

of beverages in funeral establishments as well as all other section 1(a) "food service establishments."

QUESTION 3

Section 5 of Act 269, P.A. 1968, reads in pertinent part:

"...The director or a certified health department may require immediate discontinuance of operation of any food service establishment, temporary food service establishment, vending machine or vending machine location when in their opinion continued operation would create a substantial hazard to the public health." M.C.L.A. § 325.805, M.S.A. 1969 Rev. Vol. § 14.529(5)

Upon a finding of a substantial hazard to the public health under Act 269, P.A. 1968, *supra*, the department of public health may prohibit the serving of food, including beverages, in any funeral establishment.

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AIR POLLUTION: Powers of counties, townships, villages and cities to control by ordinance, discussed in relation to state air pollution control act; extent of delegation of state police power construed. Non-charter counties are without power to adopt a complete air pollution control ordinance.

No. 4696

November 25, 1970.

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You ask for my opinion on several questions in regard to the power and authority of a county to adopt an air pollution control ordinance which would apply to all municipalities in the county of Delta, including the townships, the general act village of Garden,¹ and the home rule cities of Escanaba and Gladstone. The latter have general power to adopt ordinances,² and the duty to provide for the public peace and health and the safety of persons and property.³ The village of Garden has authority under Act 3, P.A. 1895, as amended, usually referred to as the general law village act, to abate nuisances and preserve the public health,⁴ and to pass ordinances in relation thereto.⁵ The townships have authority to adopt ordinances and regulations to secure the public health, safety and general welfare.⁶

¹ Local Acts of Michigan, 1891, p. 1077.

² M.C.L.A. § 117.3; M.S.A. 1970 Cum. Supp. § 5.2073.

³ *Ibidem.*

⁴ M.C.L.A. § 67.1; M.S.A. 1961 Rev. Vol. § 5.1285.

⁵ *Ibidem.*

⁶ M.C.L.A. § 41.181; M.S.A. 1970 Cum. Supp. § 5.45(1).

Act 348 of the Public Acts of 1965, usually referred to as the air pollution act, is the basic statutory enactment governing control of air pollution throughout the state.⁷ The air pollution act establishes a state air pollution control commission within the state department of health,⁸ which is authorized, *inter alia*, to promulgate rules and regulations, to control or prohibit air pollution in any part of the state affected by air pollution,⁹ to investigate complaints and hold hearings thereon,¹⁰ and to make determination of and issue order thereon.¹¹ The commission has authority to bring action to enforce the act.¹²

Within the context of the laws above referred to, you ask several questions, which will now be stated and answered *seriatim*:

"1. Do the cities of Escanaba and Gladstone, the village of Garden and the townships in the county, or any of them, have the authority to adopt air pollution control ordinances to control air pollution within their jurisdictional boundaries?"

The cities of Escanaba and Gladstone, being home rule cities with the power and duty to protect the health and welfare of their people, as above set forth,¹³ have authority to adopt ordinances to control air pollution to the extent held in *Huron Portland Cement Co. v. Detroit*,¹⁴ the court saying at p. 234 of a smoke abatement ordinance:

"... We find and hold that the ordinance in question is a reasonable exercise of the local police power..."

to protect the health and safety of the inhabitants. This existing authority will not conflict with, nor is it pre-empted by, the air pollution act, which at Section 24 provides as follows:

"It is the purpose of this act to provide additional and cumulative remedies to prevent and abate air pollution. Nothing in this act contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provision of this act or anything done by virtue of this act be construed as estopping individuals, counties, cities, townships or villages or other governmental units from the exercise of their respective rights to suppress nuisances or to prevent or abate air pollution."¹⁵

The Village of Garden may adopt an ordinance to abate nuisances and preserve the public health, as noted *supra*.¹⁶ Such authority is reciprocal with that of the air pollution act under Section 24 of the

⁷ M.C.L.A. § 336.11 et seq.; M.S.A. 1969 Rev. Vol. § 14.58(1) et seq.

⁸ M.C.L.A. § 336.13; M.S.A. 1969 Rev. Vol. § 14.58(3).

⁹ M.C.L.A. § 336.15; M.S.A. 1969 Rev. Vol. § 14.58(5).

¹⁰ M.C.L.A. § 336.18; M.S.A. 1969 Rev. Vol. § 14.58(8); M.C.L.A. § 336.19; M.S.A. 1969 Rev. Vol. § 14.58(9).

¹¹ M.C.L.A. § 336.23; M.S.A. 1969 Rev. Vol. § 14.58(13).

¹² M.C.L.A. § 336.27; M.S.A. 1969 Rev. Vol. § 14.58(17).

¹³ ff. 2, 3, *supra*.

¹⁴ (1959), 355 Mich. 227, *aff'd* (1960) 362 U.S. 440.

¹⁵ M.C.L.A. § 336.34; M.S.A. 1969 Rev. Vol. § 14.58(24).

