

1989

State and Local Government

Victor P. Filippini Jr.

Assoc., Burke, Bosselman & Weaver, Chicago, IL

David Schmidt

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>



Part of the [State and Local Government Law Commons](#)

Recommended Citation

Victor P. Filippini Jr., & David Schmidt, *State and Local Government*, 20 Loy. U. Chi. L. J. 623 (1989).

Available at: <http://lawcommons.luc.edu/lucj/vol20/iss2/14>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

State and Local Government

Victor P. Filippini, Jr.*
and David Schmidt**

TABLE OF CONTENTS

I. INTRODUCTION	623
II. TERRITORIAL JURISDICTION.....	624
III. LOCAL GOVERNANCE	626
IV. HOME RULE	630
V. PUBLIC FINANCE.....	637
VI. LAND DEVELOPMENT AND ZONING.....	640
A. <i>Housing and Development</i>	640
B. <i>Zoning</i>	645
VII. LICENSING	649
VIII. CONCLUSION	653

I. INTRODUCTION

During the *Survey* period,¹ the Illinois Supreme Court faced a number of legal issues directly affecting state and local governments. In resolving matters relating to territorial jurisdiction,² local governance,³ home rule,⁴ and public finance,⁵ the court reasserted the primacy of the state over its subdivisions. On other issues, including public housing and zoning⁶ and licensing,⁷ the supreme court defined more sharply the limits and reaches of governmental intervention and regulation in Illinois. These decisions affect not only the relations between governmental bodies, but also relations between such bodies and the people who they were created to serve.

* Associate, Burke, Bosselman & Weaver, Chicago, Illinois, and Boca Raton, Florida; A.B., 1980, Harvard College; J.D., 1983, University of Michigan.

** B.A., 1978, Coe College; J.D. candidate, 1990, Loyola University of Chicago.

1. The *Survey* period covers decisions issued between July 1, 1987, and July 1, 1988.

2. See *infra* notes 8-28 and accompanying text.

3. See *infra* notes 29-64 and accompanying text.

4. See *infra* notes 65-125 and accompanying text.

5. See *infra* notes 126-54 and accompanying text.

6. See *infra* notes 155-227 and accompanying text.

7. See *infra* notes 228-66 accompanying text.

II. TERRITORIAL JURISDICTION

Historically, local governments have been regarded as state-created entities,⁸ and the Illinois General Assembly has had nearly unlimited powers to establish and change the jurisdictional boundaries of the political subdivisions in the state.⁹ This longstanding power of the Illinois General Assembly was confirmed in *In re Proposed Incorporation of Liberty Lakes*,¹⁰ wherein the Illinois Supreme Court upheld the constitutionality of the state legislature's delegation of authority to a county board to determine the appropriateness of the proposed incorporation of a village.¹¹

Liberty Lakes involved a petition by residents in Lake County to incorporate an area near the villages of Lindenhurst and Lake Villa.¹² In accordance with section 2-3-18 of the Municipal Code, those residents requested the Lake County Board to make certain determinations that are a precondition to the approval of an incorporation petition.¹³ Before the county board acted, the petitioners withdrew their request and sought a ruling from the circuit court to have section 2-3-18 declared unconstitutional.¹⁴ After the county and two nearby villages intervened to oppose the motion,¹⁵

8. See, e.g., *Littell v. City of Peoria*, 374 Ill. 344, 347, 29 N.E.2d 533, 537 (1940).

9. See *Geweke v. Village of Niles*, 368 Ill. 463, 467, 14 N.E.2d 482, 484 (1938); 8 ILL. L. & PRAC. *Cities, Villages, and Other Municipal Corporations* § 33 (1954).

10. 119 Ill. 2d 179, 518 N.E.2d 132 (1987) [hereinafter *Liberty Lakes*].

11. *Id.* at 185, 518 N.E.2d at 135.

12. *Id.* at 180, 518 N.E.2d at 133. The petitioners filed a petition of incorporation in Lake County Circuit Court pursuant to section 2-3-5a of the Illinois Municipal Code. *Id.* See ILL. REV. STAT. ch. 24, para. 2-3-5a (1987).

13. *Liberty Lakes*, 119 Ill. 2d at 180, 518 N.E.2d at 133. Section 2-3-18 provides:

In any county of between 150,000 and 1,000,000 population which has adopted an official plan under 'An Act to provide for regional planning and for the creation, organization and powers of regional planning commissions,' approved June 25, 1929, as amended, the county board, by resolution, may provide that before the question of incorporating a village under this Division is submitted to the electors in response to a petition filed under Section 2-3-5 [sic] or 2-3-10 the county board must first determine that (1) the proposed incorporation is compatible with the official plan for the development of the county, and (2) the lands described in the petition as intended to be embraced in the village constitute a sufficient tax base as will insure the ability of the village to provide all necessary municipal services to its inhabitants. When such a resolution is in effect, the court in which such a petition is filed shall first require a showing that those determinations have been made by the county board. If no such showing is made, the court shall deny the petition. If such a showing is made, the court shall proceed as provided in Section 2-3-6 or 2-3-11 as the case may be.

ILL. REV. STAT. ch. 24, para. 2-3-18 (1987).

14. *Liberty Lakes*, 119 Ill. 2d at 180, 518 N.E.2d at 133.

15. *Id.* at 180-81, 518 N.E.2d at 133.

the lower court upheld the statute¹⁶ and dismissed the petition to incorporate.¹⁷ The Illinois Supreme Court allowed a direct appeal pursuant to Supreme Court Rule 302(b).¹⁸

At the outset, the court clarified drafting errors in section 2-3-18¹⁹ and noted that Lake County was authorized under the statute to make the determinations regarding proposed incorporations.²⁰ Having determined that Lake County was acting in accordance with section 2-3-18, the court next considered the constitutionality of the statute. The court reaffirmed that the legislature has complete authority over the creation and alteration of municipalities,²¹ and that the legislature could precondition an incorporation on the legislative action of the appropriate county board.²² The court then rejected the incorporators' argument that section 2-3-18 provides for an adjudicative, not legislative, determination by county boards.²³ Moreover, the court stated that the factors to be considered under section 2-3-18 are broad enough to allow a county board to fairly determine the appropriateness of an incorporation petition in light of broad policy interests.²⁴ The fact that the state

16. *Id.* at 181, 518 N.E.2d at 133.

17. *Id.*

18. *Id.*

19. The 1985 edition of the Illinois Revised Statutes contains two sections enumerated "2-3-18." The court observed that only the section added by Public Act 76-676 was at issue. In addition, the court noted that the reference in the statute to section 2-3-5 was intended to be section 2-3-5(a). *Id.*

20. Specifically, the Court found that Lake County was within the section 2-3-5(a) population guidelines, had adopted an official regional plan, and had passed a resolution requiring it to make the statutory determinations as prescribed in section 2-3-18. *Id.* at 182, 518 N.E.2d at 134.

21. *Id.* at 182, 518 N.E.2d at 134. The court stated that: "Municipalities are mere creatures of the Legislature, created for convenience in the handling of day-to-day local problems. The Legislature has complete authority over them and may change . . . [.] expand, contract or even abolish them." *Id.* (quoting *People ex rel. Landwer v. Village of Barrington*, 94 Ill. App. 2d 265, 272, 237 N.E.2d at 350, 354 (5th Dist. 1968)).

22. *Id.* at 183, 518 N.E.2d at 134 (citing *Town of Godfrey v. City of Alton*, 33 Ill. App. 3d 978, 338 N.E.2d 890 (5th Dist. 1975)).

23. *Id.* (citing *Town of Godfrey v. City of Alton*, 33 Ill. App. 3d 978, 338 N.E.2d 890 (5th Dist. 1975)). The court then rejected the incorporators' argument that section 2-3-18 provided for an adjudicative, not legislative, determination by county boards. *Id.* Section 2-3-18 applies only to counties that have adopted an official regional development plan. *Id.* Such a plan is adopted by a county board for the purpose of guiding and accomplishing the coordinated, adjusted, and harmonious development of the region. *Id.* See ILL. REV. STAT. ch. 34, para. 3001 (1987). Because Lake County is statutorily empowered to adopt an official plan, it necessarily has the power to make certain determinations regarding the compatibility of a proposed incorporation with its official plan as a matter of policy. *Liberty Lakes*, 119 Ill. 2d at 183, 518 N.E.2d at 134-35. Such policy-making is a legislative function rather than a quasi-judicial function. *Id.* at 183-84, 518 N.E.2d at 135.

24. *Liberty Lakes*, 119 Ill. 2d at 184, 518 N.E.2d at 135.

legislature retains some authority over incorporations does not diminish the legislative character of a county board's determination under the statute.²⁵

Finally, the court considered the incorporation procedures in their entirety and ruled that the division of authority between the county board and the circuit judge shows that their respective functions are different in nature.²⁶ In sum, the court upheld the general assembly's procedures for incorporation and affirmed the circuit court.²⁷ The decision itself also affirmed that it is the state legislature, not local residents, that ultimately controls political subdivisions in Illinois. As further evidence that section 2-3-18 envisions the county board's role in incorporation proceedings as a legislative one, the court noted the absence of judicial mechanisms in the County Board's decision-making process; specifically, the court used the petitioner's claim of vagueness in the statute as evidence of a lack of judicially manageable standards. The court also stated that the statute does not provide for judicial review as an administrative decision.²⁸

III. LOCAL GOVERNANCE

The limited power of citizens over their local governments was further illustrated by the Illinois Supreme Court's ruling in *League of Women Voters of Peoria v. County of Peoria*.²⁹ In that case, the plaintiff, the League of Women Voters, had placed a referendum on the November 1986 ballot proposing to change the nine districts in Peoria County from multi-member to single-member districts.³⁰ Accordingly, the total number of county board members would be reduced from twenty-seven to nine. The referendum was passed by nearly a three-to-one margin.³¹ Following the referendum, the plaintiff made several requests to the defendant, the Peoria County

25. *Id.*

26. *Id.* at 185, 518 N.E.2d at 135. Before a proposed incorporation is submitted to the voters, the circuit judge must determine that the proposed village is a "village in fact" under sections 2-3-5a and 2-3-6. *People ex rel. County of DuPage v. Lowe*, 36 Ill. 2d 372, 224 N.E.2d 1 (1985). According to the court, the fact that the county board is required to make a determination before the circuit court may act strongly suggests that the county board was not meant to function as an adjudicative body. *Liberty Lakes*, 119 Ill. 2d at 185, 518 N.E.2d at 135.

27. *Liberty Lakes*, 119 Ill. 2d at 185, 518 N.E.2d at 135.

28. *Id.*

29. 121 Ill. 2d 236, 520 N.E.2d 626 (1987) [hereinafter *League of Women Voters*].

30. *Id.* at 240-41, 520 N.E.2d at 628.

