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LOCAL GOVERNMENT: RECENT DEVELOPMENTS IN LOCAL GOVERNMENT LAW IN ILLINOIS

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THERE COULD be no time more appropriate than the present to initiate an annual survey of local government law in Illinois. Article VII, section 6 of the Illinois Constitution of 1970 has recently revolutionized local government law in this state by introducing the concept of "home rule" into Illinois jurisprudence. It is the purpose of this survey to outline the principle features of this revolution.

Prior to the adoption of the constitution of 1970, Illinois law followed the traditional view that all local governments are "creatures" of the state and totally dependent upon the state legislature as a source of power to act.¹ This doctrine is usually referred to as Dillon's Rule because it was first clearly enunciated by Judge Dillon in his classic treatise on municipal corporations.² In an often-cited case, the Illinois Supreme Court applied Dillon's Rule in the following language:

The city must have an express grant of authority from the General Assembly to enact the ordinances unless the power is necessarily implied in or incidental to power or powers expressly conferred.³

Furthermore, a necessary corollary to Dillon's Rule was the proposition that legislative grants of authority to local governments must be strictly construed. As one decision put it: "Statutes conferring powers on municipal corporations are strictly construed and any fair

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1. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, 7 RECORD OF PROCEEDINGS 1603 (1972) [hereinafter cited as 7 RECORD OF PROCEEDINGS].

2. 1 DILLON, MUNICIPAL CORPORATIONS 448 (5th ed., 1911).

3. *Ives v. City of Chicago*, 30 Ill. 2d 582, 584, 198 N.E.2d 518, 519 (1964).

or reasonable doubt that an asserted power exists is resolved against the municipality."⁴

For a broad variety of reasons, the draftsmen of the Illinois Constitution of 1970 decided to limit the concept of legislative supremacy in local government law in favor of home rule for at least some local government units.⁵ This decision was implemented principally by the rather complex provisions of article VII, section 6 of the new constitution. A close reading of that section is necessary to understand the anatomy of home rule in Illinois.

At the outset it should be noted that article VII confers home rule status automatically on all municipalities with a population of 25,000 or more and upon any county which has "a chief executive officer elected by the electors of the county."⁶ However, municipalities of less than 25,000 may elect by referendum to become home rule units.⁷ Furthermore, any home rule unit may elect by referendum "not to be a home rule unit."⁸

Article VII, section 6(a) reverses Dillon's Rule by making a direct constitutional grant of governmental power to home rule units in extremely broad language:

(a) Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.⁹

This language was consciously intended by the draftsmen to confer upon home rule units ". . . the broadest possible range of powers to deal with the problems facing them"¹⁰

In spite of the breadth of the powers conferred, the Report of the Local Government Committee of the Sixth Illinois Constitutional Convention makes it clear that the grant of powers to home rule units is not unlimited:

4. *City of Chicago v. Ingersoll Steel and Disk Division*, 371 Ill. 2d 183, 186, 20 N.E.2d 287, 288 (1939).

5. 7 RECORD OF PROCEEDINGS at 1605-11.

6. ILL. CONST., art. VII, § 6(a).

7. ILL. CONST., art. VII, § 6(a). (At the present time, only Cook County has such a chief executive.)

8. ILL. CONST., art. VII, § 6(b).

9. ILL. CONST., art. VII, § 6(a).

10. 7 RECORD OF PROCEEDINGS at 1619.

It is clear, however, that the powers of home-rule units relate to their own problems, not to those of the state or nation. Their powers should not extend to such matters as divorce, real property law, trusts, contracts, etc. . . . Thus, the proposed grant of powers to local governments extends only to matters 'pertaining to their government and affairs'.¹¹

The Local Government Committee Report also contains illustrative examples of local governmental action which, in the committee's opinion, would not fall within the range of home rule powers. For example, the committee felt that the home rule unit could not, by its own authority, regulate interest rates on loans, regulate local telephone rates, or establish separate pension funds for policemen and firemen.¹²

Thus, the main issue presented by the new home rule provisions is the precise scope of authority granted by article VII, section 6(a). The constitutional history of section 6(a) is anything but clear. To obscure matters further, the operative language of section 6(a) has no exact duplicate in the law of other states. Apparently this lack of similarity with the law of other states was a matter of conscious choice by the draftsmen.¹³ As a consequence, judicial decisions from other jurisdictions are not likely to prove very helpful in interpreting the new home rule provisions of Illinois.

