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A Balancing Analysis: The Construction of Illinois Home Rule Powers — *County of Cook v. John Sexton Contractors Company*

INTRODUCTION

Article VII, section 6¹ of the 1970 Illinois Constitution attempts to implement the ideal of local government autonomy. To this end, it introduces the concept of “home rule” into the jurisprudence of the state.² Since the constitution became effective,³ the courts have had many opportunities to interpret this new concept. Judicial clarification of the scope of home rule powers has been highlighted by construction of the “pertaining to its government and affairs” clause of section 6(a).⁴ In addition, the courts have considered the question of legislative control over the exercise of home rule authority which may be imposed by the General Assembly pursuant to its preemption powers.⁵

In *County of Cook v. John Sexton Contractors Co.*,⁶ the Illinois Supreme Court demonstrated the proper judicial approach to the construction of the “pertaining to” clause. *Sexton* detailed the factors to be considered in determining whether home rule environmental control pertains to local government and affairs.⁷ Although *Sexton* addressed only the question of home rule regulation of environmental matters, the balancing analysis underlying its decision

1. Section 6 of article VII of the 1970 Illinois Constitution will hereinafter be referred to as § 6.

2. Vitullo, *Local Government: Recent Developments in Local Government Law in Illinois*, 22 DEPAUL L. REV. 85 (1972) [hereinafter cited as Vitullo].

3. The 1970 Illinois Constitution was proposed by the Sixth Illinois Constitutional Convention, and ratified by the electorate in a special referendum election on December 15, 1970. Except for a few provisions, it became effective July 1, 1971. Section 1 of the Adoption Schedule, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS 2657 (1972) [hereinafter cited as 7 REC. OF PROC.]. See Transition Schedule for effective dates of other sections of the constitution which became effective at various times.

4. ILL. CONST. art. VII, § 6(a): 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.

5. The preemption provisions are §§ 6(g), (h), and (i) of article VII. See notes 49-70 *infra* and accompanying text.

6. 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

7. See notes 102-106 *infra* and accompanying text.

offers a guide to all decisions affecting the scope of the home rule prerogative. *Sexton* also dealt with the issue of preemption of home rule authority in the environmental field. The court held that home rule environmental regulation, though not legislatively preempted, is limited by the policy manifested in article XI of the constitution.⁸

This article will review local government law prior to home rule and the relevant home rule provisions. Emphasis will be placed upon the *Sexton* court's approach to the "pertaining to" question and its consideration of the preemption issue. The appropriate role of the courts will also be considered. Finally, the practical application of the balancing analysis suggested by *Sexton* will be demonstrated.

BACKGROUND

Local Government Law in Illinois Prior to Home Rule

The 1870 Illinois Constitution contained no provision concerning the creation or limitation of local governmental powers.⁹ As a result of this constitutional silence, local governments were viewed as "creatures" of the state, totally dependent upon the state legislature for authority to act.¹⁰ This legal tradition of state legislative supremacy and local governmental dependency meant that the General Assembly reigned supreme over all affairs of local government.¹¹ This substantial restriction on the powers of local units was embodied in Dillon's Rule.¹² Thereunder, all units of local gov-

8. See notes 79-82 *infra* and accompanying text.

9. 7 REC. OF PROC. 1603.

10. *Id.*

11. Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137 [hereinafter cited as Baum, *Part I*].

Ironically, the traditional dependent status of the local unit in this country defies the origin of the word "municipal" — a derivation of the Roman "municipium" meaning a free city capable of governing its local affairs. Note, *Home Rule: A Solution For Municipal Problems?*, 16 WYO. L.J. 47, 49 (1961). This irony is probably explained by the different development of cities in Europe and the United States. In ancient and medieval Europe, city-states experienced independent growth. In the United States, however, local settlements and budding cities were always linked by economic or patriotic ties to the mother country or sovereign state.

12. 1 J. DILLON, *Municipal Corporations* 448 (5th ed. 1911) states:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily and fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but in-

ernment could exercise only those powers which were expressly granted by state statute.¹³ As a corollary to Dillon's Rule, Illinois courts followed a tradition of narrow construction of legislative grants of local authority,¹⁴ resolving any reasonable doubt against the municipality.¹⁵ Dillon's Rule, therefore, severely restricted the ability of municipalities to deal with even the most mundane parochial problems and affairs.¹⁶

Moreover, the state legislature was confined in its attempt to respond to urban problems. The 1870 constitution's prohibition of special legislation¹⁷ effectively hindered the General Assembly in proposing particular remedies to resolve individual or unique municipal problems.¹⁸ Thus, although local governments relied solely upon the state legislature for the authority to deal with local concerns, the General Assembly was frequently precluded from effectively responding to these local petitions for power.¹⁹ Therefore, prior to the adoption of home rule in Illinois, both legal rules and constitutional provisions stood as barriers to positive urban development rather than as facilitators of progress.

The Concept of Home Rule

The rapid growth of cities and accompanying urban crises have resulted in increasing demands for municipal services, and point out the need for efficiency and flexibility at the municipal level.²⁰

dispensable (footnotes omitted).

13. "It is a rule in this State, so frequently announced as to require no citation of cases so announcing, that a municipal corporation has no inherent power but has only such power as is granted to it by the General Assembly." *City of Chicago v. Hastings Express Co.*, 369 Ill. 610, 612, 17 N.E.2d 576, 577 (1938).

14. See, e.g., *Ives v. City of Chicago*, 30 Ill. 2d 582, 198 N.E.2d 518 (1964)(legislative authorization to regulate certain class of contractors other than building contractors neither authorizes nor permits licensing of the latter).

15. 1 J. DILLON, *Municipal Corporation* 450 (5th ed. 1911).

16. See Biebel, *Home Rule in Illinois After Two Years: An Uncertain Beginning*, 6 J. MAR. J. PRAC. & PROC. 253, 255-56 (1973) [hereinafter cited as Biebel].

17. ILL. CONST. art. IV, § 22 (1870).

18. Michael & Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L.F. 559, 560 [hereinafter cited as Michael & Norton].

19. Consequently, § 22 caused more litigation than any other procedural provision of the 1870 constitution. Whalen & Wolff, *Constitutional Law: The Prudence of Judicial Restraint Under the New Illinois Constitution*, 22 DE PAUL L. REV. 63, 77 (1972) [hereinafter cited as Whalen & Wolff].

20. See 7 REC. OF PROC. 1605-1611. The following description delineates the pressing problems of urbanization requiring local attention:

The problems of police and fire protection, polluted air, befouled streams and waters, noise, traffic, littered streets, crime and vandalism, slums, obsolescence, inad-

The drafters of the 1970 Illinois Constitution answered this need by granting home rule powers to local governments.²¹ This constitutional conferral of home rule authority²² drastically alters the relationship between state and local governments.²³ In addition, this power alleviates the restrictions wrought by Dillon's Rule.²⁴ Home rule units are no longer dependent upon the General Assembly for

equate mass transportation, garbage disposal, zoning, planning, recreation, open-space, urban sprawl, and the great human and social problems, to name but a few—require the tools, the power and the flexibility on the municipal level in order to effectuate their solution. Adequate solution cannot be derived from our present method of piece-meal delegated grants of legislative power narrowly construed.

7 REC. OF PROC. 1605 (quoting from testimony of Mr. Louis Ancel before the Commission on Urban Area Government). See also Ancel, *20th Century Powers for 20th Century Cities: Constitutional Municipal Home Rule in Illinois*, 49 CHI. B. REC. 226 (1968). But see 7 REC. OF PROC. 1611-14.

21. The Local Government Committee viewed the need for broadened powers to meet the problems of urbanization as the paramount consideration favoring home rule. Other factors favoring home rule included: (1) legislative accountability—the need for a strengthened local government because it is closer to the people it serves than other forms of government and thus is likely to be more responsible to its citizens; (2) broadened local powers should reduce the legislative burden of acting on essentially local bills; (3) home rule should encourage individualistic solutions to local problems; (4) home rule should discourage the proliferation of independent special districts as a response to unique problems. 7 REC. OF PROC. 1605-06.

22. The direct, constitutional vesting of home rule powers in Illinois differs from the form of home rule in other states. In some states, home rule is dependent upon legislative implementation. Under this type of nonself-executing home rule, the constitution authorizes the legislature to delegate powers to local governments and does not itself automatically effectuate the grant. 7 REC. OF PROC. 1616-17. In other states, the charter process is commonly used. This form of home rule is self-executing in that it is adopted by local units without legislative intervention. Acceptance of home rule, however, is at the discretion of the local units who may choose to accept it through referendum adoption of a home rule charter. *Id.* at 1617-18. The automatic, self-executing home rule of the Illinois constitution is the most easily implemented. Biebel, *supra* note 16, at 258.

23. *Kanellos v. County of Cook*, 53 Ill. 2d 161, 166, 290 N.E.2d 240, 243 (1972) states:

The concept of home rule adopted under the provisions of the 1970 constitution was designed to drastically alter the relationship which previously existed between local and state government. Formerly, the actions of local governmental units were limited to those powers which were expressly authorized, implied or essential in carrying out the legislature's grant of authority. Under the home rule provisions of the 1970 constitution, however, the power of the General Assembly to limit the actions of home rule units has been circumscribed and home-rule units have been constitutionally delegated greater autonomy in the determination of their government and affairs. To accomplish this independence the constitution conferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein.

24. Dillon's Rule is still applicable in Illinois to non-home rule units. It is preserved with respect to non-home rule counties and municipalities by ILL. CONST. art. VII, § 7. Such units operate under the provision of the Illinois Municipal Code of 1961. ILL. REV. STAT. ch. 24, §§ 1-1-1 to 11-151-5 (1979).

enabling legislation to carry out the essentials of local government. Indeed, the home rule section was designed to grant the broadest possible home rule powers.²⁵ Qualified units²⁶ are now free to exercise any power and perform any function pertaining to their government and affairs.²⁷

Home rule powers, however, are not unlimited.²⁸ Total local autonomy would be impracticable,²⁹ and impermissible under the United States Constitution.³⁰ Section 6 contains explicit limitations on the general home rule power with regard to the power to tax,³¹ local indebtedness,³² and the power to license.³³ Other re-

25. 7 REC. OF PROC. 1619.

26. Section 6(a) specifies those units that automatically receive home rule powers: any county having a chief executive elected by the electors of the county, and any municipality having a population in excess of 25,000. All other municipalities are permitted to become home rule units by referendum. ILL. CONST. art. VII, § 6(a). See ILLINOIS MUNICIPAL LEAGUE, *Committee of Home Rule Attorneys Report: 1970 Illinois Constitution* (rev. ed. 1979) for a list of home rule municipalities in Illinois.

When the constitution became effective only Cook County qualified as a home rule county. Other counties have since attempted to become home rule counties. Biebel, *supra* note 16, at 259 n.38. Cf. *Taylor v. County of St. Clair*, 57 Ill. 2d 367, 312 N.E.2d 231 (1974) (upheld countywide referendum which approved proposition that chairman of county board would be selected at a general election).

Section 6(b) provides that any home rule unit may elect by referendum not to be a home rule unit. ILL. CONST. art. VII, § 6(b).

See Baum, *Part I, supra* note 11, at 139-40 for a discussion of the problems of interpretation raised by §§ 6(a) and 6(b).