31. *Id.*

Clerk, to implement the results.³² When the defendant failed to act, the plaintiff filed a petition in the circuit court seeking a writ of mandamus to implement and enforce the referendum. After the circuit court dismissed the plaintiff's petition, the supreme court allowed a direct appeal pursuant to Supreme Court Rule 302(b).³³

Although the court agreed that a referendum could change the districts from multi-member to single-member,³⁴ the central dispute concerned the electorate's power to change the size of the county board under the Illinois Constitution.³⁵ The plaintiff argued that three separate provisions in the constitution authorize such a referendum.³⁶ A majority of the court did not agree.

The majority began its analysis by observing that the plaintiff's request for a writ of mandamus was appropriate only if the referendum was valid and the defendant had a duty to enforce the referendum.³⁷ Following established principles of constitutional and statutory construction, the court looked first to the common meaning of the article VII language³⁸ and examined the debates of the constitutional convention to clarify any remaining ambiguities.³⁹ By looking at the language of article VII, section 3(a) of the constitution,⁴⁰ the majority observed that the county board — not the voters — has the mandatory duty to determine the size of the board except as that power might be limited by "law."⁴¹ The majority rejected the argument that the plaintiff's referendum was a "law" limiting the county board's power to determine its size, be-

32. *Id.*

33. *Id.* See ILL. S. CT. R. 302(b), ILL. REV. STAT. ch. 110A, para. 302(b) (1987).

34. *League of Women Voters*, 121 Ill. 2d at 243, 520 N.E.2d at 629.

35. *Id.*

36. *Id.* at 241, 520 N.E.2d at 628-29. See ILL. CONST. art. VII, §§ 3(b), 4(C), 7(2).

37. *League of Women Voters*, 121 Ill. 2d at 243, 520 N.E.2d at 629. See *In re Claudia K.*, 91 Ill. 2d 469, 440 N.E.2d 78 (1982). In Illinois, a referendum is valid only if it is authorized by article VII, section 11 of the constitution, and the meaning of that article is to be ascertained through the common understanding of the citizens who ratified the constitution. *League of Women Voters*, 121 Ill. 2d at 243, 529 N.E.2d at 629-30 (citing *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 492, 470 N.E.2d 266, 270 (1984); *People ex rel. Cosentino v. County of Adams*, 82 Ill.2d 565, 569, 413 N.E.2d 870, 872 (1980); *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 222, 390 N.E.2d 847, 854 (1979)).

38. *League of Women Voters*, 121 Ill. 2d at 243, 520 N.E.2d at 630 (citing *Kalodimos*, 103 Ill. 2d at 492-93, 470 N.E.2d at 270; *Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill. 2d 453, 359 N.E.2d 138 (1976)).

39. *Id.* at 243-44, 520 N.E.2d at 630 (citing *Kalodimos*, 103 Ill. 2d at 493, 470 N.E.2d at 270; *Client Follow-Up Co.*, 75 Ill. 2d at 220, 390 N.E.2d at 853)).

40. "A county board shall be elected in each county. The number of members of the county board shall be fixed by ordinance in each county within limitations provided by law." ILL. CONST. art. VII, § 3(a).

41. *League of Women Voters*, 121 Ill. 2d at 244, 520 N.E.2d at 630.

cause such referendum was not expressly authorized by the Illinois Constitution to have the effect of law.⁴² The majority also rejected the plaintiff's argument that section 3(b) of article VII authorizes a referendum to change the number of county board members.⁴³ The majority observed that changing the method of selection under section 3(b) would not necessarily result in a change of number.⁴⁴ Accordingly, the majority found that section 3(b) only gave voters the power to choose between at-large, single-member, or multi-member district elections.⁴⁵ It is then the role of the county board to determine the appropriate number of members and districts.⁴⁶ The majority next rejected the plaintiff's reliance on section 4(c), which provides in part that any office may be created or eliminated and the terms of office and manner of selection changed by county-wide referendum.⁴⁷ The majority stated that the first part of section 4(c) would not apply to county boards, which are mandated by section 3(a).⁴⁸ Further, the majority noted that the referendum did not seek to change the terms of office. Finally, the majority reasoned that although the power to alter the manner of selection could include the ability to change the method of election, nothing in section 4(c) empowers voters to change the number of county board members.⁴⁹ This view is also supported by the constitutional debates, where a draft of section 4(c) originally stated that the number of officers in a local unit of government could be set by referendum, but was changed because of the conflict with section 3(a).⁵⁰

42. *Id.* See ILL. CONST. art. VII, § 11. See also *Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill. 2d 453, 359 N.E.2d 138 (1977). The entire court did recognize that self-executing referenda that are clearly authorized by the constitution have the force of law. See *League of Women Voters*, 121 Ill. 2d at 245, 520 N.E.2d at 630.

43. *League of Women Voters*, 121 Ill. 2d at 246, 520 N.E.2d at 631. "The General Assembly by law shall provide methods available to all counties for the election of county board members. No county, other than Cook County, may change its method of electing board members except as approved by county-wide referendum." ILL. CONST. art. VII, § 3(b).

44. *League of Women Voters*, 121 Ill. 2d at 246, 520 N.E.2d at 631. The majority drew support for its conclusion from section 3(b) where the number of county board members was immaterial in selecting a method of election in Cook County. *Id.* The court also referred to the constitutional convention debates to indicate an intent that section 3(b) would not include the power to re-district or alter the size of the county board by referendum. *Id.* at 246-48, 520 N.E.2d at 631-32.

45. *Id.* at 249, 520 N.E.2d at 632.

46. *Id.*

47. ILL. CONST. art. VII, § 4(c).

48. *League of Women Voters*, 121 Ill. 2d at 249, 520 N.E.2d at 632.

49. *Id.* at 250, 520 N.E.2d at 633.

50. See 4 Record of Proceedings, SIXTH ILL. CONST. CONVENTION 1685, 3150, 3363 (1970).

The majority also distinguished two cases cited by the plaintiff. First, the court found *Taylor v. County of St. Clair*⁵¹ to be inapposite because it involved a change in the manner of selecting a county board chairman, not a change in the number of county board members.⁵² Second, the majority distinguished *Clarke v. Village of Arlington Heights*⁵³ on the grounds that it involved a permitted exercise of home rule power.⁵⁴ The plaintiff finally asserted that section 7(2) of the Illinois Constitution authorizes alterations in their form of government and, thus, gives voters the power to fix the number of board members.⁵⁵ The majority noted that a similar argument had been rejected in *Clarke* and concluded that the plaintiff's construction of the term "form of government" to include changing the number of board members would be contrary to the common meaning of the phrase.⁵⁶

In sum, the majority ruled that no provision in the constitution displaces a county board's right to set the number of its members in accordance with section 3(a).⁵⁷ In addition, it refused to give effect to that portion of the referendum that changed the method of election from multi-member to single-member districts because there was no way to determine if the referendum vote would have been the same without the provision reducing the number of county board members.⁵⁸ Because the plaintiff did not have a legal right to the relief requested, the majority held that the writ of mandamus was properly denied.⁵⁹

Justice Simon, joined by Chief Justice Clark, took exception to the majority's construction of the constitution because it excluded

51. 57 Ill. 2d 367, 312 N.E.2d 231 (1974).

52. *League of Women Voters*, 121 Ill. 2d at 250, 520 N.E.2d at 633.

53. 57 Ill. 2d 50, 309 N.E.2d 576 (1974).

54. *League of Women Voters*, 121 Ill. 2d at 251, 520 N.E.2d at 633. In *Clarke*, a village referendum increased the number of village trustees from six to eight in contravention of the Illinois Municipal Code. *Clarke*, 57 Ill.2d at 51, 309 N.E.2d at 577; see ILL. REV. STAT. ch. 24, para. 3-5-2 (1987). Such change was done pursuant to section 6(f) of article VII of the Illinois Constitution, however, which allows a home rule municipality to provide for its officers, their manner of selection, and terms of office by referendum. *Clarke*, 57 Ill. 2d at 50, 309 N.E.2d at 577. Thus, the majority did not find the *Clarke* case analogous to the instant case because article VII treats the election of county board members differently than the election of officers in home-rule communities.

55. *League of Women Voters*, 121 Ill. 2d at 253, 520 N.E.2d at 634. Section 7(2) provides: "Counties and municipalities which are not home rule units shall have only powers granted to them by law and the powers . . . (2) by referendum to adopt, alter or repeal their forms of government provided by law." ILL. CONST. art. VII, § 7(2).

56. *League of Women Voters*, 121 Ill. 2d at 253, 520 N.E.2d at 634.

57. *Id.* at 254, 520 N.E.2d at 634.

58. *Id.* at 255, 520 N.E.2d at 635.

59. *Id.*

a referendum from the term "law" in section 3(a).⁶⁰ Justice Simon cited several decisions in other jurisdictions where referenda were determined to be law⁶¹ and also argued that the majority was incorrect that changes from multi-member districts to single-member districts could not change the total number of board members. Justice Simon argued that although a change in method does not always change the number of board members, it is obvious that a change in the number of board members would often go hand-in-hand with a change from multi-member districts to single-member districts.⁶² Simon also emphasized that statements made by the drafters of the constitution are not necessarily the best indication of the citizens' intent when they ratified the constitution.⁶³ If section 3 were intended to limit the broad referendum power, then a specific restriction would have been spelled out in the official explanation.⁶⁴

Notwithstanding the dissenting views, the court has limited the power of popular referendum as it relates to the size and structure of county governments. At the same time, the court has implicitly acknowledged that the Illinois General Assembly could affect "by law" the size of a county board, thereby preserving the state's control over its political subdivisions.

IV. HOME RULE

The City of Highland Park's refusal to abide by the state's Prevailing Wage Act⁶⁵ provided the Illinois Supreme Court with an opportunity to weigh the powers of home rule⁶⁶ against implicit

60. *Id.* (Simon, J., dissenting).

61. *Id.* at 255-56, 520 N.E.2d at 635 (Simon, J., dissenting). *See, e.g., Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 568 (1916); *Iman v. Southern Pac. Co.*, 7 Ariz. App. 16, 20, 435 P.2d 851, 855 (1968); *Backman v. United States*, 516 A.2d 923, 926 (D.C. 1986); *Opinion of the Justices*, 309 Mass. 631, 637, 35 N.E.2d 676, 680 (1941).

62. *League of Women Voters*, 121 Ill. 2d at 257, 520 N.E.2d at 636 (Simon, J., dissenting). *See, e.g., Coalition for Political Honesty v. State Bd. of Elections*, 83 Ill. 2d 236, 415 N.E.2d at 368 (1980) (upholding referendum proposing change in Illinois House of Representatives to single-member districts and reduction in the number of representatives).

63. *League of Women Voters*, 121 Ill. 2d at 258, 520 N.E.2d at 636-37 (Simon, J., dissenting). *See* 7 Record of Proceedings, SIXTH ILL. CONST. CONVENTION 2725 (1970).

64. *League of Women Voters*, 121 Ill. 2d at 259, 520 N.E.2d at 637 (Simon, J., dissenting).

65. ILL. REV. STAT. ch. 48, paras. 39s1-39s12 (1987).

66. *See* ILL. CONST. art. VII, § 6(a). Section 6(a) states:

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 exer-

state interests in *People ex rel. Bernardi v. City of Highland Park*.⁶⁷ Once again, the court came down on the side of the state's control over its subdivisions.

