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ILLINOIS MUNICIPAL HOME RULE AND URBAN LAND—
A TEST RUN OF THE NEW CONSTITUTION

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Traditionally, throughout the United States, cities and towns have been thought of as creatures of the state legislatures, and have only been able to exercise those powers specifically enumerated and delegated to them. The trend today, however, is to reverse this concept by providing for Municipal Home Rule, whereby the powers of local government bodies are construed liberally, subject only to specific legislative limitations or pre-emption.

At present, home rule provisions have been adopted by over half the states, at least eleven since 1950.1 This movement toward municipal home rule springs from a desire for local units of government, governed by those intimately familiar with local problems and responsible to a local electorate, to enjoy the freedom to seek a solution of purely local problems without interference from the legislature and to cope with the immensely complex problems of urban life today, especially those generated by the immense variety of the services we expect of our municipalities.2 The doctrine of home rule was, in the words of the Supreme Court of Ohio, "perhaps no better put

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than by Abraham Lincoln in 1859 in an address from the statehouse front at Columbus, Ohio."³ Discussing the Douglas doctrine of popular sovereignty, Lincoln said:

I believe there is a genuine popular sovereignty. I think a definition of 'genuine popular sovereignty,' in the abstract, would be about this: That each man shall do precisely as he pleases with himself, and with all those things which exclusively concern him. Applied to government, this principle would be that a general government shall do all those things which pertain to it, and all the local governments shall do precisely as they please in respect to those matters which exclusively concern them. I understand that this government of the United States, under which we live, is based upon this principle; and I am misunderstood if it is supposed that I have any war to make upon that principle.⁴

Total municipal autonomy is manifestly impossible and probably forbidden by constitutional restraints.⁵ Indeed, it would be a costly, irrational and unworkable form of anarchy. Speaking in terms familiar to a property lawyer, it is obvious that each city or village cannot be free to adopt its own statute of descent. This is a function that belongs to the state. Nor should each city or village be free to provide its own recording office. That function has been entrusted by the state to the counties. It becomes immediately apparent that a line-drawing process must take place in each state that adopts municipal home rule.

To restate the problem in Lincoln's terms, if cities exercising home rule powers may do precisely as they please, but only with respect to matters which exclusively concern them, how are we to distinguish matters which exclusively concern the city from those matters that are of statewide concern or countywide concern? The unspoken inference, in Lincoln's proposition, plainly is that in matters which do not exclusively concern the city, the city cannot do precisely as it pleases.

Perhaps, a somewhat bizarre illustration will clarify and dramatize the issue. Suppose that the home rule city of X enacts an ordinance that on the death of a resident of the city, intestate, all his property shall pass to his nieces and nephews. Under one view, this would be

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⁴ Id.
⁵ Thus it has been held that for a state to surrender all its sovereignty to a municipality within that municipality's borders would create a state within a state, contrary to U.S. Const. art. IV, § 3. Straw v. Harris, 54 Ore. 424, 103 P. 777 (1909). Contra, 16 Wyo. L.J. 47, 51 (1961).
the law until the legislature takes this power from the city. Under
the other view, the ordinance would have no validity. The courts
would strike down the ordinance as one dealing with a matter that
does not *exclusively concern* the city.

The question thus arises: by what state agency are the lines to
be drawn, and what criteria are to guide it in the drawing of these
lines? The constitution confers on the legislature power to deny or
to limit the powers and functions of a home rule unit. Arguably
then, the legislature could be the body that is to draw the lines, so
that if cities intrude into areas that the legislature feels are not purely
local, statutes could be enacted withdrawing this power from local
governments. In most home rule states, courts have assumed this
function. Looking at a narrow area of property law will help to
bring this problem into focus, and looking at the constitution itself
will make clear that it does not solve the problem.

Many home rule states require home rule municipalities to frame
and adopt a charter or code before "home rule" powers may be exer-
cised. As a consequence, in many states large numbers of munici-
palities cannot make use of home rule powers because they have
failed to adopt charters. The Illinois Constitutional Convention
Committee on Local Government decided that the charter process is
unnecessarily complex and places undesirable impediments in the
path of the development of home rule. It was the opinion of the
Committee that "municipal structure and organization in Illinois
are sufficiently well developed to warrant the grant of extensive local
powers without first requiring the adoption of a charter for each
municipality."

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7. Van Gilder v. City of Madison, 222 Wis. 58, 73, 267 N.W. 25, 31 (1936),
where Chief Justice Rosenberry of the Wisconsin Supreme Court stated: "The
home-rule amendment does not lodge the power to determine what is a 'local af-
fair' or what is a 'matter of statewide concern' either with the municipality or with
the Legislature or attempt to define those terms. In the event of a controversy
between municipalities and the state therefore, the court is required to make the ul-
timate determination." There are sound reasons for this conclusion. If home rule
is to give freedom from legislative interference, it would hardly be advisable to
make the legislature the referee in the state's disputes with the city. It is equally
obvious that the city should not make the decision. 16 Wyo. L.J. 47, 64 (1961).
The problem is considered in greater detail subsequently. See text accompanying
notes 33 and 38 infra.
8. Sixth Illinois Constitutional Convention, Report of the Committee on Lo-
THE CONSTITUTIONAL GRANT

In 1970, a new Illinois Constitution was ratified providing for "home rule." The new constitution provides explicitly for home rule without mention of the need for a charter, providing:

A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.\textsuperscript{9}

The grant of local powers contained in this section is divided into two parts: (1) a grant of general authority to exercise any power and perform any function pertaining to its government and affairs; (2) a grant comprised of four basic powers—the power to regulate, to license, to tax, and to incur indebtedness. Together, these two parts of the section are designed to ensure that the specified counties and municipalities receive directly under the constitution the broadest possible range of powers to deal with problems facing them, and with the demands that are made upon them by their residents and by the greater society.\textsuperscript{10} In the words of Hon. John C. Parkhurst, the Chairman of the Committee on Local Government, Sixth Illinois Constitutional Convention, this grant of powers is "the most liberal grant of home rule powers to any group of municipalities in the country. . . ."\textsuperscript{11}

Other delegates to the Sixth Illinois Constitutional Convention were also of the opinion that the home rule grant of power was very

\textsuperscript{9} In the words of Hon. John C. Parkhurst, the Chairman of the Committee on Local Government, Sixth Illinois Constitutional Convention, this grant of powers is "the most liberal grant of home rule powers to any group of municipalities in the country. . . ."

