

# A New Approach to Home Rule in Illinois - County of Cook v. John Sexton Contractors Co.

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## A NEW APPROACH TO HOME RULE IN ILLINOIS— COUNTY OF COOK V. JOHN SEXTON CONTRACTORS CO.

Prior to the adoption of Article VII of the 1970 Illinois Constitution (Article VII), the General Assembly governed the affairs of local government pursuant to a rule of legislative supremacy often referred to as Dillon's Rule.<sup>1</sup> This rule authorizes a municipality to exercise only those powers expressly or implicitly granted or those indispensable to its declared objectives.<sup>2</sup> Under this common law doctrine, a municipality is dependent upon the legislature for the granting of any new powers.<sup>3</sup>

The drafters of the 1970 Illinois Constitution, however, favored a grant of authority to municipalities to exercise governmental power without prior authorization by the state legislature.<sup>4</sup> In constitutional and statutory law this right of local self-government is referred to as home rule.<sup>5</sup> Home rule was

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1. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, 7 RECORD OF PROCEEDINGS 1603-04 (1972) [hereinafter cited as PROCEEDINGS]; Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137 (1972) [hereinafter cited as Baum]. This rule is aptly titled Dillon's Rule because it was first enunciated in definitive form by Judge John F. Dillon of the Iowa Supreme Court. *Id.* at 137. See also 1 J. DILLON, MUNICIPAL CORPORATIONS 448-50 (5th ed. 1911) [hereinafter cited as DILLON].

2. Dillon's Rule 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 or fairly implied 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 indispensable.

DILLON, *supra* note 1, at 448-50 (emphasis in original). For applications of this rule, see *Strub v. Village of Deerfield*, 19 Ill. 2d 401, 167 N.E.2d 178 (1960) (although given no express authority to do so, a municipality can limit the number of scavenger licenses issued under its ordinance regulating the collection of garbage); *Concrete Contractors' Ass'n v. Village of LaGrange Park*, 14 Ill. 2d 65, 150 N.E.2d 577 (1958) (the power of a municipality to license a cement contractor is implied in its express power to establish and maintain its streets and sidewalks); *Consumers Co. v. City of Chicago*, 313 Ill. 408, 145 N.E. 114 (1924) (the express power to dispose of garbage includes the power to create and use the necessary means to accomplish this). See *Ives v. City of Chicago*, 30 Ill. 2d 582, 198 N.E.2d 518 (1964) (an ordinance of the city to license and regulate building contractors was not derived from an express grant of authority or one necessary and incidental to such powers and thus was declared invalid and void).

3. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 653-54 (1964) [hereinafter cited as Sandalow]. See also PROCEEDINGS, *supra* note 1, at 1603; Biebel, *Home Rule in Illinois After Two Years: An Uncertain Beginning*, 6 J. MAR. J. OF PRAC. AND PROC. 253, 254 (1973).

4. PROCEEDINGS, *supra* note 1, at 1605. A broad grant of municipal powers through the mechanism of home rule has been favored almost without exception by modern students of municipal affairs. Sandalow, *supra* note 3, at 652.

5. BLACK'S LAW DICTIONARY 866 (rev. 4th ed. 1968). As a legal doctrine, home rule is "a particular method for distributing power between state and local governments." Sandalow, *supra* note 3, at 645.

Over the years, "the concept of home rule [has been] beset with a multitude of meanings and implications, with little or no unanimity of agreement in respect to its basic component factors but with a predominant . . . central idea that its objective is to secure greater powers of local

adopted in Illinois to broaden the powers of local governments and to enable them to contribute effectively to solving the many problems created by the increasing urbanization of our society.<sup>6</sup>

Article VII, therefore, represents a departure from Dillon's Rule of legislative supremacy.<sup>7</sup> It provides that a home rule unit, unless specifically limited by the General Assembly, is entitled to "exercise any power and perform any function pertaining to its government and affairs."<sup>8</sup> Indeed, the language of this article was intended to confer upon home rule units the broadest possible range of powers to deal with local problems.<sup>9</sup>

Recently, the Illinois Supreme Court reviewed the scope of a home rule unit's power to require compliance with its zoning ordinance in an area also subject to regulation by the Illinois Environmental Protection Agency (IEPA).<sup>10</sup> In *County of Cook v. John Sexton Contractors Co.*,<sup>11</sup> the court

government to municipalities." CHICAGO HOME RULE COMM'N, CHICAGO'S GOVERNMENT: ITS STRUCTURAL MODERNIZATION AND HOME RULE PROBLEMS 195 (1954). Even as early as 1919, a draft of a municipal home rule provision was presented by the Legislative Reference Bureau to the framers of the 1920 constitutional convention. LEGISLATIVE REFERENCE BUREAU, 6 CONSTITUTIONAL CONVENTION BULLETINS 426-28 (1920).

Home rule provisions are varied among the more than 40 states that have adopted such a system. Froehlich, *Home Rule and Intergovernmental Cooperation and Conflict*, in 2 ILLINOIS MUNICIPAL LAW § 22.2 (S. Diamond ed. 1978) [hereinafter cited as Froehlich]. All provisions, however, do vest greater authority in the local government officials and citizens "to determine the powers, functions, structure, and organization of local government units with corresponding greater freedom from legislative provision and control." PROCEEDINGS, *supra* note 1, at 1604.