Highland Park undertook a public works project to clean and extend an intake line from Lake Michigan to the city's water filtration plant.⁶⁸ In bidding on the project, Highland Park omitted information required by the Prevailing Wage Act regarding the wages to be paid to laborers of the project.⁶⁹ The Director of the Illinois Department of Labor sought an injunction in the Lake County Circuit Court forcing the city to comply with the Act before awarding the contract.⁷⁰ The circuit court dismissed the action, holding that the city had the power not to follow the Prevailing Wage Act under its home rule authority.⁷¹ The appellate court affirmed.⁷² The Illinois Supreme Court upheld the ruling in a 1986 opinion but granted a rehearing during its January 1988 term.⁷³ Upon reconsideration, a sharply divided court ruled against the city on the grounds that the Prevailing Wage Act addresses a matter of state-wide concern.⁷⁴

Although Highland Park's project had been completed before the court reached its final decision and the question of an injunc-

cise 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.

Id.

67. 121 Ill. 2d 1, 520 N.E.2d 316 (1988).

68. *Id.* at 5, 520 N.E.2d at 318.

69. *Id.* The Prevailing Wage Act provides:

It is the policy of the State of Illinois that a wage of no less than the general prevailing hourly rate as paid for work of a similar character in the locality in which the work is performed, shall be paid to all laborers, workers and mechanics employed by or on behalf of any and all public bodies engaged in public works.

ILL. REV. STAT. ch. 48, para. 39 (1987).

70. *Bernardi*, 121 Ill. 2d at 5, 520 N.E.2d at 318.

71. *Id.* at 6, 520 N.E.2d at 318.

72. 135 Ill. App. 3d 580, 584, 482 N.E.2d 114, 117 (2d Dist. 1986).

73. *Bernardi*, 121 Ill. 2d at 4, 520 N.E.2d at 317.

74. *Id.* at 13, 520 N.E.2d at 323. In the initial hearing before the Illinois Supreme Court, Highland Park successfully argued that the decision to undertake the project was solely a local matter and, therefore, the Prevailing Wage Act did not apply. *Id.* at 4, 520 N.E.2d at 317. In reaching its decision, the majority traced the constitutional history of the Prevailing Wage Act and noted that it had been held to be constitutional. See *Hayen v. County of Ogle*, 101 Ill. 2d 413, 463 N.E.2d 124 (1984); *People ex rel. Bernardi v. Roofing Sys., Inc.*, 101 Ill. 2d 424, 463 N.E.2d 123 (1984). One of the purposes of the Prevailing Wage Act was to assure the state that public projects would be completed in a competent and timely manner. *Bernardi*, 121 Ill. 2d at 10, 520 N.E.2d at 320. The Prevailing Wage Act also was intended to protect local workers from cheap labor being imported into a locality. *Id.*

tion was moot, the court nevertheless found that the controversy itself was not moot.⁷⁵ First, sanctions against the defendant contractor could be affected,⁷⁶ and the laborers on the project stood to gain additional compensation if the court should reverse itself.⁷⁷ Second, the issues involved were likely to be raised again if the court failed to address them now.⁷⁸

The Illinois Department of Labor argued that the objectives of the Prevailing Wage Act reached beyond municipal boundaries, so that Highland Park had no home rule authority in the area of wage regulation.⁷⁹ The majority, therefore, considered the distribution of power under the home rule system. Because home rule is primarily a method of distributing power between state and local governments, it is not intended to increase the sum total of government power.⁸⁰ In other words, there can be no overlapping authority. The limited grant of power to local governments is asserted only in those areas where state or federal interests are not evident.⁸¹

To determine whether a state-wide interest was at stake in this case, the majority considered the effect of Highland Park's actions outside of the city's jurisdiction, the traditional roles played by the governmental units in regulating the economy, and whether the state or local government had the greater interest in regulating wages.⁸² The majority stated that Highland Park's refusal to abide by the Prevailing Wage Act would have a direct impact on wages paid to workers on other public projects throughout Lake County.⁸³ This result is inconsistent with the exercise of home rule power, which is not to have any effect outside of the municipality.⁸⁴

75. *Id.*

76. *Id.* If a contractor is found to be in non-compliance with the Prevailing Wage Act, that non-compliance will be published in the Illinois Register and the contractor will be precluded from being awarded government contracts for two years. ILL. REV. STAT. ch. 48, para. 39 (1987).

77. *Bernardi*, 121 Ill. 2d at 7-8, 520 N.E.2d at 319. Section 11 of the Prevailing Wage Act provides that a public body that is disputing a determination regarding the prevailing wage must, before continuing work, place enough funds in escrow to pay the increased wages should the public body lose in litigation.

78. *Id.* at 8, 520 N.E.2d at 319.

79. *Id.* at 11, 520 N.E.2d at 320.

80. *Id.* at 11, 520 N.E.2d at 320-21 (quoting Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644 (1964)).

81. *Bernardi*, 121 Ill. 2d at 12-13, 520 N.E.2d at 321 (citing *City of Des Plaines v. Chicago & N.W. Ry. Co.*, 65 Ill. 2d 1, 357 N.E.2d 433 (1976)).

82. *Id.* at 13, 520 N.E.2d at 321.

83. *Id.*

84. *Id.* at 13, 520 N.E.2d at 321-22. *See also* *Bridgman v. Korzen*, 54 Ill. 2d 74, 78 N.E.2d 9 (1972).

The majority stated that, more importantly, the area of wage regulation is a field traditionally subject to state regulation,⁸⁵ and home rule authority is limited where the state is engaging in comprehensive regulation.⁸⁶ The majority recited numerous examples of State regulation of wages and hours.⁸⁷

In the context of the state's labor regulations, the majority found that the purpose of the Prevailing Wage Act is to protect the wages paid to workers and support the integrity of the collective bargaining process by preventing the undercutting of employee wages.⁸⁸ Such protection of local labor falls within the state's regulatory power.⁸⁹ To allow Highland Park to use its home rule authority to avoid the Prevailing Wage Act would undercut all of the state's labor laws and invite increasingly localized definitions of workers' rights.⁹⁰ Such a result was unacceptable to the majority. The court, therefore, concluded that Highland Park's attempt to abrogate the Prevailing Wage Act was outside of its home rule authority.⁹¹ Compliance with the Act was a state-wide matter, not a local one.⁹²

In his dissent, Justice Miller stated that the majority misread the home rule provision in the state constitution and the purpose be-

85. *Bernardi*, 121 Ill. 2d at 13, 520 N.E.2d at 322.

86. *Id.* (citing *Kalodimos*, 103 Ill. 2d at 501, 470 N.E.2d at 274).

87. *Id.* See ILL. REV. STAT. ch. 48, paras. 1, 2 (1987) (eight-hour work day); ILL. REV. STAT. ch. 48, paras. 4(a), 4(b) (1987) (abolishing wage discrimination); ILL. REV. STAT. ch. 48, paras. 8(a)-8(h) (six-day work week); ILL. REV. STAT. ch. 48, paras. 31.1-31.22 (1987) (child labor); ILL. REV. STAT. ch. 48, paras. 39.01-39.12 (1987) (Illinois Wage Assignment Act); ILL. REV. STAT. ch. 48, paras. 138.1-138.30 (Workers' Compensation Act); ILL. REV. STAT. ch. 48, paras. 172(d)-172(g) (payment of medical exams required for employment); ILL. REV. STAT. ch. 48, paras. 300-820 (1987) (Unemployment Insurance Act); ILL. REV. STAT. ch. 48, paras. 1001-1015 (1987) (Minimum Wage Law).

88. *Bernardi*, 121 Ill. 2d at 14, 520 N.E.2d at 322.

89. *Id.* See ILL. REV. STAT. ch. 48, paras. 2(a)-2(d) (1987) ("An act relating to disputes concerning terms and conditions of employment"); ILL. REV. STAT. ch. 48, paras. 1601-1627 (1987) (Illinois Public Labor Relations Act); ILL. REV. STAT. ch. 48, paras. 269-275 (1987) ("an Act to give preference in the construction of public works projects and improvements to citizens of the United States who have resided in Illinois for one year").

90. *Bernardi*, 121 Ill. 2d at 15, 520 N.E.2d at 322-23. The majority also rejected the City's claim that federal law would govern an abuse of employee's rights by a home rule unit because the protections afforded by state laws were broader than those of the federal government. *Id.* at 15-16, 520 N.E.2d at 323. The court was unwilling to leave enforcement of workers' rights to federal officials not answerable to the voters and state officials of Illinois. *Id.*

91. *Id.* at 16, 520 N.E.2d at 323.

92. *Id.*

hind it.⁹³ Justice Miller argued that the constitution provides a mechanism for the state to preempt a subject matter from home rule,⁹⁴ but the legislature had determined that no pre-emption was warranted in this case.⁹⁵ Instead, the majority was merely substituting its judgment for that of the legislature.⁹⁶ Moreover, Justice Miller discounted the majority's fear that a ruling in favor of Highland Park would endanger the state's other economic regulations because the home rule provision applied only to public bodies.⁹⁷ Justice Miller also rejected the notion that the city's actions would have a major effect on wages in Lake County.⁹⁸

Although the court's decision in *Bernardi* emphasized the general assembly's ultimate control over local governments, it hardly represents the death knell for home rule power in Illinois. In fact, the court upheld a fuel tax ordinance enacted by Chicago in two companion cases: *Illinois Gasoline Dealers Association v. City of Chicago* and *Midwest Petroleum Marketers Association v. City of Chicago*.⁹⁹

The tax ordinance in question imposes a tax on the pump price of gasoline and required that gasoline retailers collect the tax.¹⁰⁰ In addition, the ordinance directs the city comptroller to calculate the fuel tax receipts for purposes of abating property taxes in the

93. *Id.* at 19, 520 N.E.2d at 324 (Miller, J., dissenting). Justice Moran and Justice Ryan joined in the dissent.

94. *Id.* at 18, 520 N.E.2d at 323 (Miller, J., dissenting).

95. *Id.* at 18, 520 N.E.2d at 323-24 (Miller, J., dissenting). The home rule provision in the constitution provides in part:

(g) The General Assembly . . . may deny or limit . . . any . . . power or function of a home rule unit not exercised or performed by the State

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

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

96. *Bernardi*, 121 Ill. 2d at 20, 520 N.E.2d at 324-25 (Miller, J., dissenting).

97. *Id.* at 20-21, 520 N.E.2d at 325 (Miller, J., dissenting).

98. *Id.* at 20, 520 N.E.2d at 325 (Miller, J., dissenting).

99. 119 Ill. 2d 391, 519 N.E.2d 447 (1988) [hereinafter *Illinois Gasoline Dealers*].