27. ILL. CONST. art. VII, § 6(a).

28. 7 REC. OF PROC. 1621.

29. Unfettered self-determination would be an "unworkable form of anarchy." Kratovil & Ziegweid, *Illinois Municipal Home Rule and Urban Land-A Test Run of the New Constitution*, 22 DEPAUL L. REV. 359, 360 (1972) [hereinafter cited as Kratovil & Ziegweid].

30. It has been held that if a state surrenders its sovereignty to a municipality, "sovereignial suicide" is committed by creating a state within a state, and this is prohibited by U.S. CONST. art. IV, § 3. *Straw v. Harris*, 54 Or. 424, 436, 103 P. 777, 782 (1909). In *City of Urbana v. Hauser*, 67 Ill. 2d 268, 273, 367 N.E.2d 692, 694 (1977), the Illinois Supreme Court described home rule powers in terms expressing the sovereignty aspects of home rule: "Home rule units thus have the same powers as the sovereign except where such powers are limited by the General Assembly." Other Illinois Supreme Court decisions, however, indicate that this strong language expressing near-total local autonomy should not be literally read. See notes 42 and 92 *infra*.

31. Section 6(e)(2) prohibits a home rule unit from imposing taxes on income, earnings, or occupations unless authorized by statute. ILL. CONST. art. VII, § 6(e)(2). See *Mulligan v. Dunne*, 61 Ill. 2d 544, 551-52, 338 N.E.2d 6, 11-12 (1975), *cert. denied*, 425 U.S. 916 (1976); *Paper Supply Co. v. City of Chicago*, 57 Ill. 2d 553, 317 N.E.2d 3 (1974); *Jacobs v. City of Chicago*, 53 Ill. 2d 421, 292 N.E.2d 401 (1973); *S. Bloom, Inc. v. Korshak*, 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

32. A home rule unit is prohibited from incurring debt payable from ad valorem property tax receipts which mature more than forty years from the time the debt is incurred. ILL. CONST. art. VII, § 6(d). See Biebel, *supra* note 16, at 289-93 for a discussion of home

strictions on home rule authority are found throughout the 1970 constitution.³⁴ Furthermore, the extraterritorial powers of home rule units appear to be limited to acts of a proprietary nature.³⁵ Most importantly, home rule powers are tailored by the "pertaining to" clause of section 6(a)³⁶ and the preemption prerogative of the General Assembly.³⁷

rule indebtedness.

33. A home rule unit may not "license for revenue" unless authorized by the General Assembly. ILL. CONST. art. VII, § 6(e). See *Rozner v. Korshak*, 55 Ill. 2d 430, 433, 303 N.E.2d 389, 390 (1975) (the phrase "license for revenue" describes those situations in which a unit does not have the power to tax and attempts to raise revenue by exercise of its police power). See Michael & Norton, *supra* note 18, at 593 for a discussion of the problem raised by this restriction.

34. For this reason, the introductory clause of the § 6(a) general grant of home rule power, "[e]xcept as limited by this section," is not to be literally read. The implication that there are no limitations on home rule outside of § 6 has been rejected as absurd. Baum, *Part I*, *supra* note 11, at 142. See Froehlich, *Illinois Home Rule in the Courts*, 63 ILL. B.J. 320, 321 (1975) [hereinafter cited as Froehlich].

Among the restrictions on home rule power found in other sections of the constitution is § 18 of the Bill of Rights which guarantees that units of local government as well as the state will not deny or abridge equal protection of the laws because of sex. ILL. CONST. art. 1, § 18. See Baum, *Part I*, *supra* note 11, at 142 for other examples of "outside limitations."

35. In *People ex rel. City of Salem v. McMakin*, 53 Ill. 2d 347, 291 N.E.2d 807 (1972), the Illinois Supreme Court ruled that the acquisition of land outside the corporate limits of a municipality, being an act of a proprietary nature, is within the home rule grant of power. The court also stated, however, that the "language of the constitution in the grant of power to home-rule units may raise some questions as to the extent of power to exercise sovereignty beyond corporate limits . . ." *Id.* at 366, 291 N.E.2d at 818 (emphasis added). See Cohn, *Judicial Decisions Interpreting Illinois Constitutional Home Rule Provisions, Home Rule in Illinois*, p. 37 (Vol. 71, No. 52 UNIVERSITY OF ILLINOIS BULLETIN, INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS, Dec. 1973); Biebel, *supra* note 16, at 323-25; Michael & Norton, *supra* note 18, at 584-85 for a discussion of the *McMakin* opinion. See also *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 368 N.E.2d 915 (1977).

The question of sovereign or governmental extraterritorial power, left unanswered by *McMakin*, was confronted by the court in *City of Carbondale v. Van Natta*, 61 Ill. 2d 483, 338 N.E.2d 19 (1975). The *Van Natta* court rejected the home rule unit's contention that it had extraterritorial zoning powers under § 6(a). Noting that *McMakin* specifically distinguished extraterritorial acts which are proprietary in character from acts which are governmental, the *Van Natta* court held the constitution does not confer extraterritorial sovereign or governmental powers on home rule units. Extraterritorial zoning, being a governmental function, is therefore not within the grant of home rule powers.

It now appears that a home rule unit may perform extraterritorial proprietary functions under its constitutional powers, but needs legislative authority to perform governmental operations outside its corporate boundaries. Thus, *McMakin* and *Van Natta* raise the troubling distinction between proprietary and governmental functions. See Michael & Norton, *supra* note 18, at 585.

36. See notes 38-48 *infra* and accompanying text.

37. See notes 49-70 *infra* and accompanying text.

"Pertaining to its Government and Affairs"

The greatest restriction on home rule powers is contained in the section 6(a) "pertaining to its government and affairs" clause.³⁸ This phrase marks the extent to which home rule powers have been granted.³⁹ This vague and uncertain qualification⁴⁰ was designed by the drafters of article VII to limit home rule powers to local matters.⁴¹ Constitutional authority to exercise home rule powers extends only to functions that pertain to the unit's own government and affairs. Home rule units may not regulate affairs or interests which are of a national, statewide, or regional character.⁴²

The "pertaining to" clause thus presents the threshold test to which every home rule action or ordinance must conform.⁴³ Whenever a home rule ordinance is challenged, the courts must initially test its validity by this critical constitutional criterion.⁴⁴ Therefore,

38. ILL. CONST. art. VII, § 6(a).

39. One article has suggested that the frequent characterization of this clause as a limitation on home rule power is imprecise. Instead, the clause is a measure of the extent of power delegated by the constitution. Michael & Norton, *supra* note 18, at 567.

It is questionable, however, whether the Illinois Supreme Court acknowledges this distinction. Quoting from Baum, *Part I, supra* note 11, at 153, Justice Underwood, writing in *Metropolitan Sanitary District v. City of Des Plaines*, 63 Ill. 2d 256, 259, 347 N.E.2d 716, 718 (1976), wrote, "the question is not whether the 'pertaining to . . .' language should limit the home rule grant, but rather how extensive the limitation should be."

40. The supreme court recognized the imprecision and generality of this language in *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 539, 338 N.E.2d 15, 17 (1975): "The terms of this [home rule] grant are broad and imprecise and purposely left without definition." Despite the vagueness of the clause, its inclusion was not a controversial item at the convention. Baum, *Part I, supra* note 11, at 152.

41. 7 REC. OF PROC. 1621 states:

It is clear, however, that the powers of home rule units relate to their own problems, not to those of the state or the nation. Their powers should not extend to such matters as divorce, real property law, trusts, contracts, etc. which are generally recognized as falling within the competence of the state rather than local authorities. Thus the proposed grant of powers to local governments extends only to matters "pertaining to their government and affairs."

42. In *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 338 N.E. 2d 15 (1975), the court held invalid a home rule county ordinance which imposed an additional fee on the filing of a civil complaint. The court found that the county's additional filing fee imposed a burden on the state judicial system. The court held that the administration of justice is a statewide concern and does not pertain to local government and affairs. Similarly, in *People ex rel. Lignoul v. City of Chicago*, 67 Ill. 2d 480, 368 N.E.2d 100 (1977), the court held that banking is predominantly a state and national matter, and declared invalid the home rule city's ordinance which authorized branch banking. See *Bridgman v. Korzen*, 54 Ill. 2d 74, 295 N.E.2d 9 (1972).

43. Froehlich, *supra* note 34, at 321-22.

44. If the parties fail to specifically raise the "pertaining to" question, the court should

the courts' interpretation of this phrase⁴⁵ is the most important single issue in the determination of the scope of the home rule prerogative.⁴⁶ Although guidelines have been suggested for determining what matters pertain to local government and affairs,⁴⁷ the courts bear the responsibility for defining the restraints implied by this constitutional language.⁴⁸

examine the issue on its own as its first consideration. See *City of Des Plaines v. Chicago & N.W. Ry.* 65 Ill. 2d 1, 357 N.E. 2d 433 (1976) (challenge to home rule ordinance on preemption grounds, but court raised and considered only the "pertaining to" question).

Too often, the "pertaining to" question is given silent treatment or dealt with as a collateral issue - "handled perhaps a little too quickly in an area where more judicial guidance would be welcome." Frochlich, *supra* note 34, at 322. See, e.g., *S. Bloom, Inc. v. Korshak*, 2 Ill. 2d 56, 284 N.E.2d 257 (1972); *Gilligan v. Korzen*, 56 Ill. 2d 387, 308 N.E.2d 613, *cert. denied*, 419 U.S. 814 (1974).

45. "It was acknowledged in the constitutional debates that by virtue of the general language of the grant and the qualifying phrase 'pertaining to its government and affairs' the right of a home rule unit to exercise any power will ultimately depend upon an interpretation by this court as to whether or not the power exercised is within the grant of section 6(a)." *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 540, 338 N.E.2d 15, 17 (1975) (emphasis added). See notes 118, 135-140 *infra* and accompanying text.

46. Michael & Norton, *supra* note 18, at 568.

47. The Local Government Committee used twenty examples to illustrate the operation of home rule. 7 REC. OF PROC. 1652-57. Two of these examples (nos. 2 and 4) indicate that extensive or long-standing federal or state regulation of a matter (*i.e.*, mortgage interest rates, utility rates) precludes that subject from being considered a matter pertaining to home rule government and affairs. These two examples have been twice cited by the Illinois Supreme Court. *Ampersand, Inc. v. Finley*, 61 Ill. 2d 536, 541, 338 N.E.2d 15, 17-18 (1975); *People ex rel. Lignoul v. City of Chicago*, 67 Ill. 2d 480, 486, 368 N.E.2d 100, 104 (1977).

The Report of the Committee on Local Government, 7 REC. OF PROC. 1567-1773, is the committee's commentary on its proposed article VII. Because most of article VII as adopted in the constitution is identical to the proposed article submitted by the committee, it is universally agreed that the Report is useful in interpreting the doubtful provisions of the article and in clarifying some of the uncertainties created by its language. See, e.g., Biebel, *supra* note 16, at 257. For an edited version of the committee report relating to the home rule provisions, see Baum, *The Scope of Home Rule: The Views of the Con-Con Local Government Committee*, 59 ILL. B.J. 814 (1971). For an exhaustive review of the history and drafting of the local government article, see Anderson & Lousin, *From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Constitution*, 9 J. MAR. J. PRAC. & PROC. 698 (1976).