In Illinois, any county or other municipality which has a population exceeding 25,000 is automatically a home rule unit unless it elects not to be one. ILL. CONST. art. VII, § 6(a). Municipalities with a population of less than 25,000 may elect by referendum to become home rule units. *Id.* The latest available data reveals 91 home rule municipalities and one home rule county (Cook County) in Illinois. Of the 91 municipalities that are home rule units, 23 achieved this status by referenda. Based on population growth projections, an additional 23 municipalities will become home rule units by 1980. Froehlich, *supra* at §§ 27.17-18, § 22.26.

6. PROCEEDINGS, *supra* note 1, at 1605. Although the need for increased powers of local government to meet the problems of urbanization was the primary motive to establish home rule, the Local Government Committee of the Sixth Illinois Constitutional Convention also favored a strengthening of local government for other reasons:

[Local government] is closer to the people it serves than are other forms of government and, as a result, on balance is likely to be more responsible to the citizenry, more sensitive to community needs and more efficient and effective in meeting these needs. In addition, balancing the powers of local governments will reduce the number of bills dealing with local matters that now overburden the General Assembly, will strengthen the role of local officials in determining local issues and diminish the power of state legislators who are less familiar with local conditions, and reduce the amount of state control over local affairs.

*Id.* at 1605-06.

7. Baum, *supra* note 1, at 138.

8. ILL. CONST. art. VII, § 6(a).

9. PROCEEDINGS, *supra* note 1, at 1605.

10. The Illinois Environmental Protection Agency was established pursuant to the Environmental Protection Act, effective July 1, 1970. ILL. REV. STAT. ch. 111½, § 1004 (1977). It is the purpose of the Act, which is administered by the IEPA, "to establish a unified, statewide

held that, although the IEPA had issued a permit for the operation of a privately-owned sanitary landfill, Cook County, as a home rule unit, could require that the landfill owners also conform to the county zoning ordinance. Prior to this decision, the Illinois Supreme Court had not reviewed this issue in this precise manner.<sup>12</sup>

This Note attempts to resolve the apparent inconsistency between the result reached in *Sexton* and the results of earlier Illinois Supreme Court decisions on environmental regulation.<sup>13</sup> In addition, the Note considers the range of powers intended to be granted by the Article VII language, "pertaining to its government and affairs", in light of this recent decision.<sup>14</sup> Finally, the Note determines the extent to which State law has preempted a county's home rule powers in this area and the extent to which such powers may be exercised concurrently.<sup>15</sup>

#### THE SEXTON FACTS AND PROCEDURAL HISTORY

John Sexton Contractors Co. had developed and was attempting to operate a sanitary landfill on an eighty-five acre tract of land in an unincorporated portion of Cook County.<sup>16</sup> Although the IEPA had issued developmental and operational permits to Sexton,<sup>17</sup> the landfill site was zoned as an R-4

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program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." *Id.* §§ 1001-1004.

11. 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

12. Although the regulation of sanitary landfills by non home rule units had been addressed in *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975), and *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972), *Sexton* is the first Illinois Supreme Court decision since *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d 484, 322 N.E.2d 11 (1974), to address a home rule unit's power to so regulate. *See* notes 47-50 and accompanying text *infra*. In *City of Chicago* the issue involved the home rule unit's refusal to comply with the provisions of the Act; the case did not address the power of a home rule unit to require compliance with its zoning ordinance subsequent to issuance of a permit by the operators of the landfill.

13. *See* notes 32-50 and accompanying text *infra*.

14. ILL. CONST. art. VII, § 6(a).

15. The doctrine of preemption originally was applied only in federal cases where the court found that a particular matter was of such a national character that federal law should take precedence over state law. *See, e.g.*, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), *Hines v. Davidowitz*, 312 U.S. 52 (1941), *Glen Ellyn Sav. and Loan Ass'n v. Tsoumas*, 71 Ill. 2d 493, 377 N.E.2d 1 (1978). State legislatures may preempt local governments in a similar manner. S. GIFIS, LAW DICTIONARY 158 (1975). *See, e.g.*, *Ampersand, Inc., v. Finley*, 61 Ill. 2d 537, 338 N.E.2d 15 (1975); *Kanellos v. County of Cook*, 53 Ill. 2d 161, 290 N.E.2d 240 (1972); *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 388 N.E.2d 432 (1972). *See also* Niro, *Illinois Environmental Law—State Preemption of Local Governmental Regulation of Pollution Related Activities*, 67 ILL. B.J. 118 (1978).

16. 75 Ill. 2d at 502-03, 389 N.E.2d at 554.