100. *Id.* The main text of the ordinance reads:

A tax is hereby imposed upon the privilege of purchasing or using, in the City of Chicago, vehicle fuel purchased . . . at retail. The tax shall be . . . five cents per gallon . . . [L]iability for payment of the tax shall be upon the purchaser or user of the vehicle fuel, and nothing in this chapter shall be construed to impose a tax upon the occupation of selling or distributing vehicle fuel. It shall be a violation . . . for any distributor or retail dealer to fail to add this tax to the retail price of vehicle fuel or to absorb the tax. This tax shall be in addition to any and all other taxes.

CHICAGO, ILL., MUN. CODE ch. 200.10-2 (1986).

city.¹⁰¹ Opponents of the tax claimed that it is an illegal occupation tax and that it impermissibly delegates taxing decisions to the comptroller.¹⁰² The opponents relied on *Commercial National Bank v. City of Chicago*,¹⁰³ wherein the court declared that a Chicago tax on the purchaser of services had the practical effect of taxing the occupation of selling those services.¹⁰⁴ The court declined to apply the "practical effect" test in the instant case, however, because the constitutional convention debates cited a local fuel tax as an example of permissible home rule taxation.¹⁰⁵ Therefore, placing the burden of paying the fuel tax on the purchaser was not an unconstitutional attempt to disguise an occupation tax.¹⁰⁶ The court also found that the obligations imposed upon the gasoline retailers to collect and account for the tax do not make it an occupation tax.¹⁰⁷

The second basis of the challenge related to section 3 of the ordinance, requiring the city comptroller to calculate an abatement of real estate taxes in the amount of total revenues received from the fuel tax.¹⁰⁸ The Illinois Gasoline Dealers Association (the "Association") argued that section 3 impermissibly delegates the council's legislative taxing power to the city comptroller.¹⁰⁹ The challenged section authorizes the comptroller to determine receipts from the fuel tax and file corresponding certificates of abatement on property taxes with the county clerk.¹¹⁰ The plaintiffs asserted that the power of "determination" given to the comptroller is an improper

101. *Illinois Gas Dealers*, 119 Ill. 2d at 395, 519 N.E.2d at 448-49.

102. *Id.* at 396, 519 N.E.2d at 449. Opponents also claimed that the tax is void because it was not enacted in accordance with the city council's procedural rules. The court refused to address this issue. *Id.* at 404, 519 N.E.2d at 452. Under the Illinois Constitution, a home rule municipality has no authority to impose an occupation tax except when the legislature has specifically authorized such a tax. ILL. CONST. art. VII, § 6(c). A tax is considered an occupation tax if it regulates and controls a given occupation or imposes a tax for the privilege of engaging in a given occupation, trade, or profession. *Illinois Gas Dealers*, 119 Ill. 2d at 399, 519 N.E.2d at 450 (citing *Reif v. Barrett*, 355 Ill. 104, 188 N.E.2d 889 (1933)). A tax on the privilege of selling services also constitutes an occupation tax. *Id.* (citing *Commercial Nat'l Bank v. City of Chicago*, 89 Ill.2d 45, 432 N.E.2d 227 (1981)).

103. 89 Ill. 2d 45, 432 N.E.2d 227 (1981).

104. *Id.* at 66, 432 N.E.2d at 237.

105. *Illinois Gas Dealers*, 119 Ill. 2d at 400, 519 N.E.2d at 451 (citing 7 Record of Proceedings, SIXTH ILL. CONST. CONVENTION 1655-56 (1970)).

106. *Id.*

107. *Id.* at 401, 519 N.E.2d at 451. The court noted that permissible home rule taxes frequently involve tangible objects and that fuel was also a tangible object. *Id.*

108. CHICAGO, ILL., MUN. CODE ch. 200.10-2 (1986).

109. *Illinois Gas Dealers*, 119 Ill. 2d at 396, 519 N.E.2d at 449.

110. Section 3 of the ordinance reads:

delegation of taxing authority to the executive.¹¹¹ The court stated that the ordinance is not an improper delegation and relied on its prior decision in *Paper Supply Co. v. City of Chicago*,¹¹² in which it upheld a provision allowing the Director of the Department of Revenue to determine whether a tax delinquency was the fault of the taxpayer, thereby removing the late payment penalty.¹¹³ The fuel tax ordinance similarly denies any discretion on the part of the comptroller as to how much any individual would be taxed.¹¹⁴ The court also noted that similar abatement procedures are provided for in the Illinois Municipal Code.¹¹⁵ In addition, the Association's reliance on *Bowsher v. Synar*¹¹⁶ was rejected because the powers delegated by the Congress to an executive officer, the Comptroller General, necessitated sophisticated economic judgment on his part.¹¹⁷ The city comptroller exercises no such powers.¹¹⁸

Finally, the Association argued that the ordinance is unconstitutional because it imposes more than one city tax on fuel and therefore constitutes non-uniform taxation.¹¹⁹ The court cited *People v.*

(a) The City Comptroller is . . . directed . . . to determine the amounts received from . . . the Chicago Vehicle Fuel Tax which were collected

(b) As and to the extent that any amounts described in Subsection (a) hereof were so collected, . . . the City Comptroller is . . . directed . . . to file . . . certificates of abatement with respect to the property taxes levied for the Year 1986

CHICAGO, ILL., MUN. CODE ch. 200.10 (1986).

111. *Illinois Gas Dealers*, 119 Ill. 2d at 396-98, 519 N.E.2d at 449.

112. 57 Ill. 2d 553, 317 N.E.2d at 3 (1974).

113. *Id.* at 579, 317 N.E.2d at 16. In *Paper Supply Co.*, the court found that such administrative determinations are evident in many statutes and ordinances and do not constitute an unlawful delegation of legislative or judicial authority. *Id.*

114. *Illinois Gas Dealers*, 119 Ill. 2d at 397, 519 N.E.2d at 449. See *Brown v. City of Chicago*, 42 Ill. 2d 501, 506, 250 N.E.2d 129, 132 (1969).

115. *Illinois Gas Dealers*, 119 Ill. 2d at 398, 519 N.E.2d at 450. See ILL. REV. STAT. ch. 24, para. 8-3-4 (1987).

116. 478 U.S. 714 (1986).

117. *Id.* at 733. The legislation at issue in *Bowsher v. Synar* involved a delegation of power to the Comptroller General to make unilateral reductions in various segments of the federal budget if Congress failed to meet federal budget deficit targets set by the Gramm-Rudman Bill. The United States Supreme Court held this to be an unlawful delegation of legislative power to the executive branch. *Id.* at 736. Congress has since circumvented the decision by ratifying determinations of the Comptroller General by a majority vote of both houses.

118. *Illinois Gas Dealers*, 119 Ill. 2d at 398, 519 N.E.2d at 450.

119. *Id.* at 401, 519 N.E.2d at 451-52. See *People ex rel. Hanrahan v. Caliendo*, 50 Ill. 2d 72, 277 N.E.2d 319 (1971). The constitutional provision in question states in part: "In any law classifying the subjects . . . of non-property taxes . . . , the classes shall be reasonable and the subjects . . . within each class shall be taxed uniformly." ILL. CONST. art. IX, § 2.

Deep Rock Oil Corp.,¹²⁰ which held that there was no constitutional prohibition against multiple taxation as long as the total amount was not unreasonable.¹²¹ Moreover, the court stated that the Association failed to show that another city tax had been imposed upon the privilege of purchasing fuel at retail.¹²²

The court reiterated that the legislature has broad powers to classify objects of taxation so long as such classifications are reasonable.¹²³ Therefore, the party attacking the validity of the classifications has the burden of proving that the legislature acted arbitrarily in making the classifications.¹²⁴ The court stated that the Association failed in this regard and upheld the ordinance.¹²⁵

V. PUBLIC FINANCE

Although the Illinois Supreme Court upheld a home rule unit's power to tax fuel purchases, it did not allow a local school district to demand funds from the state to finance state-mandated programs. In *Board of Trustees v. Burriss*,¹²⁶ the Illinois Supreme Court denied a request by the Chicago City Colleges of reimbursement for veteran's scholarships.¹²⁷ The State of Illinois required state colleges to offer scholarships to qualified Illinois veterans.¹²⁸ When the Illinois General Assembly failed to appropriate enough funds to reimburse nearly one-half of the college's costs in 1982 and 1983, the college filed suit.¹²⁹

The College asserted that the State Mandates Act ("the Act")¹³⁰ requires the general assembly to reimburse those funds expended by a unit of local government pursuant to an act of the legislature.¹³¹ Section 8(c) of the Act requires that a community college that seeks reimbursement for costs of implementation to file a

120. 343 Ill. 388, 175 N.E. 572 (1931).

121. *Id.* at 397, 175 N.E. at 577.

122. *Illinois Gas Dealers*, 119 Ill. 2d at 402-03, 519 N.E.2d at 452.

123. *Id.* at 403, 519 N.E.2d at 452 (citing *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356 (1973)).

124. *Id.* (citing *Jacobs v. City of Chicago*, 53 Ill. 2d 421, 292 N.E.2d 401 (1973)).

125. *Id.*

126. 118 Ill. 2d 465, 515 N.E.2d 1244 (1987).

127. *Id.* at 481, 515 N.E.2d at 1251.

128. ILL. REV. STAT. ch. 126-1/2, para. 69.1 (1985) (repealed and recodified in ILL. REV. STAT. ch. 122, para. 30-15.7d (Supp. 1986)).

129. *Board of Trustees*, 118 Ill. 2d at 469-70, 515 N.E.2d at 1246. Prior to 1982, the state had budgeted enough funds to reimburse the total amount expended by various schools. *Id.*

130. ILL. REV. STAT. ch. 85, paras. 2201-2210 (1987).

131. *Board of Trustees*, 118 Ill. 2d at 469, 515 N.E.2d at 1246.

claim with the Illinois Community College Board ("ICCB").¹³² The ICCB submitted its approval of the College's claim to the state comptroller, Roland Burris, with a request for payment, which the comptroller refused.¹³³ The co-defendant, the Director of the Department of Commerce and Community Affairs (the "Director"), then refused to request a supplemental appropriation on behalf of the college.¹³⁴ The College, therefore, sought a declaratory judgment to have the defendant Burris disburse the funds.¹³⁵ In the alternative, the College asked that the Director be ordered to request a supplemental appropriation from the legislature dismissing the College's claim against the comptroller.¹³⁶

The circuit court found that the Act applied to the veteran's scholarship program, that the Director had a duty to notify the legislature of the shortfall, and that the College was not required to appeal the ICCB's decision to the Mandate Board of Appeals.¹³⁷ The appellate court affirmed the circuit court in part, finding that no appeal to the Mandates Board was required and that the comptroller did not have to release funds unless appropriated in the legislature.¹³⁸ The appellate court reversed the lower court's decision regarding the scope of the Act and the Director's duty to notify the legislature of the need for a supplemental appropriation.¹³⁹

On review, the Illinois Supreme Court first considered the Director's argument that sovereign immunity barred the College's claim against him as a state officer.¹⁴⁰ The court stated that an action against a state officer, where that officer is alleged to be acting under an unconstitutional statute or an unlawful assumption of authority, is a suit against the officer, not the state, and, therefore, sovereign immunity is not a defense.¹⁴¹

132. ILL. REV. STAT. ch. 85, para. 2208(c) (1987).

133. *Board of Trustees*, 118 Ill. 2d at 469, 515 N.E.2d at 1246.