The Local Government Committee Report is frequently cited in Illinois Supreme Court opinions on home rule. Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MAR. J. PRAC. & PROC. 189, 216-221 (1975). See note 105 *infra*.

48. Considering the history of home rule in other states where judicial interpretation through the use of implied preemption resulted in the emasculation of home rule authority, the prospect of judicial construction of the "pertaining to" phrase raised early fearful predictions that such construction would "plague" home rule power. Biebel, *supra* note 16, at 261-62; Baum, *Part I, supra* note 11, at 152. See Thorpe, *An Analysis of Anticipated Problems Under the New Home Rule Article of the Illinois Constitution*, 50 ILL. MUN. REV. 4 (1971). See notes 123-129 *infra* and accompanying text. Nevertheless, after more than eight years of Illinois Supreme Court interpretation of the extent of home rule powers, and

The Preemption Provisions

Even where a power or function pertains to the home rule unit's government and affairs, the preemption provisions of section 6⁴⁹ allow the state legislature to limit or totally exclude the exercise of home rule power⁵⁰ over most⁵¹ local activities. The preemption scheme strikes a balance between home rule autonomy and state sovereignty.⁵² These provisions provide a precise,⁵³ unique⁵⁴ system for the limitation and exclusion of home rule powers by the General Assembly. The legislature's preemption power is limited by specific constitutional requirements. In particular, section 6(g) requires that preemptive legislation must be passed by a three-fifth majority of each house where there is no state regulation or activity in the subject area.⁵⁵ The purpose of 6(g) is to protect home

particularly in light of *Sexton*, it can be said that judicial interpretation does not pose the detrimental threat to effective home rule as earlier supposed. See text accompanying notes 141-143 *infra*.

49. ILL. CONST. art. VII, §§ 6(g), (h), (i) provide:

(g) The General Assembly by a law approved by the vote of three fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (l) of this Section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (l) of this Section.

(i) 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.

50. The constitution thus expressly retains the jurisdiction of the General Assembly to act in matters of local concern. See 7 REC. OF PROC. 1637: "Even the most determined proponents of home rule recognize that many matters of concern to local governments should be left to the determination of the state legislature."

51. The preemption provisions were intended to reserve legislative authority over all home rule functions except those specified in § 6(l). The General Assembly may not deny or limit the power of home rule units to finance local improvements by special assessment, or to levy "additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services." ILL. CONST. art. VII, § 6(l). See *Oak Park Fed. Sav. & Loan Ass'n v. Village of Oak Park*, 54 Ill. 2d 200, 204, 296 N.E.2d 344, 347 (1973). See generally *Baum, A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 564-66 [hereinafter cited as *Baum, Part II*]; *Biebel, supra* note 16, at 285-88, 319-23.

52. *Biebel, supra* note 16, at 277. See 7 REC. OF PROC. 1644-45.

53. "These sections attempt to spell out, in a more specific way than in any other state constitution, the power relationship between state and home rule unit. . . . Our preemption system is more precise than any other." *Parkhurst, Article VII - Local Government*, 52 CHI. B. REC. 94, 100 (1970) [hereinafter cited as *Parkhurst*].

54. 7 REC. OF PROC. 1645.

55. ILL. CONST. art. VII, § 6(g). See note 49 *supra*.

rule units from indiscriminate state action denying home rule powers without any exercise of state power in the area preempted.⁵⁶ Where the state does exercise a power or perform a function in the subject field, however, section 6(h) permits the General Assembly to exclude home rule action in that field by a mere majority vote of each house.⁵⁷

The most significant constitutional requirement in the preemption scheme is that the General Assembly must "specifically" express its intent to limit or exclude home rule powers.⁵⁸ Home rule powers cannot be limited by statutes enacted prior to the effective date of the 1970 constitution.⁵⁹ In addition, when a pre-1970 statute irreconcilably conflicts with a home rule ordinance, the ordinance prevails over the statute.⁶⁰ More importantly, it appears that

56. This extraordinary three-fifths burden for purely negative statutory restraints was deemed necessary to protect home rule units from sudden, massive denials of power by "laundry list" legislation. 7 REC. OF PROC. 1642. Parkhurst, *supra* note 53, at 100.

57. ILL. CONST. art. VII, § 6(h). See note 49 *supra*. For a criticism of the constitutional language expressing the crucial distinction between exercised and non-exercised state powers, see Baum, *Part II, supra* note 51, at 569. But see Biebel, *supra* note 16, at 280-81.

58. ILL. CONST. art. VII, §§ 6(h), (i). See Michael & Norton, *supra* note 18, at 565.

59. *Kanellos v. County of Cook*, 53 Ill. 2d 161, 290 N.E.2d 240 (1972) represents the supreme court's initial formulation of this principle. In *Kanellos*, the Cook County Board adopted a resolution providing for the issuance of ten million dollars in general obligation bonds without prior referendum approval. Plaintiff challenged the home rule county resolution as contrary to state law, contending that a pre-1970 constitution statute requiring referendum approval for such a bond issue was in full force and effect. In a unanimous opinion, the court held that the statute, enacted prior to the 1970 constitution was invalid as applied to a home rule county in view of Section 9 of the Transition Schedule of the 1970 constitution to remain in effect. See Note, *The "Clean Slate" Doctrine: A Liberal Construction of the Scope of the Illinois Home Rule Powers - Kanellos v. County of Cook*, 23 DEPAUL L. REV. 1298 (1974) [hereinafter cited as *Clean Slate*].

In *People ex rel. Hanrahan v. Beck*, 54 Ill. 2d 561, 301 N.E. 2d 281 (1973), the supreme court held that the Cook County Board, acting pursuant to its home rule powers, had the authority to transfer duties and powers among county officers even to the extent that such transfer conflicted with a statute enacted prior to the adoption of the 1970 constitution. The *Beck* court cited *Kanellos* as holding that a home rule unit "may adopt an ordinance pursuant to its home-rule power and thereby supersede a statute antedating the present constitution." *Id.* at 565, 301 N.E.2d at 283. See *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973) (statutory limitations enacted prior to constitution are superseded with respect to home rule units by the adoption of the 1970 constitution).

Where a statute is enacted prior to and not in anticipation of the 1970 constitution, it is totally foreign to the concept of home rule and the concept of legislative limitation under §§ 6 (g) and 6(h). A prior statute is thus incapable of meeting the requirement of specific indication of legislative intent to limit or exclude home rule powers. *Kanellos v. County of Cook*, 53 Ill. 2d 161, 166-67, 290 N.E.2d 240, 243-44 (1972).

60. In *Peters v. City of Springfield*, 57 Ill. 2d 142, 311 N.E.2d 107 (1974), the supreme court examined the constitutionality of a home rule city ordinance which reduced the mandatory retirement age of city policemen and firemen from 63 to 60. The ordinance di-

even pervasive state regulation does not preclude home rule power unless the state legislature specifically expresses its exclusivity intent.⁶¹ Even a post-1970 statute which purports to restrict home rule powers must be specific.⁶²

rectly contravened a state statute passed prior to 1970 which provided that municipalities could by ordinance provide an age limit of not less than 63 years for policemen and firemen. The court viewed the doctrine of *Kanellos* and *Beck* as controlling, and upheld the home rule ordinance.

The *Kanellos-Beck* doctrine that a local ordinance within the unit's home rule powers supersedes statutory provisions enacted prior to the adoption of our present constitution has been cited in a number of other cases dealing with statute-ordinance conflicts. *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 343 N.E.2d 919 (1976); (home rule unit empowered to enact ordinance conflicting with statutory provisions regarding the appointment and certification of police and fire officers); *Paglini v. Police Bd.*, 61 Ill. 2d 233, 335 N.E.2d 480 (1975) (home rule ordinance authorizing hearing officers not members of Police Board to conduct discharge hearings prevails over statute requiring hearings only before members of the Police Board); *Clarke v. Village of Arlington Heights*, 57 Ill. 2d 50, 309 N.E.2d 576 (1974) (home rule ordinance effecting structural revisions in village government takes precedence over contrary provisions of Illinois Municipal Code).

61. In *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975), the court rejected plaintiff's claim that extensive state regulation of the liquor industry preempted the home rule county's power to impose a tax on the retail sale of alcoholic beverages. The court noted, first, that the state legislation (the Dramshop Act) was passed long before implementation of the 1970 constitution, and second, that the legislation did not declare itself as exclusive in regard to liquor taxation.

Town of Cicero, Inc. v. Fox Valley Trotting Club, 65 Ill. 2d 10, 357 N.E.2d 1119 (1976), involved a comprehensive statutory scheme regulating the horse racing business. The supreme court decided that the existence of a pervasive state regulatory scheme did not preclude the home rule unit's power to impose a ten cent admission tax on race track amusements.

The above-cited decisions, however, concern the home rule taxing power, and fail to decide the question of whether an all-encompassing state regulatory scheme may preempt home rule regulatory action. Indeed, the *Fox Valley* court specifically pointed out that the power to regulate and the power to tax are separate and distinct powers: "Even if we assume, *arguendo*, that the existence of a comprehensive statutory regulatory scheme may serve, in a given instance, to preclude local regulatory efforts, it does not necessarily follow that the power to tax in that area would also be preempted." 65 Ill. 2d 10, 17, 357 N.E.2d 1118, 1120 (1976).

Nevertheless, considering the specificity requirement of the preemption provisions, the desire to avoid implied preemption, and the authority of *Kanellos* and *Beck*, the rationale of *Mulligan* and *Fox Valley* should apply to conclude that extensive state regulation, alone, does not preempt home rule regulatory power. The General Assembly's power to preempt may be exercised only by expressed intent, not merely by pervasive state regulation in the field. See *Mulligan v. Dunne*, 61 Ill. 2d 544, 550, 338 N.E.2d 6, 10-11 (1975), *cert. denied*, 425 U.S. 916 (1976); *Rozner v. Korshak*, 55 Ill. 2d 430, 435, 303 N.E.2d 389, 391 (1973); *Frochlich*, *supra* note 34, at 328. *But see* *Illinois Liquor Comm'n v. City of Joliet*, 26 Ill. App. 3d 27, 32, 324 N.E.2d 453, 457 (1975) (exclusivity of state action in a field may be expressed in ways other than specific legislative intent, such as by enactment of a comprehensive regulatory scheme or by establishment of a state agency for the purpose of a comprehensive regulatory scheme); *Michael & Norton*, *supra* note 18, at 580-81.

62. *Mulligan v. Dunne*, 61 Ill. 2d 544, 550, 338 N.E.2d 6, 11 (1975), *cert. denied*, 425 U.S.

In the absence of a specific statement of exclusivity, section 6(i) authorizes home rule units to exercise any local government and affairs power even if the state is concurrently exercising its powers over the subject matter.⁶³ This unique feature of concurrent authority was designed to minimize "judicial preemption."⁶⁴ Judicial or implied preemption invalidates a home rule ordinance or action on the ground that state occupation of the field impliedly preempts home rule authority in that field.⁶⁵ Implied preemption, frequently employed by the courts of other states,⁶⁶ has most often resulted in the denial of home rule authority.⁶⁷ For this reason, the drafters expressed, in section 6(i), their opposition to preemption by implication of unexpressed legislative intent.⁶⁸

The preemption scheme thus presents the second inquiry⁶⁹ to be made by the courts whenever a home rule action or ordinance is challenged. The issue is whether the home rule power has been preempted by the General Assembly pursuant to section 6(g) or 6(h).⁷⁰

916 (1976); *Rozner v. Korshak*, 55 Ill. 2d 430, 435, 303 N.E.2d 389, 391 (1973).