17. *Id.* Pursuant to the Act, the IEPA is authorized to issue permits and the Illinois Pollution Control Board is empowered to promulgate regulations requiring permits for a wide variety of activities. ILL. REV. STAT. ch. 111½ § 1039-40 (1977). Both construction and operating permits for sanitary landfill facilities are specifically provided for in the Act. *Id.* § 1021(e).

single-family residential district pursuant to Cook County's zoning ordinance.<sup>18</sup> Because this particular classification does not permit the operation of a sanitary landfill, Cook County brought suit for injunctive relief to enforce its home rule zoning ordinance against Sexton.<sup>19</sup> In the meantime, responding to a complaint filed by the Village of Richton Park (Village), the Illinois Pollution Control Board (Board) held hearings to review Sexton's actions.<sup>20</sup> As a result, Sexton then added the Board and the Village as additional counter-defendants.<sup>21</sup>

The Circuit Court of Cook County determined that it, rather than the Board, had jurisdiction over the matter, and it enjoined further Board proceedings.<sup>22</sup> The court then ruled that the Environmental Protection Act preempted any authority of home rule units to regulate the location of sanitary landfills,<sup>23</sup> and it enjoined the County from interfering with Sexton's sanitary landfill operation.<sup>24</sup> The County, the Board, and the Village separately appealed. Pursuant to an Illinois Supreme Court Rule, the case was transferred directly to the Illinois Supreme Court.<sup>25</sup>

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18. The Cook County Zoning Ordinance pertinent to a single family residential district is the R-4 classification which provides that "[a]ll uses not expressly authorized . . . are expressly prohibited." COOK COUNTY ZONING ORDINANCE, COOK COUNTY, ILL. § 4.57 (1976).

19. Specifically listed as an example of a prohibited use under this category is use as a landfill or dump. *Id.*

20. 75 Ill. 2d at 503, 389 N.E.2d at 554.

21. Sexton was granted leave to amend its counterclaim and named the Village and Board as counter-defendants. 75 Ill. 2d at 504, 389 N.E.2d at 554.

22. The circuit court entered and issued an order declaring Board Procedural Rule 503(a) and Solid Waste Rule 205(j) invalid on the grounds that the Board, in adopting these rules, exceeded the authority granted to it by the Act. *Id.* at 504, 389 N.E.2d at 555. Illinois Pollution Control Board Procedural Rule 503(a) provides:

Any person may file a Complaint seeking revocation of a permit on the ground that it was issued by the Agency in violation of the Act, or the Regulations, or of a Board Order, or seeking a cease-and-desist order against the activity described in the permit on the ground that it would cause a violation of the Act, or the Regulations, or of a Board Order . . . .

ILLINOIS POLLUTION CONTROL BOARD, RULES AND REGULATIONS, ch. 1: Procedure, Rule 503(a).

Illinois Pollution Control Board Solid Waste Rule 205(j) provides that "(a)ny person adversely affected by the issuance of a permit may petition the Board for a hearing, before the Board to contest the issuance by the Agency." *Id.* ch. 7: Solid Waste, Rule 205(j).

23. 75 Ill. 2d at 504, 389 N.E.2d at 555.

24. *Id.*

25. Illinois Supreme Court Rule 302(b) provides:

After the filing of the notice of appeal to the Appellate Court in a case in which the public interest requires prompt adjudication by the Supreme Court, the Supreme Court or a justice thereof may order that the appeal to be taken directly to it [*sic*]. Upon the entry of such an order, any documents already filed in the Appellate Court shall be transmitted by the clerk of that court to the clerk of the Supreme Court. From that point the case shall proceed in all respects as though the appeal had been taken directly to the Supreme Court.

ILL. REV. STAT. ch. 110a, § 302(b) (1977).

## THE SEXTON DECISIONS

The Illinois Supreme Court reversed the lower court decision that the Act preempted the authority of home rule units to regulate the location of sanitary landfills.<sup>26</sup> In deciding this issue, the court first distinguished prior decisions involving non home rule units and concluded that a statutory approach must be used when a home rule unit is involved.<sup>27</sup> Next, the court reviewed the statutory authority of home rule units and concluded that regulation of sanitary landfills is a proper exercise of this power.<sup>28</sup> In reaching this conclusion, the court distinguished from the *Sexton* situation precedent involving home rule units that attempted regulation beyond the home rule unit boundaries.<sup>29</sup> The court analyzed the methods by which the home rule power may be preempted and then decided that the Act had failed to preempt the home rule unit's power.<sup>30</sup> Thus, *Sexton* established that a sanitary landfill must comply with both the standards prescribed for issuance of an IEPA permit and the applicable Cook County zoning ordinance.<sup>31</sup>

*Prior Decisions Involving Municipal Regulation*

Prior Illinois Supreme Court decisions involving the regulation of environmental control facilities by municipalities involved two types of governmental units—non home rule and home rule units. These earlier decisions provide a split of authority. One line of cases involves regulation of sanitary landfills by non home rule units and questions the extent of their authority to legislate concurrently with the IEPA.<sup>32</sup>

In *O'Connor v. City of Rockford*,<sup>33</sup> the court held that a city's use of a site as a sanitary landfill should not be dependent upon issuance of a conditional use permit by the County. To do so "contravene(s) the clearly expressed legislative intent that such operations be conducted only upon issuance of a permit from the Environmental Protection Agency."<sup>34</sup> This case was

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26. 75 Ill. 2d at 517, 389 N.E.2d at 561. The Illinois Supreme Court also affirmed the circuit court's enjoining further proceedings before the Board. *Id.* at 504-05, 517, 389 N.E.2d at 555, 561.

27. *Id.* at 505-07, 389 N.E.2d at 555-56.

28. *Id.* at 507-12, 389 N.E.2d at 556-59.