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\textsuperscript{11} In the words of Hon. John C. Parkhurst, the Chairman of the Committee on Local Government, Sixth Illinois Constitutional Convention, this grant of powers is "the most liberal grant of home rule powers to any group of municipalities in the country. . . ."
broad. Hon. John G. Woods, member of the Local Government Committee, made the following statement on July 23, 1970, to the Sixth Illinois Constitutional Convention sitting as a Committee of the Whole:

If they have home rule . . . there is a lot of power in this article, and you either like it or you don't . . . But this is a broad grant of power that we are proposing to you. Make no mistake about that!\(^1\)

Delegate Phillip Carey, Vice Chairman of the Local Government Committee, had this to say the same day:

In other words, you're given broad powers subject only to that pre-emption power of the General Assembly, and this is an attempt . . . by . . . both the majority and the minority—to get away from court interpretations which have been the bane of all home rule provisions in other states.\(^2\)

On July 29, 1970, Delegate Weisberg made the following statement to the Committee of the Whole:

What the Committee majority has proposed here is a more extraordinary and broad grant of automatic home rule power than exists under any other State Constitution in the United States.\(^3\)

Except for the power to make local improvements by special assessment and to levy additional taxes for the provision of special services, any "home rule" power or function may be denied or limited by the Illinois General Assembly. The constitution provides:

The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (1) of this section.\(^4\)

The constitution also provides:

The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.\(^5\)

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15. ILL. CONST. art. VII, § 6(g). Where the legislature acts negatively, simply forbidding home rule units to exercise certain powers without assuming state responsibility for the exercise of these functions, the three-fifths vote was provided to discourage "laundry list" legislation simply listing powers forbidden to home rule units. *Local Government Report, supra* note 8, at 1642 (1970).
16. ILL. CONST. art. VII, § 6(1).
Thus the constitution contemplates that with respect to a particular “home rule” power, the legislature may dictate that “home rule” municipalities either should not exercise that power, or should exercise it within limitations imposed by the legislature. There is general agreement that the legislature should retain some authority to regulate the activities of home rule municipalities in order to prevent abuse and to effect uniformity where necessary. Thus, there is a good case for preserving state power over most, if not all, subjects that fall within the powers granted to “home rule” cities. On the other hand, there is a great danger of undue legislative restriction of “home rule” powers if the legislature is, by a simple majority, able to act on all matters affecting local governments—hence the requirement for a three-fifth majority.17

The Illinois Constitution also contains a broad pre-emption clause which states:
The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this Section.18

The “pre-emption clause” authorizes the General Assembly, by a simple majority, to exclude “home rule” units from exercising any power or performing any function if the state (the legislature) is exercising the power or performing the function, and if the statute provides specifically that the state’s exercise shall be exclusive.

An example of the application of this “pre-emption clause” is as follows: Home Rule City adopts an ordinance requiring door-to-door salesmen to obtain a city license prior to engaging in their trade within the city. Under this clause, the General Assembly could, instead, provide for a state-wide system of licensing, effected either through a state agency or through local governments acting as agents of the state. This state-wide system would, if declared exclusive by the General Assembly, preclude local licensing by “home rule” cities otherwise permitted under Section 6(a).19

Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law

18. ILL. CONST. art. VII, § 6(h). Compared to Art. VII, § 6(g), this is an affirmative rather than a negative type of preemption. Here the legislature decides to assume, as a state function, a function that might otherwise be deemed a local function. A simple legislative majority suffices.
does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.\footnote{20}{ILL. CONST. art. VII, § 6(i).}

Home rule units may, therefore, exercise power concurrently unless their power is specifically taken away by legislation. For example, the state, by statute, establishes a system for licensing beauticians. Unless the statute provides that this licensing system is to be exclusive with the state, "home rule" units may also engage in the licensing of beauticians. Local licensing would be subject, however, to any limitation specified in the statute, such, for example, as pertain to qualifications, maximum fees, and the like.\footnote{21}{Baum, The Scope of Home Rule, 59 ILL. B.J. 814, 830 (1971).}

It can be seen, then that the Illinois Constitution spells out restraints on the exercise by a "home rule" municipality of its "home rule" powers. However, the constitution places no explicit limits on the powers of a "home rule" municipality with respect to strictly state affairs, such as enactments relating to the descent of intestate property. As a result, the relationship between home rule powers and statutes existing at the date of the adoption of this constitution requires explication. It is clear that the adoption of the constitution did not automatically repeal existing Illinois statutes.\footnote{22}{Transition Schedule, ILL. CONST. art. XIV, § 9. Professor Baum emphasizes this point in Baum, A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict, 1972 U. ILL. L.F. 599, 576-577, 581.}

It is equally obvious that conflicts must necessarily arise between the Illinois statutes that are now on our books and the ordinances enacted pursuant to the grant of home rule powers. When such conflicts arise, it has been suggested that ordinances enacted within the scope of the home rule power shall prevail over the statutes.\footnote{23}{Proceedings, Vol. 92, pp. 37, 38, 40; Vanlandingham, supra note 1, 284-285.}

The views to this effect expressed on the convention floor are shared by Professor Baum.\footnote{24}{Baum, The Constitutional Background of Home Rule, a presentation to the Second Annual Local Government Law Institute, April 15, 1971.}

It is the universal rule in states having home rule provisions.\footnote{25}{ANTEAU, MUNICIPAL CORPORATION LAW § 3.16, at 137 (1968); McQUILLIN, MUNICIPAL CORPORATIONS § 21.28, at 243 (3rd ed. 1969); RHYNE, MUNICIPAL LAW § 113.2, at 55 (1957).} It will be observed, however, that this rule will apply only to ordinances enacted within the scope of the home rule power.
Clearly, this again draws attention to the existence of some inherent limitations on home rule.

"STATE AFFAIRS" V. "MUNICIPAL AFFAIRS"

What limitations may in fact be imposed on the localities may be determined by examining the distinction, between so-called "state affairs" and "local affairs." There is no precise definition of either term. The subject has been dealt with at length by the text writers and some tests have been devised. Thus, if it appears that uniform regulation throughout the state, either between urban and rural areas or between all cities, is necessary or even desirable, the matter

26. Van Gilder v. City of Madison, 222 Wis. 58, 67, 267 N.W. 25, 28 (1936), where Chief Justice Rosenberry of the Wisconsin Supreme Court, after obvious research on the question, was moved to conclude: "When is an enactment of the Legislature of state-wide concern? We find no answer to this question in any decision of any court in this country." The Chief Justice continued: "No other Constitution uses the term 'matters of state-wide concern.' While these terms in some contexts may have a definite content as used in the Constitution, they are practically indefinable." 222 Wis. at 73, 267 N.W. at 31; 2 McQuillin, Municipal Corporations § 4.85 at 164 (3rd ed. 1969); see Klemme, The Powers of Home Rule Cities in Colorado, 36 U. Colo. L. Rev. 321, 329 (1964).