¹⁶ ff. 4, *supra*.

latter, quoted this page, *supra*. The subject matter of the air pollution act, however, goes beyond nuisance abatement, including, as it does:

"...the presence in the outdoor atmosphere of air contaminants in quantities, of characteristics and under conditions and circumstances and of a duration which are injurious to human life or property or which unreasonably interfere with the enjoyment of life and property, and which are reasonably detrimental to plant and animal life in this state..."¹⁷

To the extent that the subject matter of the air pollution act extends beyond the existing authority of a general law village to control air pollution to protect human health and welfare by a nuisance abatement ordinance, the state law controls.¹⁸

Similarly, the authority of townships to secure the general welfare¹⁹ comprises only a portion of the subject matter of the air pollution act, to which the power of the township is subservient as to any state assertion of state policy.

Therefore, the answer to your first question is as follows:

The home rule cities of Escanaba and Gladstone have existing authority to adopt air pollution ordinances, at least to the extent reasonable to protect the health and welfare of citizens from air contaminants. The village of Garden has limited authority to adopt an ordinance to abate nuisances, which would include nuisances in the form of air pollution. Townships have some authority to adopt ordinances to secure the health and safety of inhabitants. Such existing authority of local governmental units is preserved by the air pollution control act.²⁰ The scope of the state law, however, extends beyond all such local power and to the extent of the overreach controls.

Next you ask:

"2. Would the adoption of an air pollution control ordinance by the Delta County Board of Supervisors be an interference with the local affairs of the cities of Escanaba and Gladstone, and the village of Garden and the townships, or any of them, and, therefore, be prohibited by C.L. 48, sec. 46.11?"

The cited statute, dealing with the powers conferred upon counties, provides at subparagraph Thirteenth as follows:

¹⁷ M.C.L.A. § 336.12; M.S.A. 1969 Rev. Vol. § 14.58(2), at subparagraph (c).

¹⁸ See, for example, *Attorney General v. City of Detroit* (1923), 225 Mich. 631; *Moorman v. State Health Commissioner* (1966), 2 Mich. App. 446; *City of Hazel Park v. Municipal Finance Commission* (1947), 317 Mich. 582.

¹⁹ ff. 6, *supra*.

²⁰ Subject to the provisions of Section 26 thereof, providing as follows:

"(1) Nothing in this act or in any rule or regulation which shall be promulgated pursuant to this act shall be deemed to invalidate any existing ordinances or regulations having requirements equal to or greater than the minimum applicable requirements of this act or prevent any political subdivision from adopting similar provisions if their requirements are equal to or greater than the minimum applicable requirements of this act." M.C.L.A. § 336.36; M.S.A. 1969 Rev. Vol. § 14.58(26).

"The . . . several boards of supervisors shall have power and they are hereby authorized . . ."

* * *

"Thirteenth, to pass such . . . 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; . . ." ²¹

Before answering your question preliminary note may well be taken that Act 293, P.A. 1966, ²² authorizes a charter county to perform the function of (*inter alia*) abatement of water and air pollution. ²³ Delta County is not a charter county. Therefore, it is not authorized to abate water and air pollution by Act 293, P.A. 1966, nor is it elsewhere so authorized.

The answer to your second question, therefore, is that the County of Delta is without authority to adopt an air pollution control ordinance because such authority as existed in the subject area prior to the adoption of the state air pollution act, *supra*, was lodged in the home rule cities, general act villages and townships as above set forth. With respect thereto, the assertion of authority by the County of Delta would be an interference with the local affairs of the cities, villages and townships in the county.

With respect to authority other than that so existing prior to the effective date of the state air pollution control act, *supra*, such authority is lodged in the air pollution control commission in the Michigan Department of Public Health. ²⁴

It should further be noted, however, that under the air pollution control act, the state is to cooperate with local units of government including counties in the enforcement of the act upon request of local officials. ²⁵ Further, Act 146, P.A. 1919, as amended, provides at Section 8 that the county board of supervisors may review and approve or disapprove rules and regulations promulgated by the county board of health or health committee of the board of supervisors. ²⁶ Such approval offers an opportunity to the county to participate effectively in cooperation with the state in the total effort to bring air pollution under control.

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²¹ M.C.L.A. § 46.11; M.S.A. 1970 Cum. Supp. § 5.331.

²² M.C.L.A. § 45.501 et seq.; M.S.A. 1970 Cum. Supp. § 5.302(1) et seq.

²³ M.C.L.A. § 45.515; M.S.A. 1970 Cum. Supp. § 5.302(15) at subparagraph (c).

²⁴ M.C.L.A. § 336.15; M.S.A. 1969 Rev. Vol. § 14.58(5).

²⁵ M.C.L.A. § 336.36; M.S.A. 1969 Rev. Vol. § 14.58(26).

²⁶ M.C.L.A. § 327.206; M.S.A. 1969 Rev. Vol. § 14.166.