



JOHN C. DANFORTH  
ATTORNEY GENERAL

OFFICES OF THE  
**ATTORNEY GENERAL OF MISSOURI**  
JEFFERSON CITY

August 23, 1974

OPINION LETTER NO. 230

Mr. James L. Wilson, Director  
Department of Natural Resources  
Jefferson State Office Building  
Jefferson City, Missouri 65101

Dear Mr. Wilson:

This letter is in reply to your request for an opinion on the questions stated below:

- "1. Is the attached Boone County Ordinance restricting the use of septic tanks a valid exercise of power by Boone County? [The ordinances attached with your opinion request are the Boone County Zoning Regulations and Subdivision Regulations adopted December 27, 1973.]
- "2. Can Boone County Zoning Regulations validly require that all individual sewer systems be approved by the Missouri Clean Water Commission?
- "3. Does the Missouri Clean Water Commission presently have authority to regulate individual sewage disposal systems to prevent pollution of waters of the state?
- "4. In the event the Missouri Clean Water Commission does not have the authority to regulate, what governmental body has such authority?
- "5. What authority determines whether an approved and adequate sanitary sewer system is reasonably accessible within the meaning of Article VII, §§ 2(c)(1)(2) and (3) of the Boone County Zoning Regulations?

Mr. James L. Wilson

- "6. Does Article VII, Section 2(c)(2) of the Boone County Zoning Regulations allow persons to install septic tanks on a temporary basis if there are provisions which would require them to eventually connect to a sanitary sewer?"

The specific sections of the Boone County Subdivision Regulations mentioned in your opinion request are as follows:

"ARTICLE VII - REQUIRED IMPROVEMENTS

\* \* \*

"2. Minimum Requirements

\* \* \*

"(c) Sewage Disposal

"(1) Where an approved and adequate public or privately owned sanitary sewer system is reasonably accessible, that meets the requirements of the Missouri Clean Water Commission and standards of Boone County, the developer shall connect with such sanitary sewer and provide adequate sewer lines with individual connections to each lot subject to the approval of the sewer district having jurisdiction.

"(2) Where an approved public or privately owned sanitary sewer is not reasonably accessible, but where plans for installations of sanitary sewers in the vicinity of the subdivision have been approved by the Clean Water Commission, the developer shall install sewers in conformity with such plans, although a connection to an existing main may not be immediately practicable. In such cases, and until a connection is made with an approved public or privately owned sewage system, the use of a temporary sewage treatment facility will be permitted, provided such disposal facilities are constructed in accordance with the regulations and requirements of the Clean Water Commission.

Mr. James L. Wilson

"(3) Where no sewers are accessible and no plans for same have been prepared, the developer shall install sewer lines and a disposal system in accordance with the requirements of the preceding paragraph. If the subdivided lots have a minimum width of two-hundred fifty (250) feet and contain a minimum area of three acres or more, he may instead install an individual sewage disposal system for each lot, but each such individual disposal sewage system shall comply with such guidelines adopted as regulations by Boone County Court, and additional regulations of Boone County Court regarding individual sewage disposal facilities and be constructed under the observation and inspection of, and approved by Boone County Public Works Department."

Boone County is a county of the second class. With regard to your first question concerning the power of a second class county, namely, Boone County, to establish regulations concerning sewage disposal, the subject of regulation of sewage disposal facilities with relation to building codes was treated in Opinion No. 317, 1967, previously issued by this office, determining that through the medium of building codes, a second class county does have such authority. In addition to the authority cited in that earlier opinion, Section 64.825, RSMo 1969, provides inter alia that with relation to second class counties:

"The county planning commission may also prepare, with the approval of the county court, . . . sets of regulations governing subdivisions of land in unincorporated areas, . . . Such regulations may . . . include the extent to which . . . sewer and other utility services shall be provided, to protect public health and general welfare. . . ."