27. Sunset T. & T. Co. v. City of Pasadena, 161 Cal. 265, 281, 118 P.796, 803 (1911), where the Supreme Court of California stated: "Are the matters referred to 'municipal affairs' within the meaning of those words as they are used in section 6 of article XI of the Constitution? There has been much discussion in our decisions as to what matters are embraced in this term, and it has been said that it is very difficult, if not impossible, to give a general definition clearly defining the term 'municipal affairs' and its scope." Similarly, in Carlberg v. Metcalfe, 120 Neb. 481, 484, 234 N.W. 87, 89-90 (1930), the Supreme Court of Nebraska said: "A careful perusal of the decisions of the courts of other states, wherein the question has arisen as to what are the functions of the municipality and the functions of the state in relation to each other, clearly indicates that this a difficult and intricate task. . . . The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation." 120 Neb. 481, 487, 234 N.W. 87, 90 (1930). And in Van Gilder v. City of Madison, 222 Wis. 58, 81, 267 N.W. 25, 34 (1936), the Wisconsin Supreme Court, speaking through Chief Justice Rosenberry, said: "So far as we are able to discover, no one has undertaken to define what is meant by local affairs and government." See McQuillin, Municipal Corporations, § 4.85, at 164 (3rd ed. 1969). The court decisions are conflicting in their views regarding local affairs as distinguished from state affairs. For example, Oklahoma has held that the assessment and collection of the property tax is a state matter and Nebraska has held the contrary. 16 Wyo. L.J. 47, 62, 63 (1961). The problem is aggravated by the fact that the concept of "municipal affairs" appears to fluctuate with the times. Vanlandingham, supra note 1, 291; 36 S. Cal. L. Rev. 430, 431.
is a "state affair." 28 Again, historical considerations play some part in the determination that a subject matter is either local or state. 29 This test can be helpful in areas that have a reliable history. Thus, to revert to an example given earlier, statutes of descent are historically a state affair. But matters that have only a brief history—for example, environmental control—are bound to present problems.

Another test relates to the impact of legislation on people outside the city. If the effect of municipal control is not great upon non-residents, the matter may well be considered a local affair. 30 Where uniformity and cooperation among governmental units are necessary, and where action of state and county officials within the limits of the city is imperative to effectuate adequate protection outside the city, the matter will in all likelihood be considered a state affair. 31 Another author argues that all of those public affairs which alone concern the inhabitants of the locality as an organized community apart from the people of the state at large, are local affairs. 32 In states where the line is drawn by the courts, by a slow process of inclusion and exclusion, the courts have determined that certain subjects are either within or without the category of local affairs. 33 The result, of course, has been that until a given question has been decided by the local supreme court, no one knows for sure whether a given subject falls within the ambit of local affairs, since "judges are required to make vital allocations of governmental power on the basis of a

29. Van Gilder v. City of Madison, 222 Wis. 58, 75, 267 N.W. 25, 32 (1936), where the Court said: "So far as we have been able to discover in all jurisdictions where the question has arisen because of a conflict between a charter ordinance adopted under a home-rule provision of a Constitution and an act of the Legislature, the matter of police and fire protection has been held to be a 'matter of state-wide concern' for the following reasons . . . (6) because for a long time these duties have been delegated to and performed by the various municipal subdivisions of the state, these functions are ordinarily thought of as being in part the primary duties of cities and municipalities." See Antieau, Municipal Corporation Law § 3.36, at 162 (1968).
31. Id.
phrase that has acquired no empirical meaning."\textsuperscript{34} There is a common understanding that such general subjects as crime, domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, and corporations are not local affairs.\textsuperscript{35} Also, where the matter is one intimately concerning the state, such as the requirement of a city building permit for state buildings, the application of city zoning ordinances to state building authorities, the sales to state institutions, or the control of state highways, state control prevails over home rule.\textsuperscript{36}

Complicating the picture is the fact that many governmental functions are "mixed," with local officials performing state functions.\textsuperscript{37} Thus the state court system may be created by state law, but judges, prosecutors, sheriffs, etc., may be chosen locally. The state court system, nevertheless, is a state institution. Also, operating within some urban areas are special-purpose authorities such as housing and transportation authorities. Plainly, the power of home rule cities to legislate with respect to these special-purpose authorities is either limited or non-existent.

\textbf{Pre-Eminence of State Legislation in the Area of State Affairs.}

In states having home rule provisions there is agreement that state legislation should prevail in all matters that are deemed "state af-
fairs."" Through exercise of the pre-emptive power the legislature can deny to a municipal corporation a power that relates clearly to a local affair. Or the power can be used to clear up any ambiguity. But even in the absence of any legislative action, an ordinance by a home rule municipality will, according to some authorities, be declared invalid by the courts if it invades the province of pure state affairs. Or, to put the proposition in negative form, home rule municipalities, it is felt by many courts, have no home rule power to legislate on matters that do not pertain to their affairs.

It has been said that two approaches to the question of home rule municipal power in state affairs are possible and have been taken by the courts. First, it can be ruled that even though the problem is one of state concern and shared by cities throughout the state, a home rule municipality has power to act thereon until the state acts. Or, alternatively, municipal power in matters of state concern can be denied by the courts in the absence of a specific constitutional or legislative grant.

After citing authority for the second proposition, Antieau argues for the first proposition, saying:

Nevertheless, because state legislatures seldom get around to providing guides on all matters of "state" concern, and since these matters often greatly affect conditions in home rule cities and need control, it is suggested that the first approach is far preferable.

Antieau then suggests a third view, namely, that the municipality may act in matters of state concern within its territorial limits unless the legislature has appropriated the field.

The language of the Illinois Constitution grants home rule power to a municipality "to perform any function pertaining to its government and affairs." This language is devoid of any grants of powers over state affairs within the territorial limits of the municipality. But Professor Baum argues that this is not conclusive. Clearly,

40. Id.
41. Id.
42. See text accompanying note 46 infra.
44. Baum, A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations, 1972 U. Ill. L.F. 137, 156. Professor Baum states that Section 6(i)
this issue is left in doubt until our Supreme Court speaks. Until then any home rule ordinance operating in any area that might be deemed to be a state affair is suspect. In short, prudence dictates at least a temporary acceptance of the notion that a home rule unit has no powers in the area of state affairs.

**Implied Pre-Emption.**

After the adoption of home rule constitutions, legislatures continue to legislate, as they have in the past, on matters of state concern. They seldom spell out their intention to exclude from such legislation home rule units legislating in the same field. And home rule cities, enjoying their new freedom, have enacted ordinances that seem to cover ground normally covered by state legislation. To cope with this problem, some courts have evolved the doctrine of implied pre-emption. Under this doctrine, if the city attempts to legislate in an area preempted by the state, its action is void. Determining whether the ordinance can stand is, in these jurisdictions, a matter for the courts. A variety of

"minimizes" judicial preemption. Baum, *supra* note 22, at 572. But he recognizes that "[s]ome difficult, perhaps insoluble problems remain." *Ibid.* Where an unavoidable conflict exists between a statute and an ordinance of a home rule unit, he feels that the constitution gives no express guidance as to how this problem is to be resolved. *Id.* at 573. Again, he says that the Illinois approach places "almost" exclusive reliance on the legislature rather than the courts to keep home rule units in line. He recognizes that the courts should occasionally step in. *Id.* at 579.


