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## Developments in the Law of Illinois: Home Rule, 17 J. Marshall L. Rev. 613 (1984)

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## SURVEY

### DEVELOPMENTS IN THE LAW OF ILLINOIS: HOME RULE

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#### I. INTRODUCTION

Since July 1, 1971, when the 1970 Illinois Constitution became generally effective, one of the most-discussed innovations of the constitution has been home rule. Article VII, section 6 grants automatic home rule status to the largest Illinois municipalities and to Cook County. It also allows every municipality and county, regardless of size or population, to obtain home rule status by referendum.

The powers and responsibilities of Illinois home rule municipalities are exceptionally broad. From the days when the con-

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vention was drafting the proposal until today, commentators within and outside Illinois have suggested that Illinois home rule is the most powerful in the nation.

The essence of home rule power is set forth in article VII, section 6(a):

(a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

These words, however, are merely the bare bones of modern municipal power in Illinois. To see whether home rule is merely a skeleton we must scrutinize (1) the way municipalities have used their home rule powers; (2) the way the judiciary has interpreted home rule powers and legislation regarding home rule; and (3) the way the General Assembly has attempted to regulate and pre-empt home rule powers. In the fourteen years since home rule became available there have been at least two attempts to summarize the home rule experience in law review articles.<sup>1</sup> This "recent developments" project is the third. Like its predecessors, it concentrates upon the recent developments in supreme and appellate court cases.

The report falls into four main divisions paralleling the grant of, and limitations on, home rule powers found in article VII, section 6, subsections (a) through (m). The main divisions include a brief introductory background before examining recent developments in Illinois case law.

The John Marshall Law Review hopes that general practitioners, as well as those who labor in this rather special vineyard, find this report both interesting and useful. As one who has cultivated the field since the seeds were planted, I can attest to the importance of this report in understanding home rule.

## II. WHAT "PERTAINS TO" LOCAL GOVERNMENT AND AFFAIRS

### A. Background

Article VII, section 6(a) of the Illinois Constitution of 1970 grants limited home rule powers to local government units.

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1. See Michael & Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L.F. 559; Biebel, *Home Rule in Illinois After Two Years: An Uncertain Beginning*, 6 J. MAR. J. PRAC. & PROC. 253 (1973).

Those municipalities that either elect<sup>2</sup> to become or otherwise qualify<sup>3</sup> as home rule units "may exercise any power and perform any function pertaining to [their] government and affairs including, but not limited to, the power to regulate for the protection of health, safety, morals and welfare; to license; to tax; and to incur debt."<sup>4</sup> This grant of power, while superficially specific, is limited by the requirement that a municipality's home rule activities must pertain to its government and affairs. Judicial interpretation of this restriction has played a primary role in determining the scope of the home rule power.

The analysis of what pertains to local government and affairs turns upon establishing what is "local." To determine whether an activity is local, Illinois courts have utilized several different approaches. Courts may analyze the effect of the governmental activity; courts may apply a traditional preemption analysis; or, courts may look at the nature of the governmental activity.

In analyzing the effect of the local governmental activity, courts have attempted to balance the challenged activity's intra-territorial effect against its extra-territorial effect. The effect of local regulation may be, to some extent, extra-territorial,<sup>5</sup> however, if the governmental activity's primary effect is outside of the municipality. Accordingly, if the primary effect of a home rule regulation is outside the municipality, then the regulation does not apply to local government and affairs.<sup>6</sup> This approach is relatively restrictive because determining what pertains to local government is not gauged by local effect but rather, by the extent of more far-reaching regional or statewide effects.

Alternatively, a court might apply a traditional preemption analysis. Under this approach, some activities, regardless of

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2. "Other Municipalities may elect by referendum to become home rule units." ILL. CONST. art. VII, § 6(a).

3. "A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units." ILL. CONST. art. VII, § 6(a).

4. ILL. CONST. art. VII, § 6(a).

5. *City of Des Plaines v. Metropolitan Sanitary District*, 59 Ill. 2d 29, 319 N.E.2d 9 (1974) (zoning and pollution ordinances of Des Plaines could *not* regulate or restrict the activities of a regional governmental authority.)

6. *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1976). A Des Plaines ordinance regulating noise emissions was not authorized under the home rule powers because it was regulating a problem "of local concern." *Id.* at 7, 357 N.E. 2d at 436. *See also* *Metropolitan San. Dist. v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976). This case dealt with Des Plaines' attempted regulation of a regional authority; the supreme court reasoned that "to permit a regional district to be regulated by a part of that region [was] incompatible with the purpose for which [the regional district] was created." *Id.* at 261, 347 N.E.2d at 719.

their apparently local nature or effect, are considered to be of statewide concern.<sup>7</sup> Preemption is determined by stated legislative purposes or goals or by legislative activity. The courts have not, however, held that any exercise of legislative power necessarily precludes all exercise of municipal power.<sup>8</sup> Rather, the courts have recognized that under some circumstances the state may exercise exclusive power while other situations may favor a concurrent exercise of power.<sup>9</sup>

Finally, the very nature of governmental activity may establish it as of either state or local concern.<sup>10</sup> Analysis of the nature of governmental activity is necessarily related to both the preemption and the effect analyses. In fact, all three methods of analysis often overlap.

On each occasion that the Illinois courts have approved a home rule unit's actions, the courts have either expressly or impliedly found the action to be within the section 6(a) grant of power.<sup>11</sup> Therefore, a discussion of what pertains to local government and affairs may be grounded on municipal activities that have been approved in the courts. This analysis of decisions should thereby establish the scope of home rule in Illinois.

The section 6(a) authority to regulate to protect health, safety, morals, and welfare is often coextensive with the municipality's licensing, taxing, and debt incurring powers. Therefore, it is sometimes difficult to categorize specific municipal activities into the non-exclusive home rule categories provided by section 6(a). As a basis for organization, however, the section 6(a) categories provide the most logical approach.

The authority to regulate to protect health, safety, morals and welfare provides a broad basis for local police power. In

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7. See e.g., *Andruss v. City of Evanston*, 68 Ill. 2d 215, 369 N.E.2d 1258 (1977) *cert. denied*, 435 U.S. 952 (1978). (regulation and licensing of real estate brokers preempted by state statutes); *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1977) (noise pollution is essentially of state-wide concern); *United Private Detective and Sec. Ass'n v. City of Chicago*, 62 Ill. 2d 506, 343 N.E.2d 453 (1976) (state preemption of licensing and regulation of private detectives).

8. "Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." ILL. CONST. art. VII, § 6(i).

9. E.g., *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1977).

10. See, e.g., *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 338 N.E.2d 15 (1975) (right of access to state's court system, by nature, of state concern).

11. Presumptively, no court would allow a home rule unit to exercise authority that did not pertain to its government and affairs since that provides the basis for the home rule grant of power.

*County of Cook v. John Sexton Contractors Co.*,<sup>12</sup> a home rule county attempted to impose restrictions on a landfill in addition to state regulations.<sup>13</sup> The Illinois Environmental Protection Agency (EPA) issued Sexton the necessary permits for the operation of a sanitary landfill. Cook County, however, refused to allow the operation of the landfill absent compliance with county regulations.<sup>14</sup> Sexton contended that its compliance with state EPA regulations was sufficient and that the state statutes preempted the area of environmental protection.<sup>15</sup> The Illinois Supreme Court held that pollution was equally a state and a local concern.<sup>16</sup> Regardless of the extent of state environmental regulation, the court held that the state and county possessed concurrent authority.<sup>17</sup> Therefore, Sexton was required to comply with state EPA standards and Cook County's sanitary landfill zoning requirements.<sup>18</sup> Further, in *City of Chicago v. Pollution Control Board*,<sup>19</sup> the supreme court held that regardless of a home rule unit's regulations, state EPA regulations provided minimum standards. Thus, the state may establish minimum levels of regulation, but local authorities may impose more restrictive pollution standards.<sup>20</sup>

Beyond the area of concurrent regulation, home rule units possess a broad range of power to protect health, morals, safety and welfare. For example, *City of Evanston v. Create Inc.*<sup>21</sup> allowed a home rule city to regulate and control apartment rentals; *City of Belleville v. Kesler*<sup>22</sup> affirmed a home rule city's power to regulate or restrict commercial signs; *City of Chicago v. Pioneer Towing, Inc.*<sup>23</sup> recognized a home rule city's authority to regulate private towing operations; *Laundry v. Smith*<sup>24</sup> recognized concurrent city and state regulation of landlord-tenant relations; *City of Crystal Lake v. Cunningham*<sup>25</sup> affirmed a city ordinance which prohibited parking on city streets during early morning hours; *Rothner v. City of Chicago*<sup>26</sup> recognized a home

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12. 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

13. *Id.* at 502-03, 389 N.E.2d at 554.

14. *Id.* at 503, 389 N.E.2d at 554.

15. *Id.* citing ILL. REV. STAT. ch. 111-1/2, ¶ 1001 (1977).

16. 75 Ill. 2d at 509, 389 N.E.2d at 557.

17. *Id.* at 517, 389 N.E.2d at 561.

18. *Id.*

19. 59 Ill. 2d 484, 322 N.E.2d 11 (1974).

20. *Id.* at 489, 322 N.E.2d at 14.

21. 85 Ill. 2d 101, 421 N.E.2d 196 (1981).

22. 101 Ill. App. 3d 710, 428 N.E.2d 617 (1981).

23. 73 Ill. App. 3d 867, 392 N.E.2d 132 (1979).

24. 66 Ill. App. 3d 616, 384 N.E.2d 430 (1978).

25. 52 Ill. App. 3d 819, 368 N.E.2d 142 (1977).

26. 66 Ill. App. 3d 428, 383 N.E.2d 1218 (1978).

rule city's authority to regulate nursing homes; *Wes Ward Enterprises, Ltd. v. Andrews*<sup>27</sup> allowed a home rule city to regulate and license massage parlors. These cases are indicative of the breadth of the police power under section 6(a).

Home rule units must, necessarily, have the authority to litigate.<sup>28</sup> Thus, home rule units possess the power to sue and be sued.<sup>29</sup> Additionally, home rule units possess the power to regulate and reform governmental structure. In *People ex rel. Hanrahan v. Beck*,<sup>30</sup> the Illinois Supreme Court upheld a Cook County ordinance which created the office of County Comptroller.<sup>31</sup> The ordinance provided that the comptroller would be appointed by the President of the County Board and that the comptroller's power would be derived from those of the elected County Clerk.<sup>32</sup> In upholding the ordinance, the court held that the ordinance did not eliminate the County Clerk's position, but merely transferred *ex officio* powers to the new County Comptroller.<sup>33</sup> Therefore, the county ordinance was valid despite its contravention of a statute which provided for the County Clerk to act *ex officio* as County Comptroller.<sup>34</sup>

In *Clarke v. Village of Arlington Heights*,<sup>35</sup> the village board passed an ordinance, which was also adopted by referendum increasing the number of village trustees from six to eight and changing the office of village clerk from elective to appointive.<sup>36</sup> The ordinance was upheld by the Illinois Supreme Court despite its contravention of the Illinois Municipal Code.<sup>37</sup>

In *Peters v. City of Springfield*,<sup>38</sup> the supreme court upheld a city ordinance which lowered the mandatory retirement age for police and firemen from sixty-three to sixty.<sup>39</sup> In upholding the ordinance, the court allowed Springfield's ordinance to supersede the statutorily mandated retirement age of sixty-three.<sup>40</sup>

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27. 42 Ill. App. 3d 458, 355 N.E.2d 131 (1976).

28. *City of West Chicago v. DuPage County*, 67 Ill. App. 3d 924, 385 N.E.2d 826 (1979).

29. *Id.* See also *Forestview Homeowners Ass'n v. County of Cook*, 18 Ill. App. 3d 230, 309 N.E.2d 763 (1974).

30. 54 Ill. 2d 561, 301 N.E.2d 281 (1973).

31. *Id.* at 567, 301 N.E.2d at 284.

32. *Id.* at 562-63, 301 N.E.2d at 281-82.

33. *Id.* at 566-67, 301 N.E.2d at 283-84.

34. *Id.* See ILL. REV. STAT. ch. 34, ¶ 1142 (1971).

35. 57 Ill. 2d 50, 309 N.E.2d 576 (1974).

36. *Id.* at 50, 309 N.E.2d at 577.

37. *Id.* at 54-55, 309 N.E.2d at 579. See ILL. REV. STAT. ch. 24, ¶ 3-5-2 (1971) (six village trustees); ILL. REV. STAT. ch. 24, ¶ 3-5-9 (1971) (elected village clerk).

38. 57 Ill. 2d 142, 311 N.E.2d 107 (1974).

39. *Id.* at 152, 311 N.E.2d at 112.

40. *Id.* at 144, 311 N.E.2d 108. See ILL. REV. STAT. ch. 24, ¶ 10-1-18 (1971).

The court's opinion was based on section 6(a)'s broad grant of home rule powers.<sup>41</sup> In *Allen v. County of Cook*,<sup>42</sup> the supreme court upheld a Cook County ordinance that reduced the votes required for county board appropriations from two-thirds to a simply majority.<sup>43</sup> A statute required two-thirds approval by the county board of all appropriations over \$5,000.00.<sup>44</sup> The County Board passed an ordinance reducing the requirement to a simply majority.<sup>45</sup> The supreme court held that this was merely an alteration of the mechanics of government and therefore, purely a local matter.<sup>46</sup>

The Illinois Supreme Court has upheld several regulations of municipal procedures. It upheld a city ordinance which altered police board review procedures in *Paglini v. Police Board of City of Chicago*.<sup>47</sup> The ordinance upheld in *Paglini* allowed for the appointment of police hearings officers who would sit at police hearings and then report to the police board rather than the statutory procedure of hearings directly in front of the police board.<sup>48</sup> Similarly, in *Stryker v. Village of Oak Park*,<sup>49</sup> the supreme court upheld a village ordinance which replaced the position of police captain with that of deputy police chief.<sup>50</sup> The positions of police chief and deputy police chief were then made terminable at the discretion of the village manager and removed from police board review.<sup>51</sup> These changes were in apparent contravention of the Illinois Municipal Code.<sup>52</sup> However, the supreme court, held as it had in *Hanrahan*, *Clarke*, *Peters*, *Allen*, and *Paglini*, that the Illinois Municipal Code did not mandate uniformity<sup>53</sup> and that home rule ordinances presumptively supersede statutes passed prior to the 1970 constitution.<sup>54</sup>

In *City of Urbana v. Houser*,<sup>55</sup> a home rule city was allowed

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41. *Peters v. City of Springfield*, 57 Ill. 2d 142, 149-52, 311 N.E.2d 107, 111-12 (1974).

42. 65 Ill. 2d 281, 357 N.E.2d 458 (1976).

43. *Id.* at 285, 357 N.E.2d at 460.

44. *Id.* at 285, 357 N.E.2d at 460. See ILL. REV. STAT. ch. 34, § 951 (1971).

45. *Allen v. County of Cook*, 65 Ill. 2d 281, 282, 357 N.E.2d 458, 459 (1976).

46. *Id.* at 285, 357 N.E.2d at 460.

47. 61 Ill. 2d 233, 236, 335 N.E.2d 480, 483 (1975).

48. *Id.* at 234-35, 335 N.E.2d at 482. See ILL. REV. STAT. ch. 24, § 10-1-18.1 (1971).

49. 62 Ill. 2d 523, 343 N.E.2d 919, *cert. denied*, 429 U.S. 832, *reh. denied*, 429 U.S. 988 (1976).

50. *Id.* at 529, 343 N.E.2d at 923.

51. *Id.* at 524-26, 343 N.E.2d at 920-21.

52. *Id.*; ILL. REV. STAT. ch. 24 § 10-2.1-1 (1971).

53. *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 528, 343 N.E.2d 919, 922-23, *cert. denied*, 429 U.S. 832 (1976).

54. *Id.* at 527, 343 N.E.2d at 922.