Although the language of section 6(a) was intended to include as extensive a range of governmental powers as possible, the draftsmen felt it necessary to mention specifically the powers to tax, to incur debt, to regulate and to license so as to protect these essential governmental powers from limitation or erosion by judicial interpretation.¹⁴

Perhaps the most important of these specific powers is the power to tax. Without adequate funding, a home rule unit would find it difficult or impossible to exercise its other powers. Section 6(a) confers a general power to tax limited only by the provisions of section 6(e)(2) which forbid a home rule unit ". . . to license for revenue or impose taxes upon or measured by income or earnings or upon occupations" unless authorized by the General Assembly.¹⁵ The pur-

11. *Id.* at 1621.

12. *Id.* at 1652.

13. *Id.* at 1621.

14. *Id.* at 1622-27.

15. ILL. CONST., art. VII, § 6(e)(2).

pose of these specific prohibitions is to protect the income tax as a revenue base for the state and to prevent the imposition of "income taxes" in the form of occupation taxes or licensing for revenue.¹⁶ Apparently, all other forms of taxation are available to home rule units.

At the time of this writing, *S. Bloom, Inc. v. Marshall Korshak*¹⁷ remains the only decision by the Illinois Supreme Court interpreting the home rule provision of the new Illinois constitution. In that case, Chicago's "cigarette tax" was upheld. The court rejected the claim (among others) that the levy was an occupation tax on either the retailer or the wholesaler. The court pointed out that the tax was levied on the consumer and was, therefore, the equivalent of a sales tax. Of prime importance was the court's observation that the legal incidence of a tax is not determined by its economic impact, but rather by the express intent of the law levying the tax. Thus, the validity of a home rule tax is largely a matter of legislative form.

It should be noted that there is no constitutional limit on the rate of home rule taxation. However, the General Assembly does retain the power to deny or limit home rule taxing powers by a three-fifths vote of all those elected to both houses.¹⁸ Whether or not this power can serve as an effective brake on possible excesses in home rule taxation remains to be seen.

The General Assembly retains a higher degree of control over indebtedness. The General Assembly may limit by law the amount of debt incurred by a home rule county.¹⁹ In the case of municipalities, the General Assembly may limit debt incurred only by a three-fifths majority of both houses except for debt to be repaid out of *ad valorem* property tax receipts. In the latter case, the General Assembly may limit the amount of debt or require a referendum by law only in excess of certain percentages of assessed evaluation of taxable property as provided in subsection 6(k).²⁰

Of particular importance are the provisions of subsection 6(l):

16. 7 RECORD OF PROCEEDINGS at 1671-72.

17. 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

18. ILL. CONST., art. VII, § 6(g).

19. ILL. CONST., art. VII, § 6(j).

20. ILL. CONST., art. VII, § 6(k). In addition, it should be noted that all indebtedness to be repaid out of *ad valorem* property tax receipts must be repaid in 40 years. ILL. CONST., art. VII, sec. 6(d).

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.²¹

Paradoxically enough, the highest degree of constitutional protection is granted to special assessments and to so-called "additional taxes" to provide "special services." This introduces the concept of "differential taxation" into Illinois local government law for the first time.²² The express purpose of the Local Government Committee in proposing the differential taxation provision was to permit home rule units to provide "special services" to limited areas within their boundaries without taxing the entire population for those services.²³

Laudatory as this purpose may be, the language of this section contains serious difficulties. First of all, the term "special services" is not defined. Secondly, the initial prohibition against legislative interference ("The General Assembly may not limit or deny the power to . . . levy additional taxes . . .") is diluted by the phrase "in the manner provided by law" contained in subsection 6(l)(2). This last phrase creates the possibility that the General Assembly "by law" can provide some type of limitation in the "manner" of levying such taxes. But what that limitation may be can be determined only by future litigation.

The prohibition against licensing for revenue found in subsection 6(d)²⁴ should not be interpreted as a ban against all licensing fees. It was the intention of the draftsmen to codify pre-existing Illinois law which permitted licensing fees which were "reasonably related" to the cost of regulation.²⁵ Of course, any such license for which a fee is charged must serve a legitimate regulatory purpose.

Another major home rule power is that conferred by subsection 6(f) which authorizes a home rule unit ". . . subject to approval by

21. ILL. CONST., art. VII, § 6(1).

22. 7 RECORD OF PROCEEDINGS at 1662.