An example of a statute that specifically expresses its exclusivity intent is the Private Detectives Act. ILL. REV. STAT. ch. 111, §§ 2601-39 (1979). Section 2639 provides: "Pursuant to paragraph (h) of Section 6 of Article VII of the Constitution of 1970 the power to regulate the private Detective Business shall be exercised exclusively by the State and may not be exercised by any unit of local government, including home rule units." See *United Private Detective Ass'n v. City of Chicago*, 62 Ill. 2d 506, 343 N.E.2d 453 (1976). A similar statute is contained in the Illinois Insurance Code. ILL. REV. STAT. ch. 73, § 614.1 (1979). See *Prudential Ins. Co. v. City of Chicago*, 66 Ill. 2d 437, 362 N.E.2d 1021 (1977).

63. ILL. CONST. art. VII, § 6(i). See note 49 *supra*.

64. 7 REC. OF PROC. 1645. Baum, *Part II, supra* note 51, at 571.

65. "In essence, the courts imply a legislative intent to limit local activity merely because of the passage of similar legislation." Biebel, *supra* note 16, at 282.

66. See Note, *The State v. The City: A Study in Preemption*, 36 CALIF. L. REV. 430 (1963); 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 292.38 (1968).

67. The emasculation of home rule in other jurisdictions through the doctrine of implied preemption is described in 4 REC. OF PROC. 3090-91.

68. "[Section 6(i)] is a guideline to the courts that concurrent local action is to be permitted unless a contrary legislative intent is expressed." 7 REC. OF PROC. 1645.

69. The preemption provisions provide detailed guidelines for the courts' determination of this question as to the vote required, specific expression of limitation or exclusivity, and the presumption of concurrent authority in the absence of such expressed intent. The precision and detail of the preemption provisions are in marked contrast to the vagueness and generality of the "pertaining to" clause. See notes 40 and 45 *supra* and accompanying text.

70. "Whether a home rule unit has the power to enact a given ordinance is . . . determined by two questions: (1) Does the subject matter pertain to its government and affairs? (2) If so, has that power been limited or denied it by the General Assembly under 6(g) or 6(h)?" *Carlson v. Village of Worth*, 62 Ill. 2d 406, 425, 343 N.E.2d 493, 503 (1975) (Underwood, J., dissenting).

THE DECISION: *County of Cook v. John Sexton Contractors Co.*

In *County of Cook v. John Sexton Contractors Co.*,⁷¹ the home rule county brought suit to enjoin defendant Sexton from developing and operating a sanitary landfill until Sexton complied with the county zoning laws. The zoning laws had previously been comprehensively amended pursuant to the county's home rule powers. Sexton, who had already received a developmental permit from the Environmental Protection Agency,⁷² counterclaimed to stop the county's attempt to subject the landfill to its zoning laws. The defendant asserted that the Environmental Protection Act⁷³ applied to the exclusion of the county's zoning laws.

The Circuit Court of Cook County ruled that the Environmental Protection Act preempted any regulatory authority by home rule units over the location of sanitary landfills. The lower court granted defendant's counterclaim, and enjoined the county from interfering with Sexton's sanitary landfill operations. A direct appeal was taken to the Illinois Supreme Court.

The major issue raised on appeal called the legitimacy of home rule powers into question. Specifically, the court considered whether the Environmental Protection Agency's issuance of a permit for the operation of a privately-owned landfill precluded the county from requiring the landfill owner's conformance to a county zoning ordinance.⁷⁴ To answer this query, the court analyzed both the "pertaining to" question and the issue of preemption.

In its analysis of the "pertaining to" question, the court recognized that environmental control is of both local and regional or statewide concern. Home rule power, however, can be exercised only in matters that are "sufficiently local in character."⁷⁵ The court determined that zoning regulation of privately-owned sanitary landfills is of such character, and therefore held that the county ordinance pertained to local government and affairs.

The court then examined the preemption issue to determine

71. 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

72. The Environmental Protection Agency (EPA) is one of three administrative agencies established by the Environmental Protection Act. ILL. REV. STAT. ch. 111½, § 1004 (1979). See notes 73 and 82 *infra*.

73. ILL. REV. STAT. ch. 111½, §§ 1001-51 (1979). The Act provides that its purpose is to "establish a unified, statewide program . . . to restore, protect, and enhance the quality of the environment." *Id.* at § 1002(b). See Klein, *Pollution Control in Illinois - The Formative Years*, 22 DE PAUL L. REV. 759 (1973) for an exhaustive survey of the Act.

74. 75 Ill. 2d 494, 505, 389 N.E.2d 553, 555 (1979).

75. *Id.* at 509, 389 N.E.2d at 557.

whether the state legislature, through the Environmental Protection Act, excluded or limited the home rule power to regulate environmental matters. The court found that the Act did not specifically express the requisite intent that the state should exclusively occupy the field of environmental control. Moreover, the court noted that the Act was adopted prior to the effective date of the 1970 constitution.⁷⁶ Finally, the court clarified two earlier decisions⁷⁷ and held that a home rule unit, unlike a non-home rule unit, may legislate concurrently with the General Assembly on environmental control.⁷⁸

The supreme court continued its discussion of the preemption question to consider the effect of article XI⁷⁹ of the constitution on

76. The Environmental Protection Act became effective on July 1, 1970 - one full year before the effective date of the 1970 constitution. *Id.* at 513, 389 N.E.2d at 559. See note 3 *supra*.

77. *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 322 N.E.2d 11 (1974); *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975).

78. In so holding, the *Sexton* court clarified the law concerning the rights of local governments to legislate on environmental matters. Prior to *Sexton*, there was much confusion on this issue because of the supreme court's failure to distinguish between home rule and non-home rule units. See *Carlson v. Briceland*, 61 Ill. App. 3d 120, 377 N.E.2d 1138 (1978); Minetz, *Recent Illinois Supreme Court Decisions Concerning the Authority of Home Rule Units to Control Local Environmental Problems*, 26 DE PAUL L. REV. 306 (1977) [hereinafter cited as Minetz]; Note, *Sanitary Landfill Permits in Illinois: State Preemption of Home Rule Zoning Powers*, 8 LOY. CHI. L.J. 353 (1977) [hereinafter cited as *Sanitary Landfill*].

In *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 489, 322 N.E.2d 11, 14-15 (1975), the court stated: "[A] local governmental unit may legislate with the General Assembly on environmental control." (emphasis added).

Later, however, in *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975), the court labeled this *City of Chicago* statement as dictum. *Worth*, like *Sexton*, concerned local regulation of a sanitary landfill, but the unit involved was a non-home rule village. The *Worth* court concluded that local regulation of the environment was preempted by the Environmental Protection Act. The *Worth* court relied upon *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972) which held that a sanitary landfill operator need only receive a permit from the EPA, and a county may not prohibit such operation by a zoning ordinance.

Because both *O'Connor* and *Worth* involved regulation by non-home rule units, it had been suggested that the supreme court was careless when it used language in *Worth* indicating a home rule unit might be precluded from enacting environmental control regulations. Minetz, *supra*, at 316. See *Sanitary Landfill*, *supra*, at 353.

The *Sexton* court makes clear that the preemption holdings of *Worth* and *O'Connor* apply only to non-home rule units. The Environmental Protection Act "operates to exclude non-home rule units from the regulation of sanitary landfills." 75 Ill. 2d 494, 507, 389 N.E.2d 553, 556 (1979) (emphasis added). *Sexton* upholds the *City of Chicago* conclusion as applied to home rule units. See note 81 *infra*.

79. ILL. CONST. art. XI, § 1 provides: "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy."

home rule environmental control. The court determined that, in the area of environmental regulation, the public policy manifested in article XI dictated a qualification of the doctrine of home rule precedence over legislation enacted prior to the 1970 constitution.⁸⁰ It concluded that a home rule unit may legislate concurrently with the General Assembly, but such home rule regulation must conform with the uniform standards established by the legislature and the state environmental agencies.⁸¹ Thus, in regulation of the environment, home rule units are limited to adopting only those uniform standards established by the Pollution Control Board.⁸²

The supreme court concluded that in zoning land for sanitary landfill sites, the county must comply with the environmental regulations of the state agency. Likewise, the state agency must comply with the county's zoning ordinance when issuing permits for landfill sites. Consequently, defendant Sexton had to comply with both the state regulations and the county's zoning ordinance. The court enjoined defendant from further operation of the landfill until it complied with the zoning ordinance.

ANALYSIS

The *Sexton* decision clarifies the law with regard to the power of local governments to act in environmental matters by explaining the sharp distinction between home rule and non-home rule units.⁸³ More importantly, the decision delineates the supreme court's interpretation of the "pertaining to" clause.⁸⁴ *Sexton's* qualification of the doctrine of home rule precedence in the absence of express legislative preemption, however, appears to be un-

80. See notes 59-61 *supra* and accompanying text.

81. The *Sexton* holding modifies the conclusion in *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 489, 322 N.E.2d 11, 14-15 (1975), which was as follows: "We conclude that a local governmental unit may legislate concurrently with the General Assembly on environmental control. However, as expressed by [the constitutional history of article XI], such legislation by a local government unit must conform with the minimum standard established by the legislature." The *Sexton* court modified the *City of Chicago* conclusion by substituting the words "home rule" for the word "local" and the word "uniform" for the word "minimum". 75 Ill. 2d 494, 514-15, 389 N.E.2d 553, 560 (1979).

82. The Pollution Control Board is another of the agencies established by the Environmental Protection Act. The Board is delegated the power to determine, define and implement statewide environmental control standards. ILL. REV. STAT. ch. 111½ § 1005. See notes 72 and 73 *supra*.

83. See note 78 *supra* and accompanying text.

84. See notes 102-117 *infra* and accompanying text.

necessary.⁸⁵ Furthermore, the court's consideration of article XI in the midst of its determination of the preemption question is misplaced.⁸⁶

Interpretation of the "Pertaining to" Clause

Local Affairs v. Statewide Concerns

In its analysis of the "pertaining to" question, the *Sexton* court acknowledged the distinction between local affairs and statewide concerns in the home rule context.⁸⁷ A matter may be of both local and statewide interest, but only an item that is sufficiently local in character is subject to home rule powers.⁸⁸ The exercise of home rule powers depends upon this distinction. The absence of precise definitions, however, renders the application of this distinction troublesome.⁸⁹ Indeed, absolute definition is probably impossible because the concepts of local affair and statewide concern appear to fluctuate with the times.⁹⁰ Nevertheless, examination of the "pertaining to" question requires that the Illinois courts decide whether a particular matter is of such local character as to be subject to home rule authority.