29. *Id.* at 509-10, 512, 389 N.E.2d at 557, 558-59. For a sampling of these cases, see notes 40-46 and accompanying text *infra*.

30. *Id.* at 513-14, 389 N.E.2d at 559. See notes 60-65 and accompanying text *infra* for a discussion of the methods by which the home rule power may be preempted.

31. 75 Ill. 2d at 516-17, 389 N.E.2d at 560-61.

32. *Carlson v. Village of Worth*, 62 Ill. 2d 406, 343 N.E.2d 493 (1975); *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972).

33. 52 Ill. 2d 360, 288 N.E.2d 432 (1972). In *O'Connor*, the City of Rockford maintained that it was entitled to operate a sanitary landfill on a tract of land outside the city limits without complying with Winnebago County's zoning ordinances. The court held that the County could not prohibit such use, since the clearly-expressed legislative intent is that operation of a sanitary landfill be conducted only upon issuance of a permit from the IEPA. *Id.* at 361, 367, 288 N.E.2d at 432, 436.

34. *Id.* at 367, 288 N.E.2d at 436.

followed by the 1975 decision of *Carlson v. Village of Worth*.<sup>35</sup> Subsequent to the issuance of an IEPA permit to the plaintiff to install and operate a sanitary landfill, the Village passed an ordinance also requiring compliance with its permit procedures.<sup>36</sup> The court concluded that local registration was preempted by State legislation in this matter.<sup>37</sup>

These cases are not indicative of the majority view in *Sexton* that, at least in the case of a home rule unit, a sanitary landfill must comply with both municipal and state regulation.<sup>38</sup> The *Sexton* court viewed these previous decisions as distinguishable precedent since both municipalities involved were non home rule units.<sup>39</sup>

The other line of authority deals with cases involving home rule units. In *Metropolitan Sanitary District v. City of Des Plaines*,<sup>40</sup> the supreme court rejected the contention that regulation of a sewage treatment plant by the City of Des Plaines was within its home rule power. This case did involve a home rule unit, but the City of Des Plaines represented only a part of the geographic region to be served by the facility.<sup>41</sup> The sewage treatment plant served six other municipalities, some of which were themselves home rule units.<sup>42</sup> *Sexton* was distinguished from this case because it did not involve "a regional governmental district seeking to create a facility to serve a specific region, with a part of that region attempting to regulate the facility."<sup>43</sup>

In a later decision, *City of Des Plaines v. Chicago and Northwestern Railway Co.*,<sup>44</sup> the court ruled that noise pollution is a matter requiring regional if

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35. 62 Ill. 2d 406, 343 N.E.2d 493 (1975).

36. *Id.* at 407-08, 343 N.E.2d at 494.

37. *Id.* at 408, 343 N.E.2d at 495. See note 15 *supra* for a discussion of preemption.

38. 75 Ill. 2d at 516-17, 389 N.E.2d at 561.

39. *Id.* at 505-07, 389 N.E.2d at 555-56. Justice Ryan, who rendered a vigorous dissent in *Carlson*, concurred in *Sexton*, stating that *Carlson* is a case of "questionable precedential value." *Id.* at 520, 389 N.E.2d at 562.

40. 63 Ill. 2d 256, 347 N.E.2d 716 (1976). The City of Des Plaines, with a 1970 population exceeding 50,000, automatically qualified as a home rule unit. Froehlich, *supra* note 5, at § 22.17.

41. 63 Ill. 2d at 260-61, 347 N.E.2d at 718-19.

42. *Id.*

43. 75 Ill. 2d at 510, 389 N.E.2d at 557. Chief Justice Goldenhersh, in his dissent, relied on *Metropolitan Sanitary District* to dispute the majority's conclusion that "control of landfills is a function pertaining to the government and affairs of a local unit of government." *Id.* at 522, 389 N.E.2d at 563 (Goldenhersh, C.J., dissenting). He failed to address, however, the precise issue on which the majority distinguished this case—*Sexton* did not involve a home rule unit attempting to regulate a facility that was designed to serve an area embracing other home rule units. *Id.* at 510, 389 N.E.2d at 557. Justice Underwood, who delivered the majority decision in *Metropolitan Sanitary District*, rendered a concurring opinion in *Sexton*, albeit with some reservation as to the distinguishability of *Metropolitan Sanitary District* and *Sexton*. *Id.* at 517-19, 389 N.E.2d at 561-62 (Underwood, J., concurring).

44. 65 Ill. 2d 1, 357 N.E.2d 433 (1976).

not statewide standards, and that therefore the city may not enforce its noise control ordinance. Because the ordinance was intended to control noise emissions originating beyond the city's boundaries, the home rule power was exceeded.<sup>45</sup> Because the zoning ordinance at issue in *Sexton* only restricted the use of land *within* the home rule unit's boundaries, the supreme court rejected this precedent.<sup>46</sup>

The *Sexton* court did rely extensively, however, on *City of Chicago v. Pollution Control Board*,<sup>47</sup> a 1974 Illinois Supreme Court decision involving a factual situation very similar to that in *Sexton*—the regulation of sanitary landfills by a home rule unit. *City of Chicago* concluded that "a local governmental unit may legislate concurrently with the General Assembly on environmental control."<sup>48</sup> Prior to *Sexton*, this conclusion had been reduced to the status of dictum by *Carlson*.<sup>49</sup> The majority in *Sexton*, however, clearly adopted this reasoning, at least insofar as home rule units are concerned.<sup>50</sup>