134. *Id.* at 469-70, 515 N.E.2d at 1246. See ILL. REV. STAT. ch. 85, para. 2208(d) (1987).

135. *Board of Trustees*, 118 Ill. 2d at 469, 515 N.E.2d at 1245-46.

136. *Id.* at 469-70, 515 N.E.2d at 1246.

137. *Id.* at 470, 515 N.E.2d at 1246. See ILL. REV. STAT. ch. 85, para. 2208(d) (1987).

138. 144 Ill. App. 3d 867, 874, 494 N.E.2d 625, 630 (1st Dist. 1986).

139. *Id.* at 874, 494 N.E.2d at 629.

140. *Board of Trustees*, 118 Ill. 2d at 471, 515 N.E.2d at 1247. The fact that state funds were at stake was not central to the issue. *Id.* at 473, 515 N.E.2d at 1247 (citing *Board of Educ. v. Cronin*, 69 Ill. App. 3d 472, 388 N.E.2d 72 (1st Dist. 1979)).

141. *Id.* at 473, 515 N.E.2d at 1247-48 (citing *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 470 N.E.2d 1029 (1984); *Sass v. Kramer*, 72 Ill. 2d 485, 381 N.E.2d 975 (1978); *People ex rel. Freeman v. Department of Pub. Welfare*, 368 Ill. 505, 14 N.E.2d 642 (1938)).

In support of its claim for reimbursement, the College contended that a 1986 change in the scholarship reimbursement law¹⁴² that became effective between the appellate court's decision in this case and the supreme court's hearing, evidenced a legislative intent to correct the appellate court's interpretation of the Act's applicability.¹⁴³ The court observed, however, that a statutory amendment will be deemed to operate prospectively unless the language of the statute clearly provides otherwise.¹⁴⁴ Because the 1986 amendment did not call for retroactive effectiveness, the pre-1986 law that was in effect at the time of the alleged injury must be applied.¹⁴⁵

The court rejected the College's argument that the Comptroller could disburse funds for a mandated program without a specific authorization. The court stated that the general assembly is constitutionally authorized to make all appropriations of state funds, and that expenditures must be related to the subject of the appropriation.¹⁴⁶ Moreover, the comptroller is authorized to refuse a request for disbursement of state funds if no appropriation has been made.¹⁴⁷ In this instance, no appropriation was made and the Comptroller properly refused the claims.¹⁴⁸

Finally, the court ruled that the veterans scholarship program was not covered by the Act.¹⁴⁹ Under the Act, state funding obligations were triggered whenever the state decided to "establish, expand or modify" functions of local governments "in such a way as to necessitate additional expenditures from local revenues."¹⁵⁰ The

142. See ILL. REV. STAT. ch. 122, para. 30-15.7d (Supp. 1986).

143. *Board of Trustees*, 118 Ill. 2d at 475, 515 N.E.2d at 1248.

144. *Id.* at 476, 515 N.E.2d at 1249 (citing *Board of Trustees v. Human Rights Comm'n*, 88 Ill. 2d 22, 35, 429 N.E.2d 1207, 1214 (1981); *Board of Trustees v. ICCB*, 63 Ill. App. 3d 969, 380 N.E.2d 988 (1st Dist. 1978)).

145. *Id.* (citing *Human Rights Comm'n*, 88 Ill. 2d at 35, 429 N.E.2d at 1214). The court also noted that the Senate debates concerning the statute indicated an intent to improve the future administration of the scholarship and not to give the comptroller authority to disburse funds without a supplemental appropriation from the legislature. *Id.* See SENATE PROCEEDINGS, 84th Ill. Gen. Assem., at 95, 102, 103 (June 25, 1986). See also ILL. CONST. art. VIII, § 2(b).

146. *Board of Trustees*, 118 Ill. 2d at 477, 515 N.E.2d at 1249. See ILL. CONST. art. VIII., § 8(d).

147. ILL. REV. STAT. ch. 15, para. 209(c) (1987).

148. *Board of Trustees*, 118 Ill. 2d at 478-79, 515 N.E.2d at 1250. Funds for veterans' scholarships had been reduced specifically by Governor Thompson's line-item veto that the general assembly failed to override or restore by a majority vote of both houses. According to the court, accepting the College's view would allow the comptroller to override the wishes of the Governor and the state legislature. *Id.* at 479, 515 N.E.2d at 1250.

149. *Id.* at 480, 515 N.E.2d at 1251.

150. *Id.*; ILL. REV. STAT. ch. 85, para. 2203(b)(1987).

College claimed that the reduced appropriation for the scholarships fell within the Act because the College was required to modify its activities to necessitate additional expenditures from local revenues.¹⁵¹ The defendants argued in response that the veteran's scholarships program was not subject to the Act because it was in effect before the Act was passed in 1981.¹⁵² The court ruled that the 1982-83 appropriation bills that cut scholarship funds did not themselves mandate any governmental functions or impose any new duty on the College to expand the scholarship program.¹⁵³ As such, there was no service mandate within the meaning of the Act.¹⁵⁴

The court's decision again demonstrates that the state has broad control over its local governments. The state not only can require localities to perform certain tasks, it can require the localities to pay for it themselves. Although the state may direct itself to assist local governments with such tasks, the state's obligation is determined by the general assembly.

VI. LAND DEVELOPMENT AND ZONING

During the *Survey* period, the Illinois Supreme Court did not only consider issues relating to the roles of and control over state and local governmental units. It also decided several cases relating to governmental powers to protect the public health, safety, and welfare.

A. Housing and Development

In the area of land development, the court considered a state agency's subsidization of low-income housing in a low and middle-income neighborhood in *Greer v. Illinois Housing Development Authority*.¹⁵⁵ The case did not question the authority of the Illinois Housing Development Authority ("IHDA") to subsidize low-income housing.¹⁵⁶ Rather, the plaintiffs challenged whether partic-

151. *Board of Trustees*, 118 Ill. 2d at 479-80, 515 N.E.2d at 1251 (quoting ILL. REV. STAT. ch. 85, para. 2203(b) (1985)).

152. *Id.* at 480, 515 N.E.2d at 1251.

153. *Id.* at 481, 515 N.E.2d at 1251.

154. *Id.* After reviewing the Act, the court did not consider whether the Director was required to seek supplemental appropriations.

155. 122 Ill. 2d 462, 524 N.E.2d 561 (1988).

156. Neither party questioned that the IHDA was created to promote the health, safety, and welfare of the low-income public, nor did the parties challenge the many powers given to the IHDA to achieve its stated goal of economic integration. These powers include: The right to make mortgages or other loans for the rehabilitation of suitable housing for low or moderate income persons or families at low or moderate rent-

ular housing subsidies were properly granted under the Illinois Housing Development Act ("the Act").¹⁵⁷

The housing developments in question in *Greer* were located in Chicago's Kenwood community, which is economically and racially integrated.¹⁵⁸ The appellant developers filed a request for funding from the IHDA to build forty-eight section 8 units for rental to very low-income families.¹⁵⁹ The IHDA in turn submitted the plan to the United States Department of Housing and Urban Development ("HUD") and received its approval.¹⁶⁰

The formally-approved IHDA plan provided that the units would be available only to section 8 tenants.¹⁶¹ This provision was apparently based upon the IHDA's conclusion that the forty-eight units would have a negligible impact upon the community and that the housing stock on the blocks in question was too run-down to attract market-rate tenants.¹⁶²

Despite the widespread support for the IHDA grants, residents of the area challenged the plan by asserting that proposed develop-

als in locations where there is a need for such housing, ILL. REV. STAT. ch. 67 1/2, para. 307.2 (1987); authority to obtain funds from a variety of sources, such as gifts, grants, and loans from federal agencies, ILL. REV. STAT. ch. 67 1/2, para. 307.20 (1987); and the power to enter into agreements with federal agencies, ILL. REV. STAT. ch. 67 1/2, para. 307.11 (1987). The Illinois Housing Development Act (the "Act") also places restrictions on the IHDA's use of funds. Section 310 of the Act requires the IHDA to approve a tenant selection plan sufficiently flexible to avoid undue economic homogeneity among the tenants of a development. ILL. REV. STAT. ch. 67 1/2, para. 310 (1987). The plan must also specify the number of units to be made available to low and moderate income families. *Id.*

157. *Greer*, 122 Ill. 2d at 485, 524 N.E.2d at 571.

158. *Id.* at 481, 524 N.E.2d at 569.

159. *Id.*

160. *Id.* The HUD memorandum indicating approval for funding determined: (1) there was a need for the units; (2) the development was consistent with the *Gautreaux* consent decree calling for scattered site/subsidized housing (*see Gautreaux v. Pierce*, 690 F.2d 616 (7th Cir. 1982)) and the City of Chicago's housing assistance program; (3) the proposed rents were compatible with designated fair-market rents for Kenwood; and (4) that undue concentration of assisted housing in the area would not occur. *Id.* at 481-82, 524 N.E.2d at 570. The funding itself was from HUD's section 8 program. Although the federal Housing Act of 1937 contemplates assistance to projects with subsidized and non-subsidized units, the actual section 8 funds are intended solely for low or very low income families. *See* 42 U.S.C. §§ 1404(a)-1440 (1982). The IHDA had funded some projects exclusively inhabited by low and very low income tenants as defined in section 8. *Greer*, 122 Ill. 2d at 481, 524 N.E.2d at 569.

Not only did the IHDA and HUD approve the project, but it was endorsed by the state representatives for the area, and no governmental body objected to the proposal. *Id.* at 482, 524 N.E.2d at 570. Additionally, the Northeastern Illinois Planning Commission supported the project, stating that it would replace sub-standard housing units in the area. *Id.*

161. *Greer*, 122 Ill. 2d at 482-83, 524 N.E.2d at 570.

162. *Id.* at 483-84, 524 N.E.2d at 570-71.

ments would contribute substantially to the existing concentration of assisted housing, distract from the racially and economically integrated character of the neighborhood, and severely impair the development of market-rate racially and economically integrated housing throughout the Kenwood neighborhood.¹⁶³ More particularly, the plaintiffs complained that the IHDA failed to observe its statutory duty to avoid undue economic homogeneity.¹⁶⁴ In addition, the plaintiffs alleged that the IHDA had not conducted an independent review of the developers' proposals, that the IHDA arbitrarily changed its mixed-income housing policy to obtain section 8 funds, and that the IHDA failed to request a waiver of HUD's section 8 requirements limiting assistance to very low income families.¹⁶⁵ The plaintiffs also charged that the developments did not comply with local building codes.¹⁶⁶

After the appellate court reversed the circuit court's order that dismissed the plaintiffs' action on the pleadings, the IHDA appealed to the supreme court.¹⁶⁷ The IHDA based its appeal on three general grounds: (1) the plaintiffs lacked standing; (2) the IHDA decisions are not reviewable; and (3) the plaintiffs failed to state a claim showing arbitrary and capricious actions on the part of the IHDA.¹⁶⁸

On the first issue, the court found that the plaintiffs had standing to challenge the IHDA's decision to subsidize the Kenwood project.¹⁶⁹ After a lengthy review of federal law regarding standing, the court decided that the "zone of interests" requirement that the IHDA sought to have applied would unnecessarily confuse and complicate the law.¹⁷⁰ Moreover, the court did not consider itself to be bound by federal law on standing¹⁷¹ because state courts are generally more willing to recognize standing for a plaintiff actually injured by an administrative decision.¹⁷² Instead, the court decided

163. *Id.* at 485, 524 N.E.2d at 571.