"Effects" Test Rejected

Prior to *Sexton*, Illinois Supreme Court decisions construing the "pertaining to" clause suggested that the court had adopted an

85. See notes 149-156 *infra* and accompanying text.

86. See text accompanying notes 154-155 *infra*.

87. This distinction is raised by the "pertaining to" clause. Home rule powers extend only to those matters that pertain to local government and affairs, and do not encompass matters of statewide concern.

88. 75 Ill. 2d 494, 509, 389 N.E.2d 553, 555 (1979).

89. *Van Gilder v. City of Madison*, 222 Wis. 58, 81, 267 N.W. 25, 34 (1936) states: "So far as we are able to determine, no one has undertaken to define what is meant by local affairs and government." The *Van Gilder* court described the terms as "practically undefineable." *Id.* at 73, 267 N.W. at 31. See 1 ANTIEAU, *Municipal Corporation Law* § 3.21 (1980); Kratovil & Ziegweid, *supra* note 29, at 366; Dyson, *Ridding Home Rule of the Local Affairs Problem*, 12 U. KAN. L. REV. 367, 378 (1964).

Carlberg v. Metcalf, 120 Neb. 481, 487, 234 N.W. 87, 90 (1930) states: "There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation."

90. *Pacific Tel. & Tel. Co. v. San Francisco*, 51 Cal. 2d 766, 771, 336 P.2d 514, 517 (1959) states: "[T]he constitutional concept of municipal affairs is not a fixed or static quantity. It changes with changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern." See Fordham, *Home Rule - AMA Model*, 44 NAT. MUN. REV. 137, 138-39 (1955).

"effects" test to determine whether a matter is a local affair.⁹¹ Under this approach, if a home rule ordinance has an impact on citizens or property outside the home rule unit or on other units of local government, the ordinance is invalid.⁹² The broader impact of the ordinance exceeds the scope of home rule authority. Great significance is accorded extraterritorial impact because the constitution's drafters intended that home rule powers be applied only to local problems.⁹³ Therefore, under the "effects" test, where the home rule ordinance or the matter regulated is of extraterritorial significance, the subject matter requires statewide or regional control. Consequently, home rule regulation is deemed inappropriate and barred.⁹⁴

In *Sexton*, the court implicitly repudiated a strict "effects" test⁹⁵

91. *Bridgman v. Korzen*, 54 Ill. 2d 74, 295 N.E.2d 9 (1972); *Metropolitan Sanitary Dist. v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976); *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1976). See *City of Highland Park v. County of Cook*, 37 Ill. App. 3d 15, 344 N.E.2d 665 (1975).

92. In *Bridgman v. Korzen*, 54 Ill. 2d 74, 295 N.E.2d 9 (1972), the court ruled that a home rule county which collected tax monies for itself and for other governmental taxing bodies must follow the method of collection prescribed by state statute. The court reasoned that because the collection of tax monies also concerned other units of government, such collection was not a matter pertaining to the government and affairs of the county. See *Biebel*, *supra* note 16, at 263-64, 312-14 for a persuasive criticism of *Bridgman*.

Metropolitan Sanitary Dist. v. City of Des Plaines, 63 Ill. 2d 256, 347 N.E.2d 716 (1976), involved a health ordinance which the home rule city attempted to apply to the Sanitary District's construction and operation of a sewerage treatment plant within Des Plaines. The court noted that the sewerage plant served a large area embracing six other municipalities. The court held that such regulation was not within Des Plaines' home rule powers.

In another decision concerning environmental control, *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1976), the court invalidated the city's noise control ordinance as not pertaining to local government and affairs. The court reasoned that some forms of noise pollution are not limited to the boundaries of one unit, and therefore are "not a matter of local concern." *Id.* at 5, 357 N.E.2d at 435. Justices Ryan and Ward filed vigorous dissents. *Id.* at 8-10, 357 N.E.2d at 436-37. See note 100 *infra*.

See *Minetz*, *supra* note 78, at 319-24 for a criticism of both *Sanitary District* and *Chicago & N.W.*

93. In *Chicago & N.W.*, for example, the court quoted from 7 REC. OF PROC. 1621: "It is clear, however, that the powers of home-rule units relate to their own problems, not to those of the state or the nation." 65 Ill. 2d 1, 5, 357 N.E.2d 433, 435 (1976). See note 41 *supra*.

94. The Local Government Committee Report mentions legislative accountability as one of the rationales for home rule. 7 REC. OF PROC. 1605, 1609. See note 21 *supra*. This goal of legislative accountability tends to reinforce the position that where a local exercise affects citizens outside the local unit to whom the unit's legislators are not accountable, the exercise is not within the grant of home rule power.

95. Since no Illinois court has ever expressly stated it is applying an "effects" test, *Sexton* of course does not expressly reject such a test. The rationale of earlier decisions, however, hinted that the supreme court was leaning toward application of an "effects" standard. See notes 91-93 *supra* and accompanying text. The rationale of *Sexton* draws back from

and thereby preserved the vitality of home rule in Illinois. The sanitary landfill involved in *Sexton* would have been for the use and benefit of communities other than Cook County.⁹⁶ Zoning restrictions that may have prohibited the operation of the landfill thus affected other units of local government and persons outside the county. Nevertheless, this did not preclude home rule regulation.⁹⁷ With numerous units of local government operating within the same urbanized region,⁹⁸ almost any action taken by one unit of government will inevitably have at least a minimal effect on other units and their citizens.⁹⁹ If extraterritorial impact were the sole, deciding criterion of the "pertaining to" question, home rule units would be in a quandary trying to effectuate strictly local responses to the myriad of urban problems.¹⁰⁰ Although this factor should be considered by the courts in deciding whether the subject home rule action pertains to local government and affairs, extraterritorial effect should not be the exclusive or determinative measure of home rule powers.¹⁰¹

The Balancing Analysis

The *Sexton* court's analysis of the "pertaining to" question was not confined to consideration of the extraterritorial impact of the ordinance. Instead, the court examined a number of factors. First,

this standard, and suggests another approach to the interpretation of the "pertaining to" phrase. See notes 96-97, 102-110 *infra* and accompanying text.

96. 75 Ill. 2d 494, 510, 389 N.E.2d 553, 557 (1979).

97. The *Sexton* court distinguished *Metropolitan Sanitary Dist. v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976). In *Sanitary District*, the court felt that the home rule regulation would unduly interfere with the greater interests of the regional district to be served by the sewage plant. See note 92 *supra*. *Sexton* found no such undue interference presented by the county zoning ordinance. See note 106 *infra* and accompanying text.

98. There are 262 municipalities within the six county Chicagoland area. NORTHEASTERN ILLINOIS PLANNING COMMISSION, *Regional Data Report* (June 30, 1978).

99. Michael & Norton, *supra* note 18, at 572; *Clean Slate*, *supra* note 59, at 1310.

100. In *Chicago & N.W. Ry.*, Justice Ryan's dissent accused the majority of invalidating "every ordinance regulating horn honking, tire squealing, and noisy mufflers." 65 Ill. 2d 1, 9, 357 N.E.2d 433, 437 (Ryan, J., dissenting). See note 92 *supra*.

Chief Justice Ward perceived a more momentous consequence of the majority's holding that the home rule city may not regulate the noise pollution emissions of the defendant railroad: "Illustrating the anomalous consequences of the majority position, the city of Chicago, a home rule unit and the railroad center of the United States, is utterly without authority to act to protect its citizens from environmental harm caused by railroads, or, for that matter, caused by anything or anyone else." *Id.* at 10, 357 N.E.2d at 437 (Ward, C.J., dissenting).

101. Many urban troubles transcend local boundaries. Therefore, the extraterritorial impact element will be present in many home rule ordinances and activities.

the court recognized the interests of other communities who would use the landfill.¹⁰² The statewide program of environmental regulation established by the Environmental Protection Act was also acknowledged.¹⁰³ In addition, the court reviewed the history of local regulation of land use and garbage disposal¹⁰⁴ and considered the constitutional intent to grant broad home rule powers for the regulation of solid waste disposal.¹⁰⁵ Finally, the court determined that the zoning ordinance applied only to unincorporated land in Cook County and, therefore, was not an imposition of the county's home rule powers upon other units of local government.¹⁰⁶ After reviewing all of these factors, the supreme court concluded that the application of the county ordinance to the sanitary landfill was a proper exercise of home rule power.

The *Sexton* analysis represents a significant departure from previous decisions which mechanically applied the extraterritorial impact standard.¹⁰⁷ The decision suggests that the Illinois Supreme Court is leaning toward a more flexible, balancing approach in its interpretation of the "pertaining to" clause.¹⁰⁸ In *Sexton*, the inter-

102. 75 Ill. 2d 494, 510, 389 N.E.2d 553, 557 (1979). See notes 96-97 *supra* and accompanying text.

103. The court deemed existence of the Act as "not determinative of whether regulation of sanitary landfills is within the home rule power." *Id.* at 510, 389 N.E.2d at 558.

104. The review included consideration of the traditional zoning powers of counties, the history of local zoning restriction of intensive land uses, and the supreme court's past recognition of garbage disposal as a local concern. *Id.* at 511-12, 389 N.E.2d at 558. See *Montgomery v. City of Galva*, 41 Ill. 2d 562, 244 N.E. 2d 193 (1969); *Strub v. Village of Deerfield*, 19 Ill. 2d 401, 167 N.E.2d 178 (1960); *Dube v. City of Chicago*, 7 Ill. 2d 313, 131 N.E.2d 9 (1955); *Consumers Co. v. City of Chicago*, 313 Ill. 408, 145 N.E. 114 (1924).

105. The court concluded that "it was [not] the intent of the framers of the 1970 constitution to exclude regulation of solid waste disposal from those matters that pertain to the government and affairs of home rule units." *Id.* at 511, 389 N.E.2d at 558.

The supreme court's consideration of this factor exemplifies its constant reference to the constitutional record, particularly the Local Government Committee Report. See note 47, *supra*.

106. This was another ground on which the *Sexton* court, 75 Ill. 2d at 512, 389 N.E.2d at 559, distinguished *Sanitary District*. See note 97 *supra*. The latter case involved the direct imposition of a health regulation upon another unit of government. The *Sanitary District* court declared, "Our fundamental difficulty is that to permit a regional district to be regulated by a part of that region is incompatible with the purpose for which it was created." 63 Ill. 2d 256, 261, 347 N.E.2d 716, 719. This "fundamental difficulty" did not exist in *Sexton*. 75 Ill. 2d 494, 510, 389 N.E.2d 553, 557.

107. See notes 91-95 *supra* and accompanying text.

108. In a concurring opinion, Mr. Justice Underwood agreed with the majority's conclusion, but registered his objections to a flexible, court-determined definition of those subjects that pertain to local government and affairs. Justice Underwood preferred a "favorable presumption" approach. 75 Ill. 2d 494, 517-19, 389 N.E. 2d 553, 561-62 (1979). See notes 123-129 *infra* and accompanying text.

ests of the surrounding communities and the statewide program established by the Environmental Protection Act were balanced against the county's interest in local regulation of the landfill, historical considerations indicating this matter to be a local function, and the fact that the ordinance was not imposed upon other units of local government.¹⁰⁹ The latter factors were determined to outweigh the former and a balance was struck in favor of the zoning ordinance pertaining to the county's government and affairs.¹¹⁰

On one side of the scale in the balancing approach is the potential impact on extraterritorial persons and property and the existence of state regulation, while the home rule unit's interest in local regulation is on the other side.¹¹¹ In addition, another relevant factor which may often be present is conflict between the home rule ordinance and state laws.¹¹² By balancing interests, all important variables are identified and discussed and no strict or mechanical test of home rule power is applied. Instead, the scope of home rule authority is determined on a case-by-case basis, the outcome of each controversy dependent upon the particular factors involved.¹¹³

The concurring opinion further indicates that the supreme court majority has indeed adopted a balancing approach.

