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# Sanitary Landfill Permits in Illinois: State Preemption of Home Rule Zoning Powers

## INTRODUCTION

Since the early nineteenth century, Illinois has had a strong tradition of narrowly construing local governmental powers.<sup>1</sup> The 1870 Illinois constitution lacked a local government provision, and the theory of legislative supremacy known as Dillon's Rule<sup>2</sup> placed the ultimate authority over local affairs in state government.<sup>3</sup> This historical development was expressly overruled by the Local Government Article of the 1970 Illinois constitution,<sup>4</sup> which contains a specific provision for home rule exercise in Illinois.<sup>5</sup> The drafters of the recent constitution expressly intended that article VII's home rule provisions be broadly interpreted and liberally construed.<sup>6</sup> Indeed, home rule under the 1970 constitution is presently considered the broadest provision in effect.<sup>7</sup> In *Kannellos v. Cook County*,<sup>8</sup> Justice Kluczynski recognized that

[t]he concept of home rule adopted under the provisions of the 1970 constitution was designed to drastically alter the relationship which previously existed between local and State government. Formerly, the actions of local governmental units were limited to those powers which were expressly authorized, implied or essential in carrying out the legislature's grant of authority. Under the home-rule provisions of the 1970 constitution, however, the power of the General Assembly to limit the actions of home-rule units has been circumscribed and home-rule units have been constitutionally delegated greater autonomy in the determination of their government and affairs. To accomplish this independence the constitution con-

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1. ILLINOIS SIXTH CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS, COMMITTEE PROPOSALS, vol. VII, at 1622 (1969-70) [hereinafter cited as COMMITTEE PROPOSALS].

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

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient but indispensable.

3. COMMITTEE PROPOSALS, *supra* note 1, at 1603.

4. ILL. CONST. art. VII.

5. ILL. CONST. art. VII, § 6.

6. COMMITTEE PROPOSALS, *supra* note 1, at 1593.

7. Parkhurst, *Article VII-Local Government*, 52 CHI. B. REC. 94, 99 (1970) [hereinafter cited as *Article VII*].

8. 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

ferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein.<sup>9</sup>

The enactment of the 1970 constitution generated a belief that home rule would gain wide acceptance in the local government units and in the courts of Illinois.<sup>10</sup> However, the recent decisions of Illinois courts in *Carlson v. Village of Worth*<sup>11</sup> and *Carlson v. Briceland*<sup>12</sup> have diminished the expectations of local government units in the continued viability of the home rule provision. These decisions permitted the State of Illinois, through the Environmental Protection Act,<sup>13</sup> to preempt the power of home rule units to establish mandatory zoning regulations applicable to sanitary landfills. It is this author's contention that these holdings are erroneous and, if followed, would lead to the emasculation of home rule in Illinois.

#### ENVIRONMENTAL PROTECTION ACT

The Environmental Protection Act<sup>14</sup> became effective July 1, 1970, and provides that its purpose is to "establish a unified, state-wide program . . . to restore, protect and enhance the quality of the environment."<sup>15</sup> Prior to that date, Illinois had lacked an effective environmental protection program. Jurisdiction over the various forms of pollution control was scattered among several administrative boards, resulting in an inability to apply effective sanctions. The Environmental Protection Act was intended to cure these shortcomings and unify the administrative structure.

The Act established three administrative agencies, each having authority to regulate some aspect of pollution control throughout the state. The agencies are the Environmental Protection Agency (EPA),<sup>16</sup> the Pollution Control Board,<sup>17</sup> and the Institute for Environmental Quality.<sup>18</sup>

The Act provides, *inter alia*, for the promulgation of regulations and the issuance of permits for the development of sanitary land-

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9. *Id.* at 166, 290 N.E.2d at 243.