164. *Id.* See *infra* note 156 and accompanying text.

165. *Id.* at 485-86, 524 N.E.2d at 571-72.

166. *Id.*

167. *Id.* at 471, 524 N.E.2d at 565.

168. *Id.* at 486-87, 524 N.E.2d at 572.

169. *Id.* at 494-95, 524 N.E.2d at 575-76.

170. *Id.* at 491, 524 N.E.2d at 574; see *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 155-56 (1970).

171. *Greer*, 122 Ill. 2d at 491, 524 N.E.2d at 574 (citing *Cusack v. Howlett*, 44 Ill. 2d 233, 36, 254 N.E.2d 506, 508 (1969)). See also *Stanley Magic-Door, Inc. v. City of Chicago*, 74 Ill. App. 3d 595, 597, 393 N.E.2d 535, 537 (1st Dist. 1979).

172. *Greer*, 122 Ill. 2d at 491, 524 N.E.2d at 574 (citing *Stanley Magic-Door*, 74 Ill. App. 3d at 597, 393 N.E.2d at 537; 2 F. COOPER, STATE ADMINISTRATIVE LAW 538 (1965)).

to confer standing upon a plaintiff who demonstrates some injury in fact to a legally cognizable interest.¹⁷³ The plaintiffs had alleged a threatened injury to the value of their property.¹⁷⁴ According to the court, the plaintiffs' proximity to the project would cause any injury to be "distinct and palpable" and "fairly traceable" to the IHDA's actions.¹⁷⁵ Therefore, the plaintiffs had standing.¹⁷⁶

The court next rejected the IHDA's claim that its administrative decisions were not judicially reviewable.¹⁷⁷ The plaintiffs requested the court to determine whether the IHDA had abused its discretion by acting in an arbitrary and capricious manner.¹⁷⁸ The court noted that this standard of review was the lowest level of judicial scrutiny.¹⁷⁹ In considering whether the legislature intended IHDA decisions to be judicially reviewable, the court observed that most agency actions are presumed to be reviewable in the absence of some express statutory prohibition of review.¹⁸⁰ In this regard, the IHDA relied upon the express language of the statute, which gave it the sole discretion to determine the number of units and rentals to be charged.¹⁸¹ According to the court, such language does not preclude judicial review, however, because certain statutory limitations would have no meaning if the IHDA could ignore the limitations without fear of judicial review.¹⁸² Although the IHDA's

173. *Id.* at 492-93, 524 N.E.2d at 574-75 (citing *Glazewski v. Coronet Ins.*, 108 Ill. 2d 243, 483 N.E.2d 1263 (1985)).

174. *Id.* at 493, 524 N.E.2d at 575. See *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 115 (1979) (suburban homeowners had standing to challenge racial steering policies that could reduce their property values).

175. *Greer*, 122 Ill. 2d at 494, 524 N.E.2d 575; see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977). The court also rejected the IHDA's argument that the plaintiffs had failed to prove standing on the basis that the burden is on a defendant to prove an affirmative defense of lack of standing. See *In re Custody of McCarthy*, 157 Ill. App. 3d 377, 380, 510 N.E.2d 555, 556 (2d Dist. 1987). The court found nothing in the IHDA's pleadings alleging lack of standing. *Greer*, 122 Ill. 2d at 494-95, 524 N.E.2d at 576.

176. *Greer*, 122 Ill. 2d at 495, 524 N.E.2d at 576.

177. *Id.* at 498, 524 N.E.2d at 577.

178. *Id.* at 496-97, 524 N.E.2d at 576-77.

179. *Id.* (citing *Dorfman v. Geiber*, 29 Ill. 2d 191, 196, 193 N.E.2d 770, 773 (1963)).

180. *Id.* at 497, 524 N.E.2d at 577; see *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). A statute's language, structure, objective legislative history, and the type of administrative action involved are factors in determining whether judicial review is appropriate. *Greer*, 122 Ill. 2d at 497-98, 524 N.E.2d at 577.

181. *Greer*, 122 Ill. 2d at 497-98, 524 N.E.2d at 577. The section states in part: "The number of such units and the rentals for them shall be determined in such a way that, in the sole judgment of the Authority, a major portion of that estimated benefit is used to reduce rentals for those units . . ." ILL. REV. STAT. ch. 67 1/2, para. 310 (1987).

182. In particular, the court pointed to the statutory requirement that the IHDA

determinations on matters within its discretion should be given great deference, the court believed that this deference could best be protected by subjecting it to review for arbitrariness or capriciousness.¹⁸³

Finally, the IHDA contended that it did not have a statutory duty to avoid undue economic homogeneity and, even if it did, the plaintiffs' pleadings failed to allege arbitrary and capricious acts on the IHDA's part.¹⁸⁴ The court reiterated that the language of the Act mandates a reasonable attempt at avoiding economic segregation.¹⁸⁵ The court set forth guidelines that would suggest an arbitrary and capricious action by an agency: agency reliance on factors not intended in the legislation to be considered; agency failure to consider an important aspect of the problem; or an explanation by the agency of its decision that runs counter to the evidence before the agency or that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁸⁶ Sudden and unexplained changes in policy also can be considered to be arbitrary.¹⁸⁷ The court stated that because the plaintiffs had alleged that the IHDA failed to consider certain relevant factors, and that the IHDA had acted arbitrarily in abandoning a prior policy, questions of fact had been raised that could not be dismissed on the pleadings.¹⁸⁸ Therefore, the court reversed the trial court's judgment for the IHDA on the pleadings and remanded the case for further proceedings.¹⁸⁹ In so doing, the court recognized the rights of nearby residents to place a check on gov-

shall avoid undue economic homogeneity in awarding grants. *Greer*, 122 Ill. 2d at 499, 524 N.E.2d at 577.

183. *Id.* at 501, 524 N.E.2d at 578. The IHDA also argued that because it is a corporate body and its function is non-adjudicatory, cases dealing with review of adjudicatory functions of an administrative agency were not applicable to the case at bar. The court rejected this argument. *Id.*

184. *Id.*

185. *Id.* See ILL. REV. STAT. ch. 67 1/2, paras. 303, 310 (1987).

186. *Greer*, 122 Ill. 2d at 505-06, 524 N.E.2d at 581 (citing *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Ins. Co.*, 463 U.S. 29 (1983)).

187. *Id.* at 506, 524 N.E.2d at 581. See 2 C. KOCH, ADMINISTRATIVE LAW & PRACTICE § 9.6, at 101 (1985).

188. *Greer*, 122 Ill. 2d at 506, 524 N.E.2d at 581.

189. *Id.* The final section of *Greer* deals with the plaintiff's cause of action against the owners and developers of the proposed rehabilitation project on the grounds that the renovations would violate the Chicago Building Code, CHICAGO MUN. CODE ch. 24, § 11-1 (1985), and the Chicago Rehabilitation Code, CHICAGO MUN. CODE ch. 78.1 (1983). The court determined that the renovations conflicted with the building and rehabilitation codes. Because the project was already completed, the plaintiffs expressed only a desire that the basement apartments renovated in violation of the rehabilitation code be vacated. The supreme court left the granting of appropriate relief to the trial court on remand. *Greer*, 122 Ill. 2d at 506-17, 524 N.E.2d at 581-86.

ernmental intervention as it relates to the siting of subsidized housing units.

B. Zoning

The Illinois Supreme Court confronted the thorny problem of restricting adult entertainment businesses to certain locations in *County of Cook v. Renaissance Arcade and Bookstore*.¹⁹⁰ In that case, the court held that certain restrictions in the Cook County Zoning Ordinance are reasonable and that the granting of a one-year amortization period for existing businesses to relocate was appropriate.¹⁹¹

This controversy arose in 1983 when Cook County sought injunctions to close adult businesses operating inside areas not zoned for such use. The trial court granted the injunction, the appellate court reversed, and the County appealed to the supreme court.¹⁹² The 1981 ordinance at issue here amended part of a similar 1977 ordinance that was held unconstitutional in *County of Cook v. World Wide News Agency*.¹⁹³ The 1981 ordinance restricts adult uses to "all 78 industrially zoned areas of 1-2, 1-3, and 1-4 and as special uses in all the 245 commercially zoned areas of C-3, C-4, and C-8."¹⁹⁴ The ordinance also sets a limit of no more than two adult uses within 1000 feet of each other in a commercial zone,¹⁹⁵ and any commercial zone locations must be considered at a hearing before the zoning board of appeals and receive the approval of the board of commissioners.¹⁹⁶ Pre-existing businesses affected by the new ordinance are given six months to relocate, plus six more months if application is made for a certificate of non-conformance.¹⁹⁷ Businesses also can apply for an extension beyond the one-year period.¹⁹⁸

In reviewing the county ordinance, the court first confirmed that municipalities can regulate the location of adult entertainment through the use of their zoning powers.¹⁹⁹ The court then ex-

190. 122 Ill. 2d 123, 522 N.E.2d 73 (1988) [hereinafter *Renaissance Arcade*].

191. *Id.* at 141-42, 522 N.E.2d at 80-81.

192. *Id.* at 130, 522 N.E.2d at 75.

193. 98 Ill. App. 3d 1094, 424 N.E.2d 1173 (1st Dist. 1981).

194. COOK COUNTY ZONING ORDINANCE § 13.16-1 (1981).

195. *Id.*

196. COOK COUNTY ZONING ORDINANCE §§ 13-17, 13-10 (1981).

197. COOK COUNTY ZONING ORDINANCE §§ 13.16-4-1 to 13.16-4-5 (1981).

198. COOK COUNTY ZONING ORDINANCE § 13.16-4-4 (1981).

199. *Renaissance Arcade*, 122 Ill. 2d at 132, 522 N.E.2d at 76. The court cited *Young v. American Mini Theatres*, 427 U.S. 50 (1976), in which the United States Supreme Court held that a Detroit ordinance prohibiting more than two adult businesses

amined the United State Supreme Court's ruling in *Renton v. Playtime Theatres*,²⁰⁰ where an ordinance banning adult uses from certain areas near church, school, and residential areas was upheld as a valid "content-neutral" regulation designed to serve a substantial governmental interest without unreasonably limiting alternative avenues of communication.²⁰¹ The purpose of the Renton ordinance was prevention of crime, preservation of property values, and protection of retail businesses that, in the Court's view, was a substantial interest in limiting the "secondary effects" of adult uses.²⁰² Because more than five percent of Renton's land area remained available for adult uses, the United States Supreme Court concluded that the right to operate such a business was not being denied.²⁰³

In the instant case, the Illinois Supreme Court held that the Cook County ordinance satisfies the standards set forth in *Renton*.²⁰⁴ Although the defendants pointed to previous decisions that struck down ordinances restricting adult uses to largely industrial areas,²⁰⁵ the court found that those cases were distinguishable because the industrially-zoned areas available for adult uses under the county ordinance included numerous tracts of land, some of which were almost 100 acres in size.²⁰⁶ The court also rejected the defendants' claim of economic hardship in light of the cost of available land. Citing *Renton*, the court stated that the first amendment does not protect persons against the market place.²⁰⁷ The court's determination on the validity of the zoning restrictions is consistent with numerous post-*Renton* challenges to similar ordinances.²⁰⁸ The ordinance at issue here provides a reasonable

located within 1000 feet of each other or within 500 feet of a residential area was a valid exercise of a city's interest in attempting to preserve the quality of urban life. *Id.* at 71-72. Justice Powell's concurrence noted the usefulness of such zoning to preserve a city's character. *Id.* at 80 (Powell, J., concurring).

