Recent Illinois Supreme Court Decisions Concerning the Authority of Home Rule Units to Control Local Environmental Problems

Robert S. Minetz
RECENT ILLINOIS SUPREME COURT DECISIONS CONCERNING THE AUTHORITY OF HOME RULE UNITS TO CONTROL LOCAL ENVIRONMENTAL PROBLEMS

Robert S. Minetz*

Five and one-half years ago, Illinois' new constitution became effective. One of the goals of the constitution was to provide greater autonomy for local governments by granting home rule powers. In the area of control of environmental problems, however, the Illinois Supreme Court has severely limited the power of home rule units. Mr. Minetz traces the development of home rule law relating to environmental problems and criticizes restrictions on local regulation.

The citizens of Illinois convened a constitutional convention in 1970 to review and reconsider their 100-year-old constitution. After great effort and substantial debate, a proposal was drafted which subsequently was accepted by the voters of this State. The new constitution became effective on July 1, 1971 and it now stands as both the cornerstone of Illinois law and a national model. The role of effectuating the intent of the framers of the constitution then devolved upon the state judiciary. A number of years have passed since the formation of the constitution and it is now an appropriate time to determine whether the broad ideals and goals of the constitutional convention have been applied faithfully to the myriad of situations which have faced the courts.

One of the primary issues before the 1970 convention was the proper relationship between state and local governments and the amount of autonomy which should be conferred upon cities, towns, and villages. Many authorities believed that it was imper-

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2. Section 1 of Adoption Schedule of the Ill. Const. See Transition Schedule for effective dates of other sections of the constitution which become effective at various times.

ative for local units of government to receive greater power and 
autonomy to solve growing urban problems. Thus, Illinois de-
cided to follow other states and adopt the concept of "home rule." The local government provision of the 1970 constitution is 
article VII. Section 6 of this article defines the powers granted to 
home rule units and is the heart of the local government provi-

The clear purpose of home rule was to expand the powers of 
municipal governments from their previous narrow scope of au-

MAR. J. PRAC. & PRO. 253, 253-54 (1973) [hereinafter cited as Biebel]; CONSTITUTION 
RESEARCH GROUP, CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 251-66 
(1970) [hereinafter cited as CONSTITUTIONAL RESEARCH GROUP].

4. CONSTITUTIONAL RESEARCH GROUP, supra note 3, at 263-65. Mr. Louis Ancel, an at-
torney and an expert in urban affairs, presented the following relevant testimony to the 
Commission on Urban Area Government on Sept. 17, 1969:

The problems of police and fire protection, polluted air, befouled streams and 
waters, noise, traffic, littered streets, crime and vandalism, slums, obsolescence, 
inadequate 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 solutions cannot be derived from 
our present method of piecemeal delegated grants of legislative power narrowly 
construed.

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Prior to the adoption of the recent constitution, Illinois, like most other jurisdictions, had been controlled by the famous doctrine known as Dillon's Rule. Thus, cities, towns and villages could exercise only those specific and limited powers conferred upon them by the state legislature. The Record of Proceedings of the Sixth Illinois Constitutional Convention shows that the framers of the new constitution intended to reverse the presumption against local authority and establish a new presumption in favor of municipal rule. New article VII provides that a home rule unit may "perform any function pertaining to its government and affairs" unless the General Assembly specifically limits the authority of the municipality. The subsequent judicial interpretation and development of this constitutional grant of power to municipal government and the preemption of this authority by state action are the principal subject matters of this review.

The new provisions of home rule power are quite simple. Section 6(a) confers a broad grant of power on home rule units. Sections 6(g) and (h) of article VII allow the General Assembly to prevent local entities from acting in particular areas of government; however, these sections also require the General Assembly to express its intent in a prescribed manner. The General Assembly by a three-fifths vote of the members of each house may deny

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7. See 2 E. McQuillin, MUNICIPAL CORPORATIONS §10.09 (rev. ed. 1966).
9. 1 J. DILLON, MUNICIPAL CORPS. §237, at 448-50 (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 or 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 indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

See also City of Clinton v. Cedar Rapids & Mo. R. R.R., 24 Iowa 455 (1868).
10. PROCEEDINGS, supra note 4, at 1593-94. See Baum, supra note 8, at 138; Biebel, supra note 3, at 257, 271-72, 282-83.
11. ILL. CONST. art. VII, §6(a).
12. Id. See note 5 supra, for text. See also Vitullo, Local Government: Recent Developments in Local Government Law in Illinois, 22 DEPAUL L. REV. 85, 86 (1973) [hereinafter cited as Vitullo].
or limit home rule powers which are not exercised by the state.\textsuperscript{13} The General Assembly also may provide \textit{specifically} by law for exclusive state jurisdiction in areas of state concern or activity.\textsuperscript{14}