55. 67 Ill. 2d 268, 367 N.E.2d 692 (1977).



to condemn and demolish a building despite specific statutory language that the zoning enabling act<sup>56</sup> did "not apply within the jurisdiction of any home rule unit." The supreme court struck the restricting clause from the statute,<sup>57</sup> holding that home rule powers were to be broadly and liberally construed<sup>58</sup> and that home rule communities should have all municipal powers granted by statutes.<sup>59</sup>

Section 6(a) grants home rule units the power to tax; however, section 6(e) prohibits taxes based "upon or measured by income or earnings or upon occupations" except as provided for by the general assembly.<sup>60</sup> In determining the scope of the home rule taxing power, one of the first cases established the right of home rule units to tax property. In *City of Evanston v. County of Cook*,<sup>61</sup> the supreme court upheld both city and county ordinances which imposed a tax on the sale of new motor vehicles.<sup>62</sup> The court found no conflict between the taxes and held that they could be imposed simultaneously.<sup>63</sup> If the court had found a conflict, section 6(c) states that the municipal ordinance would prevail within the municipality's jurisdiction.<sup>64</sup>

In *Williams v. City of Chicago*,<sup>65</sup> the supreme court upheld Chicago's transaction tax.<sup>66</sup> The tax was imposed upon transactions involving the transfer of real property and the lease or rental of certain specified personal property.<sup>67</sup> The tax was imposed at a higher rate against residents than non-residents.<sup>68</sup> In upholding the tax, the court stated that municipalities have broad discretion in imposing taxes as long as the municipality acts reasonably.<sup>69</sup> The classifications of who is taxed and at

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56. ILL. REV. STAT. ch. 24, § 11-31-1 (1971); see *City of Urbana v. Houser*, 67 Ill. 2d 268, 271, 367 N.E.2d 692, 693 (1977).

57. *City of Urbana v. Houser*, 67 Ill. 2d 268, 275, 367 N.E.2d 692, 695 (1977).

58. *Id.* at 272-73, 367 N.E.2d at 693-94.

59. *Id.* at 273, 367 N.E.2d at 694. See also *City of Carbondale v. Van Natta*, 61 Ill. 2d 483, 338 N.E.2d 19 (1975) (upholding city action under municipal zoning power not under home rule power).

60. ILL. CONST. art. VII, § 6(e) (1970).

61. 53 Ill. 2d 312, 291 N.E.2d 823 (1972).

62. *Id.* at 314, 291 N.E.2d at 824.

63. *Id.* at 319, 291 N.E.2d at 826-27.

64. "If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction." ILL. CONST. art. VII, § 6(c) (1970).

65. 66 Ill. 2d 423, 362 N.E.2d 1030, cert. denied, 434 U.S. 924 (1977).

66. *Id.* at 435, 362 N.E.2d at 1036.

67. *Id.* at 425, 362 N.E.2d at 1031.

68. *Id.* at 427, 362 N.E.2d at 1032.

69. *Id.* at 435, 362 N.E.2d at 1036.

what rate must not be arbitrary.<sup>70</sup> The classification must bear a reasonable relation to the municipality's legitimate objectives.<sup>71</sup> Finally, the court found a presumption in favor of the validity of classifications which could only be overcome by proof of the classification's arbitrary or unreasonable nature.<sup>72</sup> In *Williams*, the court found no arbitrariness or unreasonableness since the taxes disproportionately collected from residents would be disproportionately dispersed in favor of residents.<sup>73</sup>

Similar to taxes with graduated burdens are taxes on special service areas; taxes imposed upon "special" geographic areas in order to offset the cost of special services provided to that area. In *Coryn v. City of Moline*,<sup>74</sup> the supreme court upheld a city imposed special service area tax.<sup>75</sup> Moline created a special service area to provide a tax base for the building and maintenance of a shopping mall.<sup>76</sup> The tax area was challenged as providing a service for more than just the special service area.<sup>77</sup> The benefits of the mall, it was argued, would extend to the entire city, not just the special service area.<sup>78</sup> However, the supreme court held that the benefits accruing to the rest of the city did not mean that the mall was not "special" to the service area.<sup>79</sup> The court, in recognizing the broad discretion held by home rule units, held that while "the area taxed must be [the] area served, the primary determination of that area is left to the home rule unit. The degree and manner of correlation required between the area taxed and the area served is not apparent on the face of the constitutional provision . . . [§ 6(1)(2)]."<sup>80</sup> However, this "does not mean that local . . . government [is] free to gerrymander the boundaries of special service areas to maximize revenues, without regard to whether there is a rational re-

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70. *Id.* at 432, 362 N.E.2d at 1035, *citing*, *City of Chicago v. Ames*, 365 Ill. 529, 7 N.E.2d 294 (1937).

71. *Williams v. City of Chicago*, 66 Ill. 2d 423, 432, 362 N.E.2d 1030, 1035 (1977), *citing*, *Modern Dairy Co. v. Department of Revenue*, 413 Ill. 55, 108 N.E.2d 8 (1952).

72. *Williams v. City of Chicago*, 66 Ill. 2d 423, 432-33, 362 N.E.2d 1030, 1035 (1977), *citing*, *Jacobs v. City of Chicago*, 53 Ill. 2d 421, 292 N.E.2d 401 (1973); *Thorpe v. Mahin*, 43 Ill. 2d 36, 250 N.E.2d 633 (1969); *Grenier & Co. v. Stevenson*, 42 Ill. 2d 289, 247 N.E.2d 606 (1969); *Doolin v. Korshak*, 39 Ill. 2d 521, 236 N.E.2d 897 (1968).

73. *Williams v. City of Chicago*, 66 Ill. 2d 423, 434-35, 362 N.E.2d 1030, 1036 (1977).

74. 71 Ill. 2d 194, 374 N.E.2d 211 (1978).

75. *Id.* at 202, 374 N.E.2d 214-15.

76. *Id.* at 198, 374 N.E.2d at 212-13.

77. *Id.*

78. *Id.* at 199, 374 N.E.2d at 213.

79. *Id.* at 201, 374 N.E.2d at 214.

80. *Id.*

lationship between [the] property taxed and the property served."<sup>81</sup> The court thereby recognized the discretion of home rule units in establishing special service areas but also gave notice that special service areas do not provide *carte blanche* for disproportionate taxation created by gerrymandering.

Similarly, a Cook County ordinance designating unincorporated Cook County a special service area was upheld. In *Gilligan v. Korzen*,<sup>82</sup> the supreme court upheld a wheel tax upon vehicles owned by residents of unincorporated Cook County.<sup>83</sup> The court held that the tax and the special service area were reasonable in relation to the county's special responsibilities to the unincorporated areas of the county;<sup>84</sup> the service and the tax were both applied to the same area.

Another area of concern in home rule taxing situations is the prohibition of occupation taxes.<sup>85</sup> In *Paper Supply Co. v. City of Chicago*,<sup>86</sup> the supreme court upheld Chicago's "head tax." Chicago imposed a tax upon all businesses that employed fifteen or more full time employees.<sup>87</sup> The tax was challenged as an occupation tax,<sup>88</sup> but the court held that an occupation tax either regulates a specific business or taxes the privilege of being a specific business.<sup>89</sup> This tax, the court found, taxed doing business in general not particular occupations.<sup>90</sup>

In *Jacobs v. City of Chicago*,<sup>91</sup> the supreme court upheld Chicago's parking tax.<sup>92</sup> The court held that the tax was not upon the parking garages (as an occupation) but rather, upon the consumers who parked in the garages.<sup>93</sup> Similarly, in *Town of Cicero v. Fox Valley Trotting Club, Inc.*,<sup>94</sup> the supreme court held that an admissions tax upon the patrons of a race track was not an occupation tax upon the race track, but rather, a tax upon the consumers.<sup>95</sup>

Similar in nature to the taxes in *Paper Supply*, *Jacobs*, and *Fox Valley Trotting*, was a Peoria tax which was the subject of

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81. *Id.* at 202, 374 N.E.2d at 214-15.

82. 56 Ill. 2d 387, 308 N.E.2d 613, *cert. denied*, 419 U.S. 841 (1974).

83. *Id.* at 388-89, 308 N.E.2d at 614.

84. *Id.* at 390, 308 N.E.2d at 614-15.

85. ILL. CONST. art. VII, § 6(e) (1970).

86. 57 Ill. 2d 553, 317 N.E.2d 3 (1974).

87. *Id.* at 558, 317 N.E.2d at 5.

88. *Id.* at 559, 317 N.E.2d at 5-6.

89. *Id.* at 566, 317 N.E.2d at 9-10.

90. *Id.*

91. 53 Ill. 2d 421, 292 N.E.2d 401 (1973).

92. *Id.* at 429, 292 N.E.2d at 406.

93. *Id.* at 424, 292 N.E.2d at 403.

94. 65 Ill. 2d 10, 357 N.E.2d 1118 (1976).

95. *Id.* at 18, 357 N.E.2d at 1121.

two Illinois Supreme Court decisions. Peoria passed an ordinance that imposed a tax on attendance at amusements and on the sale of food and alcoholic beverages in restaurants and taverns.<sup>96</sup> In *Board of Education v. City of Peoria*,<sup>97</sup> the ordinance was challenged as applied against public schools and the park district.<sup>98</sup> Following the reasoning in their earlier decisions (*Paper Supply, Jacobs, and Fox Valley Trotting*) the court found the tax not upon the schools or the parks but rather, on the ultimate consumer.<sup>99</sup> However, the court held the tax inapplicable to the schools since their legislative authority did not include the power to collect taxes.<sup>100</sup> The court did, however, uphold the tax against the parks and stated that there was no presumption that home rule municipalities could not impose taxes upon public institutions.<sup>101</sup> In *Kerasotes Rialto Theater Corp. v. City of Peoria*,<sup>102</sup> the same tax ordinance was challenged based upon its arbitrary application. Kerasotes contended that the tax was arbitrarily applied because the tax exemptions were based on the nature of the seller-supplier while the tax was paid by the consumer.<sup>103</sup> The supreme court, however, found the classification of exemptions reasonable as based on the seller-supplier as charitable, educational, or not-for-profit organizations.<sup>104</sup> The court held that patrons of the exempt organizations were often there not only for amusement but also in a contributory sense and therefore the profit/non-profit classification seemed reasonable.<sup>105</sup>

Additional taxes have also been approved by the Illinois Supreme Court. In *City of Rockford v. Gill*,<sup>106</sup> the court upheld a city library tax that exceeded the statutory level.<sup>107</sup> Acting under its home rule authority, Rockford imposed a tax of .1604 percent upon all taxable property.<sup>108</sup> An Illinois statute provided for a .15 percent maximum.<sup>109</sup> However, the court upheld

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96. *Board of Educ. v. City of Peoria*, 76 Ill. 2d 469, 471, 394 N.E.2d 399, 400 (1979); *Kerasotes Rialto Theatre Corp. v. City of Peoria*, 77 Ill. 2d 491, 493, 397 N.E.2d 790, 791 (1979).

97. 76 Ill. 2d 469, 394 N.E.2d 399 (1979).

98. *Id.* at 474, 394 N.E.2d at 400-01.

99. *Id.* at 474-75, 394 N.E.2d at 401-02.

100. *Id.* at 477, 394 N.E.2d at 403.

101. *Id.* at 477, 394 N.E.2d at 403.

102. 77 Ill. 2d 491, 397 N.E.2d 790 (1979).

103. *Id.* at 496, 397 N.E.2d at 793-94.

104. *Id.* at 498, 397 N.E.2d at 793-94.

105. *Id.*

106. 75 Ill. 2d 334, 388 N.E.2d 384 (1979).

107. *Id.* at 338, 388 N.E.2d at 385. See ILL. REV. STAT. ch. 81, § 3-1 (1975).

108. *City of Rockford v. Gill*, 75 Ill. 2d 334, 338, 388 N.E.2d 384, 385 (1979).

109. *Id.*

the Rockford library tax since the statute had been enacted in 1965, prior to the adoption of home rule and therefore the tax ceiling was not applicable to home rule units.<sup>110</sup>

In *Milligan v. Dunne*,<sup>111</sup> the court upheld a Cook County tax on retail liquor sales.<sup>112</sup> The court addressed two major concerns: first, the tax was not an occupation tax since it was ultimately passed on to the consumer;<sup>113</sup> and second, there was no state preemption despite the extent of state regulation and taxation of liquor.<sup>114</sup> In *S. Bloom, Inc. v. Korshak*,<sup>115</sup> the court upheld Chicago's cigarette tax.<sup>116</sup> The supreme court rejected the contention that it was an occupation tax.<sup>117</sup> In *Rozner v. Korshak*,<sup>118</sup> the court upheld Chicago's wheel tax as a legitimate tax and not as a prohibited license for revenue.<sup>119</sup>

### B. Recent Developments

Although the home rule provisions of the Illinois State Constitution have been in effect for more than a decade, the phrase "pertaining to its government and affairs" remains a subject of litigation. The proper subject of home rule regulation under the constitution remains open to judicial construction. This is especially true where a home rule unit enacts a city ordinance modifying or conflicting with an already existing state statute. The majority of the recent cases discussed below fit into the category of ordinances meant to protect the public health, safety, morals and welfare.

In *Quilici v. Village of Morton Grove*,<sup>120</sup> the United States Court of Appeals for the Seventh Circuit held that an ordinance banning handguns and other weapons from the northwest suburb was a valid exercise of home rule power.<sup>121</sup> Quilici initially filed a complaint in state court. The village removed the suit to

110. *Id.* at 341, 388 N.E.2d at 387.

111. 61 Ill. 2d 544, 338 N.E.2d 6 (1975), *cert. denied*, 425 U.S. 916 (1976).

112. *Id.* at 558, 338 N.E.2d at 15.

113. *Id.* at 552, 338 N.E.2d at 11-12.

114. *Id.* at 551, 338 N.E.2d at 10-11.

115. 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

116. *Id.* at 60, 284 N.E.2d at 260.

117. *Id.* at 59, 284 N.E.2d at 260.

118. 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

119. *Id.* at 433-36, 303 N.E.2d at 390-92. *But see* Gilligan v. Korzen, 56 Ill. 2d 387, 308 N.E.2d 613, *cert. denied*, 419 U.S. 841 (1974) (upholding a similar wheel tax on motor vehicles in unincorporated Cook County).

120. 695 F.2d 261 (7th Cir. 1982).

121. *Id.* at 267-69. The law in question was Ordinance No. 81-11 which prohibits handguns, any weapon which could discharge eight or more shots in a single function, bludgeons, blackjacks, metal knuckles, switchblades, etc. *Id.* at 263-64 n.1.

the federal court and consolidated it with two other pending suits.<sup>122</sup> An action for declaratory judgment and permanent injunction against the enforcement of the ordinance was based on allegations that the ordinance violated the Illinois Constitution<sup>123</sup> and the second, ninth and fourteenth amendments to the United States Constitution.<sup>124</sup> The district court granted summary judgment in favor of Morton Grove and an appeal followed.<sup>125</sup>

Before reaching the constitutional issue, the appellate court considered the issue of whether the ordinance was a valid exercise of home rule power. The court analyzed the issue in terms of the police power and whether the exercise of the police power violated a constitutionally guaranteed right of an individual to bear arms.<sup>126</sup> After noting that the State of Illinois did not have an exclusive interest in gun control,<sup>127</sup> the court upheld the Morton Grove ordinance as a valid exercise of the Village's police power.<sup>128</sup> Moreover, the court found that Morton Grove's desire to control handguns within its boundaries was properly aimed at protecting the health and safety of its citizens.<sup>129</sup>

*Quilici* turned on the issue of exclusive state control over a specific area of law. The same issue surfaced in *City of Carbondale v. Yehling*:<sup>130</sup> there, the Illinois Supreme Court was confronted with a city ordinance providing for the condemnation of real property by eminent domain. The issue arose when the City of Carbondale filed petitions for condemnation. The defendants filed motions to dismiss asserting that the city exceeded its home rule authority in passing an eminent domain ordinance similar to the state statute.<sup>131</sup> The motions to dismiss were granted. Following this judgment, the court issued an amended order reaffirming the original order and certified the question of home rule authority to the supreme court.<sup>132</sup>

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122. 695 F.2d at 264.

123. ILL. CONST. art. I § 22 (1970).

124. U.S. CONST. amends. II, IX and XIV.

125. 695 F.2d at 265.

