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LICENSES: Nursing Homes.
ORDINANCES: Counties.

Counties are without authority to license nursing homes and homes for the aged caring for less than 4 persons.

No. 4154 April 26, 1963.

Honorable Lloyd A. Stephens
State Senator
The Capitol
Lansing, Michigan

You have asked my opinion as to whether nursing homes and homes for the aged caring for less than four persons can be required by a county ordinance to be licensed by the county.

I note that the present statute[1] governing the licensing of nursing homes and homes for the aged places the responsibility for administration of the act and licensing, involving four or more persons, upon the State Health Commissioner. There is no statute requiring a license involving less than four persons. Nor am I able to find any statute specifically authorizing counties, or their boards of health or health committees, to require a license of persons caring for less than four such persons.

In 1962 the state senate had before it Senate Bill No. 1328 which would have broadened Act 139, P.A. 1956, supra, and included nursing homes and homes for the aged caring for 2 or more individuals. The bill was not reported by the senate committee on health and welfare. (Senate Journal 1962, Vol. 2, p. 1893). In the 1963 session of the legislature, a comparable bill, being House Bill No. 192, was introduced and referred to the house committee on social aid and welfare. House Bill No. 192 died in the house committee. (House Status of Bills, April 15, 1963, p. 33).

Counties have only such powers as are expressly conferred upon them by the Constitution or the statutes.[2] The power of the board of supervisors to enact ordinances is found in Act 156, P.A. 1851, as amended.[3] The Eleventh section of that act is prefaced as follows:

> "The said several boards of supervisors shall have power and they are hereby authorized at any meeting thereof lawfully held: * * *."

The Thirteenth subdivision of Section 11 confers the ordinance-making power in these words:

> "Thirteenth, To pass such laws, regulations and ordinances relating to purely county affairs as they may see fit, but which shall not be opposed to the general laws of this state and which shall not interfere with the local affairs of any township, incorporated city or village within the limits of such county; * * *."

[1] Act 139, P.A. 1956, as amended by Act 46, P.A. 1957, Act 9, P.A. 1958 and Act 108, P.A. 1960; assigned C.L. section numbers 331.651 et seq., M.S.A. 1961 Cum. Supp. 14.1281 et seq.

[2] *Mosier v. Wayne County Board of Auditors,* 295 Mich. 27.

[3] C.L. 1948 § 46.1 et seq., M.S.A. 1961 Rev. Vol. § 5.321 et seq.

The Attorney General over a span of years has consistently held that the phrase "county affairs" within the purview of the Thirteenth subdivision is limited to those affairs relating to the county in its organic and corporate capacity and included within its governmental or corporate powers.[4]

The nursing of the sick and infirm and the care of the aged are matters of state-wide concern. The legislature has not delegated to the counties any portion of this responsibility nor empowered the counties or the county boards of supervisors to legislate in this field. It therefore follows that an attempt by the county through the exercise of its ordinance-making power to license nursing homes or homes for the aged cannot be said to be in exercise of its governmental power since no such power has been granted.

Neither can it be said that such an ordinance could be passed by the county board acting on behalf of the county in its organic and corporate capacity. Such things as the laws governing domestic relations, the probate of wills, the taxation of inheritances, the punishment of crimes of a general nature and the establishment of courts cannot be said to touch the affairs that a county is organized to regulate. To this category can be added the welfare and care of the citizens of the state who are old, sick or infirm. What is meant by the county affairs which may be regulated in its corporate capacity was illustrated by Chief Justice Cardozo when serving on the Court of Appeals of the State of New York when he said in a special concurring opinion in the case of *Adler v. Deegan,* 251 N.Y. 467, 167 N.E. 705, involving an act relating to a city housing law:

> "If a city lays out a park, or builds a recreation pier, or provides for public concerts, it is exercising the police power, and is acting for the welfare of its inhabitants, yet acting in a matter that is distinctively its own affair, a matter that is bound up with its own business, its own finances, its own corporate activities."

The licensing by the county of the establishments with which we are here concerned is not a health measure for the purpose of avoidance of pestilence or contagion. It does not fall within the general powers and duties concerning public health conferred upon the counties, the county boards of health and the county health committees of the boards of supervisors by Act 306, P.A. 1927, as amended;[5] nor does this act confer any ordinance-making power on these boards and committees.

It is, therefore, my opinion that counties do not have the power to license nursing homes caring for less than four persons.

FRANK J. KELLEY,
Attorney General.

[4] O.A.G. 1943-44, p. 563; O.A.G. 1945-46; p. 639; O.A.G. 1947-48, p. 691; O.A.G. 1957-58, Vol. 1, p. 168.

[5] C.L. 1948 § 327.201 et seq.; M.S.A. 1956 Rev. Vol. § 14.161 et seq.