Sections 6(i) and (m) of article VII provide two aids to judicial construction of the home rule provisions of the constitution. Section 6(i) declares that the state and home rule units may act concurrently in areas in which the General Assembly has not specifically limited the concurrent exercise of power or specifically declared the state’s exercise to be exclusive. Section 6(m) states that the powers and functions of home rule units shall be liberally construed. Thus, a fair reading of section 6 strongly suggests that home rule authority is presumed unless the General Assembly acts to divest local government of power. The constitutional convention left no room for any implied preemption by state action.\textsuperscript{15}

The most difficult questions concerning the proper relationship between a home rule unit and the state and its agencies have arisen in environmental matters. Specifically, the issues have been whether the Illinois Environmental Protection Act\textsuperscript{16} has preempted the right of home rule cities to legislate on issues with environmental impact and whether the broad grant of power conferred on home rule units by section 6(a) includes the power to legislate on environmental problems. If one reads the constitution literally, the answer is simple. Since the General Assembly has

\textsuperscript{13} ILL. CONST. art. VII, §6(g).

\textsuperscript{14} ILL. CONST. art. VII, §6(h) (emphasis added).

\textsuperscript{15} See PROCEEDINGS, supra note 4, at 1622, 1941-46; Vitullo, supra note 12, at 91. \textit{But see} Chutgach Electric Ass'n v. City of Anchorage, 476 P.2d 115 (Alas. 1970). Interpreting a state constitution with a broad grant of home rule power, the Alaska Supreme Court in \textit{Chutgach Electric Ass'n} expressed its opinion that the legislature need not specifically state its legislative intent to prevent the exercise of power by a home rule unit. Instead, the Alaska Supreme Court found state preemption through the state’s exercise of power in a particular field. The decision in \textit{Chutgach Electric Ass'n} should not be regarded as authority for implied preemption in Illinois.

The theory of preemption by implication is contrary to the preemption procedure outlined by art. VII, §6 of the Illinois Constitution and specifically opposed to §6(i) which requires concurrent jurisdiction absent specific state limitation. Moreover, the Alaska Supreme Court cited but failed to follow the contrary arguments of Prof. Chester Antieau, 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW §292.38 (1968), which opposed the doctrines of “implied preemption” or “occupation of the field.” 476 P.2d at 120 n.16 and accompanying text. Antieau’s position is better reasoned and more consistent with the Illinois Constitution. \textit{See also} text accompanying notes 33-35 infra.

\textsuperscript{16} ILL. REV. STAT. ch. 111½, §§1011 \textit{et seq.} (1975).
never specifically provided that the state would act exclusively in environmental matters pursuant to section 6(h), the city and state could act concurrently pursuant to the command of section 6(i). Also, the grant of power conferred by section 6(a) allows home rule units to perform any function and exercise any power pertaining to its government and affairs and specifically includes the power to regulate for the public health, safety and welfare. Thus, section 6(a) would seem to allow local legislation to help solve environmental problems. The highest court of Illinois has not followed this simple logic.

The first important decision concerning the proper scope of the constitutional grant of power to home rule units in environmental matters was City of Chicago v. Pollution Control Board. In this case, the Illinois Environmental Protection Agency and the Illinois Pollution Control Board appealed an order which enjoined them from enforcing the Illinois Environmental Protection Act against the City of Chicago. The City of Chicago offered a number of bases for its claim that it was not subject to this state regulation. Chicago argued that the city is a home rule unit under article VII of the constitution and the collection and disposal of garbage and waste is a governmental function within its home rule powers. Also, the City of Chicago explained that the General Assembly had not acted pursuant to article VII to restrict the city's exercise of its home rule powers. The state agencies claimed that the state has exclusive authority in the area of environmental protection pursuant to article XI of the 1970 constitution and the Environmental Protection Act. Also, they argued that environmental and pollution matters are not matters of concern for local governments within the meaning of section 6(a).

The Illinois Supreme Court unanimously held that the City of Chicago must comply with the provisions of the Illinois Environ-

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18. Id. at 486, 322 N.E.2d at 13. The city never claimed that state agencies could not regulate non-municipal entities within its borders.
19. Ill. Const. art. XI, §1 provides:
   Public Policy—Legislative Responsibility
   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.
20. 59 Ill.2d at 486, 322 N.E.2d at 13.
mental Protection Act. In order to arrive at its decision, the court thoroughly reviewed article XI of the state constitution, the Illinois Environmental Protection Act, the Record of Proceedings of the Constitutional Convention and the committees' reports concerning articles VII and XI. The court noted that the state had legislated in the field of environmental law but had not expressed its intention to exclude local legislative efforts. Thus, the court's opinion concluded:

[A] local governmental unit may legislate concurrently with the General Assembly on environmental control. However, such legislation by a local governmental unit must conform with the minimum standards established by the legislature.

This statement of law contains two important ingredients. First, the supreme court was willing to effectuate section 6(m) of article VII of the constitution and allow concurrent jurisdiction.