10. See Parkhurst, *Two Years Later: The Status of Home Rule in Illinois*, 71 U. ILL. BULL. INST. GOV'T PUB. AFF. 21, 24 (1973) [hereinafter cited as *Two Years Later*]. See also Biebel, *Home Rule in Illinois After Two Years: An Uncertain Beginning*, 6 J. MAR. J. PRAC. & PROC. 253, 329 (1973) [hereinafter cited as *Home Rule in Illinois*].

11. 62 Ill. 2d 406, 343 N.E.2d 493 (1975).

12. 75 L 12530 (Cir. Ct. Cook Co., decided Aug. 9, 1976).

13. ILL. REV. STAT. ch. 111½, §§ 1001-51 (1975).

14. ILL. REV. STAT. ch. 111½, §§ 1001-51 (1975). For an in-depth study of the Act, see Klein, *Pollution Control in Illinois—The Formative Years*, 22 DE PAUL L. REV. 759 (1973).

15. ILL. REV. STAT. ch. 111½, § 1002(b) (1975).

16. *Id.* at § 1004.

17. *Id.* at § 1005.

18. *Id.* at § 1006.

fills, but fails to explicitly declare that home rule zoning ordinances are not applicable to such landfills. The Act establishes a unified program of land pollution and refuse disposal regulation, and is designed to prevent both the pollution and the misuse of land.<sup>19</sup> No person can engage in a refuse disposal operation without a permit issued by the Environmental Protection Agency.<sup>20</sup> The Pollution Control Board has authority to establish standards for the location, design, and operation of refuse disposal sites.<sup>21</sup> Furthermore, the Board, in establishing regulations pursuant to the Act, is authorized to take into consideration the character of surrounding land uses and zoning classifications.<sup>22</sup> In addition to requiring the acquisition of a permit prior to the construction and operation of a sanitary landfill, the Act also permits the EPA to attach conditions to the landfill permit necessary to accomplish the purposes of the Act.<sup>23</sup>

#### THE DECISIONS: WORTH AND BRICELAND

In *Carlson v. Village of Worth*,<sup>24</sup> the plaintiff was issued a permit by the Environmental Protection Agency to operate a sanitary landfill within the Village of Worth—a non-home rule municipality. Following the EPA's issuance of a permit to the plaintiff, the Village of Worth enacted an environmental protection ordinance requiring a village permit to operate a sanitary landfill. The issuance of the village permit was conditioned upon compliance with the environmental ordinance and the village zoning ordinance.<sup>25</sup>

Plaintiff brought an action seeking a declaratory judgment that the village ordinance was invalid. Summary judgment was entered for plaintiff. The appellate court noted that the case involved a non-home rule municipality<sup>26</sup> and affirmed the trial court's holding. The Illinois Supreme Court affirmed in a four to three decision and held that local regulation of sanitary landfills was preempted by the Illinois Environmental Protection Act.<sup>27</sup> The supreme court did not

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19. *Id.* at § 1020.

20. *Id.* at § 1021(e).

21. *Id.* at § 1022(a).

22. *Id.* at § 1027.

23. *Id.* at § 1039.

24. 62 Ill. 2d 406, 343 N.E.2d 493 (1975).

25. *Id.* at 408, 343 N.E.2d at 494.

26. *Carlson v. Village of Worth*, 25 Ill. App. 3d 315, 317, 322 N.E. 2d 852, 853 (1974): Defendant, having a population of less than 25,000, is not a home rule unit under article 7, section 6 of the 1970 Illinois Constitution, and has not elected to acquire that status by referendum. As a result, defendant has only those powers which have been delegated to such entities by statute.

27. 62 Ill. 2d 406, 408, 343 N.E.2d 493, 494 (1975).

distinguish the preemptive effect of the Environmental Protection Act upon home rule and non-home rule units. In effect, this distinction disregards the constitutional home rule provision and facilitates the dissolution of home rule in Illinois.