#### *Statutory Authority of Home Rule Units*

A review of the statutory authority on this subject reveals that regulation of sanitary landfills by Cook County comes within the ambit of its home rule powers only if such regulation "pertain(s) to its government and affairs."<sup>51</sup>

45. *Id.*

46. 75 Ill. 2d at 512, 389 N.E.2d at 558-59. The decision in *Northwestern Ry.* did not indicate that the ordinance in issue attempted to regulate the *sites* of noise pollution. The issue in that case concerned the regulation of the noise itself, which extended beyond the home rule boundaries. In contrast, the zoning ordinance in *Sexton* is not aimed at regulating any aspect of a landfill *except for* the site itself. Reply Brief and Argument for Plaintiff-Counter-Defendant-Appellant, County of Cook at 4, County of Cook v. John Sexton Contractors Co., 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

47. 59 Ill. 2d 484, 322 N.E.2d 11 (1974).

48. *Id.* at 489, 322 N.E.2d at 14-15.

49. The *Carlson* court considered this statement as dictum because "[n]o issue relating to the power of a municipality to legislate concerning environmental control was before the court, and certainly it was not intended to overrule the decision of this court in the *O'Connor* case." 62 Ill. 2d at 409, 343 N.E.2d at 495. As previously noted, however, both *Carlson* and *O'Connor* involved non home rule units and as such are limited by *Sexton* in their applicability. See note 39 and accompanying text *supra*.

50. 75 Ill. 2d at 507, 389 N.E.2d at 556. See also *Carlson v. Briceland*, 61 Ill. App. 3d 247, 251, 377 N.E.2d 1138, 1142 (1st Dist. 1978), in which the Illinois Appellate Court adhered to the Supreme Court holding in *City of Chicago*, noting that "there is no clear-cut precedent eliminating Cook County's home rule authority over the location of refuse disposal operations."

51. ILL. CONST. art. VII, § 6(a). The "pertaining to" language of section 6(a) originally was designed to restrict home rule powers to matters local in nature. Baum, *supra* note 1, at 153. The Local Government Committee, in its proposal to the Illinois Constitutional Convention, stated that "the powers of home rule units relate to their own problems, not to those of the state or nation. . . . Thus, the proposed grant of powers to local governments extends only to matters 'pertaining to their government and affairs'." PROCEEDINGS *supra* note 1, at 1621. The inclusion of these words in the home rule grant was not a matter of controversy, and the language suggested by the majority was accepted without dispute. *Id.* at 1853-1942.



There is no question that this language limits the home rule power; at issue is the extent of this limitation.<sup>52</sup>

The drafters of the 1970 Illinois Constitution intended to ensure that home rule units "receive directly under the Constitution the broadest possible range of powers to deal with problems facing them and with demands that are made upon them."<sup>53</sup> This intent is reiterated in section 6(m) of Article VII, which states that "powers and functions of home rule units shall be construed liberally."<sup>54</sup>

The *Sexton* majority rejected the appellee's contention that a home rule unit may not regulate sanitary landfills.<sup>55</sup> Relying not only on the legislative history of the Constitution,<sup>56</sup> but also on the court's earlier decisions involving regulation of garbage disposal,<sup>57</sup> the court concluded that "the County's zoning restrictions regarding sanitary landfills pertain(s) to its government and affairs."<sup>58</sup>

### *Legislative Preemption*

Having established that the regulation of sanitary landfills is within the County's home rule powers, *Sexton* next addressed the question of legislative preemption or limitation on the home rule power.<sup>59</sup> To preempt the home rule unit's power, the legislature must satisfy several conditions. Initially, it must act pursuant to the requirements of Article VII, section 6(g),<sup>60</sup>

52. Baum, *supra* note 1, at 153.

53. PROCEEDINGS, *supra* note 1, at 1619.

54. ILL. CONST. art. VII, § 6(m). Froehlich proposes that this section is a reversal of Dillon's Rule for home rule units. Froehlich, *supra* note 5, § 22.15.

55. 75 Ill. 2d at 511-12, 389 N.E.2d at 558-59.

Two 1978 Illinois Appellate Court decisions interpreted the meaning of home rule and matters of local concern in a manner similar to that in *Sexton*. See *Landry v. Smith*, 63 Ill. App. 3d 616, 384 N.E.2d 430 (1st Dist. 1978); *Carlson v. Briceland*, 61 Ill. App. 3d 247, 377 N.E.2d 1138 (1st Dist. 1978). Concluding that regulation of a sanitary landfill is within the home rule powers, the court in *Briceland* stated, "it is difficult to conceive of a concern more local than where garbage should be disposed of." *Id.* at 254, 377 N.E.2d at 1143-44. The court in *Landry* also adhered to a broad interpretation of home rule powers and held that a city's regulation of a landlord's eviction procedures is a matter of local concern and thereby pertains to its government and affairs. 63 Ill. App. 3d at 620-21, 384 N.E.2d at 433.