23. *Id.*

24. ILL. CONST., art. VII, § 6(d).

25. 7 RECORD OF PROCEEDINGS at 1675.

referendum to adopt, alter, or repeal a form of government provided by law”²⁶ Subsection 6(f) further provides “. . . [a] home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law.”²⁷ The general intention of the draftsmen appears to have been to permit home rule municipalities to select any of the general forms of municipal government provided in the Illinois Municipal Code.²⁸ However, the inclusion of the term “alter” in subsection 6(f) creates a basic ambiguity. It suggests that a home rule municipality, by referendum or otherwise, might be able to make significant alterations in the structure of its form of government not specifically provided for in the Municipal Code. Furthermore, the authority to provide for its officers, their manners of selection and terms of office, suggests the possibility of major alterations in the offices and official powers set forth for municipal officers in the Illinois Municipal Code. In addition, it would seem safe to assume that a home rule unit could make whatever changes it deemed advisable in those matters which could be classified as “internal procedure” as contrasted with those matters relating to the form of government or the officers of the unit.²⁹ Again, only future litigation can clarify these basic ambiguities.

In subsections 6(d) and 6(e),³⁰ the new constitution codifies the right of home rule units to enforce obedience to their legislative directive by the imposition of criminal sanctions. Subsections 6(d) (2) denies to home rule units the power “to define and provide for the punishment of a felony.” Subsection 6(e)(1) provides: “A home rule unit has only the power that the General Assembly may provide by law . . . to punish by imprisonment for more than 6 months. . . .” The report of the Local Government Committee makes it clear that the intention of the draftsmen was to codify on the constitutional level the existing ability of counties and municipalities

26. ILL. CONST., art. VII, § 6(f).

27. *Id.*

28. See ILL. REV. STAT. ch. 24, § 3-11-1 to § 3-11-30; § 4-1-1 to § 4-10-1; § 5-1-1 to § 5-6; § 6-1-1 to § 6-5-1 (1971).

29. Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137, 146-52 (1972).

30. ILL. CONST., art. VII, § 6(d) and 6(e).

to enforce their ordinances by the use of criminal sanctions.³¹ However, it should be noted that strong doubts have been expressed as to whether or not a separate system of law enforcement on the municipal level may violate federal constitutional principles.³²

Given the broad range of regulatory powers granted by subsection 6(a), it is obviously possible for many conflicts to arise between state regulatory policy and the regulatory policies of the various home rule units in the state. Subsections 6(g), 6(h) and 6(i) were adopted to cope with this problem.³³ Subsection 6(g) permits the legislature to limit or deny any home rule power, including the power to tax "by a vote of three-fifths of the members of each house." Subsection 6(h), on the other hand, permits the General Assembly to "provide specifically by law for the exclusive exercise of the State of any power or function by a home rule unit. . . ." The report of the Local Government Committee makes it clear that the provisions of subsection 6(g) were intended to apply only to those instances in which the General Assembly was simply creating a legal vacuum by prohibiting home rule legislation without prohibiting regulation at the state level.³⁴ In contrast, subsection 6(h) was intended to cover those situations in which the state was itself operating in the field.³⁵ Subsection 6(i) was intended merely to make it clear that where the General Assembly so specified local regulation and state regulation in the same area could exist concurrently.

Thus, subsections 6(g), 6(h) and 6(i) provide the mechanism whereby the legislature might intervene in matters "pertaining to their government and affairs" when over-riding state policy should make such intervention necessary. It should be noted, however, that the effect of these sections is to eliminate the possibility of "implied pre-emption" as a doctrine limiting the role of home rule action.³⁶ Section 6(h) requires that the General Assembly "specifically" provide for the exclusive exercise of a function or power.

31. 7 RECORD OF PROCEEDINGS at 1650-51.

32. Comment, *Defending an Illinois Proceeding for Violation of a Municipal Ordinance: The Worst of All Possible Worlds*, 1 LOYOLA L.J. 86 (1970).

33. ILL. CONST., art. VII, §§ 6(g), 6(h), 6(i).

34. 7 RECORD OF PROCEEDINGS at 1641-42.

35. *Id.* at 1642-45.

36. *Id.* at 1643.

As can be seen, the critical issue that arises out of the provisions of subsections 6(g), 6(h) and 6(i) is the question of the size of the majority necessary for any legislative action limiting home rule functions. Assuming that a 60 percent majority of those elected to both houses is available, the General Assembly may deny or limit any home rule function except for those provided in subsection 6(1). If, however, only a simple majority can be mustered in favor of legislative intervention, only the provisions of 6(h) and 6(i) are applicable. However, to invoke the provisions of 6(h) and 6(i), the state must itself "exercise the power or perform the function." Thus, it becomes critical to determine when the state is actually exercising the power or performing the function as contrasted with those situations in which the state is operating merely to limit or deny home rule powers. For example, can the provisions of section 6(h) be invoked if the legislature should pass by a simple majority a statute setting forth a particular procedure to be followed by all local zoning boards? To hold that the state is "performing a function" by enacting such a statute would make it possible for the General Assembly to interfere by a simple majority in the exercise of all home rule powers. Consequently, it would appear that such a statute would have to be enacted by a 60 percent majority of both houses to be effective against home rule units. Whatever the answer to this problem should turn out to be, the important point is that the capacity of the legislature to act under these circumstances will be determined by the definition of the term "the exclusive exercise of the state of any power or function." As is so often the case under the new constitution, the definition of this all important phrase will have to await future litigation.