126. *Id.* at 267-69.

127. *Id.*

128. *Id.* at 269.

129. *Id.* at 268-69. The one dissenting judge stated that gun control was an exclusive state function and that Morton Grove's Ordinance No. 81-11 was an invalid exercise of home rule power. *Id.* at 271-72 (Coffey, J., dissenting).

130. 96 Ill. 2d 495, 451 N.E.2d 837 (1983).

131. *Id.*

132. *City of Carbondale v. Yehling*, 96 Ill. 2d 495, 451 N.E.2d 837 (1983). In all, eight cases were involved; all were dismissed.

The argument made by the parties seeking to invalidate the ordinance was based on the existence of a state law. The parties argued that the state law served as proof that the state had an overriding interest in property law and, therefore, the home rule unit was precluded from regulating in that area.<sup>133</sup> The court addressed the argument by re-examining the clause "pertaining to its government and affairs."<sup>134</sup> First, matters of statewide concern do not "pertain to" the governing of a home rule unit.<sup>135</sup> The court held that the exercise of eminent domain over property does pertain to the city's government and affairs. Control of property in this manner does not require uniform laws with statewide application. Thus, a home rule unit may place such controls on property within its borders.<sup>136</sup>

Despite the court's finding that the subject matter of the Carbondale ordinance pertained to local government and affairs, the ordinance was invalidated on other grounds. The court held that the ordinance was invalid because it prescribed specific judicial procedures. The judiciary is an area of exclusive state control and not subject to regulation by home rule units. Because the judicial procedures were incorporated into the Carbondale ordinance in a manner which prohibited severance of the unconstitutional portions, the entire ordinance was declared invalid.<sup>137</sup>

In *City of Evanston v. Create, Inc.*,<sup>138</sup> Evanston passed an ordinance requiring certain provisions to be included in rental lease agreements between landlord and tenant. Opponents of the ordinance claimed that a state statute regulating landlord-tenant relations was evidence of the state's intent to retain exclusive control of landlord-tenant laws.<sup>139</sup> The Illinois Supreme Court stated two reasons for holding the ordinance valid. First, the landlord-tenant statute did not specifically provide for exclusion of home rule power to regulate that area of law. Further, although amended many times, the state statute was enacted prior to the 1970 constitution. The court relied on the rule that a home rule ordinance will prevail over a conflicting state statute when the state statute was enacted prior to 1970.<sup>140</sup> The second reason given for validating the ordinance was its limited scope. The ordinance was confined to rental properties within the city's

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133. *Id.* at 501, 451 N.E.2d at 839.

134. *Id.*; ILL. CONST. art. VII § 6(a).

135. *City of Carbondale v. Yehling*, 96 Ill. 2d 495, 451 N.E.2d 837 (1983).

136. *Id.* at 501, 451 N.E.2d at 840.

137. *Id.* at 504, 451 N.E.2d at 841.

138. 85 Ill. 2d 101, 421 N.E.2d 196 (1981).

139. *Id.* at 108, 421 N.E.2d at 199.

140. *Id.*

borders.<sup>141</sup> The court also found that the regulation of landlord-tenant relations did not require statewide uniformity or exclusivity.<sup>142</sup> For these reasons the landlord-tenant ordinance was found to pertain to the city's government and affairs.

Six months after the Illinois Supreme Court decided *Create*, an Illinois appellate court faced a similar situation. The *City of Belleville v. Kesler*<sup>143</sup> raised the question whether a state statute is a manifestation of the state's intent to maintain exclusive control over a particular area of law.<sup>144</sup> The City of Belleville, pursuant to its home rule power, enacted an ordinance regulating free standing signs on property located in an area zoned as a multifamily district. The property owned by the defendant was originally zoned as commercial and later changed to multifamily. The sign on the property projected into the public right of way and encroached on the property line in violation of the ordinance.<sup>145</sup> The trial court held that the ordinance was unconstitutional.<sup>146</sup>

On appeal, the defendant argued that the ordinance was invalid because it was based upon the Illinois Municipal Code.<sup>147</sup> The court, however, pointed out that the ordinance was passed pursuant to home rule authority and not a state statute.<sup>148</sup> Continuing, the court held that the regulation of signs on private property pertained to the city's government and affairs because the ordinance addressed a problem involving the public health, safety and welfare of the residents of Belleville.<sup>149</sup>

The scope of the home rule power to zone was addressed in *Thompson v. Cook County Zoning Board of Appeals*.<sup>150</sup> The issue presented was whether passage of an amendatory zoning ordinance and the issuance of a special use permit constituted a proper exercise of home rule power.<sup>151</sup> The court answered in

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141. *Id.* at 112-113, 421 N.E.2d at 199-200.

142. *Id.* at 114, 421 N.E.2d at 201. The defendants also alleged that the ordinance interfered with the state judiciary system and substantive contract law. The court held that substantive contract law was not changed and that a state may impose specific conditions on contracts, pursuant to the police power, for the public good. Further, the ordinance does not bar the parties from state courts; therefore, no interference was found. *Id.* at 115-16, 421 N.E.2d at 202-03.

143. 101 Ill. App. 3d 710, 428 N.E.2d 617 (1981).

144. *Id.*

145. *Id.* at 712, 428 N.E.2d at 618.

146. *Id.*

147. ILL. REV. STAT. ch. 24, § 11-80-15 (1979).

148. 101 Ill. App. 3d 710, 713, 428 N.E.2d 617, 618 (1981).

149. *Id.* at 713, 428 N.E.2d at 620.

150. 96 Ill. App. 3d 561, 421 N.E.2d 285 (1981).

151. *Id.* The other issues presented to the court for review were: (1) the procedural aspects of the Cook County Zoning Board of Appeals in passing



the affirmative.<sup>152</sup> The appellants contended that the zoning board approved the ordinance in violation of a state statute regulating state zoning boards.<sup>153</sup> The court disagreed and held that zoning is a valid exercise of home rule power and pertains to the local government's affairs.<sup>154</sup> Because Cook County is a home rule unit, it was not bound by the state statute.<sup>155</sup>

Along with ordinances protecting the health, safety and welfare of residents, the Illinois Constitution grants the home rule unit the power to tax provided such taxes pertain to the local government and affairs.<sup>156</sup> The Appellate Court for the Second District balanced the power of the home rule unit to impose a local tax against the limitations of the state statutes in *Elgin National Bank v. Rowcliff*.<sup>157</sup> The problem in *Rowcliff* was the disproportionate assessment of taxes upon the plaintiff due to the exemption of certain charitable and religious organizations and municipal buildings from the special service area taxes.<sup>158</sup> The distinction made was that these properties were exempt from taxes by virtue of the state revenue act.<sup>159</sup> In an earlier decision, this appellate court held that special taxation for improvements was not necessarily revenue and, therefore, those organizations normally exempt under the revenue act are taxable under the special service area tax.<sup>160</sup> The question presented was whether the city council's later exemption of certain properties in accordance with the state statute was a valid exercise of home rule power.<sup>161</sup> Noting that home rule powers must be liberally construed,<sup>162</sup> the court held that where the home rule unit has power to tax, it also can exempt properties under the state revenue act.<sup>163</sup>

Another appellate court addressed a taxation issue in the

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the ordinance; and, (2) the admission of testimony taken before the Board into evidence.

152. *Id.*

153. *Id.* at 567, 421 N.E.2d at 291-92. County Zoning Enabling Act, ILL. REV. STAT. ch. 34, § 3156 (1979).

154. 96 Ill. App. 3d at 569, 421 N.E.2d at 292. *See also* County of Cook v. John Sexton Contractors, 75 Ill. 2d 494, 389 N.E.2d 553 (1979); Johnny Bruce Co. v. Champaign, 24 Ill. App. 3d 900, 321 N.E.2d 469 (1974).

155. 96 Ill. App. 3d at 569, 421 N.E.2d at 292.

156. ILL. CONST. art. VII § 6(a) (1970).

157. 109 Ill. App. 3d 719, 441 N.E.2d 112 (1982).

158. *Id.* at 721, 441 N.E.2d at 114.

159. Revenue Act of 1939, ILL. REV. STAT. ch. 120 §§ 500.1 - 500.23 (1979).

160. *Ciaccio v. City of Elgin*, 85 Ill. App. 3d 507, 407 N.E.2d 108 (1980).

161. *Elgin Nat'l Bank v. Rowcliff*, 109 Ill. App. 3d 719, 441 N.E.2d 112 (1982).

162. *Id.* at 730, 441 N.E.2d at 119.

163. *Id.*

context of revenue bonds.<sup>164</sup> South Barrington, a home rule unit, passed a resolution to issue revenue bonds to help finance a Marshall Field retail store in a neighboring town.<sup>165</sup> South Barrington later withdrew the issuance of the bonds, claiming it exceeded its constitutional authority under the home rule grant. The city claimed the bonds were to be used to build a facility beyond its boundaries.<sup>166</sup> The court analyzed the constitutionality of the bonds in terms of the Industrial Project Revenue Bond Act.<sup>167</sup> First, the court noted that the statute grants non-home rule units authority to finance certain projects within ten miles of their borders.<sup>168</sup> An earlier supreme court decision held that home rule units had this power not by virtue of a statute, but by virtue of the home rule provision of the 1970 constitution.<sup>169</sup> Because South Barrington exercised its authority pursuant to home rule provisions and not the state statute, there was no express legislative limitation on the use of the bonds for industrial projects rather than retail outlets.<sup>170</sup> The court thus extended the area that may be encompassed for the issuance of bonds for a commercial development to a ten mile radius of the home rule unit's borders.<sup>171</sup> Where revenue bonds are concerned, the issuance may "pertain to" the local government, even though the use of the bonds falls outside the corporate borders.<sup>172</sup>

Two subjects pertaining to a home rule unit's government and affairs, but not specifically mentioned in the Illinois Constitution are the establishment of salaries for government officials<sup>173</sup> and the regulation of home rule unit personnel.<sup>174</sup> In *Winokur v. Rosewell*, the Cook County Board enacted salary raises which were vetoed by the County Board President. The board members overrode the veto and passed appropriations to finance the raises. The President exercised a partial line veto which reduced the raises provided in the initial resolution.<sup>175</sup>

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164. *Marshall Field & Co. v. Village of South Barrington*, 92 Ill. App. 3d 360, 415 N.E.2d 1277 (1981).

165. *Id.* at 361, 415 N.E.2d at 1279.

166. *Id.* at 362, 415 N.E.2d at 1279. The second issue was whether the monies would be spent for public use as required by the constitution. *Id.*

167. *Id.* at 364, 415 N.E.2d at 1281. ILL. REV. STAT. ch. 24, § 11-74-4(1) (1979).

168. 92 Ill. App. 3d at 364, 415 N.E.2d at 1281 (1981).

169. *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 291 N.E.2d 807 (1972).

170. 92 Ill. App. 3d at 365, 415 N.E.2d at 1281.

171. *Id.*

172. *But see supra* notes 135-41 and accompanying text.

173. *Winokur v. Rosewell*, 83 Ill. 2d 92, 414 N.E.2d 724 (1980).

174. *Resman v. Personnel Brd. of the City of Chicago*, 96 Ill. App. 3d 919, 422 N.E.2d 120 (1981).

175. 83 Ill. 2d at 94, 414 N.E.2d at 725.

The Illinois Supreme Court held that the raises were a valid exercise of home rule power and that the home rule power supercedes the state statute regulating the procedures for setting the salaries of county board personnel.<sup>176</sup>

Thus, recent Illinois decisions demonstrate the continuing trend to liberally construe the home rule powers granted by the 1970 Constitution. An emerging issue, however, is whether home rule powers are limited, in *all* cases, by the physical boundaries of the home rule unit.<sup>177</sup>

### III. LIMITATIONS ON HOME RULE POWERS: JUDICIAL LIMITATIONS—SUBJECTS NOT PERTAINING TO LOCAL AFFAIRS

#### A. Background

The Illinois Constitution of 1970 granted home rule municipalities broad powers to cope with problems peculiar to municipal and county government.<sup>178</sup> The basic grant of power in section 6(a) contains two parts.<sup>179</sup> The first part is a grant of general authority which states that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs. . . ."<sup>180</sup> The second part is a grant of four basic powers which are "the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt."<sup>181</sup>

The terms of this grant are broad<sup>182</sup> and are to be given a liberal construction.<sup>183</sup> The grant, however, is not a grant of sovereignty upon the home rule unit.<sup>184</sup> The home rule unit's power only extends to those powers pertaining to its government and affairs.<sup>185</sup> There is no precise definition of "local affairs"<sup>186</sup> or "state affairs."<sup>187</sup> The attempt to define these terms

176. *Id.* see Counties Act, ILL. REV. STAT. ch. 34 ¶ 304 (1977).

177. See *supra* notes 155-62, and accompanying text.

178. ILL. CONST. art. VII, § 6(a) (1970).

179. Kratovil and Ziegwald, *Illinois Home Rule and Urban Land — A Test Run of the New Constitution*, 22 DE. PAUL L. REV. 359, 362 (1972).

180. ILL. CONST. art. VII, § 6(a).

181. *Id.*

182. *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 539, 338 N.E.2d 15, 17 (1975).

183. ILL. CONST. art. VII, § 6(m). See Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L. F. 137, 157.

184. Michael and Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L. F. 559, 601-02.

185. ILL. CONST. art. VII, § 6(a). See Michael and Norton, *supra* note 183, at 601 (discusses the grant and limitations imposed by section 6(a)).

186. See *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 539, 338 N.E.2d 15, 17 (1975) (almost impossible to define the term municipal affairs). See also Kratovil and Ziegwald, *supra* note 178, at 366.

is further complicated by the rapidly changing character of urban society.<sup>188</sup> The grant of home rule, necessarily, leaves an area of uncertainty as to the scope of authority vested in municipalities.<sup>189</sup> It has been left to the courts to distinguish a "local affair" from a "state affair." This distinction often is the crucial factor in determining the extent of authority granted to a home rule municipality under section 6(a).<sup>190</sup>

The Local Government Committee of the Sixth Illinois Constitutional Convention,<sup>191</sup> recalling the problems of judicial preemption experienced in other states,<sup>192</sup> attempted to minimize the potential judicial construction of the home rule unit's scope of authority.<sup>193</sup> Nevertheless, several commentators, because of the uncertainty in Illinois' constitutional grant of home rule powers, recognized and feared the judiciary's potential power to undermine the legislature's intent to grant broad powers to local governments.<sup>194</sup> Regardless of these restraints and reservations, it necessarily falls upon the courts to distinguish matters of local concern from matters of state concern.<sup>195</sup>

Since home rule's implementation, the courts have attempted to define the parameters of the phrase "pertaining to local government and affairs." In defining these parameters, the courts have determined that certain subject matter does not pertain to local affairs and government. In reaching these determi-

187. See *Van Gilder v. City of Madison*, 222 Wis. 58, 67, 267 N.W. 25, 28 (1936) (term "statewide concern" is practically undefinable). See also *Kratovil and Ziegwald, supra* note 178, at 366.

188. See *Vanlandingham, Symposium: Problems in Constitutional Law — Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 291 (1968).

189. *Kratovil and Ziegwald, supra* note 178, at 385.

190. See *id.* at 366-68.

191. The committee was the basic working unit which conducted hearings, made proposals and prepared the home rule provision of the Illinois Constitution. Anderson and Lousin, *From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Illinois Constitution*, 9 J. MAR. J. PRAC. & PROC. 697, 708 (1976) (contains a comprehensive biography of the committee members and a history of the committee proceedings).

192. *Committee Proceedings*, Vol. IV at 3053. See also *Biebel, Home Rule in Illinois After Two Years: An Uncertain Beginning*, 6 J. MAR. J. PRAC. & PROC. 253, 282 (1973) (discussion of implied presumption's adverse effect on home rule in Texas, California and Ohio).

193. The effort to minimize the problem of judicial implied preemption was the reason sections 6(g), (h) and (i) were drafted into the home rule provision. See *Vitullo, Local Government: Recent Developments in Local Government Law in Illinois*, 22 DE PAUL L. REV. 85, 91 (1972). See also *Biebel, supra* note 191, at 283; *Baum, supra* note 182, at 157.