200. 475 U.S. 41 (1986).

201. *Id.* at 47.

202. *Id.* at 52.

203. *Id.* at 54.

204. *Renaissance Arcade*, 122 Ill. 2d at 135, 522 N.E.2d at 78.

205. *Id.* at 135-38, 522 N.E.2d at 78-79. See *Basiardanes v. Galveston*, 682 F.2d 1203 (5th Cir. 1982); *North Street Book Shoppe v. Village of Endicott*, 582 F. Supp. 1428 (N.D.N.Y. 1984); *Purple Onion, Inc. v. Jackson*, 511 F. Supp. 1207 (N.D. Ga. 1981).

206. *Renaissance Arcade*, 122 Ill. 2d at 139, 522 N.E.2d at 79.

207. *Id.* (quoting *Renton*, 475 U.S. at 54). The court also observed that the cases are legion sustaining zoning against claims of serious economic damage. *Id.* (quoting *Young*, 427 U.S. at 78 (Powell, J., concurring)).

208. *Id.* at 139, 522 N.E.2d at 79-80. See *S & G News, Inc. v. City of Southgate*, 638 F. Supp. 1060 (E.D. Mich. 1986); *Dumas v. Dallas*, 648 F. Supp. 1061 (S.D. Tex. 1986); *City of Vallejo v. Adult Book*, 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143 (1985).

number of alternative sites and, therefore, does not violate first amendment rights to free speech or access to adult materials.²⁰⁹

The court next addressed the bookstore's contention that the lack of a grandfather clause in the ordinance is unconstitutional because neither the *Young* decision nor the *Renton* decision applied to pre-existing uses.²¹⁰ The county argued that the amortization clause gives pre-existing owners adequate time to relocate.²¹¹ In considering these arguments, the court cited several other decisions that upheld ordinances with amortization periods as short as ninety days.²¹² The court found the provision to be sufficient and stated that amortization schedules are entitled to a presumption of validity that may be overcome by showing that the public welfare does not require the restriction of use and resulting loss to the property owner.²¹³ In the court's view, the defendants failed to present any evidence of economic costs that would outweigh the presumption of validity given to the amortization clause.²¹⁴ On the other hand, the county had presented sufficient evidence of the harm caused by a concentration of adult entertainment near residential and commercial areas.²¹⁵

The court next considered the effect of the decision in *County of Cook v. World Wide News Agency*²¹⁶ on certain provisions of the county's 1977 ordinance. The defendants claimed that the provisions that were not specifically struck down in *World Wide* remained in force and, therefore, imposed an additional limitation on the availability of land for adult uses that had not been considered by the court.²¹⁷ In *World Wide*, a provision requiring an adult use

209. *Renaissance Arcade*, 122 Ill. 2d at 139-40, 522 N.E.2d at 80.

210. *Id.* at 140, 522 N.E.2d at 80.

211. *Id.*

212. *Id.* at 140-141, 522 N.E.2d at 80. See *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984); *Hart Book Stores v. Edmisten*, 612 F.2d 821 (4th Cir. 1979); *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986); *City of Vallejo v. Adult Books*, 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143 (1985); *Castner v. City of Oakland*, 129 Cal. App. 3d 94, 180 Cal. Rptr. 682 (1982); *Northend Cinema v. City of Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978).

213. *Renaissance Arcade*, 122 Ill. 2d at 142-43, 522 N.E.2d at 81 (citing *Village of Oak Park v. Gordon*, 32 Ill. 2d 295, 205 N.E.2d 464 (1965)).

214. *Id.* at 144, 522 N.E.2d at 82.

215. *Id.* The court refused to examine the defendants' contention that the amortization period given to adult uses was shorter than other uses and therefore violated the equal protection clause of the federal constitution. *Id.* The cases cited by the defendants did not address the issue and the court ruled that the argument was waived. *Id.* (citing ILL. S. CT. RS. 341(e)(7), 341(f), ILL. REV. STAT. ch. 110A, para. 341(e)(7), 341(f) (1985)).

216. 98 Ill. App. 3d 1094, 424 N.E.2d 1173 (1st Dist. 1981).

217. *Renaissance Arcade*, 122 Ill. 2d at 146, 522 N.E.2d at 83.

to obtain a waiver from 60% of the surrounding residents, land-owners, and businessmen was struck down.²¹⁸ In light of the legislative intent behind the 1977 ordinance, the court concluded that the ordinance would never have passed without the invalidated provisions.²¹⁹ Furthermore, the court found that the 1981 ordinance was intended to supersede the 1977 ordinance entirely.²²⁰ The court noted that the old section 13.16-4 was replaced by a new section that included the amortization provision and evidenced an intent to remedy the defects in the 1977 ordinance.²²¹ The 1981 ordinance also included comprehensive regulations that covered the same matters as the provisions in the 1977 ordinance that were not specifically struck down.²²² Because of the new comprehensive regulations, the court concluded that the relevant sections of the 1977 ordinance are no longer in effect.²²³

Finally, the supreme court invalidated one section of the 1981 ordinance that allowed the Board of Commissioners to accept or reject applications for special use permits in commercially-zoned areas.²²⁴ The court found no standards or guidelines to implement this authority, thereby giving county officials the power to discriminate on the basis of the use.²²⁵ The court stated that this total discretion of county officials violated the defendants' first amendment rights.²²⁶ Nevertheless, the invalid provision was held to be severable from the ordinance.²²⁷

The right to challenge governmental selections of subsidized

218. *Id.* at 147-48, 522 N.E.2d at 83.

219. *Id.* at 148, 522 N.E.2d at 83-84.

220. *Id.* at 148, 522 N.E.2d at 84. Drafters of new laws are assumed to intend to rectify the deficiencies in previous laws stricken by the courts. *Id.* (citing *People v. J.O. Beekman & Co.*, 347 Ill. 92, 95, 179 N.E. 435, 436 (1932)).

221. *Id.*

222. *Id.* at 149-50, 522 N.E.2d at 84.

223. *Id.* at 150, 522 N.E.2d at 84.

224. *Id.* at 151, 522 N.E.2d at 85. The section stated: "The Board of Commissioners shall act to accept or reject the report . . . of the Zoning Board of Appeals [regarding] special use petitions for Adult Regulated Uses . . ." COOK COUNTY ZONING ORDINANCE § 13.17-1 (1981).

225. *Renaissance Arcade*, 122 Ill. 2d at 151, 522 N.E.2d at 85. The court cited *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), wherein the United States Supreme Court struck down a law requiring a permit to engage in a parade or public demonstration by condemning "the vesting of totally discretionary power in the hands of officials to grant or deny permits or licenses needed to engage in protected activity." *Renaissance Arcade*, 122 Ill. 2d at 151, 522 N.E.2d at 85 (citing *Shuttlesworth*, 394 U.S. at 151).

226. *Renaissance Arcade*, 122 Ill. 2d at 151-52, 522 N.E.2d at 85. See also *Zebulon Enters. v. County of DuPage*, 146 Ill. App. 3d 515, 522, 496 N.E.2d 1256, 1260-61 (2d Dist. 1986).

227. *Renaissance Arcade*, 122 Ill. 2d at 152, 522 N.E.2d at 85.

housing sites and the continued efforts to restrict adult uses represent the growing force of local residents who believe that certain offensive uses should not be in their backyards. The courts can expect such litigation to continue to flood their dockets.

VII. LICENSING

The power of the state to license activities conducted within its boundaries has long been recognized as a legitimate exercise of the state's police power. When that traditional power extended to the relatively new and fast-growing area of child care, it was not surprising that the courts were asked to review the propriety of such regulations. In *Pre-School Owners Association v. Department of Children and Family Services*,²²⁸ the Illinois Supreme Court reviewed regulations of the state involving specific types of day-care facilities as well as the exemption of certain types of facilities from such regulations. The Pre-School Owners Association ("Association") challenged the exemptions on state and federal constitutional grounds.²²⁹ After the trial judge granted summary judgment for the Association, the Department of Children and Family Services ("DCFS") appealed directly to the Illinois Supreme Court pursuant to Supreme Court Rule 304(a).²³⁰ The court reversed the summary judgment and remanded the case for further proceedings.²³¹

The statute in question was the Child Care Act of 1969 (the "Act").²³² The Act requires the DCFS to license and regulate child-care facilities in Illinois.²³³ The Association challenged certain regulations on due process grounds and argued that the exemptions in section 2.09 of the Act violate the equal protection and establishment clauses of the constitution.²³⁴ The Association also claimed that section 2.09 is improper special legislation.²³⁵

In considering the challenged exemptions, the court stated that statutes are presumed to be valid and that the burden of proving

228. 119 Ill. 2d 268, 518 N.E.2d 1018 (1988).

229. *Id.* at 271-73, 518 N.E.2d at 1021.

230. *Id.* at 272, 518 N.E.2d at 1020.

231. *Id.* at 287, 518 N.E.2d at 1027.

232. ILL. REV. STAT. ch. 23, paras. 2211-2230 (1987).

233. *Id.*

234. *Pre-School Owners Ass'n*, 119 Ill. 2d at 273, 518 N.E.2d at 1021.

235. *Id.* The court dismissed the Association's challenge to the exemptions for transient and short-term programs on the grounds that the legislature may identify particular problems that it deems necessary to address. The exemptions for programs existing on federal property was also upheld in light of the federal supremacy clause. *Id.* at 276, 518 N.E.2d at 1022.

their unconstitutionality in this case rests with the Association.²³⁶ According to the court, the section 2.09 exemptions²³⁷ themselves can be categorized in three general groups: first, programs affiliated with schools or institutions under the auspices of the State Board of Education;²³⁸ second, temporary or short-term programs or those serving a transient population;²³⁹ and third, programs conducted on federal property.²⁴⁰ The court then said that the same standard is applied in finding a violation of equal protection or the prohibition against special legislation.²⁴¹ That standard is "whether the challenged legislation bears a rational relationship to a legitimate governmental interest."²⁴²

After finding no violation with the federal land and transient exemptions, the court considered the remaining categories of exemptions that affect programs recognized or registered with the State Board of Education.²⁴³ The exemption for school programs, in general, was proper because the legislature could determine that day-care programs affiliated with schools or the State Board of Education would already have the staff, facilities, and experience deemed necessary for their proper and adequate operation.²⁴⁴

The court declined to follow a Wisconsin case in which an exemption for public and parochial schools, but not private nonsectarian schools, was struck down on equal protection grounds.²⁴⁵ Because section 2.09 does not differentiate between types of schools, the Wisconsin case was distinguishable.²⁴⁶ Therefore, the

236. *Id.* at 275, 518 N.E.2d at 1022 (citing *Sayles v. Thompson*, 99 Ill. 2d 122, 124-25, 457 N.E.2d 440, 441-42 (1983)).