47. 72 HARV. L. REV. 737, 747 (1959). It is not universally conceded that this is a problem for the courts. There is much dissatisfaction with the solution offered by the courts. See, e.g., 36 S. CAL. L. REV. 430, 442 (1963). It was the view of Dean Fordham that court decisions unduly fettered home rule cities and that the constitution should rule out judicial interference by granting plenary legislative power to home rule cities, equal with that of the legislature, not limited to local affairs, subject only to such specific interdiction as the legislature might see fit to impose. Dyson, *Ridding Home Rule of the Local Affairs Problem*, 12 KAN. L. REV. 376 (1963-64); Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U.L. REV. 571, 581 (1955); Note, *Municipal Home Rule in Iowa: House File 380, 49* IOWA L. REV. 826, 829 (1964); Comment, *Municipal Home Rule Powers Impact on Private Legal Relationships*, 56 IOWA L. REV. 631, 641 (1971). The Fordham proposal was considered by the Illinois Convention. In the end the decision went against adoption of the Fordham proposal. *Local Government Report, supra* note 8, at 46-47. Instead, the convention opted for the more conservative view that home rule cities should be given plenary powers, such as those granted in NEW YORK CONST. art. IX, § 2(c), to legislate regarding local affairs.
tests have been devised by the courts to determine the extent of conflict.\footnote{48} How this problem will be resolved in Illinois remains to be seen. As to existing state legislation and future home rule ordinances, it seems that court decisions may be essential to resolve any conflict. As to future state legislation, predictions are difficult. It is unlikely that the legislature will always tag on its enactments a statement that the state's exercise of power is or is not intended to exclude like enactments by home rule cities. At times this will be done.\footnote{49} At other times the legislature may not speak to this point. Suppose, for example, that the legislature adopts the Uniform Probate Act or the Uniform Consumer Credit Code. It is unlikely that it would feel obliged to say anything about home rule cities. The legislation speaks for itself. The entire state is affected, including home rule cities, and city action in this area is impliedly forbidden.

\textit{Governmental and Municipal Functions Distinguished}

It must be remembered that a home rule municipality functions in two separate and distinct capacities. As a municipal corporation, it acts as an arm of the state and exercises the governmental functions and powers of such,\footnote{50} thereby contributing to the convenient administration of the government. Its purely municipal or proprietary functions consist of those granted for the specific benefit and advantage of the urban community embraced within the corporate boundaries.\footnote{51} Within this context, land held for governmental pur-

\footnote{48} Feiler, \textit{supra} note 46, \textit{passim}. See text accompanying footnotes 38, \textit{et seq.}

\footnote{49} Montgomery, \textit{State Pre-emption and Local Legislation}, 4 SANTA CLARA LAW. 188 (1963-64). See, \textit{e.g.}, ILL. REV. STAT., ch. 111 12, §§ 713, 736 (1971), providing for the licensing and regulation of mobile home parks, with a provision that it does not apply within the jurisdiction of any home rule unit. \textit{See also,} Opinion of Atty. Gen., Ill., No. S-496—July 24, 1972, in which the Attorney General advised Dr. Yoder, Director of the Department of Public Health, that the Mobile Home Park Act (ILL. REV. STAT. ch. 1111/2, §§ 711 \textit{et seq.} (1971)) and the Recreational Area Licensing Act (ILL. REV. STAT. ch. 1111/2, §§ 761 \textit{et seq.} (1971)) do not apply to a municipality located within a home rule county, even though the municipality itself is not a home rule unit.


poses is treated differently from land held for purely local or municipal purposes.

Absent home rule authority, statutory authority is needed to sell land being used for governmental purposes. It is certainly arguable that a municipality dealing with, let us say, a firehouse in active use is not engaged in a local affair. The same could be said of a home rule county attempting to sell the county court house. Perhaps, this is what Antieau had in mind when he said:

Unless the property is used essentially for educational, health, police or fire purposes, there is a tendency to apply local rules rather than state legislation to the acquisition, management and disposal of municipal properties.

Therefore, it would seem to follow that in dealing with sales or leases of surplus land or with street vacations, the municipality is dealing with land that has lost its governmental character, because it is no longer serving a governmental function. Municipalities, acting sensibly and in awareness of what has been stated here, have confined their dispositions to land not needed and not being used for a governmental purpose. Thus, the litigation tends to focus on procedural matters, such as the necessity of obtaining bids. However, where the land is no longer classified as governmental land, home rule units should be able to devise their own procedure.

SALES OF CITY LAND

At this juncture an analysis of specific urban land problems arising under the Illinois Municipal Home Rule system will provide further insight into the practical workings of this new grant of power. Under the Illinois statutes, which have continued vitality under the constitution, a bidding procedure is prescribed for the sale of city

52. McRobie v. Westernport, 260 Md. 464, 467, 272 A.2d 655 (1971), where the Supreme Court of Maryland, in holding that a parking lot was held in a governmental capacity, stated: "Property held or maintained in proprietary capacity may be disposed of unless specifically restrained by charter or statute, but property held in a governmental capacity cannot be disposed of without express authority." Rhyne says: "It is the general rule that in the absence of charter or statutory authority, municipal property dedicated and being used for a governmental purpose, or held in trust may not be sold by a municipality." RHINE, MUNICIPAL LAW § 16-11, at 379 (1957); Also, the general rule seems to be that municipalities may sell, without statutory authority, land which is not actually being used for a public purpose, although it was bought for a public use. ANTIÉAU, MUNICIPAL CORPORATION LAW § 20.19, at 74-75 (1968).

53. ANTIÉAU, MUNICIPAL CORPORATION LAW § 3.19, at 147 (1968).
land no longer needed for public purposes. The question that now arises is whether the sale of this city land is a local affair, which enables a city to dispense with the bidding procedure and sell the land at a private sale. How this land is disposed of obviously concerns only the residents of the city. Without the slightest doubt, we can conclude that the statutory bidding procedure is inapplicable to the sale of such property. This does no violence to the notion that home rule does not extend to real property matters. What is meant is that municipal home rule does not extend to specifying the legal requirement for deeds, easements, or mortgages. These are matters that should be uniform throughout the state, but how a municipality disposes of its own land is a matter that concerns only that municipality.

LEASES OF CITY LAND

Just as the courts have determined that the sale of municipal real estate is a municipal or local matter, they also have held that the leasing of city-owned real estate is purely a local matter. Therefore, home rule cities are not constrained by statutory inhibitions in relation thereto.