*Carlson v. Briceland*<sup>28</sup> involved a conflict between the Environmental Protection Act and the Cook County zoning ordinance enacted pursuant to its home rule authority. The *Briceland* plaintiffs brought a declaratory judgment action against the EPA and its director seeking to invalidate two conditions contained in an EPA permit. Both conditions required compliance with local zoning ordinances prior to the development of a solid waste disposal site.<sup>29</sup> The plaintiffs contended that the Environmental Protection Act did not authorize the EPA to condition permits upon compliance with local zoning ordinances. Plaintiffs further claimed that the state was endowed with the exclusive authority to regulate sanitary landfills, and that the two conditions delegated authority to local units of government in derogation of the Act.

Cook County was granted the right to intervene, whereupon it brought a countersuit alleging that the sanitary landfill site was within unincorporated Cook County and, therefore, subject to the Cook County Zoning Ordinance. The county further alleged that the plaintiffs failed to obtain a special use permit required by the zoning ordinance.<sup>30</sup> The court dismissed the counter-complaint and granted summary judgment to the plaintiff declaring the two contested permit conditions invalid. However, the validity of the permit was upheld.<sup>31</sup>

Subsequently, Cook County moved to void the permit and remand the controversy to the EPA for a rehearing. The court granted the motion and remanded the cause to the EPA for an evaluation

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28. 75 L 12530 (Cir. Ct. Cook Co., decided Aug. 9, 1976). Since *Briceland*, other cases have arisen involving sanitary landfills and the application to them of local zoning ordinances. See *John Sexton Co. v. Illinois Environmental Protection Agency*, PCB 75-478 (filed Sept., 1976).

29. Permit No. 1975-39-DE was issued by the Environmental Protection Agency on May 29, 1975. The two conditions in question were special condition 1 and general condition 4. Special condition 1 reads as follows:

Construction work on, or development of, the proposed site is specifically prohibited until the permittee submits proof to the Agency that the site has been zoned for, has received a special use permit for, or is in compliance with all zoning laws and ordinances for use as specified in this permit.

General condition 4 states that:

This permit, . . . (c) does not release the permittee from compliance with other applicable statutes of the State of Illinois, or with applicable local laws, regulations or zoning ordinances.

30. *Carlson v. Briceland*, 75 L 12530 (Cir. Ct. Cook Co., decided Aug. 9, 1976) (counter-complaint for declaratory judgment and injunctive relief filed on November 10, 1975).

31. *Id.* (Judge Berg's court order of November 26, 1975).

of the suitability of the site for use as a sanitary landfill.<sup>32</sup> Thereafter, the Agency reviewed the site's suitability and issued a supplemental permit.<sup>33</sup> The supplemental permit effectively rendered moot the defendant's argument that the EPA failed to consider land use and zoning factors. In ruling on the county's motion to vacate judgment on the counter-complaint, the court dismissed the cause between the plaintiffs and the EPA. As between the county and the plaintiffs, the court entered judgment for plaintiffs.<sup>34</sup>

The controversy created by these two decisions was anticipated in the dissenting opinion of Justice Underwood in *Worth*. Justice Underwood feared the extension of the majority's reasoning to home rule units. He stated that the facts of the *Worth* case were inapplicable to home rule units, since such governmental bodies are explicitly delegated their powers by the 1970 constitution. Such powers can only be limited by legislative action taken pursuant to section 6 of article VII. Hence, to protect home rule units from the scope of *Worth*, Justice Underwood proposed a two-step analysis to determine whether a home rule unit has the power to enact a given ordinance: "(1) Does the subject matter pertain to its government and affairs? (2) If so, has that power been limited or denied it by the General Assembly under 6(g) or 6(h)?"<sup>35</sup>

Since *Worth* did not involve a home rule municipality, the conclusion is inescapable that the *Worth* holding is not precedent for limiting a home rule unit's power.

#### THE SCOPE OF HOME RULE AUTHORITY

Home rule units derive the authority to enact a home rule zoning ordinance<sup>36</sup> from section 6(a) of article VII of the 1970 Illinois Constitution:

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

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32. *Id.* (Judge Berg's court order of March 22, 1976).