237. *Id.* at 276, 518 N.E.2d at 1022.

238. ILL. REV. STAT. ch. 23, paras. 2212.09(a), 2212.09(b), 2212.09(c), 2212.09(i) (1987).

239. ILL. REV. STAT. ch. 23, paras. 2212.09(e), 2212.09(g), 2212.09(h) (1987).

240. ILL. REV. STAT. ch. 23, para. 2212.09(f) (1987).

241. *Pre-School Owners Ass'n*, 119 Ill. 2d at 275-76, 518 N.E.2d at 1022 (quoting *Chicago Nat'l League Ball Club v. Thompson*, 108 Ill. 2d 357, 368, 483 N.E.2d 1245, 1250 (1986)).

242. *Id.* at 275, 518 N.E.2d at 1022 (citing *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986)).

243. *Id.* at 277, 518 N.E.2d at 1023. The court found a legislative intent to divide administrative authority over school-sponsored programs and those outside the Board of Education's jurisdiction. *Id.*

244. *Id.* at 277, 518 N.E.2d 1023. The court noted that the exemptions only applied to programs serving children at least three years old. *See* ILL. REV. STAT. ch. 23, paras. 2219.09(a), 2219.09(b), 2219.09(c), 2219.09(d), 2219.09(i) (1987). In this regard, the lack of specific day-care regulations of the Board of Education did not affect the validity of the section 2.09 exemptions. *Pre-School Owners Ass'n*, 119 Ill. 2d at 277, 518 N.E.2d at 1023.

245. *Pre-School Owners Ass'n*, 119 Ill. 2d at 277-78, 518 N.E.2d at 1023 (citing *Milwaukee Montessori School v. Percy*, 473 F. Supp. 1358 (E.D. Wis. 1979)).

246. *Id.* at 278, 518 N.E.2d at 1023.

court concluded that the exemptions do not violate equal protection or special legislation prohibitions because they are rationally related to the problems and concerns identified by the legislature.²⁴⁷

Count II of the Association's complaint averred that the exemption in subsection (i) for sectarian day-care programs violates the establishment clause of the United States Constitution²⁴⁸ and a similar state constitution provision.²⁴⁹ The court agreed with the parties that the test in *Lemon v. Kurtzman*²⁵⁰ would determine the exemption's validity.²⁵¹ The *Lemon* test requires: (1) that the statute must have a secular legislative purpose; (2) that its principal or primary effect must be one that neither advances nor inhibits religion; and (3) that the statute must not foster "an excessive governmental entanglement with religion."²⁵²

The Association contended that because the exemption for secular schools was passed as an independent piece of legislation, it was based on invalid religious grounds.²⁵³ The court, however, noted that the exemption for religious school programs conforms to other school-related exemptions in the statute and, therefore, is subject to the legislative discretion over the type, manner, and extent of regulation that is needed.²⁵⁴ Section 2.09 satisfies the second part

247. *Id.*

248. U.S. CONST. amend I.

249. *Pre-School Owners Ass'n*, 119 Ill. 2d at 278, 518 N.E.2d at 1023. See ILL. CONST. art. I, § 3.

250. 403 U.S. 602 (1971).

251. *Pre-School Owners Ass'n*, 119 Ill. 2d at 278, 518 N.E.2d at 1023. See Board of Education v. Bakalis, 54 Ill. 2d 448, 465-66, 299 N.E.2d 737, 742 (1973), for an example of a previous use of the *Lemon* test in Illinois.

252. *Lemon*, 403 U.S. at 612-13.

253. *Pre-School Owners Ass'n*, 119 Ill. 2d at 279, 518 N.E.2d at 1024. The Association cited *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230 (4th Cir. 1984), *appeal after remand*, 789 F.2d 295 (4th Cir. 1986), wherein the court of appeals found an apparently invalid religious purpose under the *Lemon* test because a Virginia statute exempted only sectarian programs. *Id.* at 242. The court of appeals, however, refused to invalidate the provision preferring, instead, to remand so that religious groups could intervene in support of the law. *Id.* at 247. The Illinois court in the case at bar distinguished *Forest Hills* by pointing out that the exemption for secular schools conformed to the other previously existing exemptions for other school-related facilities. *Pre-School Owners Ass'n*, 119 Ill. 2d at 279-80, 518 N.E.2d 1024.

254. *Pre-School Owners Ass'n*, 119 Ill. 2d at 280, 518 N.E.2d at 1024. The court reiterated that the legislature can properly determine that day-care programs monitored by the State Board of Education need not be regulated by DCFS. The court also noted that alleviating governmental interference with the ability of religious organizations to define and carry out their religious missions is a permissible governmental purpose. *Id.* (citing *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2868 (1987)). In particular, the court looked at that portion of section 2.09 that limited the exemption to

of the *Lemon* test, which requires that legislation neither advance nor inhibit religion, because it extends exemptions to diverse kinds of programs.²⁵⁵ Finally, the court found that the third prong of the *Lemon* test, relating to excessive governmental entanglement with religion, was easily satisfied because section 2.09 reduces, rather than fosters, government entanglement with religion.²⁵⁶

The Association's challenges to a broad range of regulations on grounds of unconstitutional vagueness and lack of due process also were rejected. The initial challenge was to the DCFS's personnel qualifications. The Association attacked the following factors as vague: (1) emotional maturity when working with children; (2) willingness to cooperate with the aims of the facility; (3) flexibility and patience; and (4) physical and mental health that does not interfere with child care responsibilities.²⁵⁷ The court noted that it had upheld similar provisions allowing the revocation of dentists' licenses for improper, unprofessional, or dishonorable conduct,²⁵⁸ as well as the removal of housing authority commissioners for being incompetent or guilty of neglect of duty or malfeasance.²⁵⁹ Accordingly, the DCFS's broad licensing standards are constitutionally acceptable.²⁶⁰

The court also considered a long list of Association objections to various regulations promulgated by the DCFS establishing general requirements for teaching skills, behavior control, activities and facilities, equipment, and toy selection. Such regulations are entitled to a presumption of validity.²⁶¹ The court then found that the regulations in question here provide sufficient guidance as to DCFS

organizations that claim federal tax-exempt status, receive no governmental aid, and primarily provide religious education. *Id.*

255. *Id.* at 281, 518 N.E.2d at 1024. For a law to have an unlawful effect on religion, it must advance religion through government activities and influence. *Id.* (citing *Corporation of the Presiding Bishop*, 107 S. Ct. at 2869). Therefore, the court considered whether non-religious groups benefited from section 2.09. Because a broad range of non-sectarian day-care centers are exempted under the provision, section 2.09 had no unlawful "effects" and therefore satisfied the second part of the *Lemon* test. *Id.* at 281, 518 N.E.2d at 1024-25. See *Mueller v. Allen*, 463 U.S. 388, 397 (1983).

256. *Pre-School Owners Ass'n*, 119 Ill. 2d at 281, 518 N.E.2d at 1025.

257. ILL. ADMIN. CODE tit. 89, § 407.10(a) (1985).

258. *Pre-School Owners Ass'n*, 119 Ill. 2d at 283, 518 N.E.2d at 1025 (citing *Chastek v. Anderson*, 83 Ill. 2d 502, 509, 416 N.E.2d 247, 251 (1981)).

259. *Id.* (citing *Scott v. Department of Commerce & Community Affairs*, 84 Ill. 2d 42, 49-51, 416 N.E.2d 1082, 1087 (1981)).

260. *Id.* See generally ILL. ADMIN. CODE tit. 89, §§ 407.1-407.35 (1985).

261. *Pre-School Owners Ass'n*, 119 Ill. 2d at 285, 518 N.E.2d 1026 (citing *Northern Ill. Auto. Wreckers & Rebuilders Ass'n v. Dixon*, 75 Ill. 2d 53, 58, 387 N.E.2d 320, 323 (1979); *People ex rel. Colletti v. Pate*, 31 Ill. 2d 354, 359, 201 N.E.2d 390, 393 (1964)).

standards and policies.²⁶² Moreover, the DCFS is available to interpret words or phrases in the regulations in the event any uncertainty arose.²⁶³ Therefore, the court held that the regulations are not unconstitutionally vague.²⁶⁴

A final challenge by the Association involved a regulation prohibiting employment of persons accused of child abuse or neglect.²⁶⁵ The court stated that the regulation is not vague because the regulation explains what findings are required for a person to be identified as a perpetrator of abuse or neglect.²⁶⁶ Because such regulations are sufficiently specific and reasonably related to the health and safety of children in day care, the court upheld their validity.

Thus, the court found that the traditional licensing power of the state could extend to day-care facilities and that the court could divide administrative responsibilities in whatever way that it deems to be reasonable.

VIII. CONCLUSION

Although not one of the cases decided by the Illinois Supreme Court during the *Survey* period is representative of all trends or nuances of state and local government law in Illinois, such cases do set new guideposts that the lower courts and all litigants in this area must consider. Moreover, state and local government officials can benefit from the decisions of the supreme court as they consider new programs and initiatives.

262. *Id.* at 286, 518 N.E.2d at 1027.

263. Section 7(c) of the Child Care Act provides: "The Department, in applying standards prescribed . . . shall offer consultation through employed staff or other qualified persons to assist applicants and licensees in meeting and maintaining minimum requirements . . ." ILL. REV. STAT. ch. 23, para. 2217(c) (1987).

264. *Pre-School Owners Ass'n*, 119 Ill. 2d at 286, 518 N.E.2d at 1027.

265. *Id.* Section 407.10(c) provides:

No individual shall be in contact with children cared for in a day care center who, within the preceding 10 years: (1) has been identified through circuit court [of committing] child abuse, child neglect, or child sexual abuse or through the Department's investigatory process . . . as having [committed] an indicated incident of child abuse, child neglect, or child sexual abuse; or (2) is awaiting an investigative decision or trial on such charges.

ILL. ADMIN. CODE tit. 89, § 407.10(c) (1985).

266. *Pre-School Owners Ass'n*, 119 Ill. 2d at 286-87, 518 N.E.2d at 1027. The court also dismissed a due process challenge regarding the lack of a pre-termination hearing for a person accused of abuse or neglect on the grounds that the Association had not demonstrated imminent harm from the regulation and therefore lacked standing. *Id.*