194. *Biebel, supra* note 191, at 262-63 (citing *Baum, supra* note 182, at 152). This commentator asserted that the key to effective home rule is the successful restraint of the courts' power to preempt a home rule unit's authority. *Id.* at 282.

195. See *Michael and Norton, supra* note 181, at 568.

nations, the courts have struggled to find a standard when reviewing a home rule unit's expression of control over a subject. The courts initially focused on the question of whether the local authority was expressly or impliedly preempted by a state statute.<sup>196</sup> These early decisions were criticized because the courts' reasoning had the potential for severely limiting the scope of a home rule unit's authority.<sup>197</sup> Later cases, however, shifted the focus from the preemption question to the question of whether the matter regulated "pertained to" the home rule unit's government and affairs.<sup>198</sup> This shift in focus aligns the courts' scope of review with that intended by the framers.<sup>199</sup> A review of the pre-1980 cases illustrates the courts' struggle to establish a test in which to sort out what subjects are either within or without the local affairs category.<sup>200</sup> This review attempts to identify how the courts analyze a given question within this area as an aid in giving some predictability to what is not within the ambit of local affairs.<sup>201</sup> Generally, the court holds that affairs are not within the ambit of a home rule unit when: (1) the subject matter is an area of law traditionally governed by the state, and (2) the home rule unit's exercise of power has an impact beyond its borders.<sup>202</sup>

In the cases where the court found that a traditional state interest preempted local regulation, the primary factors in reaching that conclusion were whether a unified system was contemplated,<sup>203</sup> whether the matter regulated was of statewide concern,<sup>204</sup> and whether the state had a dominant interest in regulating the matter.<sup>205</sup> If these questions were answered af-

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196. See *Bridgman v. Korzen*, 54 Ill. 2d 74, 295 N.E.2d 9 (1972).

197. Biebel, *supra* note 191 at 314.

198. See *Carlson v. Briceland*, 61 Ill. App. 3d 120, 377 N.E.2d 1138 (1978) (court held home rule intended to reverse presumption against local authority).

199. *Anderson and Lousin*, *supra* note 190, at 747 ("Courts could check the power of a home rule unit only by narrowly interpreting the powers and functions pertaining to its government and affairs.").

200. See *supra* notes 194-95 and accompanying text. See also *Kratovil and Ziegwald*, *supra* note 178, at 367.

201. See *id.*

202. *Michael and Norton*, *supra* note 183, at 568-69. See also *Metropolitan Sanitary Dist. v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976) (application of city ordinance to a regional sewage system was not within the grant of home rule powers). *City of Des Plaines v. Chicago and Nw. Ry. Co.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1976) (regulation of noise pollution is a matter of state concern because it extends beyond borders of the municipality).

203. *People ex rel. Lignoul v. City of Chicago*, 67 Ill. 2d 480, 368 N.E.2d 100 (1977); *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 338 N.E.2d 15 (1975).

204. *Id.*

205. *People v. Valentine*, 50 Ill. App. 3d 447, 365 N.E.2d 1082 (1977) (criminal identification and investigation).

firmatively, the matter was a "state affair" and not within the ambit of the home rule unit. The analysis of several cases illustrates this point.

In *People ex rel Lignoul v. City of Chicago*,<sup>206</sup> a city passed an ordinance allowing branch banking. The Illinois Supreme Court held that, due to the pervasive state and federal regulation of the area, banking is outside the jurisdiction of home rule units.<sup>207</sup> The *Lignoul* court found that matters predominantly regulated by state and national statutes are matters not pertaining to local government and affairs.<sup>208</sup>

Similarly, in *People v. Valentine*,<sup>209</sup> the court held that an ordinance governing expungement of arrest records was not a matter which pertained to local affairs.<sup>210</sup> The court stated that the expungement provisions of the state statute are concerned with the right of privacy regardless of residence or place of arrest.<sup>211</sup> This subject matter has been comprehensively regulated by the state for many years and is exclusively an area of state regulation.<sup>212</sup>

In *Ampersand v. Finley*,<sup>213</sup> the court addressed a tax imposing a \$1.00 fee on the filing of all civil actions in Cook County. The fee was to be used for the support of the Cook County Law Library. The court struck down the ordinance imposing the \$1.00 fee because it was an exercise of local control over the state's court system. The fee was found to be a local attempt to burden access to the state's judicial system. The court held that ease of access to the courts should be maintained and that there was a need for statewide uniformity in the level of accessibility to the courts.<sup>214</sup>

In other cases the court has also held that home rule units are without jurisdiction over the administration of justice.<sup>215</sup> In *Cummings v. Daley*,<sup>216</sup> the Chicago Commission on Human Relations suspended the real estate licenses of a real estate firm, its president and one of its salesmen. They had been charged with violations of Chicago's Fair Housing Ordinance. The ordi-

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206. 67 Ill. 2d 480, 368 N.E.2d 100 (1977).

207. *Id.* at 485-86, 368 N.E.2d at 103-04.

208. *Id.* at 484-85, 368 N.E.2d at 103.

209. 50 Ill. App. 3d 447, 365 N.E.2d 1082 (1977).

210. *Id.* at 450-51, 365 N.E.2d at 1085.

211. *Id.*

212. *Id.* at 450-51, 365 N.E.2d at 1085.

213. 61 Ill. 2d 537, 338 N.E.2d 15 (1975).

214. *Id.* at 541-42, 338 N.E.2d at 18.

215. *Nowicki v. Evanston Fair Housing Review Bd.*, 62 Ill. 2d 11, 338 N.E.2d 186 (1975); *Cummings v. Daley*, 58 Ill. 2d 1, 317 N.E.2d 22 (1974).

216. 58 Ill. 2d 1, 317 N.E.2d 22 (1974).

nance provided that review would be governed by the Illinois Administrative Review Act.<sup>217</sup> The provision providing review was challenged and the court held that the methods of review were of state interest. The court stated that the method of judicial review did not pertain to local government and affairs but rather, that methods of review were established and maintained by the state. The court denied any home rule authority to determine the method of judicial review for the unit's administrative agencies.

These decisions indicate that an ordinance by a home rule municipality will be declared invalid if it invades the province of purely state affairs.<sup>218</sup> The courts, after finding that a subject matter is of state concern, have, in several cases, considered whether the municipality could legislate concurrently with the state. The court has allowed concurrent regulation by the state and governmental units in the area of environmental control.

In *City of Chicago v. Pollution Control Board*,<sup>219</sup> the Illinois Environmental Protection Agency and the Illinois Pollution Control Board appealed an order enjoining them from enforcing the Illinois Environmental Protection Act against the City of Chicago. The court held that Chicago must comply with the provisions of the state act.<sup>220</sup> The court noted that the legislature did not express an intention to completely exclude local regulatory efforts in the field of environmental law. The court concluded that a municipal unit may legislate concurrently, provided the local ordinance conforms with the minimum standards established by the legislature.<sup>221</sup> It is important to note that when concurrent legislation is allowed the state has superior authority in case of a conflict between the home rule unit and the state.<sup>222</sup>

The decision permitting concurrent legislation in the area of environmental control was not completely settled after *Pollution Control Board*.<sup>223</sup> In *Carlson v. Village of Worth*,<sup>224</sup> the court held that local regulation of a sanitary landfill was preempted by

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217. *Id.* at 3, 317 N.E.2d at 23.

218. *See supra* notes 202-04 and accompanying text. *See also* Kratovil and Ziegwald, *supra* note 178 at 370.

219. 59 Ill. 2d 484, 322 N.E.2d 11 (1974).

220. *Id.* at 486, 322 N.E.2d at 13.

221. *Id.* at 489, 322 N.E.2d at 14.

222. Minetz, *Recent Illinois Supreme Court Decisions concerning the Authority of Home Rule Units to Control Local Environmental Problems*, 26 DE PAUL L. REV. 306, 312 (1977).

223. 59 Ill. 2d 484, 322 N.E.2d 11 (1974).

224. *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 496 (1975) (a non-home rule municipality sought to regulate a sanitary landfill).

the Environmental Protection Act.<sup>225</sup> The court stated that *Pollution Control Board's* conclusion that a local governmental unit may legislate concurrently with the General Assembly was dictum.<sup>226</sup> The court, in later cases firmly established the principle that the local home rule unit and the General Assembly may legislate environmental matters concurrently in an exact, definite area wholly within a home rule unit's boundaries.<sup>227</sup>

In cases where a home rule unit's ordinance has an extra-territorial impact, the court does not consider whether the local unit could legislate concurrently.<sup>228</sup> In these cases, the court examines the state statute and determines whether it preempts all home rule regulation in the area.<sup>229</sup> The most significant cases dealing with the extra-territorial impact of an ordinance have concerned control over environmental pollution matters.<sup>230</sup> These cases illustrate the courts' development of a method of analysis in determining whether a subject matter is a "state affair" and does not pertain to "local government and affairs."

In *Metropolitan Sanitary District v. City of Des Plaines*,<sup>231</sup> a home rule municipality sought to regulate a regional sanitation authority's construction and operation of a sewage treatment plant. The city required a regional district to acquire a city permit and to comply with city health ordinances. The sanitary district had a state EPA permit and contended that its compliance with state standards was sufficient. The court held that waste disposal was inherently a matter of state concern and that state standards preempt the field leaving no opportunity for local regulation.<sup>232</sup> The court's reasoning was based on the regional nature of a sanitary district and the unacceptability of subjecting regional entities to a plethora of municipalities and their regulations.

In *City of Des Plaines v. Chicago and Northwestern Railway Co.*,<sup>233</sup> the supreme court invalidated a city noise ordinance because it found that environmental problems were outside the grant of authority conferred on home rule units by section

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225. *Id.* at 409, 343 N.E.2d at 500.

226. *Id.*

227. *E.g.*, *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979) (court allowed concurrent legislation); *Carlson v. Briceland*, 61 Ill. App. 3d 120, 377 N.E.2d 1138 (1978) (court held local governmental units may legislate concurrently with state).

228. *See Michael and Norton, supra* note 183, at 569.

229. *See County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

230. *See Michael and Norton, supra* note 7, at 569.

231. 63 Ill. 2d 256, 347 N.E.2d 716 (1976).

232. *Id.* at 259, 347 N.E.2d at 720.

233. 65 Ill. 2d 1, 357 N.E.2d 433 (1976).



6(a).<sup>234</sup> The court applied the first step of the analysis introduced in *Metropolitan Sanitary District* and likewise did not need to reach the preemption question.<sup>235</sup> The court reasoned that noise pollution was a concern but is essentially a matter requiring regional or statewide standards and control.<sup>236</sup> The court compared noise pollution with air and water pollution. The court noted that all three may emanate from a local source but all have the potential to travel well beyond their sources. The city, therefore, intended to control emissions originating beyond its boundaries, as well as those within its boundaries.

These cases support the view that home rule units may not regulate environmental matters which have an extra-territorial effect on other municipalities. These matters do not pertain to local affairs but are of a statewide or regional concern. State affairs, traditionally "recognized as falling within the competence of the state rather than local authorities," do not pertain to local affairs and are also outside the ambit of home rule regulation.<sup>237</sup> The court, giving a liberal construction to the grant of home rule power, has allowed concurrent legislation wholly within a home rule unit's boundaries, if it is not an area traditionally or expressly a state affair.

### B. Recent Developments

Since 1979, the issue of when a municipal enactment does not "pertain to its government and affairs" has generally been analyzed under the traditional approach: is the matter acted upon one of state-wide concern,<sup>238</sup> or does the enactment have an impact beyond the territorial borders of the home rule unit.<sup>239</sup> Perhaps the most terse, yet thorough analysis of the issue appeared in a 1980 opinion of the Illinois Attorney General.<sup>240</sup> The City of Des Plaines, a home rule unit, had passed an ordinance which provided that unclaimed property shall escheat to the city.<sup>241</sup> The Attorney General's opinion stated that Illinois has two separate statutory provisions that regulate the disposition of unclaimed or abandoned property.<sup>242</sup> The Attorney General reasoned that the Des Plaines ordinance would have a

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234. *Id.* at 4-6, 357 N.E.2d at 435.

235. *Id.*

236. *Id.*

237. See *supra* notes 205-217 and accompanying text.

238. *People v. Valentine*, 50 Ill. App. 3d 447 (1977).

239. *Bridgeman v. Korzen*, 54 Ill. 2d 74 (1972).

240. Atty. Gen. Op. S-1498 (July 7, 1980).

241. *Id.*

242. ILL. REV. STAT. ch. 49, § 1 *et seq.* (1979) (property of person who dies without heirs escheats to county of residence); ILL. REV. STAT. ch. 141, § 101

"substantial impact on the state"<sup>243</sup> and therefore did not pertain to its government and affairs because of the "clear" intrusion upon a traditional power of the state. Also, property that escheats to the city might be property that would otherwise escheat to the county under Ill. Rev. Stat. ch. 49, § 1, *et seq.* (1939). The ordinance thus has an effect and impact on the affairs of other governmental units<sup>244</sup> and is consequently not an appropriate area for city regulation.<sup>245</sup>

There have been two other cases of interest that held invalid municipal ordinances under a "state-wide" concern analysis. In *McLorn v. City of East St. Louis*,<sup>246</sup> the appellate court held invalid an ordinance prohibiting the non-wage garnishment of the city's funds that were on deposit in institutions within the city.<sup>247</sup> The court initially reasoned that the ordinance con-

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*et seq.* (1979) (abandoned property escheats to State Director of Financial Institutions).

243. Atty. Gen. Op. at 96. (S-1498).

244. In cases involving an extraterritorial impact or effect, it has been suggested that the analysis should use a weighing process that balances the extraterritorial impact and the interests if the home rule unit is the subject matter of the enactment. Michael E. Norton, *supra* note 183, at 572. This balancing approach was used in *Carlson v. Briceland*, 61 Ill. App. 3d 247, 377 N.E.2d 1138 (1978).

245. In 1982, the Attorney General issued two opinions regarding the possible validity of a proposed gambling casino ordinance, Opinion of Attorney General, 82-036 (Oct. 22, 1982) and an ordinance governing the care and disposal of public records related to the corporate function of the city. Opinion of Attorney General, 82-054 (December 14, 1982). In both cases, there exists state statutes that specifically covered the attempted actions. ILL. REV. STAT. ch. 116, § 43.101 *et seq.* (1981) (The Local Records Act); ILL. REV. STAT. ch. 38, § 28-1 and 28-3 (1981) (sections of 1961 Criminal Code that define "gambling," "gambling place" and the possible criminal penalties). In both cases the Attorney General stated that the proposed ordinances would conflict with the state statutes. The opinions stated that the proposed matters were of essentially a state concern and that the supremacy of state law deprived the home rule unit from being able to regulate these areas. Thus, maintenance of public records of local governments and the establishment and operation of a gambling casino were not matters that pertained to the government and affairs of the municipalities and therefore not an appropriate area of home rule regulation.

246. 105 Ill. App. 3d 148, 434 N.E.2d 44 (1982).

247. The ordinance provided:

HOME RULE ORDINANCE TO GRANT IMMUNITY TO THE PROPERTY AND ASSETS OF LOCAL GOVERNMENTAL UNITS AND SCHOOL DISTRICTS FROM SUPPLEMENTARY PROCEEDINGS INSTITUTED BY JUDGMENT CREDITORS AND THEIR SUCCESSORS.