21. Id. at 490, 322 N.E.2d at 15.
22. Justice Ryan, writing for the unanimous court in City of Chicago v. Pollution Control Board, 59 Ill.2d at 488-89, 322 N.E.2d at 14, described the apparent intent of the state legislature not to preempt the environmental field. He carefully examined the committee reports of the constitutional convention and explained:

Thus it would appear that although the committee intended that the General Assembly should provide the leadership and establish uniform standards with regard to pollution control it was not the intention of the committee that the local government units be prohibited from acting in this field. It was instead the intention of the committee that under the leadership of the General Assembly the intergovernmental efforts complement one another. This conclusion also appears to be in accord with the opinion of the Local Government Committee as stated in its report. In discussing exclusive and non-exclusive exercises of State power the committee stated:

"Control of air and water pollution flood plains and sewage treatment are often cited as important examples of areas requiring regional or statewide standards and control.

At the same time, it is quite conceivable that both the state and various local governments can regulate the same activities and carry on the same or related functions without conflict or difficulty." 7 Proceedings 1642-1643.

The committee further indicated (7 Proceedings 1643) that the proposal makes clear that if the State legislates but does not express exclusivity, local governmental units retain the power to act concurrently, subject to limitations provided by law.

The evaluation of the problem in this case is the most exhaustive review by the Illinois Supreme Court on this question. Nevertheless, this conclusion was eventually repudiated by divided opinions in Carlson v. Village of Worth, and Des Plaines v. Metropolitan Sanitary District. See notes 41 & 60 and accompanying text infra.

23. 59 Ill.2d at 489, 322 N.E.2d at 14-15.
absent a specific action by the General Assembly. Second, the
court decided that the state has superior authority in case of
conflict in areas of concurrent jurisdiction. Initially, the decision
that the state had superior authority over a home rule unit in case
of conflict seemed to be the only controversial portion of the
opinion. Nevertheless, subsequent decisions have shown that the
issue of concurrent jurisdiction in environmental matters was not
as settled as many believed.

The supreme court’s decision in *Pollution Control Board* gave
precedence to the state over local authorities in environmental
matters. This portion of the opinion is contrary to a line of Illinois
Supreme Court decisions24 which hold that state statutes adopted
prior to the 1970 constitution and in conflict with the subsequent
exercise of home rule powers are invalid to the extent of the
conflict.25 The Illinois Environmental Protection Act was effective
July 1, 197026 — one full year before the effective date of the new
constitution.27 If the prior line of cases had been followed, the pre-
constitution statute would not limit home rule powers. Though
the act has been reviewed on numerous occasions since its adop-
tion and since the effective date of the new constitution, the
legislature has never provided specifically for exclusive state ju-
risdiction.28

The Illinois Supreme Court in two subsequent decisions,*Mulligan v. Dunne*29 and *Ampersand, Inc. v. Finley*,30 reaffirmed
its statement in *Pollution Control Board* that the state and home
rule units could legislate concurrently on environmental mat-
ters.31 The court in *Mulligan* had the occasion to consider whether
a county tax on the retail sale of alcoholic beverages violated

24. Cicero v. Fox Valley Trotting Club, Inc., 65 Ill.2d 10 (1976); Peters v. City of Spring-
field, 57 Ill.2d 142, 147-49, 311 N.E.2d 107, 110-11 (1974); Clarke v. Arlington Heights,
57 Ill.2d 50, 53-54, 309 N.E.2d 576, 578-79 (1974); People ex rel. Hanrahan v. Beck, 54
Ill.2d 561, 565-66, 301 N.E.2d 281, 283 (1973); Kanellos v. County of Cook, 53 Ill.2d 161,


27. See note 2 *supra*.

28. See Ill. Rev. Stat. ch. 111 1/2, §§1004, 1005, 1011, 1012, 1013, 1031, 1033, 1035,
1036, 1039, 1042, 1043, 1044, 1046 (1973).

29. 61 Ill.2d 544, 338 N.E.2d 6 (1975).

30. 61 Ill.2d 537, 338 N.E.2d 15 (1975).

31. See Ampersand, Inc. v. Finley, 61 Ill.2d 537, 543, 338 N.E.2d 15, 19 (1975); Mulligan
v. Dunne, 61 Ill.2d 544, 549, 338 N.E.2d 6, 10 (1975).
section 6 of article VII of the constitution. The challengers raised a number of issues. They claimed that the "state's extensive taxation and regulation of the liquor industry . . . demonstrate that the subject matter of the ordinance is one of statewide interest which does not pertain to the government and affairs of Cook County within the meaning of section 6(a)." The court treated this challenge as a claim that the matter was not one of local concern within section 6(a) and that the state has preempted control of the liquor industry within the meaning of section 6(h).

The plaintiff liquor dealers relied on Pollution Control Board to support their position. The court explained that the situation in Mulligan was not analogous to the Pollution Control Board case. Also, the court declared that it had indicated in Pollution Control Board "that a home rule unit could legislate concurrently with the General Assembly on environmental control;" however, local ordinances would be required to meet state standards. Ultimately, the court in Mulligan held that there was no preemption since a statute which purported to restrict home rule powers must specifically indicate the intention to preempt. For this proposition, the court cited Rozner v. Korshak, and sections 6(i) and (m) of article VII of the constitution. Thus, the court disagreed with the plaintiff's contention that extensive state legislation in a particular area may make the area one of state, and not local, concern within the meaning of section 6(a) and that an extensive regulatory scheme could act as an implied or constructive preemption within the meaning of sections 6(g) and (h).