In Ohio, which has had home rule since 1912, the City of Colum-


55. Tucson v. Arizona Alpha of Sigma Alpha Epsilon, 67 Ariz. 330, 195 P.2d 562 (1948); State v. Redick, 168 Ohio St. 543, 157 N.E.2d 106 (1959). Where a statute existing at the date of the Constitution sets forth procedural requirements—such as the percentage vote required to vacate a street or hearing requirements before changing zoning—it might be prudent for the home rule municipality to adopt its own procedural ordinance to indicate its decision to abolish the statutory requirements. This is consistent with the idea that under the General Transition section the old statutes remain applicable, even as to local affairs, until the home rule unit displaces them. As to statutes enacted after the date of the Constitution, if the statute imposes a procedural requirement it must, to be effective as to local affairs, be enacted by a three-fifths vote of the legislature. Baum, supra note 22, at 570. Professor Baum makes a convincing argument that statutes enacted prior to the Constitution, even though by a three-fifths majority, can be displaced by inconsistent home rule ordinances relating to local affairs. Supra note 22, at 578.


57. Supra notes 47 and 48 and accompanying text.
bus, a home rule city, passed an ordinance directing a city official to execute a lease of city-owned land to the Linden Veterans' Center Association. The official refused to do so on the ground that the ordinance was invalid for the reason, *inter alia*, that it was passed in disregard of a statute which provided that an ordinance authorizing the sale or lease of municipal property must be approved by two-thirds of the members of the legislative authority of the municipal corporation, and that the property must be sold or leased to the highest bidder only. The Supreme Court of Ohio, holding that it was not necessary that those statutory requirements be met, stated:

Municipalities, which, under their charters have full power to exercise local self-government, may convey property without resort to the exactions required by state statutes. . . . It seems to us that the lease which deals with a lot owned by the city of Columbus, presents only a local problem, and that, therefore, the provisions of [the statute] have no application.58

Four years later, the Supreme Court of Alaska held that the home rule city of Ketchikan was not constrained to follow the provisions of a statute which permitted municipalities to lease their municipal property only after they had found that it was no longer required for municipal purposes.59 After receiving voter approval, the city had executed an agreement to lease a hospital to a charitable, non-profit corporation for a period of ten years at a rental of one dollar a year. In an action to cancel the lease, Lien assailed the lease as being invalid on the ground, *inter alia*, that the city council had violated the statute, because they failed to find that the hospital property was not required for municipal purposes. The court responded in this language:

The statute relied upon by plaintiff has no application to this case. We hold that [the statute] which authorizes municipalities to lease [their] property, is not relevant where the powers of a home rule city are being considered.60

Very recently, in *Macauley v. Hildebrand*,61 the Supreme Court of Alaska emphasized, in distinguishing the *Lien* case, that the leasing of municipal property is clearly and purely a matter of local concern: In *Lien v. City of Ketchikan* [citation omitted] we recognized that under the Alaska Constitution home rule municipalities have broad governmental powers and refused

60. *Id.*
to void a lease of municipal property even though the city had not complied with a general state statute regarding such leases. *Lien,* however, dealt with a *matter of purely local concern, the leasing of municipal property* (emphasis added).

Thus, the determination of whether a home rule municipality can enforce an ordinance which conflicts with a state statute depends on whether the matter regulated is of state-wide or local concern. . . . [1]*In Lien,* on the other hand, we were dealing with a *city's power to lease municipal property, clearly a matter of local concern* (emphasis added).\(^62\)

Specifically, the leasing of tidelands or submerged lands by a home rule municipality presents a matter of slightly different dimensions. The California case of *Silver v. City of Los Angeles\(^63\)* is a case in point. It involved an action by a taxpayer to set aside an oil and gas lease of over 6400 acres of submerged lands situated in the Los Angeles Outer Harbor. Parties to the lease were the home rule City of Los Angeles and a private oil development company. In accordance with well-established doctrine applicable both to tidelands and submerged lands, the lands were held in trust for the public for purposes of navigation and the like. The issue before the California Supreme Court was whether, in the absence of fraud, collusion, ultra vires, or failure by a municipality to perform a duty specifically enjoined, a taxpayer could bring, in his representative capacity, an action to set aside a contract entered into between a municipality and a private corporation relative to lands held by the municipality in trust.

In holding that the taxpayer could not maintain his action, the court had the following to say about the leasing of the lands by the city:

> Although the proper use of the tidelands . . . is a statewide affair [citations omitted], this does not mean that the administration of the trust is in all matters a statewide affair. [citations omitted]. . . .

Defendant municipality is a charter city, and until the Legislature acts to provide otherwise, the manner in which it effectuates the purposes of the tidelands trust, including the manner in which it conducts negotiations for the leasing of the lands, is a municipal affair. [citations omitted]. . . .

At the time the lease was executed (December 28, 1956), . . . there was no relevant charter or statutory provision directing the manner in which the lands were to be leased.\(^64\)

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62. *Id.* at 121-22.


64. *Id.*
Two years after the lease was executed, the California legislature enacted specific legislation governing the procedures by which oil and gas leases were to be granted by municipalities. The legislation applied to non-charter cities with respect to all oil and gas leases, and to home rule (charter) cities only with respect to tidelands and submerged lands granted in trust to them by the state.\(^6\) Thus it seems that where tidelands or submerged lands are involved, a municipality holds them more in its governmental capacity, i.e., as an arm of the state, than in its municipal capacity. In other words, it seems that tidelands and submerged lands are to be treated more as land held for governmental purposes than land held for purely municipal purposes. It is surely arguable that a home rule municipality contemplating the leasing of ocean beach property will not be engaged in a local affair to the extent that it can ignore statutory law governing the sale or the leasing of tidelands.

**VACATIONS OF CITY STREETS**

Except where a street forms a link in a state highway, the authorities seem to agree that the vacation of a public street is an area in which a home rule municipality should have the power to legislate without regard to conflicting statutes. Thus, in *Constantine v. City of Sunnyvale*,\(^6\) the California Appellate Court held that although the question of the elimination of grade crossings is a matter of state concern, the vacation of city streets falls within the scope of municipal affairs; it may be accomplished without the consent of the State Railroad Commission, unless it interferes with the operation of a railroad.

Earlier, in *Sunset Telephone and Telegraph Co. v. City of Pasadena*,\(^7\) the Supreme Court of California had the following to say: "It is unquestioned that the matter of opening, widening and vacating the streets of a municipality is purely a municipal affair." And in the initial issue of the California Law Review, Professor Wil-

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\(^6\) *West Cal. Pub. Res. Code*, §§ 7058.5, 7059, 7060, 7061 (1959). Perhaps the inference is warranted that the legislature thought that both the city and the court were wrong in thinking of the disposition of a tideland as anything but a state affair.