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WHEREAS, the City of East St. Louis is a 'Home Rule Municipality' under the provisions of Article VII, Section 6—a, etc., of the Illinois State Constitution and was adopted in 1970; and

WHEREAS, the legislature of the State of Illinois has not enacted any statutes dealing with or granting sovereign immunity as to supplementary proceedings relating to local units of government, including

ferred sovereign immunity on the city in direct conflict with article XIII of the Illinois Constitution<sup>248</sup> because it essentially excluded "City funds from the reach of creditors"<sup>249</sup> and implicated the institution of banking by the city. As an alternative, the court relied on *Ampersand, Inc. v. Finley*<sup>250</sup> to conclude that

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municipalities, school districts, park districts, etc., as was reserved to said legislature in Article XIII, Section 4 of the Illinois State Constitution; and

WHEREAS, it would be within the purview of the City of East St. Louis to enact legislation dealing with the issue of immunity of local governmental units and school districts from supplementary proceedings initiated by judgment creditors and their successors as such proceedings would occur and/or effect [*sic*] such local governmental units and school districts situated within the geographical boundaries and municipal corporate limits of the City of East St. Louis; and

WHEREAS, it would be in the best interest of the City and its citizens and the local governmental units, including school districts, park districts, sewer districts, and health districts, to be granted immunity by such actions of judgment creditors as it relates to the property of such entities situated within the geographical boundaries of the City of East St. Louis.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND THE ALDERMANIC COUNCIL OF THE CITY OF EAST ST. LOUIS, as follows:

I. All property or assets of local governmental units, including municipalities, school districts, park districts and sewer districts, shall be immune and shall not be subject to garnishment actions by judgment creditors where said property or asset is held or disposed [*sic*] with any third party, or situated within the geographical boundaries and city limits of the City of East St. Louis.

II. Any institution, firm, trust, person or corporate entity situated within the city limits of the City of East St. Louis, upon which a judgment creditor issues a garnishee summons on any property or any local governmental unit, shall be empowered to affirmatively plead the immunity granted in the preceding paragraph I.

III. Any local governmental unit, upon whose property has been subject to a garnishee summons with any third party institution referred to in Section 1 and/or 2 of this Ordinance, shall have the right to intercede as a party of interest to any such garnishment proceedings and to affirmatively plead the immunity granted in Section I of this Ordinance.

IV. Garnishment process, as defined and intended within the provisions of this Ordinance, shall not include wage deduction summons upon local governmental units situated within the geographical limits of the City of East St. Louis.

*Id.* at 150-51, 434 N.E.2d at 45-6.

248. ILL. CONST. art. XIII. Section 4 of article XII provides: "Except as the General Assembly may provide by law, sovereign immunity in the State is abolished."

249. *McLorn*, 105 Ill. App. 3d at 152, 434 N.E.2d at 47. Also, the preamble to the ordinance itself implicated the attempted exercise of sovereign immunity. As quoted by the court, that part of the preamble reads: "[W]hereas, the legislature of the State of Illinois has not enacted any statutes dealing with or granting sovereign immunity as to supplementary proceedings relating to local units of government . . ." *Id.* at 150, 434 N.E.2d at 45.

250. 61 Ill. 2d 537, 338 N.E.2d 15 (1975).

the ordinance in question did not pertain to the city's government and affairs. The court reasoned that a state-wide interest exists when state constitutional provisions commit areas in question to a branch of state government.<sup>251</sup> Consequently, since the ordinance in question conferred sovereign immunity on the city, a power reserved to the General Assembly under section 4 of article XIII of the 1970 constitution, the city was attempting to exercise a power held by the state. The existence of a "state-wide interest" in the institution of banking relegated the city's ordinance as one not pertaining to the home rule unit's government and affairs and was therefore invalid.<sup>252</sup>

The second case using a "state-wide concern" or interest analysis is *City of Carbondale v. Yehling*.<sup>253</sup> In *Yehling*, the city passed an eminent domain ordinance similar to the Eminent Domain Act.<sup>254</sup> The city thereafter filed several petitions for condemnation in the circuit court. The circuit court ultimately executed a certificate of importance and the supreme court granted the city's direct appeal motion to determine whether the city had the right to acquire real property by virtue of the city's eminent domain ordinance and article VII, section 6 of the 1970 Illinois Constitution. The ordinance in question was passed by the city to aid its urban redevelopment program. The court found this concern of the city to be "sufficiently local in character that the city's purpose 'pertain[s] to [its] local government and affairs.'"<sup>255</sup> The court held, however, that enforcement of the ordinance was an impermissible interference with the state judicial system.<sup>256</sup> Because the ordinance purported "to define the notice procedures of the courts, duties of parties in court, and specific remedies available in court proceedings,"<sup>257</sup> the city was attempting to outline rules for the state courts to follow — a matter clearly of a state concern and not one pertaining to the home rule unit's government and affairs.<sup>258</sup>

A 1982 decision of the Illinois Supreme Court, *Commercial National Bank of Chicago v. City of Chicago*,<sup>259</sup> held that that

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251. *McLorn* 105 Ill. App. 3d at 153, 434 N.E.2d at 48.

252. *Id.* at 154, 434 N.E.2d at 48.

253. 96 Ill. 2d 495, 451 N.E.2d 837 (1983).

254. ILL. REV. STAT. ch. 47, § 1 *et. seq.*

255. *Yehling*, 96 Ill. 2d at 497, 451 N.E.2d at 837.

256. *Id.* at 500-01, 451 N.E.2d at 840.

257. *Id.* at 501, 451 N.E.2d at 840.

258. *Id.* The court distinguished *City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 421 N.E.2d 196 (1981) which found that the ordinance there in question could define notice procedures, duties of the parties and remedies available because that ordinance did not place any conditions upon access to the courts of the state.

259. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

portion of an ordinance that permitted "taxation upon services not rendered or performed in the territorial jurisdiction of the taxing entity"<sup>260</sup> was unconstitutional. The court so held because it was not within the power of the city "to define when a 'purchase of service is in the City' or 'substantially performed' so as to give extra-territorial effect to its taxing ordinance."<sup>261</sup> The definition was in derogation of the territorial limitation imposed on home rule powers under section 6(a) of article VII of the 1970 Illinois Constitution.<sup>262</sup>

#### IV. LEGISLATIVE PREEMPTION OF HOME RULE UNDER ARTICLE VII SECTION 6(g),(h) AND (i).

##### A. Background

The powers and authority granted to home rule units by the Illinois Constitution are not without limit by the state. It was recognized at the Constitutional Convention that although the object of article VII, section 6 was to increase local autonomy, the state had to retain constitutional authority to preempt the exercise of home rule in order to maintain a proper balance between local authority and legitimate state interests.<sup>263</sup> The preemption scheme embodied in section 6(g), (h), and (i) gives the Illinois General Assembly the authority to limit or deny the powers and functions of home rule units. These sections provide three separate and distinct preemption devices.

Section 6(g) contains two concepts. First, the General Assembly may deny or limit the power of a home rule unit to tax only by a three-fifths vote of each house. The taxing power of

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260. *Id.* at 78, 432 N.E.2d at 243.

261. *Id.* at 79, 432 N.E.2d at 243.

262. *Id.* The relevant portion of that ordinance reads as follows:

Section 200.5-3. . . . A purchase of service is in the City if either (a) the purchaser is in the City at the time the service is provided, or (b) the seller is in the City at the time the service is provided, and (c) the service is substantially performed, rendered, provided, and received or used in the City. A service shall be deemed substantially performed, rendered or provided in the City if 50% or more of the work performed or of the cost incurred by the seller in connection therewith occurs within the City; a service shall be deemed substantially received or used in the City if 50% or more of the benefits thereof are realized by the purchaser in the City.

*Id.* at 76-77, 452 N.E.2d at 242.

263. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, COMMITTEE ON LOCAL GOVERNMENT, COMMITTEE REPORT 37-40 (hereinafter cited as LOCAL GOVERNMENT REPORT), 7 RECORD OF PROCEEDINGS SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, 1611-14 (hereinafter cited as PROCEEDINGS). See Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 561 (hereinafter cited as Baum, *Part II*).

home rule units was viewed at the Constitutional Convention as fundamental to raising the financial resources necessary to local autonomy.<sup>264</sup> The state can restrict or deny that fundamental power only through the extraordinary means of a three-fifths vote of each house. The second preemption device in section 6(g) provides that in areas where the state does not exercise any power, the legislature may deny or limit any power or function of a home rule unit, except special assessments and taxes,<sup>265</sup> only by a three-fifths vote of each house. The rationale behind this preemption device is that where the state has not acted in an area, the General Assembly should not prevent home rule units from acting unless the state's interest is so great as to warrant a three-fifth majority.<sup>266</sup>

Where the state has not acted in a particular area, preemption of home rule in that area must proceed under section 6(g). The different preemption methods of sections 6(h) and (i) apply where the state is in fact acting in an area. Section 6(h) provides that the General Assembly, by a simple majority, may specifically legislate exclusive exercise by the state of any power or function of a home rule unit, except the special assessments and taxes in section 6(1). Section 6(h) does not specifically declare that the state must be acting in an area before exclusivity can be legislated under that section. The implication, however, from sections 6(g) and (h) is that section 6(g) applies where the state is not acting, and section 6(h) applies where the state does exercise some authority.<sup>267</sup> The rationale of section 6(h) is that state action in an area is evidence of a greater state interest than non-action and thus warrants preemption by only a simple majority rather than the three-fifths requirement of section 6(g).

Section 6(i) provides that home rule units may exercise any power or perform any function concurrently with the state; to the extent that the legislature does not specifically limit or specifically declare the state's action as exclusive. Section 6(i), unlike section 6(h), provides for partial preemption by the General

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264. LOCAL GOVERNMENT REPORT, *supra* note 263, at 65-67; PROCEEDINGS, *supra* note 263, at 1639-41. See also ILLINOIS INSTITUTE OF CONTINUING LEGAL EDUCATION, *Illinois Municipal Law*, § 22.52, at 50 (1982) (hereinafter cited as I.I.C.L.E. *Municipal Law*). The power to raise revenue was important enough to give it the protection of the three-fifths vote requirement. *Id.*

265. Section 6(1) states that the General Assembly may not deny or limit the power of home rule units to make local improvements by special assessments or to levy or impose taxes to provide for special services. ILL. CONST. Art. VII, § 6(1) (1970). It is not clear why this exception was added to the preemption package. For a discussion of 6(1), see Baum, *Part II*, *supra* note 263, at 564-66.

266. Baum, *Part II*, *supra* note 263 at 564.

267. See I.I.C.L.E. *Municipal Law*, *supra* note 264, § 22.57, at 56.

Assembly. Section 6(i) was designed to restrict, if not completely eliminate, implied preemption of home rule authority by the courts.<sup>268</sup> The supporters of home rule at the Constitutional Convention were fearful that if given the opportunity, the courts would severely restrict home rule authority by reading into legislation an implied, unexpressed, intent to preempt.<sup>269</sup> Section 6(i) seeks to limit the opportunity by the courts to engage in judicial preemption by flatly stating that unless the state specifically limits or declares exclusivity, home rule units have the power to regulate concurrently with the state. Thus, the power to preempt clearly lies with the state legislature, not the courts. Further, the legislature can only preempt according to the manner set out in sections 6(g), (h), and (i).

The Illinois Supreme Court has consistently held that ordinances enacted pursuant to the grant of home rule powers in section 6 will prevail over any conflicting state statute enacted before 1970.<sup>270</sup> In reaching this conclusion, the court has focused on two factors. First, section 9 of the Illinois Constitutional Transition Schedule provides that those laws passed prior to 1970, and are not inconsistent with the constitution, remain in effect.<sup>271</sup> Second, intent to preempt home rule before 1970 could not possibly exist because home rule had not been granted until

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268. See Baum, *A Tentative Survey of Illinois Home Rule (Part I): Legislative Control, Transition Problems and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 571-72.

269. LOCAL GOVERNMENT REPORT, *supra* note 263, at 71; PROCEEDINGS, *supra* note 263, at 1654.

270. *Town of Cicero v. Fox Valley Trotting Club, Inc.*, 65 Ill. 2d 10, 357 N.E.2d 1118 (1976) (state regulation of horse racing industry does not preempt home rule unit's admission tax at local race track); *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 343 N.E.2d 919 (1976) (home rule ordinance prevails over statute concerning the appointment of police and fire officials); *Paglini v. Police Bd.*, 61 Ill. 2d 233, 335 N.E.2d 480 (1975) (statute which requires a hearing only before the police board does not preempt home rule ordinance authorizing a hearing before non-board members); *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975) (state regulation of liquor industry does not preempt home rule authority to impose retail tax on alcohol); *Peters v. City of Springfield*, 57 Ill. 2d 142, 311 N.E.2d 107 (1974) (upheld ordinance reducing retirement age of city fire and policemen which conflicted with state retirement age); *Clarke v. Village of Arlington Heights*, 57 Ill. 2d 50, 309 N.E.2d 576 (1974) (Illinois Municipal Code does not preempt home rule authority to alter form of government and provide for selection and terms of office of municipal officials); *People ex rel. Hanrahan v. Beck*, 54 Ill. 2d 561, 301 N.E.2d 281 (1973) (upheld home rule ordinance that created new municipal office in conflict with statute); *Kanellos v. County of Cook*, 53 Ill. 2d 161, 290 N.E.2d 240 (1972) (upheld home rule unit's bond issue which conflicted with state statute which mandated approval of such an issue by referendum).

271. ILL. CONST. TRANSITION SCHEDULE § 9 (1970).

the 1970 constitution.<sup>272</sup> The court has found that because the pre-1970 legislation could not have the required intent to limit home rule, that legislation was inconsistent with the constitution and could not preempt a home rule unit's exercise of its powers or functions.<sup>273</sup>

It has been argued that a comprehensive legislative scheme alone can preempt a home rule unit's actions.<sup>274</sup> The trend in the cases is otherwise. The Illinois Supreme Court has upheld ordinances which conflict with comprehensive state legislation involving the power to tax,<sup>275</sup> age standards for pension benefits, state control over the liquor industry,<sup>276</sup> and state control over the form of police board hearings.<sup>277</sup> There is, however, a curious and confusing line of cases concerning the Illinois Environmental Protection Act.<sup>278</sup> These cases have found at least partial preemption of home rule authority based on the comprehensive nature of the pre-1970 statute.<sup>279</sup> The most recent case, *County of Cook v. John Sexton Contractors Co.*,<sup>280</sup> has resolved some of the confusion in this area. In *Sexton*, the Illinois Supreme Court held that the home rule unit could act concurrently with the state on environmental matters, but any home rule action must conform with the uniform standards set by the state.<sup>281</sup> The court's reasoning did not rest on the judicial doctrine of implied preemption based on the comprehensive nature of the statute.<sup>282</sup> The court first looked to the "pertaining to" language of article 7, section 6(a). It found that the environmental regulation in the local ordinance was "sufficiently local in

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272. *Kanellos v. County of Cook*, 53 Ill. 2d 161, 166-67, 290 N.E.2d 240, 243-44 (1972).

273. *Id.* See generally Note, *The "Clean Slate Doctrine": A Liberal Construction of the Scope of the Illinois Home Rule Powers- Kanellos v. County of Cook*, 23 DE PAUL. L. REV. 1298 (1974).

274. *Illinois Liquor Comm'n v. City of Joliet*, 26 Ill. App. 3d 27, 32, 324 N.E.2d 453, 457 (1975) (the state can express exclusivity in an area by enacting a comprehensive regulatory scheme). See also Michael & Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L.F. 559, 580-81.

275. *Town of Cicero v. Fox Valley Trotting Club, Inc.*, 65 Ill. 2d 10, 357 N.E.2d 1119 (1976).

276. *Peters v. City of Springfield*, 57 Ill. 2d 142, 311 N.E.2d 107 (1974); *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975).

277. *Paglini v. Police Bd.*, 61 Ill. 2d 233, 335 N.E.2d 480 (1975).

278. ILL. REV. STAT. ch. 111 1/2, §§ 1001-1051 (1983).

279. *City of Des Plaines v. Chicago & N.W.R.R.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1976); *Metropolitan Sanitary Dist. v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976); *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975); *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 322 N.E.2d 11 (1974); *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972).

280. 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

281. *Id.* at 514-15, 389 N.E.2d at 560.