At about the same time as the decision in Mulligan, the supreme court decided Ampersand and again affirmed in dicta its position in Pollution Control Board that home rule units could legislate concurrently with state agencies in environmental areas. The issue in Ampersand was whether a $2.00 library fee charged against all parties filing pleadings was a valid exercise of home rule authority. The plaintiff claimed that a home rule unit had no authority to impose a filing fee as a condition precedent to a litigant's right to use the state judicial system. The defen-

32. 61 Ill.2d at 548, 338 N.E.2d at 9.
33. Id. at 549, 338 N.E.2d at 10.
34. 55 Ill.2d 430, 303 N.E.2d 389 (1975).
35. 61 Ill.2d at 550-51, 338 N.E.2d at 11.
36. Id. at 543, 338 N.E.2d at 19.
dant in *Ampersand* attempted to use the *Pollution Control Board* decision to support its position that the state and county could act concurrently in this area. The court distinguished the situation in *Pollution Control Board* and held that the state constitution made establishment of a unified court system an area of exclusive state interest and concern. The court explained that the "interest here differs from that of the state in *City of Chicago v. Pollution Control Board*. . . . There we held that the interest of the state was not such as to preclude a home rule unit from acting, but permitted concurrent actions by the state and local governmental units."  

The law in this state would seem to have been well settled after the Illinois Supreme Court's statements in *Pollution Control Board*, *Mulligan* and *Ampersand* that home rule units could legislate on environmental matters. Nevertheless, subsequent decisions reveal that the law on this question was still in its developmental state even after these pronouncements. Moreover, statements made by the Illinois Supreme Court in a non-home rule case, *Carlson v. Village of Worth*, indicated that the court was beginning to retreat from its prior position upholding the rights of local governments to legislate on environmental matters.

Justice Schaefer, writing on behalf of a divided court, opened the opinion in *Carlson* with a statement of the issue:

> This case concerns the authority of a non-home rule municipality to superimpose the requirements of its own "environmental protection ordinance" upon the holder of a permit for the operation of a sanitary landfill issued by the State Environmental Protection Agency pursuant to the Environmental Protection Act.

The court then held that local regulation of a sanitary landfill was preempted by the Environmental Protection Act of 1970. Since no home rule unit was involved in the *Carlson* case, the court had no need to discuss whether home rule units and state agencies could act concurrently in matters of environmental concern. Nev-

37. *Id.* at 543, 338 N.E.2d at 18-19.
38. *Id.* at 543, 338 N.E.2d at 19.
40. *Id.* at 407, 343 N.E.2d at 494.
ertheless, Justice Schaefer stated that the court's previous conclusion in *Pollution Control Board* "that a local governmental unit may legislate concurrently with the General Assembly on environmental control" was dicta.41

The Illinois Supreme Court subsequently issued a supplemental opinion in *Carlson* and denied a request for rehearing. One of the briefs in support of a rehearing was filed by the Illinois Environmental Protection Agency. The agency argued that since the Pollution Control Board had not adopted any standards concerning sanitary landfills, local governments should be able to exercise concurrent jurisdiction. The supreme court rejected this contention. Thus, the court told the Environmental Protection Agency that it had exclusive authority and jurisdiction, ready or not.

The majority of the court in *Carlson* explained that the General Assembly, by passing the Environmental Protection Act preempted local authority. This statement is contrary to section 6(h) of the constitution which requires the General Assembly to specifically provide for an exclusive exercise of any power. This conclusion also seems contrary to sections 6(i) and (m) of article VII which favor concurrent jurisdiction and a liberal construction of home rule power. Moreover, the pronouncement that the 1970 Environmental Protection Act controlled the subsequently approved 1970 constitution is clearly opposed to the line of Illinois Supreme Court cases holding that statutes enacted before pas-

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41. Id. at 409, 343 N.E.2d at 495. The court's labeling its previous statements as dicta does not mean these statements have absolutely no precedential value as a matter of Illinois law. The pronouncements in *Pollution Control Board, Ampersand and Mulligan* were issued only after careful analysis of the home rule questions at issue in each case. Also, the court's statements in each of these instances were in response to arguments of counsel on issues raised in these cases and were, therefore, judicial dicta with precedential value. The leading cases in Illinois on judicial dicta were summarized and exemplified in Larson v. Johnson, 1 Ill.App.2d 36, 116 N.E.2d 187 (1st Dist. 1954), which held:

If the opinion expressed on a legal question is one casually reached by the court on an issue unrelated to the essence of the controversy or based on hypothetical facts, then it is *obiter dictum*. If, however, the question involved is one of a number of legal issues presented by the facts of that particular case, the court's decision on that question is not *dictum* even though it be the last ground of many decided by the court, all in support of its final conclusion . . . . Our Supreme Court has made a distinction between *judicial dictum* and *obiter dictum*, meaning that a legal principle deliberately passed upon by a court establishes a precedent. Scovill Mfg. Co. v. Cassidy, 275 Ill. 462, 470.