\(^7\) *Sunset T. & T. Co. v. City of Pasadena*, 161 Cal. 265, 282, 118 P. 796, 803 (1911).
liam Carey Jones stated: "The opening, widening and vacating of streets of a municipality is a purely municipal matter, and it is assumed in all the decisions that the control of city streets is a local or municipal affair. . . ." 68

In his treatise on roads and streets, 69 Elliot stated that the matter of city streets was peculiarly one of municipal control and local interest. Elliot reasoned that this must be so because, among other things, a municipality becomes liable for failure to keep its streets safe on the theory that it has exclusive control over them and the power to raise money to maintain them in safe condition for travel. According to Elliot:

There is an essential difference between cases where the matter is a general governmental one, and cases where the matter is so peculiarly one of municipal control and local interest as streets, and it seems to us that some of the courts have been misled by supposing an analogy to exist between the two classes when, upon analysis, it will be found there is none. . . .

The object of incorporating a town or city is to invest the inhabitants of the locality with the government of all the matters that are of special municipal concern, and certainly the streets are as much of special and local concern as anything connected with a town or city can well be. It ought, therefore, to be presumed that they pass under the exclusive control of the municipality as soon as it comes into existence under the law. 70

The Supreme Court of Nebraska held, in Lee v. City of McCook, 71 that when the city enlarged its corporate limits and annexed territory over which there existed a highway previously laid out by the county commissioners, the highway became impressed with the character of a street and the commissioners relinquished control and jurisdiction to the city council, who then became the only body empowered to vacate the roadway. In In re Hull, 72 the Supreme Court of Minnesota noted that those home rule charters which did not contain some provision for the vacation of streets by the municipal authorities were few indeed. The court further noted that in Balch v. St. Anthony Park West, 73 it had held that since the charter of St. Paul, a home rule city, provided a method for the vacation of streets by the city authorities, a

69. 1 ELLIOT, ROADS AND STREETS § 504, at 505 (3rd ed. 1911).
70. Id.
72. In re Hull, 163 Minn. 439, 204 N.W. 534 (1925).
district court, therefore, lacked the power to vacate a street under a statute which authorized a district court to vacate streets. The exception to this rule occurs when the municipality has its own charter providing for the vacating of streets by the local authorities.\(^7^4\)

Where a street forms a link in a state highway or turnpike, however, it seems that the vacating of such street would not be held to be a purely municipal affair, for the courts have generally subscribed to the view that home rule powers granted to cities over their streets may not be used to interfere with the state's control over its highways.\(^7^5\) A few representative cases will illustrate this view.

In *City of Lakewood v. Thormyer*,\(^7^6\) the City of Lakewood sought to enjoin the state highway director from taking action leading toward the relocation and abandonment of parts of state highways located in the cities of Lakewood and Rocky River. The court rejected the contention of Lakewood that a statute providing for such action after court approval contravened the city's home rule powers granted by the Ohio Constitution. The court held that such powers related only to "local self-government" and not to the construction of a turnpike across the state.\(^7^7\) The court's language that "the construction of a turnpike across the state hardly can be considered a matter of local self-government" was taken from the opinion of the Ohio Supreme Court in *State v. Allen*,\(^7^8\) where it was held that the state turnpike commission need not, in order to avoid violating a city's right of home rule, obtain the consent of the city before building a turnpike through it, since such construction was a state concern, not a matter of local self-government.\(^7^9\)

\(^7^4\) In closely analogous subject matter, the cases in Missouri contain holdings or dicta that municipal ordinances of home rule cities will prevail over conflicting statutes with respect to the opening and grading of streets. The reason for these judicial utterances is that the opening and improving of streets within a city are matters which are "clearly municipal affairs." Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 Mo. L. Rev. 45, 64 (1968). Antieau, *Municipal Corporation Law* § 3.24, at 153 (1968).


\(^7^6\) City of Lakewood v. Thormyer, 79 Abs. 41, 154 N.E.2d 662 (Ohio Common Pleas 1957).

\(^7^7\) Id. at 670.

\(^7^8\) State v. Allen, 158 Ohio St. 168, 107 N.E.2d 345 (1952).

\(^7^9\) See also, Southern Cal. Roads Co. v. McGuire, 2 Cal. 2d 115, 39 P.2d 412 (1934).
The Indiana case of *Larson v. Town of Wynnedale*\(^80\) involved an action to enjoin a town from vacating a street within its boundaries, where the street was a continuation of a public highway denominated a county road outside the town. The Indiana Appellate Court held that although a town had exclusive power to vacate existing highways located wholly within its limits, there was an exception to this rule, arising in instances where the highway was either a federal or state highway.

In the very recent case of *Jones v. City of Ypsilanti*,\(^81\) the Michigan Court of Appeals held that the city was responsible for maintaining the safe condition of sidewalks within the city. This result was obtained notwithstanding the fact that the defective sidewalk on which plaintiff tripped adjoined a state trunkline highway. The court reasoned that municipalities should retain reasonable control over state trunkline highways located within their boundaries, to the extent that such control pertains to local concerns and does not conflict with the paramount jurisdiction of the state highway commission.

Much earlier, in *Rogers v. City of Jackson*,\(^82\) the Michigan Supreme Court had upheld the validity of the city's vacating a city street which formed part of a state road without giving notice to or soliciting approval from the state highway commissioner. The court's decision was based upon a statute that expressly gave to municipalities the power to vacate all "state roads which . . . may be within the corporate limits of any city or village within the state."

The statute was subsequently repealed so that Michigan municipalities are now expressly *prohibited* from vacating any part of a street or road which has been duly designated as a state highway.\(^84\) The statute, construed by the court in *Rogers* and later repealed by the legislature, ran counter to the current of modern judicial thinking. The courts would today probably hold that the vacating of any part of a state highway could be accomplished only by, or at least with the concurrence of, the state.

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\(^{83}\) *Id.* at 258, 231 N.W. at 622 (1930).

ZONING

In two earlier cases, the view was expressed that the zoning power was not essential to local government, and that it was not of purely municipal concern. Now, however, zoning has come to be recognized by the courts of several jurisdictions as peculiarly within the province of local government so that, in the event of conflict between state laws and home rule ordinances, the latter will generally prevail. Thus, in what Professor Antieau has called a well-reasoned decision, the Pennsylvania Supreme Court held that zoning ordinances could be adopted under Philadelphia's own procedures, even though the adoption did not satisfy the state statute. The court explained:

Surely, there are few matters which are of less state-wide concern and which are more local in scope than zoning inside the City of Philadelphia. . . . there can be no reasonable dispute that where, as in the instant case, the Council acts on a matter which is of purely local concern in a manner inconsistent with a State law, the ordinance must prevail.

The Pennsylvania Supreme Court recently held that the legislative prohibition against a home rule city's exercise of powers contrary to other acts of the General Assembly applies only to substantive matters of state-wide concern, but not to zoning, which is peculiarly a local matter.