282. *Id.* at 514, 389 N.E.2d at 559.



character" to be a proper exercise of home rule power.<sup>283</sup> The home rule unit, however, was not given a free hand by the court to regulate in any manner it chose. The court relied on the constitutional mandate of article 11. Section 1 of article 11 states that the public policy of the state is to provide and maintain a healthful environment. It also states that the General Assembly shall provide for the implementation and enforcement of that public policy.<sup>284</sup> It was on this basis, not implied preemption, that the court held that the home rule unit must comply with the uniform standards set by the state.<sup>285</sup> The *Sexton* decision is consistent with decisions in areas other than environmental control in that it rejects the comprehensive legislature scheme argument.<sup>286</sup> In these cases, the court is more likely to focus on the "pertaining to" issue rather than an implied preemption analysis.<sup>287</sup>

Given the specificity requirements in sections 6(h) and (i), and the mandate of section 6(m), that home rule powers and functions are to be liberally construed, Illinois courts have given great deference to home rule ordinances. The supreme court has repeatedly stated that if the state wishes to preempt, it can do so under the section 6 preemption sections. The court has used this as justification for not rescuing the legislature through implied preemption.<sup>288</sup> Moreover, the supreme court has held that the legislation passed after 1970 must specifically declare an intent to limit or deny home rule.<sup>289</sup> The Illinois General As-

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283. *Id.* at 508, 389 N.E.2d at 557.

284. *Id.* at 514, 389 N.E.2d at 559.

285. *Id.* at 514-15, 389 N.E.2d 560-61. See generally Niro, *Illinois Environmental Law- State Preemption of Local Governmental Regulation of Pollution Related Activities*, 67 ILL. B.J. 118 (1978); Note, *A New Approach to Home Rule in Illinois-County of Cook v. John Sexton Contractors Co.*, 29 DE PAUL L. REV. 603 (1980); Note, *A Balancing Analysis: The Construction of Illinois Home Rule Powers-County of Cook v. John Sexton Contractors Company*, 11 LOY. U. CHI. L.J. 543 (1980); Note, *County of Cook v. John Sexton Contractors Co.- Home Rule Authority to Regulate the Site of Sanitary Landfills*, 1980 U. ILL. L.F. 505.

286. See *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 343 N.E.2d 919 (1976). See also *supra* notes 275-77 and accompanying text.

287. *People ex rel. Lighoul v. City of Chicago*, 67 Ill. 2d 480, 368 N.E.2d 100 (1977) (struck down city ordinance concerning branch banking because it did not pertain to the city's government or affairs).

288. See, e.g., *Paper Supply Co. v. City of Chicago*, 57 Ill. 2d 553, 317 N.E.2d 3 (1974) (local employer's expense tax upheld); *City of Evanston v. County of Cook*, 53 Ill. 2d 312, 291 N.E.2d 823 (1972) (tax enacted by home rule county not preempted by similar tax by municipality).

289. *City of Rockford v. Gill*, 75 Ill. 2d 334, 341, 388 N.E.2d 384, 387 (1979); *Rozner v. Korshak*, 55 Ill. 2d 430, 435, 303 N.E.2d 389, 392 (1973). Accord *Aurora Pizza Hut, Inc. v. Hayter*, 79 Ill. App. 3d 1102, 1108, 398 N.E.2d 1150, 1155 (1979); *Village of Hoffman Estates v. Union Oil*, 56 Ill. App. 3d 52, 56, 370 N.E.2d 1304, 1307 (1977).

sembly has also enacted "An Act to revise the law in relation to the construction of statutes."<sup>290</sup> In essence the statute states that no law enacted after January 12, 1977 denies or limits any power or function of a home rule unit unless there is a specific expression of an intent to do so.<sup>291</sup> The statute, in no uncertain terms, seeks to reduce the role the judiciary may play in striking down home rule ordinances.

The Supreme Court has considered other problem areas concerning statutes passed after 1970. Section 6(g) does not contain the specificity requirements of sections 6(h) and (i). The court has held that a law passed by a three-fifths vote in each house must specifically express an intent to limit or deny or it does not preempt home rule power.<sup>292</sup> Accordingly, not every bill passed by a three-fifths majority will effectively preempt home rule because the court has read into section 6(g) a requirement that the legislative intent to preempt must be specific. The court's holding predates the "Act in relation to the construction of statutes," and that Act should eliminate any further problems in this area.<sup>293</sup>

The Illinois Supreme Court has also considered the situation where the legislature has expressed state exclusivity under section 6(h) but passes a less than comprehensive state program. In *United Private Detective and Security Ass'n v. City of Chicago*,<sup>294</sup> the court held that this situation preempts the entire area from home rule activity. Even though the state's program was less than all encompassing, the court found complete preemption. While the court apparently will not engage in any widespread implied preemption, where the legislature has passed preemption legislation in accordance with the constitution, the court will uphold the state's preemption against challenges by the home rule unit.<sup>295</sup>

As previously mentioned, the case law on preemption of home rule powers reveals a remarkable deference to have rule authority. The drafters of the constitution sought to reduce the

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290. ILL. REV. STAT. ch. 1, § 1101 (1983).

291. *Id.* For a list of preemption statutes enacted by the Illinois General Assembly see I.I.C.L.E. *Municipal law*, *supra* note 264, at § 22.56, p. 54-55.

292. *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

293. The Act states that any legislation seeking to limit home rule pursuant to sections 6(g), (h), (i), (j) or (k) must be specific. ILL. REV. STAT. ch. 1, § 1106 (1982).

294. 62 Ill. 2d 506, 343 N.E.2d 453 (1976).

295. *Andruss v. City of Evanston*, 68 Ill. 2d 215, 369 N.E.2d 1258 (1977) (state preempted home rule authority to license and regulate real estate brokers); *Prudential Ins. Co. v. City of Chicago*, 66 Ill. 2d 437, 362 N.E.2d 1021 (1977) (state preempted home rule authority to license, regulate and tax insurance industry).

role of the courts in deciding preemption of home rule issues, and they have been successful. It is the General Assembly's prerogative to preempt home rule powers or functions. If it does not do so in the constitutionally prescribed manner, the Illinois Supreme Court has shown little willingness to preempt where the legislature has not.

### B. Recent Developments

In a recent Illinois appellate court case, *Mandarino v. Village of Lombard*,<sup>296</sup> the analysis used in cases of legislative preemption was set forth in a rather detailed manner. In *Mandarino*, the court held that the procedures set forth in the Illinois Municipal Code,<sup>297</sup> regarding the procedures for appointment and discharge of a police chief, did not preempt a local ordinance giving the Lombard Village Manager the power to fire the village's police chief.<sup>298</sup> The plaintiff in *Mandarino* had been fired as the police chief of the Village of Lombard by the village manager pursuant to a local ordinance giving the manager the power to terminate the police chief's employment at will. The circuit court granted the village's motion for judgment on the pleadings.

On appeal, the plaintiff argued that the local ordinance, which was adopted by the village of Lombard pursuant to its home rule powers, was preempted by a provision of the Illinois Municipal Code covering the same subject matter. However, the appellate court ruled that the Municipal Code provision did not preempt the local ordinance. The court cited a plethora of authority to support its holding that "a statute enacted subsequent to the [1970] Constitution and which purports to limit rule powers must, to that effect, be specific."<sup>299</sup> Furthermore, the court noted that the legislature has specifically codified the requirement for specific language in the statute to affect a preemption of home rule powers.<sup>300</sup> Since there was no provision in the Mu-

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296. 92 Ill. App. 3d 78, 414 N.E.2d 508 (1980).

297. ILL. REV. STAT., ch. 24, § 1-1-1 (1961).

298. Section 2.40.020 of the Lombard Village Code provides that the village manager may hire and fire the police chief at will, without any sort of formal hearing. *Mandarino v. Village of Lombard*, 92 Ill. App. 3d 78, 414 N.E.2d 508, 510 (1980).

299. *Mandarino*, 92 Ill. App. 3d 78, 81, 414 N.E.2d 508, 510 (1980). The Illinois Supreme Court cases cited as authority for the rule requiring a specific preemption provision are: *City of Rockford v. Gill*, 75 Ill. 2d 334, 338 N.E.2d 384 (1979); *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 343 N.E.2d 919 (1976); *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975); *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

300. Section 1106 of the Construction of Statutes Act specifically provides that

municipal Code specifically limiting the exercise of home rule powers in this area, the court ruled that the statute did not preempt the local ordinance.

The *Mandarino* court refused to apply the "comprehensive statutory scheme" analysis wherein the comprehensive nature of the legislation is used to indicate legislative intent to preempt local ordinances. Under this type of analysis, comprehensive state legislation may supplant local regulation. The court recognized that this analysis more directly concerns the "pertaining to its government and affairs" issue under section 6(a).<sup>301</sup>

Rather than showing legislative intent to preempt local ordinances, the court reasoned that where a state statute sets forth a comprehensive statutory scheme to regulate an area of statewide concern, the subject matter of the legislation is no longer a matter that pertains to local government and affairs. Local municipalities, therefore, have no power to regulate because its regulatory powers are limited to areas of local concern. The court ruled that the procedure for discharge of a police chief is not a matter of statewide concern and, therefore, local municipalities with home rule powers may adopt their regulations concerning the hiring and firing of police personnel.<sup>302</sup>

The Illinois Supreme Court reiterated its position on preemption in *City of Evanston v. Create, Inc.*<sup>303</sup> In *Create*, the court upheld a local ordinance which restricted the types of provisions which may be included in local apartment rental agreements. The ordinance was adopted pursuant to Evanston's home rule powers and imposed certain conditions upon rental lease agreements which were more strict than those imposed under the Illinois statute governing landlord and tenant.<sup>304</sup> The city had sued Create, a local real estate agency which managed a number of rental properties located in Evanston, to enjoin the landlord from enforcing certain provisions in its rental agreements which violated the city ordinance. The trial court, finding

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[n]o law enacted after Jan. 12, 1977, denied or limits any power or function of a home rule unit, pursuant to paragraphs (g), (h), (i), (j) or (k) of Section 6 of Article VII of the Illinois Constitution unless there is specific language limiting or denying the power or function. . . ILL. REV. STAT., ch. 1, § 1106 (1979).

301. See *supra* notes 1-118 and accompanying text which relates to the issue of the scope of government affairs under section 6(a), article VII of the Illinois Constitution of 1970.

302. The *Mandarino* court cited *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 527-28, 343 N.E.2d 919, 922 (1976).

303. 85 Ill. 2d 101, 421 N.E.2d 196 (1981).

304. The Illinois landlord and tenant statutes were revised in 1979 and are contained in "an Act to revise the law in relation to landlord and tenant", ILL. REV. STAT. ch. 80, § 1, (1979).

that the rental agreements contained provisions which violated the ordinance, enjoined Create from enforcing the unlawful provisions. Create appealed, and the appellate court affirmed.<sup>305</sup>

Create argued that the recently revised Illinois landlord and tenant law sets out a comprehensive statutory plan implying a statewide interest rather than a local matter subject to home rule authority. As a statewide interest, the defendant argued, the area was one which precluded local government regulation. This argument tacitly assumes that an area of statewide concern can not be concurrently regulated by local governments acting under home rule power. The court refused to submit to this argument, stating that state regulation and local regulation are not mutually exclusive. The court noted that, in certain cases, where the state is acting pursuant to a constitutional mandate, the local legislation would have to conform with the uniform standard set by the state legislature.<sup>306</sup> However, the court noted that cases of that sort are rare and the area of landlord and tenant is not one in which the legislature is acting pursuant to a constitutional mandate.

In a number of cases cited in *Create*, the Illinois courts had held local ordinances invalid as unreasonable exercises of home rule power. For example, *People ex rel. Lignoul v. City of Chicago*<sup>307</sup> was cited for the proposition that statewide concern for the control of branch banking was so strong that home rule units were precluded from regulating local branch banking. Thus, it was argued a strong statewide concern such as landlord and tenant regulation should act to preclude local governments from regulating in the in the landlord and tenant area. However, as the court pointed out, branch banking is an area specifically limited to state control by article XIII, section 8 of the 1970 Illinois Constitution. Again, the state legislature is acting pursuant to a constitutional mandate, and therefore, the area is one which is not subject to local regulation. In distinguishing such cases, the *Create* court reasoned that in order for a state statute to pre-

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305. *City of Evanston v. Create, Inc.*, 84 Ill. App. 3d 752, 405 N.E.2d 1350 (1950). The appellate court noted that the exercise of home rule powers by a home rule unit may be limited in one of two ways:

First, the legislature may deny or limit pursuant to sections 6(g) and 6(h). Secondly, the grant of power in 6(a) might be limited by judicial construction of the phrase 'pertaining to its government and affairs'. *Id.* at 756, 405 N.E.2d at 1353. The appellate court then ruled that the ordinance constituted a valid exercise of home rule power since the Illinois landlord and tenant laws did not specifically preempt this area of regulation and this area was clearly one of local concern. *Id.*

306. See, e.g., *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979) (area of environmental protection one of constitutional dimension requiring uniform standards set by the general assembly).

307. 67 Ill. 2d 480, 386 N.E.2d 100 (1977).

empt an ordinance adopted by a home rule unit, the statute must at least contain a statement to that effect. This is not to say, however, that there are no judicially imposed constraints on the home rule powers. As the court clearly stated in *Create*, where the home rule unit attempts to regulate in an area beyond the scope of the grant of home rule power contained in section 6(a), the courts will step in. However, this limitation is based on the scope of the home rule power and it is not based on any judicial interpretation of an implied legislative intent to preempt as indicated by a "comprehensive statutory scheme."<sup>308</sup> The *Create* court recognized that the grant of home rule powers was intended to be construed liberally and was not intended to be subject to judicial interpretation or limitation. To that end, the court ruled that while the issue of the scope of home rule powers may be subject to judicial interpretation, the courts are not free to consider legislative intent to preempt unless that intent is manifested in the form of a specific provision to that effect.

While the *Create* court's ruling on the issue of preemption is quite clear, occasionally an appellate court decides a preemption issue based on the comprehensive statutory scheme analysis.<sup>309</sup> In a recent case, *Hutchcraft v. City of Urbana*,<sup>310</sup> the appellate court specifically applied the comprehensive statutory scheme analysis; determining that a local ordinance adopted under Urbana's home rule power outlawing employment discrimination was preempted by the Illinois Fair Employment Practices Act<sup>311</sup> and the Human Rights Act.<sup>312</sup> The court reasoned that if a "statute does not contain specific provisions limiting or denying home rule power, whether through oversight or otherwise, a court is then called upon to examine the entire statute and to divine the legislative intent."<sup>313</sup> The court then ruled that the Human Rights Act was quite comprehensive in its scope and, therefore, the Act preempted local legislation in the area of discrimination. While the court's reasoning is clearly erroneous in light of the Illinois Supreme Court's ruling in *City of Evanston v. Create, Inc.*,<sup>314</sup> the ordinance in question in all likelihood constituted an invalid exercise of home rule power. A

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308. See, e.g., *Hutchcraft v. City of Urbana*, 104 Ill. App. 3d 817, 433 N.E.2d 329 (1982) (court relied on comprehensive statutory scheme); see *infra* notes 309-314 and accompanying text.

309. See *supra* note 7 and accompanying text.

310. 104 Ill. App. 3d 817, 433 N.E.2d 329 (1982).

311. ILL. REV. STAT. ch. 48, § 851 (1979).

312. ILL. REV. STAT. ch. 48, § 1-101 (1980).

313. *Hutchcraft v. City of Urbana*, 104 Ill. App. 3d 817, 822, 433 N.E.2d 329, 333 (1982). The court cited no authority for this rule.

314. 85 Ill. 2d 101, 421 N.E.2d 196 (1981); see *supra* notes 302-07 and accompanying text.

better analysis of the ordinance would have focused on the "pertaining to" analysis of section 6(a) of the constitution. Human rights and discrimination are broad areas of statewide concern. The legislature, pursuant to the constitutional mandate contained in the Illinois Bill of Rights, enacted legislation which provides for a uniform standard of equality as well as enforcement standards and procedures. Clearly, this is not an area of local concern. Therefore, the court more properly should have found that the city overstepped the basic grant of home rule powers contained in section 6(a).<sup>315</sup>

The Illinois Supreme Court's position on the issue of legislative preemption in the area of home rule power is clear: a statute cannot preempt a local ordinance unless that statute contains a specific provision which delineates the preemption. Courts are further constrained by the Construction of Statutes Act<sup>316</sup> which requires a specific statutory provision setting forth the preemption. Against the authority cited above, however, an appellate court may find that a comprehensive statutory scheme indicates legislative intent to preempt home rule power.<sup>317</sup> Nevertheless, the overriding trend is to analyze such cases under the "pertaining to" clause found in section 6(a). Further, courts generally give great deference to the home rule power as expressed by the Constitutional Convention Committee<sup>318</sup> by requiring express statutory language of preemption.