Id. at 40, 116 N.E.2d at 189.
sage of the constitution are invalid to the extent of conflict with subsequently enacted home rule ordinances.\textsuperscript{42}

The dissents in \textit{Carlson}\textsuperscript{43} made a number of important points and posed numerous interesting questions which were left unanswered by the majority of the court. First, Justice Ryan stated that any preemption that may have been implied in the Environmental Protection Act of 1970 did not survive after the effective date of the recent constitution.\textsuperscript{44} In addition, Justice Ryan conducted a review of Illinois law which revealed that Illinois municipal governments always have been able to regulate on environmental matters. A number of cases have held that a city's police power gives it the right to control garbage, noise and air pollution.\textsuperscript{45} Also, local units of government long have had the statutory authority to abate environmental and other nuisances.\textsuperscript{46}

It remained to be seen after \textit{Carlson} whether the Illinois Supreme Court really meant to deprive cities of the power to control environmental problems by forbidding them to legislate on the matter. This approach clearly would be contrary to the 1970 constitution which attempted to broaden rather than limit the power of municipalities.\textsuperscript{47} It seemed that the Illinois Supreme Court in \textit{Carlson} might simply have been careless when it used language indicating that a home rule unit might be unable to legislate to solve problems related to the environment. The term "environmental" encompasses so many areas of local concern (dirt, noise, odor, etc.) that a state cannot have meaningful home rule if mu-

\textsuperscript{42} See notes 24 & 25 and accompanying text \textit{supra}. Further evidence that the decision in \textit{Carlson v. Village of Worth} should have no bearing on the home rule issue is found in the Illinois Supreme Court's complete reliance on \textit{Carlson} on its earlier decision in \textit{O'Connor v. City of Rockford}, 52 Ill.2d 360, 288 N.E.2d 432 (1972). The \textit{O'Connor} decision, like the \textit{Carlson} holding, never discussed the power of a home rule unit. Moreover, the \textit{O'Connor} decision, like the \textit{Carlson} case, involved zoning and no environmental ordinances. Thus, it is difficult to contend that either \textit{O'Connor} or \textit{Carlson} is precedent for the proposition that a home rule unit is powerless to regulate on environmental matters within its boundaries.

\textsuperscript{43} 62 Ill.2d at 411-14, 418-26, 343 N.E.2d at 496-98, 500-04 (Ward, C.J., and Underwood and Ryan, J.J., dissenting).

\textsuperscript{44} See notes 24 & 25 and accompanying text \textit{supra}.

\textsuperscript{45} 62 Ill.2d at 420-23, 343 N.E.2d at 501. See also \textit{Carpentersville Ready Mix Co. v. Carpentersville}, 39 Ill.App.3d 840, 350 N.E.2d 508 (2d Dist. 1976) (city may properly enact ordinance to reduce noises, fumes and vibrations).

\textsuperscript{46} ILL. REV. STAT. ch. 24, §11-60-2 (1975). See also id. §11-19-5 (power of city to provide for method of garbage disposal).

\textsuperscript{47} See notes 7-15 and accompanying text \textit{supra}.
municipal governments are deprived of control over environmental questions. It is important to also note that there has been no indication from the legislature that it meant to preempt the field of environmental control. If the General Assembly desires to preempt an area of local concern, the court must require a specific statement pursuant to section 6(h) of article VII of the 1970 constitution. Moreover, the legislature should not take a preemptive step in the field of environmental control until it is ready and able to fund a project designed to protect the residents of each and every town, city and village from the numerous environmental problems of ordinary daily life.48

One issue remained after Carlson: Was the dicta in Pollution Control Board or the dicta in Carlson which labeled the Pollution Control Board statement as dicta the law in Illinois? The Illinois Supreme Court in Metropolitan Sanitary District v. City of Des Plaines49 had an opportunity finally to decide whether the right of a home rule unit to legislate in environmental matters had been preempted by the state. The court failed to take this opportunity and decided the case on another ground. The factual issue presented was the constitutional right of the city, a home rule unit, to regulate the construction or operation of a sewage treatment plant being constructed within the city's borders by a special district. The trial court had ruled that the district was obliged to comply with reasonable provisions of the city's health ordinance which were not inconsistent with the conditions imposed by the Environmental Protection Agency.50 The supreme

48. Professor Baum explained in an early article on the subject of preemption of home rule powers, that the 1970 constitution makes it the role of the legislature, and not of the court, to preempt. Baum, supra note 8, at 157. See also Baum, A Tentative Survey of Illinois Home Rule (Part II): Legislative Control Transitions, and Intergovernmental Conflict, 1972 U. Ill. L. F. 559, 579 (1972). He contended that the specific inclusion in section 6(a) of the power to regulate for the protection of the public health, safety, morals and welfare... was designed to prevent judicial erosion of the municipal power to exercise the police power. Baum, supra note 8, at 141. Also, judicial preemption was at odds with the thrust of the Illinois Constitution which favors concurrent exercise of power and attempts to avoid implied preemption by judicial decision. Baum (Part II), supra, at 579.


