), having to do with countywide services and functions, states that any such charter provision "shall set forth the limits within which the municipalities may exercise the same power collaterally and coextensively." There are at least three ways this language could be construed. First of all, the phrase may imply that the right to exercise the same power collaterally and coextensively always resides in the city, and that this residual role may prevent the county from completely taking over a service or function. Second, it may mean that the city's collateral and coextensive power, if it exists at all in a particular case, is to be limited by the charter amendment. Finally, this particular phrase omits "political subdivision," which was used earlier in the paragraph in conjunction with "municipality." This may indicate that if the county wants to contract with any political subdivision other than a city—e.g., a special road district, the charter does not have to set forth the limits for collateral and coextensive exercise of the same power by the political subdivision.

61. 400 S.W.2d 89 (Mo. 1966).
62. Id. at 93.
The question whether a county can perform a countywide service without all cities in the county having the same power may arise under section 18(c). The second paragraph of section 18(c) refers to the "exercise of legislative power pertaining to any and all services and functions of any municipality or subdivision . . . throughout the entire county. . . ." Because of the language of amended section 18(c) refers to any municipality, it suggests that it is not necessary for all cities to have the power.

Article VI, section 16 of the Missouri constitution provides:

Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof . . . for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law.

Section 70.220, RSMo 1969, was enacted to implement article VI, section 16 of the Missouri constitution. This statute requires that the subject or purpose of any contract or cooperative action be within the scope of the power of each municipality or subdivision. Because article VI, section 16 implies that each municipality or subdivision shall have coextensive power, it is questionable that this conflicts with section 18(c) as amended, which allows counties to legislate countywide when approved by county vote. Section 16, by the use of the language "may contract," speaks in terms of voluntary action or cooperation. In contrast, section 18(c) speaks of powers vested in a charter county by reason of its charter, the exercise of these countywide powers, and the implementation of countywide programs. Because of this difference in intent, it is improbable that each municipality and political subdivision in a county must have reciprocal power before a charter county could adopt countywide measures.

E. Proposed Constitutional Amendments

A Senate joint resolution introduced in the last General Assembly called for the submission to Missouri voters of amendments to sections 18(a), 18(b), and 18(f) of article VI of the Missouri constitution. The amendments to section 18(a) and 18(f) would have lowered the population requirement for charter counties from 85,000 to 80,000 inhabitants, and lowered the percentage of county voters required for a petition for a charter commission from 20 to 8 percent of the total vote cast for governor at the last general election. The amendment to section 18(b) would have

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63. In School District of Kansas City v. Kansas City, 382 S.W.2d 688 (Mo. En Banc 1964), the Missouri Supreme Court stated:

Section 70.220 follows the language of the constitutional provision, § 16 of Art. 6, but further spells out the requirement implicit in the Constitution that the subject and purposes of the cooperative contract or action shall be within the scope of the powers of the municipality or subdivision.

Id. at 692.

substituted "not prohibited" for "prescribed" in section 18(b), so that it would have read as follows:

The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers [prescribed] not prohibited by the constitution and laws of the state.65

The latter proposed amendment was intended to give charter counties greater powers,66 presumably in areas where there are no conflicting legislative or constitutional provisions. There was some thought that the legislature could act in matters of purely local concern under the prior section 18(b). Where such a conflict occurs, and the matter is actually determined to be local, the charter county should prevail under the constitution as it now reads, provided the county has appropriate authority in its charter. The amendment was opposed by the two charter counties, St. Louis County and Jackson County, because they believed that the present section 18(b) was adequate, and they were content with its provisions.67 The resolution was passed in the Senate, but was not acted upon by the House. If passed, the proposed section 18(b) would change county charters from instruments of grant to instruments of limitation, by the use of language similar to that found in both the Jackson County and St. Louis County charters.68 The charter counties apparently believe that the language in their charters is sufficient and wish no further tampering with section 18(b).69 It appears that there will be no further immediate attempts to amend section 18(b), because the authors of the proposed amendment will probably defer to the judgment of the charter counties. There will, however, be further attempts to amend sections 18(a) and 18(f)70 in regard to the population requirement for charter counties.

V. Observations and Conclusions

With the addition of Jackson County as a charter county and the possibility of more counties obtaining charters in the near future, the

65. Id.
67. Telephone interview with the Office of County Counsel of both Jackson and St. Louis Counties, July 1975.
69. Telephone interview with the Office of County Counsel of both Jackson and St. Louis Counties, July 1975.
70. A measure which would grant the power to form charter governments to all of Missouri’s counties was approved by the Missouri House and sent to the Senate for further consideration. This measure would eliminate the present 85,000 population requirement. Because such a measure would amend the state constitution, if approved by the Senate, it will also have to be approved by a majority of the voters in a statewide election, Columbia Daily-Tribune, Jan. 15, 1976, at 3, col. 4.
The permissible scope of a charter county's power to legislate under section 18(c) will become increasingly important.

The legality or constitutionality of a particular action is not the only problem charter counties face. Under the 1970 amendment, counties can now legislate countywide if there is a charter amendment approved by county voters. Political considerations, however, may restrict the use of countywide legislation. Rather than viewing charters as county self-government or as home rule, residents of outlying areas of the counties may view them as similar to big city government or as another layer of government being imposed on them. Outlying municipalities often feel disenfranchised by attempts of others to act within their boundaries. At least three reasons were given by incorporated areas within the county for the opposition and ultimate defeat of the three St. Louis County proposals: (1) anticipated higher taxes; (2) county takeover of municipalities; and (3) countywide building and housing codes containing less stringent provisions than the existing municipal codes. Even with the failure of such attempts at countywide measures, such attempts may have value in bringing about the desired result through contract and compromise, at least where incorporated areas fear a different result at a later election.

The desirability and potential success of county home rule may well turn on the geographical make-up of a county. St. Louis County is more or less homogeneous and to a large extent incorporated. This situation lends itself more readily to the concept of home rule. Jackson County, on the other hand, contains two large cities, Kansas City and Independence, with almost one-third of the remaining county being unincorporated. The budget of the City of Kansas City is approximately twice that of Jackson County. In addition to problems of political division, this creates funding problems for Jackson County, because it must come up with an attractive program to persuade the voters to approve countywide action, particularly where the action requires incurring additional debt. Kansas City presently provides services to a large percentage of the county voters, and these voters may be content with such services.

County government may seek to overcome such problems by showing out-county areas the benefits of county home rule. Current plans in Jackson County are to improve out-county relations with programs of bridge and road improvement. There is also some discussion of eventual consolidation of countywide logistical functions.

Though home rule provides counties with powers not found in statutes, what home rule can offer a lightly urbanized county is subject to conjecture at this point. County home rule has met with two recent failures

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71. St. Louis Post-Dispatch, October 28, 1971, at 6W.
72. Telephone interview with Office of County Counsel of Jackson County, July 1975.
73. Id.
74. Id.