33. Supplemental Permit No. 76-263 was issued May 21, 1976 by the Environmental Protection Agency.

34. *Carlson v. Briceland*, 75 L. 12530 (Cir. Ct. Cook Co., decided Aug. 9, 1976) (Judge Berg's court order of August 9, 1976). Cook County is presently appealing the circuit court decision.

35. 62 Ill. 2d 406, 425, 343 N.E.2d 493, 503 (1976).

36. Cook County, Ill., Zoning Ordinance, Ordaining Clause (1976):

This comprehensive amendment is passed pursuant to Cook County's Home Rule Powers as are set forth in Article VII, Section 6 of the 1970 Illinois Constitution, and in no way derives its authority from Illinois Revised Statutes, Chapter 34, Paragraphs 3151 through 3161 (1973).

by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.<sup>37</sup>

Home rule in Illinois, the product of the Sixth Illinois Constitutional Convention, became effective July 1, 1971—one year after the Environmental Protection Act was enacted. Section 6(a) grants home rule units broad authority to “exercise any power and perform any function pertaining to its government and affairs.” This section was designed to grant home rule units the broadest powers permissible within the parameters of the 1970 constitution. In this regard it was considered by its drafters to be unique.<sup>38</sup> Furthermore, to protect against the type of judicial preemption exercised in *Briceland*, section 6(a) specifically sets forth four basic powers falling within the general grant of authority: (1) the general police powers, (2) the power to license, (3) the power to tax, and (4) the power to incur debt.<sup>39</sup>

The constitutional debates provide the most authoritative guidance when construing the 1970 Illinois constitution.<sup>40</sup> Article VII of the constitution was enacted in the same basic form as the draft submitted to the convention by the Local Government Committee. It is this committee’s report that most clearly encompasses the drafter’s intentions in article VII.<sup>41</sup>

The Record of Proceedings of the Sixth Illinois Constitutional Convention illustrates the framers’ intent to grant home rule units broad police powers. The Local Government Committee’s report, while including restrictions upon the power to tax, to control the local debt, and to license for revenue, fails to subject the police

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37. ILL. CONST. art. VII, § 6(a).

38. COMMITTEE PROPOSALS, vol. VII, *supra* note 1, at 1621.

39. *Id.* at 1622, where the committee report states:

Standing alone, the general grant of local powers would be subject to interpretation and possible limitation in important respects by the courts . . . . To avoid this danger, the Committee believes it desirable to specify those basic areas of power which are most important and which, without question, are included in the more general language of the proposed section.

See Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137, 141 [hereinafter cited as *Part I*].

40. See *People ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 532, 150 N.E.2d 168, 172 (1958), where the Illinois Supreme Court stated: “The primary object of construction of the constitution is to ascertain and give effect to the intent of the framers.”

41. Baum, *The Scope of Home Rule: The Views of the Con-Con Local Government Committee*, 59 ILL. B.J. 814, 815 (1971).

powers to any such restrictions.<sup>42</sup> In commenting upon the need for granting general and specific powers to home rule units, the report affirms that its purpose was to insure that home rule units receive "directly under the constitution the broadest possible range of powers" to solve their problems.<sup>43</sup> The committee report further establishes that there were no objections to the vesting of broad police powers in home rule units. To this end section 6(m) of article VII requires that the powers and functions of home rule units be liberally construed.<sup>44</sup> Section 6(m) reverses that portion of Dillon's Rule requiring the court, when in doubt, to resolve questions of local authority against the local governmental entity.