Substantially the same language is found in Section 64.580, RSMo 1969, and a county is free to proceed under the alternative provisions of either of these sections. The Boone County Subdivision Regulation states that it was adopted pursuant to the provisions of Section 64.825 (and 64.840), RSMo 1969, so this opinion will deal with that section and sections related to that alternative statutory scheme, Sections 64.800 to 64.880, RSMo 1969.

As pointed out in the earlier 1967 opinion:

Mr. James L. Wilson

"It is the opinion of this office that under Sections 64.170, RSMo Cum. Supp. 1965, and 64.180, RSMo 1959, counties of the first and second class may adopt building codes which include provisions for the regulation of plumbing installation and sewage disposal."

That earlier opinion remains in effect and pursuant to it and the provisions of Section 64.825, RSMo (and 64.580), we conclude that the county has authority to regulate the use of septic tanks in Boone County. Whether the specific Boone County regulation is a valid exercise of that power, however, is a question which must be addressed to the Boone County Prosecuting Attorney.

There are certain other sections of the Boone County Zoning and Subdivision Regulations (which are separate regulations) which should be noted for the purposes of this opinion.

Article III, paragraph 31 of the Subdivision Regulations defines subdivision as follows:

"The term 'subdivision' means the division of a parcel of land into two or more lots or parcels for development or, if a new street is involved, any division of a parcel of land; provided that a division of land for agricultural purposes and not involving a new street shall not be deemed a subdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided. The term 'subdivision' shall also include all resubdivision of land or lots. The division of a lot one time into two parcels, each of which is ten acres or more, shall not be considered a subdivision."

In Section 8 of the Zoning Regulations on page 19, the county provides for minimum lot areas and widths. Then the following appears:

"Where public or community sewers are not available, suitable sewage disposal systems shall be designed in accordance with the Clean water Commission Requirements and plans prepared by a registered professional engineer.

"Septic tanks shall be prohibited for any individual sewage disposal system in areas

Mr. James L. Wilson

bounded as follows: R12 twn 47 North half of the Northwest quarter of Section 18, Northeast quarter of Section 18, Northwest quarter of Section 17, North half of Northeast quarter of Section 17, Southeast quarter of Section 8, Southwest quarter of Section 8, Southeast quarter of Section 7, Southwest quarter of Section 7, East half of Southeast quarter of Section 12."

Considering your second question whether Boone County, a second class county, can adopt regulations which require that all individual sewer systems be approved by the Clean Water Commission, the point is somewhat obscure but there appears to be no improper delegation of authority in requiring approval or compliance with state standards, since such a regulation does not purport to give the Clean Water Commission any powers it does not already possess. Schnider v. State, 38 Cal.2d 439, 241 P.2d 1, 43 A.L.R.2d 1068 (Cal. Bank 1952).

However, there does appear to be a problem whenever such regulations require approval beyond that which the Missouri Clean Water Commission would normally undertake to give. Although the statutory power of the Clean Water Commission to regulate to prevent water pollution extends to any source in the state which would cause pollution, Section 204.026.8 and 16, RSMo Supp. 1973, and so would extend to subdivisions with fewer than ten lots or parcels, its policy as set forth in its regulations for the disposal of wastewater in subdivisions, CWC-R9, is to require prior approval only for subdivisions containing ten or more lots. Since the Boone County definition of subdivision applies to divisions of land into two or more lots, it appears that Boone County in many instances would require the Clean Water Commission to approve individual sewer systems in subdivisions for which it has made a policy determination not to require advance approval. This would be in effect a direction by Boone County to the Clean Water Commission for action in excess of the normal activity of the Commission, and therefore a direction beyond any authority of a second class county which this office has been able to locate.

Your third question inquires whether the Missouri Clean Water Commission presently has authority to regulate individual sewage disposal systems to prevent pollution of waters to the state.