109. In earlier cases, the supreme court simply stressed the extraterritorial element involved without discussing any other interests or variables. See *Bridgman v. Korzen*, 54 Ill. 2d 74, 295 N.E.2d 9 (1972); *Metropolitan Sanitary Dist. v. City of Des Plaines*, 63 Ill. 2d 259, 347 N.E.2d 716 (1976); *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill. 2d 1, 357 N.E.2d 433. See note 92 *supra*. *Sexton*, however, indicates that extraterritorial impact or the interests of other communities is only one of several factors to be considered.

110. See 75 Ill. 2d 494, 508-512, 389 N.E.2d 553, 557-59 (1979).

111. "The courts must weigh local values, conditions and interests against the values and interests of the larger community." *Clean Slate*, *supra* note 59, at 1311. Due process considerations may often be another relevant variable. See *Baum, Part I*, *supra* note 11, at 155. *Clean Slate*, *supra* note 59, at 1311.

112. "The cases in which home rule ordinances have an extraterritorial effect must be analyzed in terms of whether they create an unreasonable conflict with state law or with a governmental agency with geographical jurisdiction that is wider than the home rule unit. If a home rule ordinance having any significant extraterritorial effect creates such an unreasonable conflict, the courts are likely to declare it invalid as outside the unit's 'government and affairs.' In the absence of such a conflict, however, any effect outside the unit must be weighed against the importance of the regulation to the residents of the unit. Only when the ordinance creates a serious governmental conflict can a rule that automatically invalidates the ordinance with extraterritorial effect be justified. Thus, in many cases, *conflict should be but one of the factors considered by the court in its balancing process.*" Michael & Norton, *supra* note 18, at 582 (emphasis added).

113. The balancing test's dependence on case-by-case adjudication is its major drawback. The scope of home rule power over a particular matter will be uncertain until the courts have decided whether that matter pertains to local government and affairs. See Michael & Norton, *supra* note 18, at 602: "[I]t is map making, not map reading." See also

Although *Sexton* uses a balancing process, it is certainly not the ultimate articulation of that approach.¹¹⁴ The *Sexton* court was preoccupied with distinguishing those prior decisions which cited extraterritorial impact to invalidate the home rule activity.¹¹⁵ Nonetheless, the court's methodology in distinguishing these earlier decisions suggests a more flexible analysis of home rule power. Moreover, it appears that the balancing analysis is not limited to matters of environmental control.¹¹⁶ This weighing approach is properly applicable whenever the "pertaining to" question confronts the courts.¹¹⁷

Role of the Courts

The balancing approach in the construction of the "pertaining to" clause presupposes that the courts will assume an active, critical role in determining the scope of home rule powers.¹¹⁸ It is questionable whether the judiciary should, as a matter of policy, perform such a crucial function.¹¹⁹ Indeed, it would appear that the framers of the 1970 constitution wished to limit the role of the courts in the home rule context. Undoubtedly, the drafters feared a narrow interpretation of home rule authority by the courts.¹²⁰ The enumeration of specific powers in section 6(a) was designed to protect the general grant of home rule authority from narrow con-

Clean Slate, *supra* note 59, at 1312. Compare with "favorable presumption" approach, notes 123-129 *infra* and accompanying text.

114. A more articulate expression of the weighing process is found in *Carlson v. Brice-land*, 61 Ill. App. 3d 247, 377 N.E.2d 1138 (1978), which contained almost the identical facts of *Sexton*. The *Carlson* rationale is also very similar to that of *Sexton*. See generally *Michael & Norton*, *supra* note 18, at 573-74. See note 151 *infra*.

115. See notes 97 and 106 *supra*. In addition to distinguishing *Metropolitan Sanitary Dist.*, the court distinguished *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1976), on the ground that the ordinance in *N.W. Ry.* was "intended to control emissions originating beyond [the unit's] boundaries." 75 Ill. 2d 494, 512, 389 N.E.2d 553, 559 (1979). See note 92 *supra*.

116. See text accompanying notes 157-172 *infra*.

117. *Michael & Norton*, *supra* note 18, at 574.

118. See *Vitulo*, *supra* note 2, at 92.

119. Discussion of the respective roles of the judiciary and the legislature is a matter that receives little attention from either the courts or the legislature. Illinois Supreme Court decisions construing the "pertaining to" language indicate, however, that the courts will take a leading role in defining the scope of home rule powers. The policy considerations surrounding this development should be examined.

120. See 7 REC. OF PROC. 1622; 4 REC. OF PROC. 3053; *Baum*, Part I, *supra* note 11, at 156-57. This fear was apparently based upon Illinois' long history of strict judicial construction of local powers. See notes 13-15 *supra* and accompanying text.

struction.¹²¹ Moreover, the requirement of express legislative preemption forecloses the possibility of the courts implying preemption.¹²²

Favorable Presumption Approach

It has been suggested that the home rule provisions accord to the judiciary a very limited, almost non-existent, role.¹²³ More specifically, it has been argued that section 6 establishes a presumption in favor of the exercise of home rule authority.¹²⁴ Unless the General Assembly has acted to preempt home rule authority, the exercise of power would be presumed to be within the section 6(a) grant.¹²⁵ This favorable presumption could be rebutted only where the home rule ordinance produces oppression or injustice, or interferes with vital state policies.¹²⁶ Otherwise, the burden would be solely upon the state legislature to control the abuses of home rule authority through its preemption powers.¹²⁷ The courts would pre-

121. 7 REC. OF PROC. 1622. See note 4 *supra*.

122. The drafters were aware that the courts of other states had thwarted the development of home rule through the tool of judicial or implied preemption. See notes 64-68 *supra* and accompanying text. The vice-chairman of the Local Government Committee, Mr. Phillip Carey, expressed the framers' general feeling about court interpretations of home rule powers by mentioning the preemption provisions in other states. 4 REC. OF PROC. 3053. See notes 144-146 *infra* and accompanying text.

123. Baum, *Part I, supra* note 11, at 156-57. "The language [of § 6] does not contemplate substantial restraint added by judicial interpretation; indeed, it was designed to make this interpretation difficult if not impossible." *Id.* at 156.

124. "The Record of Proceedings . . . shows that the framers of the new constitution intended to reverse the presumption against local authority and establish a new presumption in favor of home rule." Minetz, *supra* note 78, at 308 (citing 7 REC. OF PROC. 1593-94).

125. Proponents of the "favorable presumption" approach rely heavily on § 6(m) which provides: "Powers and functions of home rule units shall be construed liberally." ILL. CONST. art. VII, § 6(m). It is argued that § 6(m) creates a presumption which characterizes any challenged home rule activity as local in nature, and thus pertaining to the unit's government and affairs. Biebel, *supra* note 16, at 271-72.

This interpretation, however, goes far beyond the intent of the drafters. Section 6(m) reverses the tradition of narrow interpretation of local powers embodied in Dillon's Rule. 7 REC. OF PROC. 1593-94. See notes 12-15 *supra* and accompanying text. This mandate of liberal construction may well balance in favor of a home rule exercise, but it does not create a presumption in favor of home rule. Rather, it is a guide to the courts' construction of the "pertaining to" clause. *Id.*

126. Only in these situations would the courts be permitted to step in and compensate for legislative inaction or oversight. Baum, *Part I, supra* note 11, at 157. See Biebel, *supra* note 16, at 283. *But see* notes 133-134 *infra* and accompanying text.

127. Short of oppression or injustice, the favorable presumption approach allocates singularly to the legislature the critical role of controlling the home rule prerogative: "The design of section 6 places great responsibility upon the legislature to ensure that home rule does not degenerate into provincialism which could injure the people of the state." Baum, *Part I, supra* note 11, at 157.

sume that the subject matter pertains to the home rule unit's government and affairs,¹²⁸ thereby minimizing judicial interpretation.¹²⁹

The Courts and the "Pertaining to" Issue

The fundamental problem with the favorable presumption approach is that it implicitly deletes the "pertaining to" clause from the constitution. Under this approach, home rule authority would be confined only by those limitations specifically established by the legislature.¹³⁰ There are, however, many matters not expressly preempted from home rule authority, but of such statewide or national concern that they should not be "presumed" to be within the scope of home rule power.¹³¹ Consequently, the basic flaw in the favorable presumption approach is that it neglects the initial question raised by the "pertaining to" clause, and considers only

128. "In short, when the question is posed whether a function or power sought to be exercised is local in nature so as to permit home rule action, a strong presumption would issue in favor of the 'local' alternative, which should be overcome only in the most compelling circumstances." Biebel, *supra* note 16, at 283.

129. The underlying rationale of the "favorable presumption" approach is the position that it is *necessary* to limit the role of the courts in order to avoid narrow construction of home rule powers. The basic fear is that judicial activity in the home rule context will inevitably thwart the positive development of home rule. See Fordham, *Home Rule-AMA Model*, 44 NAT. MUN. REV., 137, 138-39 (1955).

The difference between Fordham's proposed draft of constitutional home rule power and the § 6(a) grant demonstrates the different roles allocated to the courts under the two provisions. Fordham's draft permits a home rule unit to "exercise any power or perform any function which the legislature has power to devolve upon [a municipality]." Fordham's proposal contains no qualifying phrase like the § 6(a) "pertaining to" clause. Thus, Fordham's draft does rule out judicial interpretation of home rule powers. It grants plenary legislative power to home rule units *not limited to local government and affairs*, and subject only to limitations imposed by the legislature.

Fordham's proposal was considered, but rejected by the Local Government Committee. The Committee's final decision was that home rule authority should encompass only those matters pertaining to local government and affairs. The inclusion of this language allows the judiciary to determine the scope of home rule powers. See 7 REC. OF PROC. 1621-22; Kratovil & Ziegweid, *supra* note 29, at 370 n.47. See notes 136-140 *infra* and accompanying text.

130. This could only lead to anomalous and unintended results. For example, there is long-standing, uniform state regulation of utility rates in Illinois. Yet, unless the state legislature has specifically excluded home rule powers in this area, the favorable presumption approach, strictly applied, would permit a home rule ordinance regulating telephone rates. This was certainly not intended by the framers of the 1970 constitution. See 7 REC. OF PROC. 1652. See also *People ex rel. Pub. Util. Comm'n v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 243 P.2d 397 (1952).