50. Id. at 258, 347 N.E.2d at 717. The trial court's memorandum opinion was rendered by the Honorable Samuel B. Epstein in consolidated cases 75 L 3818 and 75 CH 5742 (Cir. Ct. of Cook County, Ill., Oct. 29, 1975).
court reversed\textsuperscript{51} and changed its approach to the entire question of the right of home rule units to legislate on environmental issues. The focus shifted from the preemption question to the question of whether a home rule city had the power pursuant to article VII, section 6(a) to pass laws touching on the environment.\textsuperscript{52}

The district asserted two grounds in support of its position that it was not subject to local regulation. First, it claimed that environmental regulation of a sewage treatment plant is a matter of statewide concern and therefore not within the local government and affairs provision of section 6(a). The district also claimed that the city's regulation had been wholly preempted by the Environmental Protection Act. The Illinois Supreme Court only decided the first question and held that the city's health ordinance which was designed to regulate the potentially dangerous facility within its borders was not a function pertaining to the city's government and affairs.

The court's principal objection to the city's legislation was that "to permit a regional district to be regulated by a part of that region is incompatible with the purpose for which it is created."\textsuperscript{53} In addition, the court was concerned that other parts of the region may adopt inconsistent regulations.\textsuperscript{54} The bases of the court's

\textsuperscript{51} It must be noted that one possible explanation for the court's decision was the particular dispute at issue. The court had previously decided two other cases involving the same parties and project. See Des Plaines v. Metropolitan Sanitary Dist., 48 Ill.2d 11, 268 N.E.2d 428 (1971); Des Plaines v. Metropolitan Sanitary Dist., 59 Ill.2d 29, 319 N.E.2d 9 (1974). Thus, the court may have been attempting to remain consistent with its previous holdings allowing the Metropolitan Sanitary District to build its sewage plant without any regulation by the City of Des Plaines. One must wonder if a different decision would have been reached if the issue had been the right of the Chicago Housing Authority to build a low income housing project in a wealthy suburb.

\textsuperscript{52} Earlier commentators recognized that the Illinois Supreme Court's decision in Bridgman v. Korzen, 54 Ill.2d 74, 295 N.E.2d 9 (1972), spelled trouble for the intended broad construction of art. VII, §6(a). The court in Bridgman held that the collection of taxes by Cook County on behalf of all taxing bodies in the county was not a home rule power. Biebel, supra note 3, at 263-64, 330 (citing Professors Baum & Cohn). Compare Biebel, supra note 3, with 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, 1299 (1974) (author predicting that Illinois Supreme Court has "assured that home rule powers will not be narrowly circumscribed").

\textsuperscript{53} 63 Ill.2d at 261, 347 N.E.2d at 719.

\textsuperscript{54} Id. The court's concern about inconsistent legislation by the various home rule units which comprise the District was not warranted. The facts of the case did not involve this type of conflict. Also, it would seem reasonable that the interest of the City of Des Plaines would be superior to the interest of other home rule units because the plant was planned
ultimate decision do not survive careful scrutiny. The court's characterization of the city's ordinance as an attempt to regulate a special district is improper. The ordinance did not single out special districts. Instead, the city's ordinance was an attempt to regulate any and all potentially dangerous sewage works within its borders. The ownership of the source of pollution was not crucial. The real section 6(a) issue was whether or not the city's passage of a health ordinance to regulate the environmental effects of a potentially dangerous treatment facility within its boundaries was "a power or function pertaining to its government and affairs" within the meaning of section 6(a). The answer to this question is that nothing is of more local concern than pollution and, therefore, the Des Plaines pollution regulation was a proper power to be exercised by a home rule unit. The right of a home rule unit to legislate on environmental matters is prescribed by section 6(a) which specifically provides that "the power to regulate for the protection of the public health, safety, morals and welfare" is conferred on home rule units.

The court's conclusion in Metropolitan Sanitary District that a special district was not subject to regulation by a home rule unit gives special districts absolute authority to impose their will on home rule municipalities. This conclusion was not warranted. A home rule municipality ranks only behind state government in the hierarchy of power in this state. Only the General Assembly may limit the powers of home rule governments. The 1970 constitution granted broad power and authority to home rule units and continued to confer only limited rights on special districts. Thus, the court's judgment which gave preference to the special district in its activities within the corporate boundaries of the home rule unit was contrary to the hierarchy established by the 1970 constitution. The court implied an additional grant of power to special districts that the constitutional convention refused or neglected to confer.