The term "water contaminant" is defined in Section 204.016(12) of the Missouri Clean Water Law as:

Mr. James L. Wilson

". . . any particulate matter or solid matter or liquid or any gas or vapor or any combination thereof, or any temperature change which is in or enters any waters of the state either directly or indirectly by surface runoff, by sewer, by subsurface seepage or otherwise, which causes or would cause pollution upon entering waters of the state, or which violates or exceeds any of the standards, regulations or limitations set forth in sections 204.006 to 204.141 or any federal water pollution control act, or is included in the definition of pollutant in such federal act;"

A discharge from sewage systems would fit within that definition as matter or liquid which would cause pollution upon entering any waters of the state, or, as specifically included within the definition of pollutant in the Federal Water Pollution Control Act. The federal act definition of pollutant reads as follows:

"The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . ." Section 502(6), Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500, 92 Congress, 2nd Session.

Section 204.051.1, RSMo Supp. 1973, provides that it is unlawful for any person:

"(1) To cause pollution of any waters of the state or to place or cause or permit to be placed any water contaminant in a location where it is reasonably certain to cause pollution of any waters of the state;"

Section 204.076.1, RSMo Supp. 1973, provides that:

"It is unlawful for any person to cause or permit any discharge of water contaminants from any water contaminant or point source located in Missouri in violation of sections 204.006 to 204.141, or any standard, rule or regulation promulgated by the commission.

Mr. James L. Wilson

In the event the commission or its executive secretary determines that any provision of sections 204.006 to 204.141 or standard, rules, limitations or regulations promulgated pursuant thereto, or permits issued by, or any final abatement order, other order, or determination made by the commission or the executive secretary, or any filing requirement under sections 204.006 to 204.141 or any other provision which this state is required to enforce under any federal water pollution control act, is being, was, or is in imminent danger of being violated, the commission or executive secretary may cause to have instituted a civil action in any court of competent jurisdiction for the injunctive relief to prevent any such violation or further violation or for the assessment of a penalty. . . ."

Section 204.026 provides that the Commission shall:

"(8) Adopt, amend, promulgate, or repeal after due notice and hearing, rules and regulations to enforce, implement, and effectuate the powers and duties of sections 204.006 to 204.141 and any required of this state by any federal water pollution control act, and as the commission may deem necessary to prevent, control and abate existing or potential pollution;

\* \* \*

"(16) Establish effluent and pretreatment and toxic material control regulations to further the purposes of sections 204.006 to 204.141 and as required to insure compliance with all effluent limitations, water quality related effluent limitations, national standards of performance and toxic and pretreatment effluent standards, and all requirements and any time schedules thereunder, as established by any federal water pollution control act for point sources in this state, and where necessary to prevent violation of water quality standards of this state;"

Mr. James L. Wilson

Pursuant to these provisions, the Clean Water Commission has authority to regulate individual sewage disposal systems, including septic tanks, to prevent pollution of and the discharge of water contaminants to waters of the state, and in fact has adopted the subdivision regulations referred to above which do restrict or regulate the use of individual sewage disposal systems in subdivisions. Therefore, the Commission has the authority to regulate such systems, and violation of its regulations would be subject to the provisions of Section 204.076, RSMo Supp. 1973, quoted above. In addition, Section 204.051.1(1), RSMo Supp. 1973, set forth above, declares it to be unlawful to use any water contaminant source, which would include an individual sewage treatment system, which would cause or be reasonably certain to cause pollution of any waters of the state, hence such system posing such a threat would be subject to the authority of the Clean Water Commission.

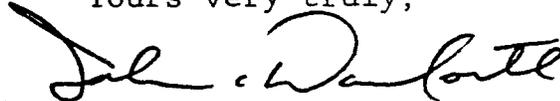
Your question four asks:

"In the event the Missouri Clean Water Commission does not have the authority to regulate, what governmental body has such authority?"

As stated above, it is our opinion that the Missouri Clean Water Commission does have authority to regulate individual sewage disposal systems.

With regard to questions five and six, it is the policy of this office to refer questions concerning the interpretation of local ordinances to the adopting governmental body. Therefore, these questions should be directed to the prosecuting attorney of Boone County for an answer.

Yours very truly,



JOHN C. DANFORTH  
Attorney General