In Colorado, one of the oldest constitutional home rule states, a statute providing for changing zoning regulations, restrictions, or boundaries, when objected to by twenty per cent of the property owners in the area affected by the change, requires a three-fourths vote of the council before such an amendment shall become effec-

87. One eminent scholar of home rule law has stated that early attempts to base zoning upon home rule power were generally rebuffed by the courts, but that recent decisions appear to support the conclusion that the authority to zone may now be based on the grant of home rule. See Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643, 718, n.285 (1964). But see Sato, "Municipal Affairs" in California, 60 Cal. L. Rev. 1055, 1097-1098 (June 1972), where Professor Sato advances his opinion that there is no room for local autonomy even in the field of land use regulations where there is a conflict between state and local enactments.
90. Colo. Const. art. XX, § 1, adopted for Denver Nov. 4, 1902; art. XX, § 6, adopted for other home rule cities and towns Nov. 5, 1912.
In a very recent decision, the Colorado Supreme Court held that the statute was superseded by a comprehensive home rule city zoning ordinance which specifically eliminated the three-fourths majority requirement and provided, instead, that any change would only require the affirmative vote of a simple majority of the entire city council. Said the court: "We hold that zoning under [the] Colorado Constitution, art. XX, §6, is local and municipal matter."

A California appellate court recently observed in dictum that zoning is a municipal affair over which a home rule city has supreme control, and which lies beyond the scope of legislative action. Earlier, the California Supreme Court had held that the issuance of permits for the erection of buildings within its territorial limits is a municipal affair over which San Francisco, as a home rule city, has supreme control.

In Ohio, another constitutional home rule state, home rule municipalities directly exercise the sovereignty of the state in dealing with problems of zoning—as well as kindred matters of urban renewal, open space programs, building codes, and other land use controls—so that each home rule municipality may determine its own objectives and concepts of desirable urban development without the difficulties of obtaining statutory authority. Observing that the Ohio Constitution grants a municipality the option of determining its own plan of local self-government by framing and adopting a home rule charter, the Ohio Supreme Court stated:

If a municipality adopts a [home rule] charter it thereby and thereunder has the power to enact and enforce ordinances relating to local affairs, but, if it does not, its organization and operation are regulated by the statutory provisions covering the subject.

The court then held that because the Village of Oakwood had not

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94. Lindell Co. v. Bd. of Permit Appeals, 23 Cal. 2d 303, 313, 144 P.2d 4, 8-9 (1944).
adopted a home rule charter incorporating provisions related to zoning, it was, therefore, still subject to statutory enactments with respect to the procedure to be followed in the adoption of zoning ordinances. Chief Justice Weygandt dissented on the authority of an earlier case97 wherein the Ohio Supreme Court had held that the home rule provisions of the Ohio Constitution were self-executing, and that the power of local self-government was inherent in all municipalities regardless of enabling legislation and the existence of municipal charters.98

In Minnesota, the supreme court recently held, in A.C.E. Equipment Co. v. Erickson,99 that, in purely local matters such as zoning, the provisions of Minneapolis' Home Rule Charter should prevail over general statutes regulating state-wide problems. The court quoted as follows from State v. City of Crookston:100

As stated in American Elec. Co. v. City of Waseca [citations omitted]: the provisions of home rule charters upon all subjects proper for municipal regulation prevail over the general statutes relating to the same subject-matter, except in those cases where the charter contravenes the public policy of the state, as declared by the general laws, and in those instances where the legislature expressly declares that a general law shall prevail, or a purpose that it shall so prevail appears by fair implication, taking into consideration the subject and the general nature of the charter and general statutory provisions.101

In State ex rel. Ekern v. Milwaukee,102 the Wisconsin Supreme Court had under consideration the validity of an ordinance adopted by the home rule city of Milwaukee by which the city elected that a statute limiting the height of buildings in cities of the first class should not apply to the city of Milwaukee. The ordinance fixed a maximum height higher than was prescribed in the statute. After some discussion of several of the considerations affecting the construction of the home rule amendment to the Wisconsin Constitution, the court said:

As applied to the situation here presented, we hold that, though the height of buildings in cities is of state-wide concern . . . nevertheless, . . . the height of buildings in a particular community is a problem and affair which much more intimately and

98. Supra note 96, at 452, 123 N.E.2d at 422.
100. State v. City of Crookston, 252 Minn. 526, 91 N.W.2d 81 (1958).
101. Id. at 529, 91 N.W.2d 83-84.
directly concerns the inhabitants of that community than the casual visitor or the other parts of the state, and it is therefore a 'local affair' of such community within the Amendment.\textsuperscript{103}

In New York, a breakdown of cases recently undertaken by Professor Macchiarola led him to conclude that home rule has been upheld by New York courts in an increasing number of areas, and that the area of local government's greatest strength is in the powers over zoning.\textsuperscript{104}

In Illinois one cannot predict, on the basis of adjudicated cases, whether our courts will follow what appears to be a trend, in the direction of regarding zoning as a matter peculiarly within the province of a home rule unit. Nonetheless, it is interesting to note that, in at least two decisions, our supreme court has stated:

\textit{Zoning lies primarily within the province of the municipality, and it is neither the province nor the duty of courts to interfere with the discretion with which the municipal authorities are vested unless the action of the municipal authorities is shown to be unrelated to the public health, safety, and morals} (emphasis added).\textsuperscript{105}

In addition:

\textit{It is well established that it is primarily the province of the municipal body to determine the use and purpose to which property may be devoted, and it is neither the province nor the duty of the courts to interfere with the discretion with which such bodies are vested unless the legislative action of the municipality is shown to be arbitrary, capricious or unrelated to the public health, safety and morals} (emphasis added).\textsuperscript{106}

Recent decisions, however, cast a cloud upon these accepted views. Vigorous attacks have been launched upon "exclusionary zoning," which is in reality "snob zoning" that converts a suburb into a haven of tranquil homes, free from the problems, for example, that apartments bring. The latest view is that the zoning power is police power exercised in behalf of the public of the entire state, and that zoning that blocks the poor from access to the suburbs—either through the medium of large-lot zoning or via the total exclusion of apartments—is unconstitutional.\textsuperscript{107} The question then is, has zon-

\textsuperscript{103} Id. at 640-41, 209 N.W. at 862.


\textsuperscript{106} La Salle Nat. Bank v. County of Cook, 12 Ill.2d 40, 46, 145 N.E.2d 65, 68 (1957).

\textsuperscript{107} Oakwood at Madison Inc. v. Twp. of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land &
ing begun a swing back to the view that it is not simply a local affair? That question remains unanswered.

Other Problems.

At this point, this paper has served its intended purpose. A few narrow problems of property and municipal law have been analyzed in the context of the new constitution, and judicial determinations have been proffered. Much remains, of course, for the courts to explore.  