## V. HOME RULE TAX

### A. *Financing Local Improvements by Special Assessment*

Subsection 6(l) of article 7<sup>319</sup> provides that the General Assembly may not limit or deny the power of home rule units to finance local improvements by special assessment<sup>320</sup> or to levy additional taxes to benefit special services areas.<sup>321</sup> This subsection accomplishes two purposes. By negative implication, it

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315. Because the Illinois Supreme Court would probably have found the ordinance invalid as an improper exercise of home rule power based on a section 6(a) analysis, it is not difficult to understand why the City of Evanston's Petition for Certiorari was denied.

316. See *supra* note 299 and accompanying text.

317. See, e.g., *Hutchcraft v. City of Urbana*, 104 Ill. App. 3d 817, 433 N.E.2d 329 (1982).

318. The Constitutional Convention Committee on Local Government made its position on preemption very clear, specifically acting to prohibit judicial interpretation of legislation in search of legislative intent to preempt. See 4 Record of Proceedings, Sixth Illinois Constitutional Convention 3034 (1969).

319. ILL. CONST. art. VII § 6(l).

320. ILL. CONST. art. VII § 6(l)(1).

321. ILL. CONST. art. VII § 6(l)(2).

confers the power to tax for local improvements and special service areas.<sup>322</sup> It also prevents the General Assembly from limiting this power,<sup>323</sup> although the General Assembly may deny the power to make special assessments for local improvements if it is denied to other classes of units of local governments.<sup>324</sup>

Subsection 6(l)(1), which provides that home rule units may levy special assessments for local improvements, is not a new power, but one traditionally given to local units of government.<sup>325</sup> The only limitation on this power is that the special assessment tax must benefit the area taxed.<sup>326</sup> A local improvement has been defined as a public improvement "which by reason of its being confined to a locality, enhances the value of adjacent property as distinguished from benefits diffused by it throughout the municipality."<sup>327</sup> The primary purpose and effect must be a benefit to the locality, even if there is an incidental public benefit<sup>328</sup> and the benefit must be demonstrated in order to justify the additional taxes.<sup>329</sup>

In contrast, subsection 6(l)(2) does create a new power. The section gives home rule units the power to impose differential taxes.<sup>330</sup> This subsection accomplishes three distinct goals. It gives home rule units as broad a power to deal with local

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322. The express power to tax is conferred on home rule units by ILL. CONST. art. VII § 6(a).

323. Subsection 6(l) is specifically excluded from subsections (g) and (h), which permit the General Assembly to limit or deny the power to tax or exercise other powers. See, Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Control*, 1972 U. ILL. L.F. 559, 564-66. For the history of subsection 6(l) and its exclusion from subsections 6(g) and (h), see Anderson and Lousin, *From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Illinois Constitution*, 9 J. MAR. J. PRAC. & PROC. 697, 777-80 (1976).

324. ILL. CONST. art. VII § 6(l)(1).

325. Michael & Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L.F. 559, 595.

326. *City of Edwardsville v. Jenkins*, 376 Ill. 327, 329-30, 33 N.E.2d 598, 600 (1941).

327. *City of Waukegan v. DeWolf*, 258 Ill. 374, 377, 101 N.E. 532, 553 (1913).

328. *Village of Downers Grove v. Bailey*, 325 Ill. 186, 191, 156 N.E. 362, 363 (1927).

329. *Village of Hinsdale v. Lowenstine*, 23 Ill. App. 3d 357, 360, 319 N.E.2d 83, 85 (1974).

330. The grant of power was clearly a departure from the requirement of uniformity in ad valorem property taxation, and it was intended that units of general local government, that is counties and municipalities, should have the power to furnish special services and improvements to limited areas within their geographic boundaries and to impose taxes only on those areas that benefit from the service furnished or improvement received.

*Hiken Furniture Company v. City of Belleville*, 53 Ill. App. 3d, 306, 309, 368 N.E.2d 353, 356 (1977). See also *Walter Peckat Co. v. Regional Transp. Auth.*,



problems as that conferred upon non-home rule counties and municipalities.<sup>331</sup> Second, it gives home rule units a more flexible means of financing improvements through the use of differential taxation.<sup>332</sup> Finally, it discourages the proliferation of special units of local government for a single purpose.<sup>333</sup>

Despite the express language of the Constitution, that the General Assembly may not limit or deny the powers granted in subsection 6(l),<sup>334</sup> the Illinois Supreme Court, in its first interpretation of subsection 6(l)(2), did just that.<sup>335</sup> In *Oak Park Federal Savings and Loan Association v. Village of Oak Park*,<sup>336</sup> the court held that the city ordinances which were enacted to create a special district to fund a shopping mall were void. The court found the power conferred by the subsection could only be exercised "in the manner provided by law"<sup>337</sup> and interpreted this to mean that the General Assembly must enact enabling legislation before this power could be exercised.<sup>338</sup> In response to this decision, the General Assembly enacted the Special Service Areas Act.<sup>339</sup> Now, most of the litigation concerning subsection 6(l)(2) involves an interpretation of the enabling legislation as well as the constitutional provision.<sup>340</sup>

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81 Ill. 2d 221, 407 N.E.2d 28 (1980) (differential taxing constitutional to fund RTA).

331. ILL. CONST. art. VII § 7(6) (home rule and non-home rule power to levy special service tax). Biebel, *Home Rule in Illinois After Two Years: An Uncertain Beginning*, 6 J. MAR. J. PRAC. & PROC. 251, 285-86 (1973).

332. Biebel, *supra* note 330, at 286. The property benefitted must bear the burden of the taxation, but the initial determination of benefit is made by the taxing governmental entity. *Andrews v. County of Madison*, 54 Ill. App. 3d 343, 354, 369 N.E.2d 532, 540 (1977), *Hiken Furniture Co. v. City of Belleville*, 53 Ill. App. 3d 306, 310, 368 N.E.2d 961, 964 (1977).

Special services are defined as: "all forms of services pertaining to the government and affairs of the municipality or county, including but not limited to . . . improvements permissible under Article 9 of the Illinois Municipal Code." ILL. REV. STAT. ch. 120 § 1302 (1983). Local improvements would include streets, curbs, gutters, sanitary and storm sewers, water mains, street lights, sidewalks, and parking lots but not profit centers such as retail store buildings. *Kane & Belkin, Financial Commercial Development in Illinois by the Use of Various Forms of Municipal Bonds*, 29 DE PAUL L. REV. 1009, 1016 (1980).

333. Biebel, *supra* note 334, at 286. See also *Anderson & Lousin, supra* note 322 at 778.

334. ILL. CONST. art. VII § 6(1).

335. *Oak Park Fed. Sav. & Loan Assoc. v. Village of Oak Park*, 54 Ill. 2d 200, 205, 296 N.E.2d 344, 348 (1973) (Ward, J., dissenting).

336. 54 Ill. 2d 200, 296 N.E.2d 344 (1973).

337. 54 Ill. 2d at 204, 296 N.E.2d at 347.

338. *Id.* at 203-04, 296 N.E.2d at 347-48.

339. ILL. REV. STAT. ch. 120 §§ 1301-1310.2 (1983).

340. *E.g.*, *Schwarzbach v. City of Highland Park*, 82 Ill. App. 3d 807, 403 N.E.2d 102 (1980) (issue of proper notice).

In *Ciaccio v. City of Elgin*,<sup>341</sup> for example, the plaintiffs were taxpayers within a special service area created to build and maintain a downtown parking lot. They contended that the city had violated the enabling legislation by giving improper notice to owners of taxable personal property within the designated area,<sup>342</sup> by drawing erroneous boundaries for the proposed area,<sup>343</sup> and by filing a non-complying map.<sup>344</sup> The Illinois Appellate Court for the Second District found, however, that these technical objections did not invalidate the ordinances because, in all respects, the ordinance substantially complied with the enabling legislation.<sup>345</sup> This holding is consistent with the express constitutional mandate that the powers and functions of home rule units "shall be liberally construed."<sup>346</sup>

The plaintiffs in *Ciaccio* also raised questions as to the limitations on a home rule unit's power to exempt charitable and religious organizations from the special service tax and to create a district which included properties which received no benefits.<sup>347</sup> The court found that a disparity in benefits would not invalidate the ordinances creating the special district unless the inequality was "so great as to be obviously unjust and irrational."<sup>348</sup> Here, there was no proof of such a disparity.<sup>349</sup> Nor were the ordinances invalid as an impermissible attempt to "gerrymander" the district in order to maximize revenues.<sup>350</sup> The plaintiffs contended that the boundaries of the district were drawn to include a number of tax exempt properties which would not oppose the special service levy because these proper-

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341. 85 Ill. App. 3d 507, 407 N.E.2d 108 (1980).

342. *Id.* at 511, 407 N.E.2d at 111.

343. *Id.* at 512, 407 N.E.2d at 112.

344. *Id.*

345. *Ciaccio v. City of Elgin*, 85 Ill. App. 3d 507, 407 N.E.2d 108, 112 (1980). See also *Schwarzbach v. City of Highland Park*, 82 Ill. App. 3d 807, 814, 403 N.E.2d 102, 107 (1980) (notice did not have to include a statement of purpose).

346. ILL. CONST. art. VII § 6(m). *Accord*, *Coryn v. City of Moline*, 71 Ill. 2d 194, 200, 374 N.E.2d 211, 213 (1978) (the power to establish special services is broad if construed liberally).

347. *Ciaccio v. City of Elgin*, 85 Ill. App. 3d 507, 516-17, 407 N.E.2d 108, 114-15 (1980).

348. *Id.* *Accord*, *Coryn v. City of Moline*, 71 Ill. 2d 194, 201, 374 N.E.2d 211, 214 (1978) (taxes imposed need not directly correspond to the benefit); *Hiken Furniture Co. v. City of Belleville*, 53 Ill. App. 3d 306, 311, 368 N.E.2d 961, 965 (1977) (a reasonable relationship is sufficient); *Andrews v. County of Madison*, 54 Ill. App. 3d 343, 354, 369 N.E.2d 532, 540 (1977) (additional taxes may be levied against property generally benefitting from the service without a meticulous scrutiny of the benefit to each property).

349. *Ciaccio v. City of Elgin*, 85 Ill. App. 3d 507, 516, 407 N.E.2d 108, 115 (1980).

350. *Id.* at 516, 407 N.E.2d at 114-15.

ties would not be subject to the tax.<sup>351</sup> The court found that the mere inclusion<sup>352</sup> of these properties within the district was not per se fraudulent.<sup>353</sup> Although there appears to be limits on the ability of a home rule unit to create a plan which maximizes revenue,<sup>354</sup> those limits were not reached in *Ciaccio* because the exempt properties were contiguous to taxable properties.<sup>355</sup> Also, the ordinance creating the special service district did not contain any exceptions.<sup>356</sup> The exemptions only became apparent when the taxes were levied and the traditionally tax exempt properties were not included on the tax roll.<sup>357</sup>

According to the *Ciaccio* court's interpretation of the enabling legislation and subsection 6(l)(2), home rule units have considerable discretion in creating special service areas. The home rule unit does not have to include all benefitted property within the designated area, nor must the property that is included be benefitted equally. Also, the home rule unit may include property within the area which will not oppose the tax if it is property that is traditionally not taxed, and the ordinance creating the special service area does not include this exemption. This is not to say that a property which is exempt from general revenue taxes is necessarily exempt from a special service tax.<sup>358</sup> A home rule unit has the power, however, to continue the exemption if it so chooses.<sup>359</sup>

The ability of the home rule unit to exempt charitable and religious organizations from a special service tax was clarified in *Elgin National Bank v. Rowcliff*,<sup>360</sup> a case related to *Ciaccio*. In *Rowcliff*, the plaintiffs sought a writ of mandamus in order to compel the taxing authorities to include the exempt properties on the tax roll.<sup>361</sup> The Appellate Court for the Second District reiterated its finding that an exemption from general revenue taxes did not necessarily exempt a property from a special serv-

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351. *Id.* at 516-17, 407 N.E.2d at 114-15. See also *Coryn v. City of Moline*, 71 Ill. 2d 194, 202, 374 N.E.2d 211, 214 (1978) (not free to gerrymander without regard to the rational relationship between the property served and the property taxed).

352. *Ciaccio v. City of Elgin*, 85 Ill. App. 3d 507, 517-18, 407 N.E.2d 108, 115-16 (1980).

353. *Id.*

354. *Coryn v. City of Moline*, 71 Ill. 2d 194, 202, 374 N.E.2d 211, 214 (1978).

355. *Ciaccio v. City of Elgin*, 85 Ill. App. 3d 507, 518, 407 N.E.2d 108, 116 (1980).

356. *Id.* at 115. 407 N.E.2d at 116.

357. *Id.*

358. *Id.*

359. *Id.*

360. 109 Ill. App. 3d 719, 441 N.E.2d 112 (1982).

361. *Id.* at 721, 441 N.E.2d at 114.

ice tax.<sup>362</sup> The court found, however, that even absent a specific exemption within the ordinance, compliance with the enabling statute<sup>363</sup> would result in the exemption.<sup>364</sup> A special service tax is imposed and levied in accordance with the Revenue Act of 1939,<sup>365</sup> which accords charitable and religious organizations an exemption. In addition, the enabling legislation does not prohibit the taxing authority from exempting traditionally tax exempt properties from a special service tax. The decision to exempt certain properties, according to the court, is within the discretion of the city, and the court will not interfere unless the exemption is clearly unlawful and unauthorized.<sup>366</sup>

According to the Second District Appellate Court, a home rule unit has almost unbridled power to impose and levy taxes for a special service area. Under this power, a home rule unit may define the area to be served and exempt certain properties within that area. Subsection 6(l) thus should provide a flexible and practical tool that local governments may use to deal with problems germane to each locality.<sup>367</sup> The more recent judicial interpretations show a willingness on the part of the courts to construe subsection 6(l) liberally. Although there may be limitations on the power to tax under subsection 6(l), these limitations have yet to be clearly enunciated by the courts.

### *B. Limitations on the Taxing Powers*

The Illinois Constitution of 1970 brought about a dramatic change in a municipality's power to raise revenue by granting home rule units the specific power to license and tax.<sup>368</sup> This power is limited, however, by provisions within article 7, section

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362. *Id.* at 727, 441 N.E.2d at 117.

363. ILL. REV. STAT. ch. 120 § 1310 (1983).

364. *Elgin Nat'l Bank v. Rowcliff*, 109 Ill. App. 3d 719, 728, 441 N.E.2d 112, 118 (1982).

365. *Id.* at 730, 441 N.E.2d at 119. See ILL. REV. STAT. ch. 120 §§ 500.1-500.23 (1983) exempts property used for churches, charitable organizations, property of political subdivisions, and public grounds owned by political subdivisions.

366. *Elgin Nat'l Bank v. Rowcliff*, 109 Ill. App. 3d 719, 725, 441 N.E.2d 112, 119 (1982).

367. The Illinois courts have upheld various special service areas. *Elgin Nat'l Bank v. Rowcliff*, 109 Ill. App. 3d 719, 441 N.E.2d 112 (1982), a shopping mall, *Coryn v. City of Moline*, 71 Ill. 2d 194, 374 N.E.2d 211 (1978), a semi-mall, *Hiken Furniture Co. v. City of Belleville*, 53 Ill. App. 3d 306, 368 N.E.2d 961 (1977), and a sewage system, *Andrews v. County of Madison*, 54 Ill. App. 3d 343, 369 N.E.2d 532 (1977). The special service area is a procedure for making improvements distinct from that of special assessments and which avoids many of the complexities of special assessments. *Andrews v. County of Madison*, 54 Ill. App. 3d 343, 369 N.E.2d 532, 540 (1977).