56. See text accompanying notes 51-54 *supra*.

57. These pre-home rule decisions held that a municipality, through its police power, can regulate the collection, removal, and disposal of garbage, and they are relevant since a sanitary landfill is one means of garbage disposal. *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); *Consumers Co. v. City of Chicago*, 313 Ill. 408, 145 N.E. 114 (1924). The court also relied upon an earlier decision that held that regulation of noise from a factory was of local concern and subject to the city's zoning ordinance. *Dube v. City of Chicago*, 7 Ill. 2d 313, 131 N.E.2d 9 (1955).

58. 75 Ill. 2d at 511-12, 389 N.E.2d at 558.

59. *Id.* at 513, 389 N.E.2d at 559.

60. ILL. CONST. art. VII, § 6(g), provides that "[t]he General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit . . . any . . . power or function of a home rule unit."

which requires approval by a three-fifths majority of each house of the General Assembly, or section 6(h),<sup>61</sup> which requires a simple majority of each house if exclusive exercise by the state is specifically provided in the legislation. Further, the legislature must act subsequent to July 1, 1971, the effective date of the Illinois Constitution.<sup>62</sup>

According to *Sexton*, the Act had failed to meet any of the conditions requisite to preemption of the home rule powers used by Cook County in regulating the establishment of sanitary landfills. First, the court failed to find any evidence that would support a contention that the legislature attempted to deny or limit the County's home rule power pursuant to section 6(g).<sup>63</sup> Second, the court relied on *City of Chicago* to hold that no express indication of an intent to limit or deny the home rule powers as required for preemption pursuant to section 6(h) was contained in the Act.<sup>64</sup> Finally, the court noted that the Act, which became effective on July 1, 1970, was enacted prior to the July 1, 1971, effective date of the Illinois Constitution, and accordingly could not preempt the home rule unit's legislation in this manner.<sup>65</sup>

After holding that the Act failed to preempt the home rule powers, the *Sexton* majority next determined the proper relationship between the powers of the IEPA and those of Cook County as the home rule unit by relying on the decision in *City of Chicago* and also on the statutory authority contained in Article VII, section 6(i). Using different guidelines than those used by Chief Justice Goldenhersh in his dissent, the majority concluded that the state and county could act in unison on matters of environmental concern.<sup>66</sup> In *City of Chicago*, the court stated that home rule units may legis-

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61. *Id.* § 6(h) provides that "[t]he General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit." Only a simple majority is required under § 6(h). *Id.*

If the state legislates but does not express exclusivity, local governmental units retain the power to act concurrently. *City of Chicago v. Pollution Control Bd.*, 59 Ill. 2d at 489, 322 N.E.2d at 14-15. See also *Kanellos v. County of Cook*, 53 Ill. 2d 161, 166, 290 N.E.2d 240, 243 (1972) (legislative limitation must be expressly delineated).

62. *Prudential Ins. Co. of America v. City of Chicago*, 66 Ill. 2d 437, 362 N.E.2d 1021 (1977) (a conflicting statute enacted prior to the effective date of the Illinois Constitution is superseded by the home rule power); *Paglini v. Police Bd. of City of Chicago*, 61 Ill. 2d 233, 335 N.E.2d 480 (1975) (an ordinance of a home rule unit can supersede a previously enacted conflicting statute); *Kanellos v. County of Cook*, 53 Ill. 2d at 166, 290 N.E.2d at 243 (pre-1970 statute held inapplicable insofar as applied to a home rule county); *Union Nat'l Bank and Trust Co. v. Board of Supervisors of Kendall County*, 65 Ill. App. 3d 1004, 382 N.E.2d 1382 (2nd Dist. 1978) (to the extent that two statutes are inconsistent, the earlier act is, to that extent, repealed). See also ILL. CONST. TRANSITION SCHEDULE § 9.

63. 75 Ill. 2d at 513, 389 N.E.2d at 559. See note 60 *supra*.

64. *Id.* See ILL. REV. STAT. ch. 111½, §§ 1001-1050 (1977).

65. ILL. REV. STAT. ch. 111½, § 1001 (1977). See note 62 and accompanying text *supra*.

66. 75 Ill. 2d at 516-17, 389 N.E.2d at 559-60.

The need for a statewide program discussed by Chief Justice Goldenhersh in his dissent in *Sexton* is not incongruous with concurrent legislation by the home rule unit. 75 Ill. 2d at 520-21, 389 N.E.2d at 562-63 (Goldenhersh, C.J., dissenting). The Chief Justice bases his argument

late concurrently with the General Assembly on such matters.<sup>67</sup> This holding is consistent with the language of section 6(i) that "[h]ome 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."<sup>68</sup>

#### THE LAW AFTER SEXTON

The significance of the *Sexton* decision is limited to regulation by and within the home rule unit.<sup>69</sup> Although the court has succeeded in clarifying the position of prior Illinois decisions concerning regulation of environmental control facilities,<sup>70</sup> a practical problem arises with implementation of this ruling. Clearly, in situations identical to *Sexton*, conformity to both state and home rule regulation will be required.<sup>71</sup>