Up to this point, the discussion has drawn a distinction between local affairs and state affairs. The existence in the constitution of a provision for county home rule suggests the possibility that our courts may discover a new category, that of "county affairs." There are matters that historically have fallen to the role of the county, for example, that of maintaining a county recorder's office. Should a home rule city appear to trench upon a matter traditionally confided by the state to county governments, the possibility exists that our courts may choose to approach this in terms of "county affairs" versus "local affairs."

Such a result would not necessarily flow from the language of the constitution, nor would it be confined to situations involving home rule counties. Each state has created a diversity of public corporations and in turn each has been assigned a role by the state. A municipal home rule unit cannot establish its own recording office, for the simple reason that recording is not a local affair. Moreover,


108. For example, sales of dedicated land present special problems. But see City of Marysville v. Boyd, 181 Cal. App. 2d 755, 5 Cal. Rptr. 598 (1960), where the court approached the problem in home rule terms.

109. Indeed, the existence of county home rule makes inevitable a clash over state affairs as distinguished from county affairs, much as has occurred in the state versus local affairs controversy. Glauberman, County Home Rule: An Urban Necessity, 1 URBAN L.R. 170, 185 (1969). Professor Baum thinks that potential conflicts between counties and home rule units will breed considerable litigation. Baum, supra note 22, at 585.

110. Cralle v. City of Eureka, 136 Cal. App. 2d 808, 811, 289 P.2d 509, 511 (1955) where the court said: "Furthermore, to give an interpretation to the charter section whereby it becomes a recording statute would extend the [Eureka] charter beyond the regulation of municipal affairs. It would be to foster chaos to allow cities to establish recording requirements in addition to those covered by state general laws, the certainty required to expedite title searches would be impaired and
even in the management of its local affairs, the home rule unit cannot regulate other public bodies—like counties—for no express or implied home rule power exists to regulate other public bodies.\textsuperscript{111}

CONCLUSION

Dillon's Rule, first articulated in 1872, provided a dependable bench-mark.\textsuperscript{112} One looked at the state statutes, construed them, and if the power assumed by the city was not granted by the legislature, it did not exist. Now this certainty has been replaced by uncertainty. Few urban problems will lend themselves to the easy solutions found to the problems here. Many court decisions will be needed to resolve the new problems. These decisions unfortunately are likely to be made in an atmosphere of controversy. There are those who question the wisdom of municipal home rule. To some, metropolitan government embracing the entire metropolitan community—as in the "unigovernment" of Marion County, Indiana—seems more efficient.\textsuperscript{113} Whether county home rule can fill the present void seems doubtful. Existing loyalties are linked to the municipality. No one says "I live in Cook County." He thinks of himself as a resident of Evanston, Chicago, or Oak Park. Others rendered more difficult and uncertain if each chartered [home rule] city were to establish special recording laws. . . . We think the provisions of the Civil Code relating to recording are matters of general state concern and not to be abrogated or enlarged by a municipal charter. . . . Having held that the provision of the charter relied upon, considered as a recording statute, is not one properly within the realm of municipal affairs, we do not now agree with appellant's position. . . ." [emphasis added]

111. Wilson v. City of Medford, 107 Ore. 624, 643, 215 P. 184, 190 (1923), where the Oregon Supreme Court stated: " . . . the city can as a part of its prescribed procedure require the recording in the office of the county recorder of any paper which it would, by force of state law, be the duty of that officer to record if presented by any individual; but cities cannot in the exercise of the initiative and under the guise of municipal legislation expand the duties of state or county officers beyond the limits fixed by state laws: West Linn v. Tufts, 75 Ore. 304, 146 P. 986 (1915)." Professor Baum, in the absence of legislative history on this point, speculates that home rule units may be able to regulate, within their boundaries, the actions of special districts or authorities created by the state. Baum, supra note 22, at 587. But see Cuyahoga Met. Housing Auth. v. City of Cleveland, 342 F. Supp. 250, 257 (1972).


view municipal government as largely archaic. They ask, for example, why supplying water and other essential services should not be deemed a function of state government. The multiplicity of municipal water bureaus, for example, each with its clerks, typewriters, water bills, and water wells seems to them irrational and the antithesis of efficient government. It was noted by the Illinois constitutional convention delegates that Illinois has more governments per thousand (1/1,600) than dentists (1/1,800), and that what the layman or sociologist would refer to as "Chicago" comprises over a thousand such units of government, including counties, cities, towns, special service districts, school districts, unincorporated areas, and parts of two states. The crying need to call a halt to spiraling property tax bills speaks eloquently, some argue, for a new approach, as does the view that equal protection requires equality in the provision of municipal services—a view that has not stopped with schools, but has progressed to include street paving, street lighting, sanitary sewers, water mains, fire hydrants, and even traffic control signals.

The flight to the suburbs, with the accompanying decay of the inner city, seems, to some, to make rational home rule government impossible in most metropolitan areas, for the core-city tax collector finds himself with less and less to tax while the need for greater revenue grows daily.

Some fear that, as municipalities grapple with insoluble problems,

114. It has been suggested that essential services should be financed and administered by the state and federal governments. Prof. Glenn W. Fisher of Wichita State, reported in Chicago Daily News, April 28, 1972, at 5.


they will be tempted to wield the new tool of home rule like a meat axe, all to no purpose, for the limitations on municipal power are inherent—like the forms of action, "they rule us from the grave." Few problems are as simple as the problems we have discussed here. The volume of litigation in this area will be significant indeed.

Editorial Note: Since this article was accepted for publication, the Supreme Court has handed down its decision in Bridgman v. Korzen, No. 45290 (Sept., 1972). It is clear from this opinion that the Supreme Court intends to review actions of home rule units where the charge is made that such action does not fall within its home rule powers. This disposes of one of the important problems discussed in the article i.e., whether a home rule unit can pass an ordinance dealing with other than municipal affairs and, whether the courts or only the legislature can decide when a home rule unit is exercising powers beyond its authority.

In another as yet unreported Supreme Court decision, Kanellos v. County of Cook, No. 44889 (May, 1972), the court apparently holds that prior procedural statutory requirements, such as a referendum, are not binding on home rule units legislating within their constitutional authority. This appears to make unnecessary the precautions suggested in footnote 55.

Also, the Supreme Court has indicated it intends to resolve disputes between home-rule counties and home-rule municipalities. City of Evanston v. County of Cook, 53 Ill.2d 312, rehearing denied Jan. 26, 1973. The dissent takes a step toward embracing the doctrine of implied preemption. And in People ex rel. City of Salem v. McMackin, 53 Ill.2d 347, rehearing denied December 1, 1972, the court chose to determine the extent of a city's home rule powers with respect to acquisition of extraterritorial real estate.