Since *Village of Euclid v. Amber Realty Co.*,<sup>45</sup> county zoning ordinances have been recognized as a proper exercise of the police powers so long as their purpose is the protection of the public health, safety, comfort, morals, and general welfare.<sup>46</sup> Moreover, the committee report establishes that there were no objections to the vesting of broad police powers in home rule units.<sup>47</sup> The *Amber Realty* rationale coupled with the committee's intent to extend the police powers compels the conclusion that the power to zone is a permissible exercise of home rule authority. The Illinois Appellate Court in *Johnny Bruce Co. v. City of Champaign*<sup>48</sup> held that the grant of power to home rule units under section 6(a) includes the power to zone.<sup>49</sup> This decision illustrates the trend in a number of states which have determined that under the various home rule provisions zoning is a local concern.<sup>50</sup> Additionally, in *Cain v. American National Bank*,<sup>51</sup> the Illinois court stated that since the state

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42. COMMITTEE PROPOSALS, vol. VII, *supra* note 1, at 1601. *But see* COMMITTEE PROPOSALS, vol. VII, *supra* note 1, at 1621, which may raise some doubts as to the authority of home rule units to regulate land use:

[T]he powers of home rule units relate to their own problems, not to those of the state or the nation. Their powers should not extend to such matters as divorce, real property law, trusts, contracts, etc. which are generally recognized as falling within the competence of state rather than local authorities.

43. *Id.* at 1619.

44. ILL. CONST. art. VII, § 6(m):

Powers and functions of home rule units shall be construed liberally.

45. 272 U.S. 365 (1926).

46. *Id.* at 387. *See also* the Cook County Zoning Ordinance, which specifically declares its purposes to "promote and to protect the public health, safety, morals, comfort, convenience, and the general welfare of the people." Cook Co., Ill., Zoning Ordinance art. 2, § 1 (1976).

47. COMMITTEE PROPOSALS, vol. VII, *supra* note 1, at 1623.

48. 24 Ill. App. 3d 900, 321 N.E.2d 469 (1974).

49. *Id.* at 903, 321 N.E.2d at 471.

50. Kratovil & Ziegweid, *Illinois Municipal Home Rule and Urban Land—A Test Run of the New Constitution*, 22 DE PAUL L. REV. 359, 380 (1972).

51. *Cain v. American Nat'l Bank*, 26 Ill. App. 3d 574, 325 N.E.2d 799 (1975).

zoning enabling statute<sup>52</sup> is not applicable to home rule municipalities, the City of Chicago derives its power to zone from section 6(a).<sup>53</sup> Similarly, the Illinois county zoning enabling statute<sup>54</sup> is inapplicable to home rule counties. Hence, Cook County looks to section 6(a) of article VII for its grant of authority.<sup>55</sup>

#### THE PREEMPTION PROVISIONS

The legislative limitations within section 6 of article VII, which are also referred to as the preemption provisions, define the balance of power between home rule units and state government. These provisions are paragraphs (g), (h), and (i) of section 6:

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

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

A major concern of several members of the Local Government Committee was the problem of implied preemption—"the denial or limitation of a local power merely because state legislation has been passed relating to the same area of activity."<sup>56</sup> The chairman of the Local Government Committee, John Parkhurst, has suggested that the success of home rule in Illinois is dependent upon the judiciary's interpretation of the preemption provision. However, most decisions in other states have upheld the power of the state, thereby emasculating home rule power.<sup>57</sup> Judicial limitations imposed on home rule in other states should not be persuasive in Illinois due to Illinois' unique approach to the problem.<sup>58</sup> Sections 6(g), (h), and (i) of

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52. ILL. REV. STAT. ch. 24, § 11-13-1 (1975).

53. 26 Ill. App. 3d 574, 581, 325 N.E.2d 799, 805 (1975).

54. ILL. REV. STAT. ch. 34, § 3151 (1975).

55. See Cook County Zoning Ordinance, *supra* note 36.

56. *Home Rule in Illinois*, *supra* note 10, at 282.

57. *Two Years Later*, *supra* note 10, at 21.

58. COMMITTEE PROPOSALS, vol. VII, *supra* note 1, at 1621.

article VII are more specific than any other similar state constitutional provision. The 1970 constitution was drafted so that the need for broad judicial interpretation would be reduced to a minimum.<sup>59</sup> The specific language was selected to insure that legislative restraints upon home rule authority would not be misconstrued by judicial interpretation.<sup>60</sup> If the Illinois General Assembly disapproves of specific activity undertaken by a home rule unit, sections 6(g), (h), and (i) define the manner in which the legislature may act.