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56. Compare the preference given to special districts over home rule units in this case, with the dissents of Justices Underwood, Schaefer and Davis in City of Evanston v. County of Cook, 53 Ill.2d 312, 319-24, 291 N.E.2d 823, 827-30 (1972), expressing the opinion that home rule units have greater power than county governments.
The late Professor Baum, counsel to the Home Rule Committee of the constitutional convention, had occasion to specifically study the potential problem of a conflict between a home rule unit and a special district.\(^7\) His analysis reached an opposite conclusion to the decision by the supreme court in *Metropolitan Sanitary District*. He explained that the home rule provisions of the constitution do not affect special districts. Thus, special districts remain subject to strict legislative control. Professor Baum then contrasted the status of special districts with the broad new authority conferred by the constitution on home rule governments. He concluded that home rule units may regulate special districts as they do other actions affecting their residents pursuant to the powers granted in section 6(a).

It is important to realize that the supreme court decided *Metropolitan Sanitary District* with no evidence that the local regulation would hamper the effectiveness of the special district.\(^8\) Moreover, the court reversed a limited trial court order which held that the district was subject only to "reasonable" provisions which were not inconsistent with the permit conditions imposed by the State Environmental Protection Agency.\(^5\) The court's usurpation of home rule authority without the showing of any

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57. Baum (Part II), *supra* note 48, at 586-87. Professor Baum explained his reasoning: Less clear is the power of home rule units to regulate the activities of special districts operating within their boundaries. Before home rule became the law in Illinois, special districts often operated within a municipality without complying with applicable municipal regulations. Several cases held that special districts need not comply with local zoning restrictions when acquiring property and building facilities appropriate to their statutory purposes. The advent of home rule does not specifically alter decisions such as these. But it does change the whole setting in which the problem of municipal-special district conflict arises. Municipal home rule authority now has constitutional sanction. Legislative diminution of that authority must be effected through procedures specified in sections 6(g), (h), and (i), or through identification of the subject matter as not pertaining to home rule government and affairs under section 6(a). In this setting the claim of the special districts appears to be weakened. Although I have found no legislative history one way or the other on this issue, there seems to be no good reason why, absent legislative restraints enacted in the required manner, home rule units should not regulate the actions of special districts as they do other actions affecting their residents pursuant to the powers granted in section 6(a).

58. The court's original opinion was modified on rehearing after the City of Des Plaines in its petition for rehearing reminded the court that no evidence had been admitted in the trial court on the issue of the reasonableness and effect of the ordinance.

59. 63 Ill.2d at 258, 347 N.E.2d at 717.
necessity for this action was incorrect both as a matter of constitutional law and social policy.

Along with obvious constitutional authority, the city in Metropolitan Sanitary District relied on the court's previous statements in Pollution Control Board, Ampersand, and Mulligan for authority in support of its right to legislate concurrently with the state on environmental matters. Nevertheless, the court specifically rejected the city's position and instead restated the position it announced in Carlson that its previous statement allowing concurrent jurisdiction was dicta.

The dissenting justices strenuously argued that "it is imperative that we do not continue to deprive units of local government, especially home rule units, of the right to legislate in the area most essential to the health and welfare of the inhabitants and in an area where there has been for many years recognized authority of local government units to legislate." The language of the constitution and the intent of its framers strongly support the position taken by the dissenters.

The Illinois Supreme Court during its September 1976 term finally firmly ruled on the issue of whether home rule units may legislate on environmental matters. In City of Des Plaines v. Chicago and Northwestern Railway, the court held that home rule units could not regulate on environmental matters because environmental problems were outside the grant of authority conferred on home rule units by article VII section 6(a). This decision reversed the appellate court holding that the City of Des Plaines had the authority to pass and enforce a noise ordinance. The court again bypassed the preemption question which had been of crucial importance in earlier cases.

The facts in Chicago and Northwestern Railway were not in serious dispute. The City of Des Plaines is a home rule unit that had passed a noise ordinance regulating unreasonable noises within the city. The local noise ordinance had the same standards

60. Id. at 260, 347 N.E.2d at 718.
61. Id. at 262, 347 N.E.2d at 719.
62. See text accompanying notes 7-15 supra.
63. 65 Ill.2d 1, 357 N.E.2d 433 (Ward, C.J., Ryan and Goldenhersh, JJ. dissenting) (1976).
as subsequent Illinois Environmental Protection Agency regulations. The defendant railroad operated a yard that had locomotives which had exceeded the city's prescribed noise levels on twenty-seven occasions. Therefore, the plaintiff charged the defendant with a violation of its ordinances. The evidence at trial showed that the yard was wholly located within the city and the measurement of the noise level was only at points within the municipal boundaries.

The supreme court held that the City of Des Plaines did not have the authority to pass its noise ordinance. The basis of the court's decision was that the regulation of noise was not a power or function pertaining to a home rule unit's "government and affairs" within the meaning of section 6(a). The court reasoned:

While noise pollution may initially appear to be a matter of local concern, an analysis of the problem reveals that noise pollution is a matter requiring regional, if not statewide, standards and controls. As with air or water pollution which may emanate from a small, local source and then travel outward to foul an entire area or region, noise pollution also extends beyond its source, although on a more limited scale than air or water pollution. Local municipalities often border upon one another. While certain categories of noise pollution may be confined within the boundaries of one municipality, such as an irate motorist sounding his horn, other categories are not so limited. A railroad yard or industrial district located on the boundary of one municipality will obviously affect other municipalities with noise pollution emissions. Of particular relevance is the question of noise emissions from trains in transit which may pass through numerous municipalities en route to their destination.