Home rule units attempting to regulate beyond their geographic boundaries, however, are still forced to address the issue of the *Metropolitan Sanitary District* decision.<sup>72</sup> This case was narrowly distinguished by the *Sexton* majority because it involved regulation of a regional facility by a home rule unit representing only part of the region to be served by that facility.<sup>73</sup> Although the court did not consider the *Sexton* landfill a regional facility, it admitted that the facility would be used by surrounding communities.<sup>74</sup> Unfortunately, the *Sexton* majority refrained from defining

on the distinction drawn between the powers of the Board in relation to particular types of pollution problems. *Id.* The power to prescribe standards for the location of land pollution and refuse disposal has been specifically provided for, whereas the regulations relating to the control of air and water pollution do not specifically require the Board to promulgate standards for the location of those facilities. *Id.* Chief Justice Goldenhersh interprets this distinction as indicative of the legislature's intent that location of a sanitary landfill should be determined according to a unified statewide program. *Id.*

Instead, it is suggested that the distinction is drawn because of the differences in the nature of the types of pollution. Regulation of land pollution and refuse disposal is of necessity more concerned with the *location* of these facilities because the land itself is used in the control of pollution and suitability of a particular site is of primary importance. The regulations concerning air and water pollution do not address location but instead concentrate on specifying the types of equipment to be used, for in this type of pollution equipment is of fundamental importance in implementing control. ILL. REV. STAT. ch. 111½, § 1017 (1977). The majority required home rule units to adhere to uniform statewide standards but at the same time permitted local implementation and enforcement of these uniform standards. 75 Ill. 2d at 515, 389 N.E.2d at 560.

67. 59 Ill. 2d at 489, 322 N.E.2d at 14-15.

68. ILL. CONST. art. VII, § 6(i).

69. 75 Ill. 2d at 513, 516, 389 N.E.2d at 559-60.

70. See notes 32-50 and accompanying text *supra*.

71. See note 78 *infra* for a discussion of the IEPA's current approach to the problem.

72. *Metropolitan Sanitary Dist. v. City of Des Plaines*, 63 Ill. 2d 256, 347 N.E.2d 716 (1976).

73. See notes 40-43 and accompanying text *supra*.

74. 75 Ill. 2d at 510, 389 N.E.2d at 557.

exactly what is meant by the term "regional".<sup>75</sup> Therefore, in situations not closely analogous to *Sexton*, home rule units attempting regulation that may affect other municipalities must look for other grounds to distinguish *Metropolitan Sanitary District* until the meaning of "regional" facility is clarified. Implementation of *Sexton* in such situations would have been facilitated if the majority instead had chosen to overrule the earlier decision.

Although the status of state legislation that conflicts with home rule legislation is an area that remains unresolved by the *Sexton* decision, recent cases have held that a home rule ordinance will prevail over an inconsistent state statute that was enacted prior to the effective date of the 1970 Illinois Constitution.<sup>76</sup> To date, however, the problem of state legislation that was enacted subsequent to the 1970 Illinois Constitution and that conflicts with home rule legislation has not been addressed. Unless the requirements for preemption of the home rule unit's power are satisfied,<sup>77</sup> a subsequently-enacted conflicting state statute apparently will be forced to yield to the home rule unit's power.

The *Sexton* decision most acutely will affect home rule units in their relationship with state legislative bodies and administrative agencies. The IEPA already has undertaken efforts to preempt home rule powers in siting sanitary landfills.<sup>78</sup> It is anticipated that several bills will be introduced in the next session of the Illinois General Assembly as a direct response to the problems encountered by the IEPA in *Sexton*.<sup>79</sup> Passage of legislation to empower the IEPA to preempt the home rule power should be forestalled, however, until the effects of *Sexton* are evaluated, and it is then determined that concurrent regulation is an impractical solution.

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75. *Id.*

76. *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 343 N.E.2d 919 (1976); *Paglini v. Police Bd.*, 61 Ill. 2d 233, 335 N.E.2d 480 (1975); *Kanellos v. County of Cook*, 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

77. See notes 59-65 and accompanying text *supra*.

78. 15 LOCAL GOV'T NEWSLETTER (Ill. St. B.A.) No. 2 (June 1979). The Illinois Environmental Protection Agency considers this to be a decision of major impact. In anticipation of the problems to be encountered, on January 31, 1979, House Representative D. Deuster introduced a bill to the General Assembly to curtail the powers of the home rule unit in siting landfills. H.R. 114, Ill. Gen. Assembly, 81st Sess. (1979). "The siting procedures and rules provided for in this Act for regional pollution control facilities shall be the exclusive siting procedures and rules for such facilities." *Id.* The bill passed in the House of Representatives but after being sent to the Senate, was referred to the Agriculture, Conservation and Energy Committee for further study. To date, no further action has been taken on this bill. 1 STATE OF ILLINOIS, LEGISLATIVE SYNOPSIS AND DIGEST (JUNE, 1979).

Currently, the IEPA has to deal with the practical problem of determining how to site landfills. In situations involving sites in home rule units, the IEPA is advising that complying with the local zoning ordinance in addition to obtaining an IEPA permit is necessary. Where non home rule units are involved, however, the IEPA considers its own permit to be the only necessity. Interview with Delbert Haschemeyer, Deputy Director of the Illinois Environmental Protection Agency, Springfield, Illinois (Sept. 20, 1979) [hereinafter cited as Haschemeyer Interview].