131. Among such concerns are banking and the administration of justice. *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, 542, 338 N.E.2d 15, 18 (1975). See note 42 *supra* and accompanying text.

the second, preemption question.¹³²

Furthermore, the reliance upon the state legislature to control the abuses of "presumed" home rule power is misguided. Typically, the General Assembly will exercise its preemption powers only where a home rule unit is overly aggressive in an area that is also a matter of state interest. Similarly, the General Assembly might act where local and state activities conflict to the detriment of state policy.¹³³ This is exactly the point at which advocates of a limited judicial role would permit the courts to interfere.¹³⁴ Judicial scrutiny, however, is required prior to this point. Every challenged exercise of home rule power must be examined to determine whether that exercise pertains to the home rule unit's government and affairs.¹³⁵

The "pertaining to" clause demands an active role of the judiciary in determining the scope of home rule powers. Although the drafters voiced grave concerns about the interpretation of home rule authority by the courts,¹³⁶ judicial construction of the "pertaining to" clause still effectuates constitutional intent.¹³⁷ The vagueness of the clause requires that the courts define local matters,¹³⁸ and distinguish municipal affairs from regional and statewide concerns.¹³⁹ The judiciary is the proper body to determine

132. See note 70 *supra* and accompanying text.

133. The political balance, workload burden, and other practical limitations of the General Assembly result in infrequent exercises of its preemption powers. See *Clean State*, *supra* note 59, at 1307.

134. One of the reasons for home rule was to relieve the legislature of its heavy burden of responding to local requests for power. The favorable presumption approach would reimpose this burden, except that the legislature would be responding to local *abuses* of power. See note 21 *supra*.

135. See notes 43-46 *supra* and accompanying text.

136. See notes 120-122 *supra* and accompanying text.

137. *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 540, 338 N.E.2d 15, 17 (1975). See note 45 *supra*. In responding to the question of whether the determination of home rule powers would ultimately depend upon the interpretation of the Illinois Supreme Court, a delegate answered, "Try as we may, we can never escape the state supreme court." 4 REC. OF PROC. 3052.

138. See *Ampersand, Inc. v. Finley*, 61 Ill. 2d 537, 540, 338 N.E.2d 15, 17 (1975). The delegates rejected efforts to precisely define home rule powers by writing into the constitution a "laundry list" setting forth all areas to be designated as of statewide concern or all areas to be designated as being of local concern. *Id.* Parkhurst, *supra* note 53, at 100.

Instead, in anticipation of judicial review, the framers intentionally drafted a vague and uncertain qualifying phrase. See Whalen & Wolff, *supra* note 19, at 65-66 (authors criticize delegates for deferring political solution to various problems to the courts for determination).

139. See text accompanying note 88 *supra*. The courts can thereby assist home rule units in better understanding the reach of their authority.

where the line between local and state affairs is to be drawn.¹⁴⁰

It has been suggested that, in light of *Sexton*, the courts will apply a balancing analysis in the determination of the "pertaining to" question.¹⁴¹ This approach will ensure positive, steady maturation of home rule in Illinois, and avoid the overly restrictive interpretations of home rule authority typical of the courts of other states.¹⁴² Illinois home rule decisions will be based upon the particular interests and factors involved,¹⁴³ and not upon any fictions of legislative intent. Through a balancing analysis of the "pertaining to" question, the courts can exercise an active, leadership role in the development of home rule in Illinois.

The Courts and the Preemption Issue

With respect to the preemption question, however, the role of the courts should be limited.¹⁴⁴ The preemption provisions precisely detail the requirements of legislative exclusion or limitation of home rule powers.¹⁴⁵ Consequently, the courts need only determine whether the legislature has met the constitutional requisites. There is no room for implied preemption or judicial interpretation of legislative intent.¹⁴⁶ Preemption of home rule powers is strictly and solely within the purview of the state legislature.

Accordingly, the *Sexton* court considered whether the Environmental Protection Act preempted home rule environmental regulation.¹⁴⁷ Because the Act did not express the requisite exclusivity intent and, additionally, was enacted prior to the 1970 constitution, the court held that it did not preempt the county zoning ordinance.¹⁴⁸

140. See Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 660 (1964); Krotovil & Ziegweid, *supra* note 29, at 367, 368-69.

141. See notes 108-117 *supra* and accompanying text.

142. See note 65 *supra* and accompanying text.

143. See notes 111-113 *supra* and accompanying text.

144. Much of the discussion in the constitutional debates concerning a limited role of the courts was directly related to the use of implied preemption by the courts of other states. Therefore, it follows that so far as the *preemption* issue is concerned the role of the courts should be limited so as to eliminate the possibility of implied preemption. See, e.g., 4 REC. OF PROC. 3053, 3090-91. See note 122 *supra*.

145. See notes 53-63, *supra* and accompanying text.

146. See notes 64-65, *supra* and accompanying text.

147. 75 Ill. 2d 494, 512-13, 389 N.E.2d 553, 559 (1979).

148. *Id.* See text accompanying note 76 *supra*.

Consideration of Article XI

Ordinarily, the courts need only determine the "pertaining to" and preemption questions in home rule controversies. The *Sexton* court, however, continued its discussion to consider the effect of article XI¹⁴⁹ on home rule regulation of the environment.¹⁵⁰ Such analysis was unnecessary because the issues before the court were already decided.¹⁵¹ Nevertheless, the *Sexton* majority discussed the ramifications of article XI on home rule environmental regulation, and concluded that home rule units must conform with the uniform environmental standards established by the legislature and the state environmental agencies.¹⁵² The court gave precedence to the Environmental Protection Act over non-uniform home rule regulations. This conclusion required re-affirmance of a prior modification of the doctrine of home rule precedence over pre-1970 constitution legislation.¹⁵³

149. . See note 79 *supra*.

150. 75 Ill. 2d 494, 514-15, 389 N.E.2d 553, 559-61 (1979). See notes 79-82 *supra* and accompanying text.

151. The zoning ordinance as applied to the sanitary landfill was determined to be within the county's home rule authority, and this power had not been preempted by the General Assembly. The necessary conclusion to be drawn from these two determinations was that the defendant had to comply with the county ordinance. Therefore, no further discussion was required. See *Carlson v. Briceland*, 61 Ill. App. 3d 267, 377 N.E.2d 1138 (1978). This appellate court decision involved substantially the same facts as *Sexton*, and did not consider the effect of article XI upon home rule zoning control of sanitary landfills. See note 114 *supra*.

152. 75 Ill. 2d 494, 514-15, 389 N.E.2d 553, 559-60 (1979).

153. In *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 322 N.E.2d 11 (1974), the supreme court examined the effect of article XI on home rule environmental regulation, and modified the *Kanellos-Beck* doctrine. The home rule city claimed that its municipal disposal sites and incinerator plants were not subject to the provisions of the Environmental Protection Act because the disposal of garbage is a governmental function within its home rule powers, and the General Assembly had not acted pursuant to the preemption provisions to restrict the city's exercise of these powers. The supreme court held that the city must comply with Environmental Protection Act and the rules adopted pursuant thereto.

This decision thus gave precedence to a state statute enacted prior to the adoption of the constitution over home rule regulation. It is therefore contrary to the line of supreme court decisions which hold that state statutes adopted prior to the 1970 constitution and in conflict with the exercise of home rule powers are without force to the extent of the conflict. See notes 59-60 *supra* and accompanying text. See also *Minetz*, *supra* note 78, at 312; *Froehlich*, *supra* note 34, at 321.

The *City of Chicago* court held that the rule established by *Kanellos* and its progeny does not apply to environmental control because article XI expresses the constitutional intent that the General Assembly should provide leadership and establish uniform standards with regard to pollution control. Therefore, reversing the *Kanellos-Beck* rule in this instance, the Environmental Protection Act prevails over conflicting home rule regulations. 59 Ill. 2d 484, 489, 322 N.E.2d 11, 14 (1974).

Article XI expresses the intention of the constitution's drafters that the General Assembly play a leadership role and form a coordinated plan of action in the fight against environmental pollution.¹⁵⁴ The supreme court should have discussed article XI as one element in its balancing analysis of the "pertaining to" question. The need for state legislative leadership and uniform standards, as expressed by article XI, should be additional factors considered in determining whether a home rule environmental regulation pertains to local government and affairs. Although these factors would weigh against the local exercise of power, they may not be determinative.

Indeed, if the *Sexton* court had incorporated the discussion of article XI in its balancing analysis, the result would have been the same. The zoning ordinance involved in *Sexton* posed no threat to article XI's uniformity goal. Moreover, the county regulation did not present an irreconcilable conflict with the state environmental regulations.¹⁵⁵ Thus, the home rule activity did not unreasonably interfere with state uniform standards.¹⁵⁶ Therefore, the county ordinance would still have been valid as pertaining to the unit's gov-

154. *Id.* at 488, 322 N.E.2d at 14; 6 REC. OF PROC. 700; 75 Ill. 2d 494, 514, 389 N.E.2d 553, 559 (1979).

155. This fact distinguishes *Sexton* from *City of Chicago v. Pollution Control Bd.* In *City of Chicago*, the home rule unit was operating a refuse disposal site in violation of provisions of the Environmental Protection Act and rules established by the state agencies. The controversy concerned a direct conflict between a home rule unit and the state. In *Sexton*, the home rule ordinance did not directly contravene any state environmental regulations.

Still, there was a more subtle element of conflict in *Sexton*. The Environmental Protection Agency had issued its permit for the location and operation of the landfill. The county prohibited the same unless *Sexton* complied with its zoning ordinance. Nonetheless, the conflict in *Sexton* did not present unreasonable interference with the state environmental protection plan.

156. Under the balancing analysis, a local ordinance which poses unreasonable interference with state environmental regulations would not pertain to the home rule unit's government and affairs. The state environmental regulation would then prevail over the ordinance. In view of the unreasonable interference caused by the ordinance, it would be determined that the challenged ordinance does not pertain to local government and affairs, and thus is invalid. It is therefore unnecessary to modify the well established rule that *valid* home rule regulation prevails over prior conflicting state statutes. Since the challenged ordinance is determined to be not within the home rule power, it would not be necessary to consider the preemption issue.

The *Sexton* court concluded that the power of the Pollution Control Board to set uniform environmental standards and the power of the county to zone property within its boundaries are concurrent powers, but they "must be exercised cooperatively in the interest of environmental protection." 75 Ill. 2d 494, 516, 389 N.E.2d 553, 560 (1979) (emphasis added). Where the home rule ordinance conflicts with state standards, it should be held invalid as not within the scope of the home rule unit's powers.

ernment and affairs.

Article XI is a proper subject of consideration when a home rule activity relating to environmental control is challenged. Its consideration, however, should be as an element in the balancing test. In the case of *Sexton*, such an analysis would have achieved the same result, and the court could have avoided endorsement of the earlier modification of an otherwise well-established doctrine.

APPLICATION OF THE BALANCING ANALYSIS

The *Sexton* court's balancing analysis has import for home rule issues outside the environmental field. The flexible analysis of the "pertaining to" question and a strict interpretation of preemption should lead to a positive evolution of home rule powers. The following illustrations exemplify the application of this two-pronged test for home rule power. Both of the fact situations demonstrate the tensions between local and regional or statewide interests. In the second hypothetical, however, the balancing analysis shows the broader interests to be more compelling than the local interests and, thus, the home rule action is barred.

*Home Rule Rent Control Ordinance*¹⁵⁷

Assume that an Illinois home rule municipality enacts an ordinance providing for the regulation of rents in all residential housing with four or more units within the corporate limits of the city. The home rule city enacts this ordinance after determining that an inflationary spiral in residential rent rates and a housing shortage exists throughout the city. The city concludes that these problems require the control and regulation of rents. Assume further that no state statute expressly limits or excludes the power of home rule units to impose regulatory controls on residential rent rates.