368. ILL. CONST. art. 7 § 6(a).

6.<sup>369</sup> These limitations specify that the unit may only license for revenue or tax income, earnings, or occupations when the General Assembly specifically grants that power,<sup>370</sup> and that the General Assembly may, by a vote of three-fifths of its members, restrict the unit's taxing power.<sup>371</sup> The limit on the home rule taxing power is itself limited by the proviso that the power of home rule units shall be construed liberally.<sup>372</sup>

Until recently, the Illinois Supreme Court followed the liberal construction command and generally upheld taxes imposed by home rule units.<sup>373</sup> In 1980, however, a tax on persons entering a horse racetrack was found to be an impermissible tax on occupations.<sup>374</sup> Soon thereafter, the Illinois Supreme Court decided that even the constitutional command of liberal construction will not save a home rule unit's attempt to tax services.<sup>375</sup> This section discusses and analyzes three recent decisions of the Illinois Supreme Court that establish some of the parameters of an occupation tax under article VII, section 6(e).

In *Estate of Carey v. Village of Stickney*,<sup>376</sup> the plaintiffs conducted horse races in Stickney, Illinois. The village, a home rule unit, passed an ordinance requiring racetrack licensees to pay a tax of ten cents for each person entering a racetrack with an admission ticket.<sup>377</sup> The ordinance specifically allowed the racetrack licensee to collect the tax from ticket holders in addition to the amount paid for the ticket.<sup>378</sup> The plaintiffs refused to pay the tax and brought suit, claiming that it was an impermissible occupation tax.<sup>379</sup>

The lower courts disagreed on the issue of whether the tax was upon occupations; the circuit court holding that it was and the appellate court holding it was not.<sup>380</sup> The Illinois Supreme

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369. *Id.* ILL. CONST. art. 7, § 6.

370. ILL. CONST. art. 7 § 6(e).

371. ILL. CONST. art. 7 § 6(g).

372. ILL. CONST. art. 7 § 6(m).

373. *See* *Commercial Nat'l Bank of Chicago v. City of Chicago*, 89 Ill. 2d 45, 49, 432 N.E.2d 227, 233 (1982) (court held city tax unconstitutional levy on occupation).

374. *Estate of Carey v. Village of Stickney*, 81 Ill. 2d 406, 411 N.E.2d 209 (1980).

375. *Waukegan Community Unit School Dist. 60 v. City of Waukegan*, 95 Ill. 2d 244, N.E.2d 345 (1983); *Commercial National Bank of Chicago*, 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

376. 81 Ill. 2d 406, 411 N.E.2d 209 (1980).

377. *Id.* at 408, 411 N.E.2d 209.

378. *Id.* (quoting *Stickney*, ILL., MUNICIPAL CODE ch. 18A, § 18A.02 (1965)).

379. 81 Ill. 2d at 410, 411 N.E.2d at 210.

380. 69 Ill. App. 3d 539, 542, 388 N.E.2d 120 (1979). Both courts relied on *Town of Cicero v. Fox Valley Trotting Club, Inc.*, 65 Ill. 2d 10, 357 N.E.2d 1118

Court agreed with the circuit court and reversed the appellate court. The supreme court noted that the ordinance was designed to and did impose a tax upon a given occupation: those licensed to conduct horseracing. These two factors, the design and actual imposition (incidence) of the tax made it an occupation tax. The fact that the tax could be passed on to the ticketholders was inconsequential because it fell upon the racetrack operator and it is the legal incidence of the tax that controls.<sup>381</sup> Other similar tax ordinances which the court upheld had expressly placed the legal incidence of the tax upon the consumer.<sup>382</sup>

After the *Carey* decision, it seemed clear that the liberal construction mandate,<sup>383</sup> would only save a home rule ordinance that looked like an occupation tax if the incidence of the tax was specifically placed upon the consumer. This would presumably prove that the ordinance was neither designed to tax an occupation nor to impose a tax upon an occupation.<sup>384</sup> In 1982, however, the Illinois Supreme Court indicated that those who provide services are in a special class of occupation and a home rule unit could not tax them, even if the legal incidence of the tax was placed upon the consumer.<sup>385</sup>

Pursuant to its purported home rule taxing powers conferred by the 1970 constitution, the City of Chicago adopted a service tax ordinance which imposed a tax on "each purchaser who purchases service in the City . . . at a rate of 1% of the purchase price of such service."<sup>386</sup> Despite this declaration that

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(1976). In *Cicero*, an ordinance imposed a tax on all amusements in the town and made it unlawful for anyone to conduct an amusement for gain or profit without paying the tax. *Id.* at 22, 357 N.E.2d at 1123. The Illinois Supreme Court held that this was not an occupation tax because the tax was not designed to fall on a given occupation. People who conduct amusements are not necessarily engaged in the occupation of conducting amusements. Thus, the tax is broader than an occupation tax and the fact that its burden may fall on those engaged in a certain occupation is not enough to classify it as an occupation tax. *Id.*

381. *Estate of Carey*, 81 Ill. 2d 406, 411 N.E.2d 209.

382. *Kerasotes Rialto Theater Corp. v. City of Peoria*, 77 Ill. 2d 491, 397 N.E.2d 790 (1979) (ordinance levying a 2% admission charge on the privilege of participating or witnessing an amusement specifically placed the "ultimate incidence" upon the consumer. *Id.* at 494, 397 N.E.2d at 796. *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975) (tax on the retail sale of alcoholic beverages to be borne by the consumer by its inclusion in the sale price places the legal incidence of the tax on the consumer); *Bloom Inc. v. Korshak*, 52 Ill. 2d 56, 284 N.E.2d 257 (1972) (ordinance levying cigarette tax states that tax shall be collected from the purchaser).

383. ILL. CONST. Art. 7 § 6(m).

384. *Estate of Carey*, 81 Ill. 406, 411 N.E.2d 209.

385. *Commercial National Bank v. City of Chicago*, 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

386. MUNICIPAL CODE OF CHICAGO § 200.5-3 (1981).

the legal incidence of the tax would fall on the purchaser, collection and remittance duties as well as liability for uncollected taxes were imposed upon the seller.<sup>387</sup>

In *Commercial National Bank of Chicago v. City of Chicago*,<sup>388</sup> the supreme court sustained a challenge to the new service tax ordinance. As one basis for the decision, the majority concluded that the service tax was unconstitutional because it found the tax to be a levy upon occupations without authorization by the General Assembly.<sup>389</sup> The court held that any tax on the privilege of engaging in the business of selling service is an occupation tax within the meaning of the 1970 constitution.<sup>390</sup> Language in the majority opinion implied that this holding would apply regardless of whether the legal incidence of the tax fell on the seller or purchaser of services.<sup>391</sup>

In discounting the relevance of who the legal incidence of the tax was levied against, the majority created an important distinction between the way it will analyze service tax ordinances as opposed to the way it presently analyzes non-service tax ordinances. Non-service taxes were viewed as presumptively within the home rule unit's general power to tax.<sup>392</sup> Only when the legal incidence of a non-service tax falls upon the seller of the subject matter of taxation would such tax be classi-

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387. *Id.*

388. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

389. *Id.* at 47, 432 N.E.2d at 229.

390. *Id.* at 54, 432 N.E.2d at 235. The court relied on reference in the debates between delegates to the 1970 constitutional convention to their general understanding that service taxes, like the one before the court in *Commercial National*, would be included in the definition of "occupation tax" in section 6(e) of Article VII. *Id.* at 49, 432 N.E.2d at 230-32.

391. The majority stated:

So far in this opinion we, as was the case with the delegates to the constitutional convention, have not drawn the fine line of distinction between a tax imposed upon the seller of services and one imposed upon the purchaser of these services. Those who opposed the restriction on the power to tax occupations in the constitutional convention saw this limitation as an impediment to taxing the sale of services, regardless of whether such a tax could technically be considered an occupation tax or a sales tax.

*Id.* at 62, 432 N.E.2d at 235.

392. *Id.* at 63, 432 N.E.2d at 235. Non-service taxes distinguished by the court include taxes imposed upon the sale of cigarettes, *Bloom Inc. v. Korshak*, 52 Ill. 2d 56, 284 N.E.2d 257 (1972), or on the sale of alcoholic beverages, *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975), taxes imposed on the privilege of attending an amusement, *City of Cicero v. Fox Valley Trotting Club, Inc.*, 65 Ill. 2d 10, 357 N.E.2d 1118 (1978); *Kerasotes Rialto Theater Theater Corp. v. City of Peoria*, 77 Ill. 2d 421, 397 N.E.2d 790 (1979), taxes on the privilege of occupying a parking place, *Jacobs v. City of Chicago*, 53 Ill. 2d 421, 292 N.E.2d 401 (1973), and taxes on the privilege of employing workers, *Paper Supply Co. v. City of Chicago*, 57 Ill. 2d 553, 317 N.E.2d 3 (1974). The taxes at issue in each of these cases were upheld by the court.

fied as an "occupation tax."<sup>393</sup> When faced with a service tax ordinance, however, the court apparently does not even need to reach the issue of legal incidence, because the constitutional limitation on home rule occupation taxes was specifically intended by the delegates to the 1970 Illinois constitutional convention to preclude the taxation of services without reference to legal incidence.<sup>394</sup>

Despite its display of the delegate's general disregard for the legal incidence factor, the court partially relied on this factor to support its holding. After noting that the ordinance declares, on its face, that the tax is imposed upon the purchaser of services, the court found that the practical operation of the tax was to place responsibilities and liabilities (*i.e.*, the legal incidence) for the tax upon the seller of services.<sup>395</sup> The court further observed that if all home rule units adopted similar tax ordinances, and if such ordinances were held constitutionally valid, "[t]he seller of services would be required to keep records for every home rule unit in which he provided services, and his books and records would be subject to audit by each."<sup>396</sup> Such a result would directly conflict with one of the General Assembly's stated reasons for precluding local occupation taxes: unimpaired efficiency in the operation of business within the state.<sup>397</sup>

Whether the court's limited discussion regarding the legal incidence of the Chicago service tax was meant to provide only supplemental support for its holding or, rather, to denote its general reluctance to part with a factor that has traditionally played a central role in its analyses of home rule tax power questions,<sup>398</sup> was not made entirely clear by the *Commercial National* opinion. If this decision is read to include the legal incidence factor in the analysis of the validity of a subsequent service tax ordinance which truly imposes all duties of remittance and collection and liability for non-payment upon the pur-

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393. *E.g.*, *Estate of Carey v. Village of Stickney*, 81 Ill. 2d 406, 411 N.E.2d 209 (1980). The court alluded to another class of non-service taxes which would be most obviously classified as occupation taxes: taxes imposed upon specific trades, businesses or professions. *Commercial National* at 440, 432 N.E.2d at 234.

394. *See supra* note 394.

395. *Commercial National* at 442, 423 N.E.2d at 238.

396. *Id.*

397. *Id.*

398. *See, e.g.*, *Estate of Carey v. Village of Stickney*, 81 Ill. 2d 406, 412, 411 N.E.2d 209, 211 (*citing* *Kerasotes Rialto Theatre Corp. v. City of Peoria*, 77 Ill. 2d 491, 397 N.E.2d 790); *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6; *Bloom, Inc. v. Korshak*, 52 Ill. 2d 56, 284 N.E.2d 257; *First Nat'l Bank v. Jones*, 48 Ill. 2d 282, 269 N.E.2d 494; *National Bank v. Isaacs*, 27 Ill. 2d 205, 188 N.E.2d 704 (1963).



chaser, such tax may arguably survive constitutional scrutiny. This result, however, would be difficult to justify in light of the unequivocal intent of the convention delegates to limit local taxation of the sale of services regardless of legal incidence.<sup>399</sup> Accordingly, when the Illinois Supreme Court next spoke, it seemingly eliminated the analytical relevance of the legal incidence of a service tax.

In *Waukegan Community Unit School District 60 v. City of Waukegan*,<sup>400</sup> consumer utility taxes imposed by home rule units were at issue.<sup>401</sup> The home rule units Waukegan, Evanston, Oak Park, and Rosemont all enacted ordinances that taxed purchasers of goods and services from certain public utilities.<sup>402</sup> The taxes were specifically placed upon the consumers, although they were collected by the utilities and then paid to the respective home rule units.<sup>403</sup> The court began its analysis by noting that the holding of *Commercial National*<sup>404</sup> applied because public utilities render services, are "engaged in service occupations,"<sup>405</sup> and the delegates to the constitutional convention intended that occupation taxes not be imposed by home rule units without legislative authorization.<sup>406</sup>

Although the utilities did provide the products of gas and electricity to customers, the court found the provision of products to be incidental to their primary function, the rendering of services.<sup>407</sup> The court then held that all home rule taxes on transactions consisting primarily of the sale of services were prohibited by the Illinois Constitution unless specifically authorized by the legislature.<sup>408</sup>

This holding makes the legal incidence of a tax and services irrelevant. If a tax is levied on services and without the required legislative approval, the tax can be characterized as an occupation tax no matter where the legal incidence falls. This proposi-

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399. See *supra* note 394.

400. 95 Ill. 2d 244, 447 N.E.2d 345 (1983).

401. *Id.* at 249, 447 N.E.2d at 347.

402. *Id.*

403. *Id.* at 253, 447 N.E.2d at 349.

404. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

405. 95 Ill. 2d at 252, 447 N.E.2d at 348.

406. *Id.* This reasoning is faulty because it implies that any home rule unit tax that is at all related to an occupation is an impermissible tax upon the occupation. The court previously stated clearly that the legal incidence of a tax determined if the tax was upon an occupation or the consumer. *Estate of Carey v. Village of Stickney*, 81 Ill. 2d 406, 412, 411 N.E.2d 209, 211 (1980) (*citing* *First Nat'l Bank v. Jones*, 48 Ill. 2d 282, 288, 269 N.E.2d 494 (1971); *National Bank v. Isaacs*, 27 Ill. 2d 205, 207, 188 N.E.2d 704 (1963)).

407. 95 Ill. 2d at 253, 447 N.E.2d at 349.

408. *Id.* at 254, 447 N.E.2d at 349.

tion finds support in the court's declaration that "the 1970 constitution prohibits *all taxes* applicable to transactions principally consisting of the sale of 'services'."<sup>409</sup> Nevertheless, the courts again included in its analysis a discussion regarding the legal incidence of the utility taxes in question. As additional support for its holding, it cited the fact that the "practical operation" of the tax was an attempt to impose a tax upon the services the utilities provided to the public.<sup>410</sup> The court found significance in the ordinance's lack of any provision for the collection of unpaid taxes from the consumer. It further noted that the utility rather than the consumer faced the burden of record-keeping, as well as the penalty for failing to pay the taxes.<sup>411</sup>

Despite these observations, the high court's utilization of the legal incidence factor in the analysis of a home rule ordinance which taxes service transactions is most probably surplusage. It appears the court's reliance on the delegate's preclusion of any type of home rule taxation of such transactions would have been sufficient, in and of itself, to strike down the ordinance in question in both *Commercial National* and *Waukegan*. In breaking new ground in the interpretation of section 6(e)'s home rule taxation limitations, the court apparently found solace in the fact that the legal incidence factor, in both of these cases, would support its invalidation of the tax ordinances in question. It necessarily follows, however, that if the court is confronted with a challenge to a service tax ordinance at a later date that imposed all legal burdens and obligations upon the purchaser of the services, the drafter's mandate would seem to compel the invalidation of such an ordinance.

The result of the supreme court's three recent examinations of the occupation tax limitation provision is an analytical bifurcation, separating service from non-service taxes. When the subject matter of taxation consists primarily of the sale of services, the court, following *Commercial National* and *Waukegan*, will invalidate the tax as beyond the constitutional powers of the taxing home rule unit unless specifically authorized by the General Assembly. When the subject matter of taxation consists primarily of non-service items, the court, following *Carey* will invalidate the tax only if the legal incidence falls on the seller of such items; thereby rendering such tax an "occupation tax" as defined by section 6(e). Accordingly, future litigation in this area would most likely focus upon whether the ordinance in question taxes services or not.

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409. *Id.* (Emphasis added.)

410. *Id.*

411. *Id.* at 256, 447 N.E.2d at 350.



### *ERRATUM*

The book review in Vol. 17:1, page 243, by Richard Ausness, incorrectly lists the Agricultural Law treatise as containing 118 pages. The correct number of pages for this two-volume set is 1,472 pages.