In summary, it would appear that, although the grant of home rule powers in subsection 6(a) is indeed broad, it may be limited in two ways. First, the legislature might interfere pursuant to subsections 6(g), 6(h) and 6(i). Secondly, the grant of power in 6(a) might be limited by judicial construction of the phrase "pertaining to its government and affairs." These two possibilities raise the question of the respective role of the judiciary and the legislature in controlling the use of home rule power.

It has been suggested elsewhere that the role of the judiciary in controlling the possible abuse of home rule power should be a limited

one.³⁷ It is argued that the entire structure of the home rule article in the new constitution would seem to place the primary burden of controlling the abuse of home rule power on the legislature. However, it is obvious that the draftsmen of the home rule article recognized that the grant of power in subsection 6(a) could not be considered unlimited. Furthermore, it is obvious that no legislature can possibly foresee all of the conflicts between state policy on one hand and a multitude of home rule policies on the other hand. It might not be possible for the legislature to react politically in time to avoid considerable abuse or injustice by the unforeseen impact of innumerable home rule regulations. Although a discussion of all of the issues involved in this question are beyond the scope of this article, the role of the judiciary in interpreting the various provisions of section 6 is a critical one and obviously can be determined only by future litigation. For the time being, all we can do is point out that the Constitutional Convention mandated in section 6(m) that the "powers and functions of home rule units shall be construed liberally."³⁸

One of the most important additions to the powers of local governments to be found in the new constitution is in section 10 of the local government article:

Section 10. INTERGOVERNMENTAL COOPERATION

(a) Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

(b) Officers and employees of units of local government and school districts may participate in intergovernmental activities authorized by their units of government without relinquishing their offices or positions.

(c) The State shall encourage intergovernmental cooperation and use its technical and financial resources to assist intergovernmental activities.³⁹

37. Baum, *supra* note 29, at 152-57.

38. ILL. CONST., art. VII, § 6(m).

39. ILL. CONST., art. VII, § 10.

Section 10 was intended to provide a possible solution to problems which extend beyond the limited boundaries of local governmental units. It is the only section in the new constitution which addresses itself to the so-called metropolitan area problems.⁴⁰ In effect, section 10 removes any legal objection to the delegation of governmental powers on the local government level.

It should be noted that section 10 applies to all governmental units. Although it is not confined to home rule units, it can be assumed that home rule units because of their wider scope of possible activities will make wider use of section 10 than will non-home rule units. In addition, it should be noted that these powers can be curtailed by the legislature by a simple majority.

Unfortunately, the Illinois Constitution of 1970 contains little provision for resolving conflicts between local governmental units.⁴¹ Consequently, Illinois law remains in the somewhat confusing position that it has traditionally maintained on this question. For example, in *City of Des Plaines v. Metropolitan Sanitary District*⁴² the Illinois Supreme Court has recently held that a sanitary district may locate a sewage processing facility within the boundaries of a city without any regard to that city's zoning laws. Following the lead of the Illinois Supreme Court, an Illinois appellate court has also recently held that a city may acquire and operate a garbage dump in an unincorporated area of a county without regard to that county's zoning regulations.⁴³ In both of these cases, the rationale leaned heavily on the fact that the legislature had granted to the Chicago Metropolitan Sanitary District and to the City of Rockford the power of eminent domain to acquire property for the particular use which was the subject of the complaint. Apparently, the granting of eminent domain to accomplish a particular use or function immunizes that function from any restriction or control by any other local governmental units. Thus, there remains no mechanism for resolving the conflicting interests involved in cases such as these. We can assume

40. 7 RECORD OF PROCEEDINGS at 1747-52.

41. The one exception to this generalization is the limited provision in art. VII, § 6(c) resolving conflicts between home rule counties and municipalities located within their borders.

42. 48 Ill. 2d 11, 268 N.E.2d 428 (1971).

43. *O'Connor v. City of Rockford*, 3 Ill. App. 3d 548, 279 N.E.2d 356 (1972).

that the law will remain in this situation until such time as the legislature shall provide a more appropriate solution to resolving inter-governmental conflicts on the local level.

In conclusion, it is obvious that the Illinois Constitution of 1970 has set in motion legal trends and political forces that will ultimately remake the entire body of local governmental law in this state. At this time we foresee these movements and trends only in a general way. It will remain for the annual surveys of the future to document the details of these trends as they unfold.