79. Haschemeyer Interview, *supra* note 78.

Concurrent regulation is desirable to preserve the interests of the local community under the present system of environmental regulation. Presently, before permits are issued, the home rule unit is required to hold public hearings in the localities of proposed land use changes so that local zoning and planning boards can afford members of the local citizenry an opportunity to present their viewpoints on the proposed changes.<sup>80</sup> Because the IEPA is not required to hold public hearings in the local areas where land use for sanitary landfills is proposed,<sup>81</sup> the interests of the people most directly affected by the changes might not be best served if exclusive authority is granted to the IEPA.

Although its greatest effect will be in situations that are closely analogous to *Sexton*, the decision also has applicability outside the area of environmental regulation, an extension of the *Sexton* theory to situations involving a home rule unit's licensing or regulatory power can certainly be foreseen.<sup>82</sup> Because the grant of these powers in Article VII, section 6(a) specifies that these powers pertain to the home rule unit's government and affairs. Thus, in such situations, only the question of legislative preemption with regard to these powers remains to be addressed.

Nevertheless, *Sexton* must be narrowly construed.<sup>83</sup> Clearly it does not apply to non home rule situations.<sup>84</sup> As discussed above, attempts by home rule units to regulate beyond their boundaries will be met with uncertain results until the status of *Metropolitan Sanitary District* is clarified.<sup>85</sup> Further, the applicability of *Sexton* to situations involving home rule authority that conflicts with subsequently-enacted state legislation will be determined by the particular state legislation.<sup>86</sup>

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80. *Carlson v. Briceland*, 61 Ill. App. 3d 247, 252-53, 377 N.E.2d 1138, 1142-43 (1st Dist. 1978).

81. *Id.*

82. ILL. CONST. art. VII, § 6(a).

83. Justice Ryan in his concurring opinion emphasized the narrow construction that must be given to the *Sexton* decision: "This case involves only the question of the authority of a home rule unit to regulate the location of landfills through the use of zoning power. There is no need to discuss . . . what authority a non home rule unit has in this area." 75 Ill. 2d at 520, 389 N.E.2d at 562. (Ryan, J., concurring).

84. The court distinguished between home rule and non home rule units throughout its decision, emphasizing that a different approach is needed when a non home rule unit is involved. 75 Ill. 2d at 513, 389 N.E.2d at 559.

85. "Few ordinances will have absolutely no impact beyond the borders of the home rule unit. . . . [T]he validity of home rule regulation under section 6 (a) should be determined by comparing the effect of the ordinance in the governmental unit with its extraterritorial effect." Michael & Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L.F. 559, 574 [hereinafter cited as Michael and Norton]. See text accompanying notes 72-75 *supra*.

86. See text accompanying notes 76-77 *supra*.

## CONCLUSION

Although *Sexton* must be narrowly construed, the overriding judicial concern in *Sexton* to ensure the home rule unit some voice in environmental regulation within its boundaries has been achieved.<sup>87</sup> *Sexton* has established precedent that regulation of the sites of sanitary landfills pertains to a county's government and affairs and thus is included within its home rule powers. *Sexton* also has established the principle that a home rule unit may legislate concurrently with the General Assembly on matters of environmental control.<sup>88</sup> Concurrent jurisdiction by the home rule unit and the IEPA is essential to protect the competing interests involved in the regulation of sanitary landfills.<sup>89</sup>

The court has clarified the applicability of prior court decisions in this area and thus has reduced the need for future judicial involvement. Any limitation on a home rule unit's power must therefore come from the legislature. *Sexton* is an indication that the Illinois Supreme Court has overcome its reluctance to construe the powers of a home rule unit broadly in accordance with the spirit of the Illinois Constitution. The framers of the state constitution similarly intended to place the responsibility for limiting this power where it rightfully belongs, with the legislature.

Gail Buoscio Rago

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

Perhaps the most extreme result of State preemption of the home rule power has been forecast by P. Orlinsky, *Is the Future of Local Zoning Doomed?: O'Connor, Carlson, and Beyond*, 66 ILL. B.J. 262 (1978): "It may very well be that all that is necessary to remove any facility from the purview of a local zoning ordinance is the acquisition of a permit from the Environmental Protection Agency." *Id.* at 286.

88. 75 Ill. 2d at 512-13, 389 N.E.2d at 559. See Michael and Norton, *supra* note 84, at 574. As the authors have noted, "recognizing exclusive IEPA authority would lead to the ironical result that home rule units today would possess less power to control the location of disposal sites than local governments possessed prior to the adoption of home rule."

89. As a means of protecting the competing interests involved, a balancing test that would have utility beyond IEPA situations has been suggested. "Such an approach would weigh the extent to which the local government's exercise of power would impinge upon the interests of other governmental entities or of persons beyond the borders of the home rule unit." Michael & Norton, *supra* note 84, at 574. See also *Carlson v. Briceland*, 61 Ill. App. 3d 247, 377 N.E.2d 1138 (1st Dist. 1978). This approach is similar to Professor Baum's argument that is quoted extensively by Justice Underwood in his concurring opinion in *Sexton*, 75 Ill. 2d at 517-19, 389 N.E.2d at 561-62 (Underwood, J., concurring).