Several lessors, directly affected by the ordinance, file suit seeking a declaratory judgment and injunctive relief. The lessors claim that the city lacks the constitutional power to enact a rent control ordinance because rent control is not a matter pertaining to the city's government and affairs. The lessors argue that rent control

157. The Local Government Committee Report contains twenty examples illustrating the application of proposed article VII. One example concerns a rent control ordinance enacted by a home rule unit. The Report states that the ordinance pertains to the unit's government and affairs, but the committee does not explain its conclusion. See 7 REC. OF PROC. 1652.

This illustration indicates that the balancing analysis supplies the rationale for the committee's conclusion.

affects the landlord-tenant relationship, which is a matter of state-wide concern. The plaintiffs further contend that even if the challenged ordinance is within the city's home rule powers, state legislation regulating the landlord-tenant relationship preempts home rule regulation in this field.¹⁵⁸

The initial question to be addressed is whether the rent control ordinance pertains to the home rule unit's government and affairs.¹⁵⁹ To answer this question, the balancing analysis can be applied. Relevant factors to be considered are: (1) state regulation of the landlord-tenant relationship, and (2) the interests of the home rule city in rent control. The ordinance does not involve any impact upon other municipalities or citizens outside the home rule city. Therefore, extraterritorial impact is not a relevant consideration.

It has been generalized that landlord-tenant matters are inherently reserved for the state alone,¹⁶⁰ but this conclusionary reasoning fails to explain why such matters are subject solely to state-wide control.¹⁶¹ With the balancing approach, the state interest in regulating the landlord-tenant relationship is weighed against the interests of the home rule city. Here, the home rule unit institutes rent control to cope with the compounded urban problems of rent inflation and housing shortage. A rent control ordinance can immediately and effectively remedy the harm done by lack of housing and skyrocketing rents.¹⁶² Moreover, the ordinance is not contrary to any statutory provisions relating to the landlord-tenant relationship.¹⁶³ Rather, the ordinance merely supplements the state law.¹⁶⁴

158. These facts are substantially the same as in *City of Miami Beach v. Fleetwood Hotel, Inc.* 261 So.2d 801 (Fla. 1972). The Supreme Court of Florida held the home rule city ordinance constitutionally invalid. The court ruled that the landlord-tenant relationship is a matter inherently reserved for the state alone, and is not a proper subject for local treatment. See note 161 *infra* and accompanying text.

159. See notes 43-44 *supra* and accompanying text.

160. *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801, 804 (Fla. 1972). See note 158 *supra*.

161. See generally *Clean Slate*, *supra* note 59, at 1310.

162. *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801, 810 (Fla. 1972)(Ervin, J., dissenting).

163. There is no state statute that involves rent control.

164. The *Miami Beach* majority determined, however, that the rent control ordinance conflicted with, among others, a state statute providing that a tenancy may be terminated at will upon giving of specified notice. *Id.* at 806.

Even if a conflict between state law and the ordinance were found to exist in the illustration, this would just be an additional factor to be considered and should not be determinative. See note 112 *supra* and accompanying text.

All of these factors weigh in favor of the rent control ordinance pertaining to the government and affairs of the city. Therefore, the rent control ordinance should fall within the scope of the city's home rule power.

If rent control is within the city's home rule powers, the ordinance is a proper exercise of power if not preempted. The issue of whether the home rule power to enact this ordinance has been preempted by the General Assembly is easily resolved. No state statute enacted since 1970 has expressly limited the power of home rule units to enact rent control ordinances or any other regulations concerning the landlord-tenant relationship. Mere state occupation of the landlord-tenant field may not preempt home rule activity.¹⁶⁵ Therefore, the home rule ordinance should be upheld. The municipality has the constitutional power to enact the ordinance and this power has not been preempted by the General Assembly.

Home Rule Zoning Ordinance Applied to a Public Utility

Assume Home Rule City comprehensively amends its zoning laws pursuant to its home rule powers. An amended zoning ordinance provides that no structure supporting a high voltage electrical transmission line shall exceed 100 feet in height unless a special use permit is issued by the city Zoning Board of Appeals. The city zoning laws are amended for the express purpose of promoting the orderly development of industrial, commercial, and residential zones in the interests of public welfare and safety.

Assume further that in an effort to expand and improve its regional services, Electric Company wishes to run a high voltage electrical transmission line from one power plant outside Home Rule City to another plant located outside the city. Neither plant serves Home Rule City, but the route of the overhead transmission line will cross over Home Rule City. Furthermore, Electric Company's plans call for the line to be supported by towers averaging 140 feet in height. Several of these towers are to be located within Home Rule City. All of Electric Company's plans, including the construction of 140-foot towers in Home Rule City, have been approved by the Illinois Commerce Commission. Legislation enacted prior to 1970 vested this state agency with exclusive regulatory power over the instrumentalities of all public utilities within the state.¹⁶⁶

165. See notes 61, 64-65 *supra* and accompanying text.

166. This agency has traditionally exercised control and supervision over the public utility business. See *City of Chicago v. Hastings Express Co.*, 369 Ill. 610, 17 N.E.2d 576 (1938);

Electric Company's application for a special use permit to construct the 140-foot towers within Home Rule City is denied by the city Zoning Board of Appeals. The Zoning Board cites aesthetic considerations for its refusal to grant the permit. Electric Company then brings suit to have the zoning ordinance declared unconstitutional. Electric Company asserts that public utility service is a statewide concern as evidenced by the pervasive, long-standing state regulation in the area by the Illinois Commerce Commission, and, therefore, does not pertain to Home Rule City's government and affairs. No question of preemption is raised.¹⁶⁷

Many of the factors involved in *Sexton* are also present in this fact situation. Like the statewide environmental protection standards in *Sexton*, this case involves a statewide program of utility regulation. Although, as in *Sexton*, the ordinance is not a direct regulatory imposition upon other units of local government, other communities are affected. Thus, the interests of other municipalities and persons outside of Home Rule City who are to be served by the power plants must be considered. Likewise, the interests of Home Rule City in this zoning regulation must also be weighed. Finally, additional factors include historical considerations and the element of conflict.¹⁶⁸

Despite the factual similarity to *Sexton*, a weighing of the factors indicates that the ordinance is not within the scope of Home Rule City's section 6(a) powers.¹⁶⁹ This home rule regulation is inimical to the greater interests of the regions served by the two plants. Home Rule City's zoning ordinance interferes with the interests of the regions to be benefitted by the transmission lines.¹⁷⁰

Hemphill v. Wabash Ry., 209 F.2d 768 (7th Cir. 1954).

167. These facts are similar to those of a Michigan Court of Appeals case. The Michigan court, however, considered only the issue of preemption. The court held that the state legislature had not granted exclusive authority to the state public service commission to regulate public electric utilities, and the local zoning regulation was upheld. Significantly, however, the Michigan court also emphasized that the local power must be exercised "reasonably", having regard for local conditions and the importance of electric power development in the state. *Detroit Edison Co. v. City of Wixom*, 10 Mich. App. 218, 159 N.W.2d 230 (1969), *rev'd on other grounds*, 382 Mich. 673, 172 N.W.2d 382 (1969). Compare, *New England LNG Co. v. City of Fall River*, 331 N.E.2d 536 (Mass. 1975).

168. The element of conflict in this situation is similar to that in *Sexton*. See note 155 *supra*. The state has granted its permission for the construction of the towers within Home Rule City. The city ordinance prohibits this construction.

169. Nevertheless, neither extraterritorial impact of the ordinance nor the existence of state regulation in the utility field are solely determinative. See notes 107-110 *supra* and accompanying text.

170. In this fact situation, the home rule regulation is unreasonably adverse to the inter-

Electric Company and the Commerce Commission would be unable to improve and expand electrical service in these areas if the city ordinance were upheld.¹⁷¹ The city does have a valid interest in promulgating a master plan for the orderly development of the city and it claims that the aesthetic harms presented by 140-foot towers would disrupt this plan. The interests of the regions to be served and the interests of the state in providing adequate utility service to these areas, however, clearly outweigh the interests of Home Rule City. Therefore, Home Rule City's zoning ordinance is invalid because it does not pertain to its government and affairs.

Other regulation of utility instrumentalities, however, may still pertain to Home Rule City's government and affairs. Home Rule City may, within its home rule power, charge Electric Company with the responsibility of meeting reasonable standards of construction, filing its plans with the city, and providing the city with other information to allow for the proper administration of home rule police powers.¹⁷² Only those home rule regulations or ordinances that the weighing process indicates unreasonably interfere with the greater interests of other areas or with state regulation are outside the scope of Home Rule City's section 6(a) authority.

CONCLUSION

The ramifications of *County of Cook v. John Sexton Contractors Co.* extend far beyond the narrow issue resolved in that case. The *Sexton* decision indicates that the Illinois Supreme Court has adopted a balancing analysis in its construction of the crucial "pertaining to its government and affairs" clause of section 6(a). This analysis signifies the court's rejection of a rigid "effects" test in favor of a more flexible approach. The supreme court's flexible approach is consistent with the constitution's mandate of liberal construction of home rule powers.¹⁷³ The balancing analysis ensures the positive evolution of home rule in Illinois. Moreover, a weighing process interpretation of the scope of home rule powers places the courts in a leadership role in assuring the continued growth of

ests of other communities. This is not to say that *all* home rule regulation of a public utility is inimical to the interests of others served by the utility. See *Graham Farms, Inc. v. Indianapolis Power & Light Co.*, 233 N.E.2d 656, 666 (Ind. 1968); text accompanying note 172 *infra*.

171. This conclusion may, however, depend upon whether as a practical matter an alternative route would be possible or whether its costs would be prohibitive.

172. See *Chugach Elec. Ass'n v. City of Anchorage*, 476 P.2d 115, 123 (Alas. 1970).

173. Ill. Const. art. VII, § 6(m).

home rule. Through the balancing analysis, the courts will protect the freedom of home rule units to unilaterally combat their various local problems,¹⁷⁴ but still insure that home rule does not degenerate into city-state provincialism. Thus, the supreme court's balancing analysis of the threshold, "pertaining to" question is a welcomed development.

The *Sexton* court's consideration of the second, preemption issue, however, raises some objections. The court should have discussed article XI in deciding the initial "pertaining to" question. This would have allowed the court to abstain from qualifying the general rule that home rule ordinances prevail over state statutes enacted prior to the adoption of the 1970 constitution. Preemption is solely the prerogative of the General Assembly and should not be implied by the courts, even if the implication is based upon a constitutional provision. Because *Sexton's* discussion of preemption concerns article XI, that decision should not be viewed as authority for further qualification of the doctrine of home rule precedence over prior conflicting statutes. This portion of *Sexton*, then, should be strictly limited to the area of environmental control.

Contrariwise, the balancing analysis of the "pertaining to" question applies beyond environmental issues. The above illustrations demonstrate the utility of the balancing test in other areas. This analysis guarantees that the power to regulate granted by section 6(a) will be liberally construed. Home rule power, however, will not be permitted to unreasonably interfere with the predominant interests of areas outside the local unit and of the state.

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174. In stark contrast to their position prior to home rule, the courts can now assist in the battle against urban blight. See notes 14-16 *supra* and accompanying text.