This conclusion overlooks the local nature of the facts before the court. In Chicago and Northwestern Railway, the offensive noise started in Des Plaines in a railroad yard wholly within the city's border. The clamor had bothered Des Plaines residents in the early morning hours when locomotives were started for the day. The sounds were measured only in Des Plaines. A simple situation involving a noisy neighbor was presented to the Illinois

65. Regulations had been adopted by the Environmental Protection Agency prior to the date of the violations at issue in this case, however, the regulations were not effective until after a grace period. The violations at issue occurred during the grace period.
66. 65 Ill.2d at 5, 357 N.E.2d at 435.
Supreme Court. The court's finding that this limited noise pollution problem was not a matter of local concern was not based on the facts. While attempting to solve the potential problem that could occur if, for example, Des Plaines brought an action against a Mt. Prospect business for noise starting in Mt. Prospect that travelled to Des Plaines and exceeded Des Plaines noise levels, while complying with Mt. Prospect law, the Illinois Supreme Court destroyed the power of Illinois municipalities to solve local noise problems.

Chief Justice Ward and Justices Ryan and Goldenhirsch filed a dissent to the majority opinion. The dissent authored by Justice Ryan argued that the majority failed to consider whether it was even possible for all the state's pollution problems to be policed by the state Environmental Protection Agency. Also, the dissenters offered their opinion that it will be absolutely impossible for the EPA to eliminate the offending noises from every train whistle, siren and motor vehicle. Moreover, Justice Ryan pointed out that the majority opinion has invalidated every ordinance regulating horn honking, tire squealing and noisy mufflers. The broad grant of regulatory power conferred on home rule units by section 6(a) has now been construed to forbid home rule units from controlling even the simplest sound problem.

Mr. Chief Justice Ward also filed his own dissenting opinion in which he succinctly explained the problem now facing local governments:

However, I, too, consider, especially in the case of home rule units, that local governmental units generally should be able to act concurrently with the State in the environmental protection field. There will be instances where difficult problems may be presented, but the problems certainly would not be beyond solution. Illustrating the anomalous consequences of the majority's 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. Every small village as well as every large city must depend for protection solely on the State's interest in their environmental problems and the adequacy of its protective action.

67. Id. at 8, 357 N.E.2d at 436.
68. Id. at 9-10, 357 N.E.2d at 437-38.
Can this be the result intended by the framers of the 1970 constitution who attempted to confer broad power onto local governments?

The only conclusion that can now be drawn is that the power to regulate granted to home rule units by article VII, section 6(a) of the 1970 constitution will be narrowly construed, especially in environmental matters. It is hoped that in the future the justices of the supreme court will reverse this trend, read the constitution, study the intent of its framers, and restore the constitutional grant of power to home rule units.

69. Two other supreme court cases were decided during the September 1976 term and a review of these cases is relevant to any attempt to understand the present state of home rule authority. In Cicero v. Fox Valley Trotting Club, Inc., 65 Ill.2d 10, ___ N.E.2d ___ (1976), the court took a different approach to a similar issue. The issue before the court was whether an ordinance levying a municipal admission tax was valid. The local racetrack challenged the ordinance on grounds similar to the challenges raised by the railroad in the Des Plaines decision. The race track first contended that the state's extensive regulation had preempted the field of horse racing control. The court held that no preemption occurred because the Racing Acts were adopted prior to the constitution. Thus, preemption by these acts was not possible according to numerous previous decisions. In addition, the court held that the failure of the General Assembly to act pursuant to article VII, section 6(g) proved that no preemption occurred. This preemption reasoning contradicts the preemption reasoning used by the court in the environmental cases.

The next issue in Fox Valley Trotting Club was whether the taxation of horse racing was an activity pertaining to Cicero's government and affairs within the meaning of article VII, section 6(a). The court held that the power to levy this amusement tax was within the power conferred by section 6(a). The court carefully explained that this case dealt with the power to tax which is separate and distinct from the power to regulate. Then, the court held that article VII, section 6(a) confers upon home rule units a broad taxing power and upheld the city's tax. Thus, the supreme court in this tax case was willing to faithfully follow the intent of the framers of the constitution to grant substantial power to home rule units.

During its September term, the Illinois Supreme Court also decided Bulk Terminals Co. v. EPA, 65 Ill.2d 31, 357 N.E.2d 430 (1976). The primary issue presented was the problem of a company that first was prosecuted for a violation of a home rule environmental ordinance and then was charged by the Environmental Protection Agency in another proceeding. The answer to this question was deferred. The court avoided the problem by deciding the case on the issue of exhaustion of administrative remedies. In any event, the dual prosecution problem in environmental areas is probably moot since home rule units no longer have the power to legislate on environmental problems.

70. Since the supreme court has not delineated any real standards to govern its future decisions and the divided court will soon be changing, the future is difficult to predict.