The General Assembly has the authority to limit any home rule activity, except for activity relating to special assessment and special service districts.<sup>61</sup> The vote required to enact legislation in home rule units is dependent upon two considerations: the nature of the local power affected and the intention of the General Assembly to exclusively govern that area of activity.

Section 6(g) of article VII enables the General Assembly to deny or limit any power of a home rule unit, including the power to tax. Where the state fails to exercise a power or to perform a function in a home rule unit, section 6(g) imposes upon the Illinois legislature the burden of a three-fifths majority vote. The purpose of section 6(g) is to protect home rule units from indiscriminate action by the state which would effectively prevent local government from exercising its section 6(a) powers.<sup>62</sup>

These provisions are balanced against section 6(h) which permits the General Assembly to preempt any home rule power except the power to tax. This authority to enact preemptive legislation requires a simple majority vote of the Illinois legislature. Although section 6(h) does not require that the state engage in activities in the preempted area, this requirement may be implied from section 6(g).<sup>63</sup> The committee suggests that the state may reserve exclusive jurisdiction by enacting state-wide regulatory legislation.<sup>64</sup> The committee report provides: "It should be noted that under para-

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59. *Article VII, supra* note 7, at 100. Chairman Parkhurst states:

These sections attempt to spell out, in a more specific way than in any other state constitution, the power relationship between state and home rule unit. The intent is to reduce to a minimum the vast gray area that has led to endless litigation in other home rule states, and left to the courts the devilish problem of defining what is a "local power" vs. what is a matter of "state wide concern." Needless to say, without a preemption system that sets up a means for solving the conflicts between state statutes and local ordinances, the courts tend to hold that the sovereign state wins, and home rule has thus been rendered impotent in many states.

60. *Part I, supra* note 39, at 156.

61. ILL. CONST. art. VII, § 6(1).

62. COMMITTEE PROPOSALS, vol. VII, *supra* note 1, at 1642.

63. *Id.*

64. *Id.* at 1644.

graphs 3.2(b) and (c) [enacted as sections 6(h) and (i) of article VII with slight modification] the state can act—and express exclusivity—in many ways.”<sup>65</sup>

The drafters of the 1970 constitution contemplated, however, that this exercise of preemptive power by the state government would be pursuant to rules and regulations adopted under sections 6(h) and 6(i). Since the Environmental Protection Act was adopted one year prior to the effective date of article VII, the statute cannot claim exclusivity by mandate pursuant to section 6(h).<sup>66</sup> Furthermore, it is difficult to perceive how the EPA can claim preemption under section 6(h), since the Act does not grant the EPA exclusive power to zone within the state, nor has the EPA attempted to establish zoning ordinances.<sup>67</sup>

Section 6(i) recognizes that home rule units, in the absence of a specific exclusion, can act concurrently with the state. The purpose of this provision is to prevent the preemption of home rule powers by judicial interpretation of non-existent legislative intent.<sup>68</sup> Therefore, the mere fact that the state has established a state-wide program for environmental protection should not lead to the invalidation of zoning ordinances regulating landfill locations.<sup>69</sup>

When the preemption provisions are viewed as a whole, it is clear that for a home rule unit's power to be usurped there must be a statement of exclusivity from state government in addition to the vote required by the particular constitutional provision. The Illinois Supreme Court in *Rozner v. Korshak*<sup>70</sup> held that a statute purport-

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65. *Id.* (emphasis added).

66. ILL. REV. STAT. ch. 111½, §§ 1001-51 (1975).

67. See Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 570 [hereinafter cited as *Part II*]. The Committee comments make it difficult to rationally interpret sections 6(g), (h), and (i). Further, the passage would render section 6(g) practically meaningless, which would be inconsistent with the intent of the constitution. Hence, the Committee's "overly broad interpretation should be rejected. . . ."

68. COMMITTEE PROPOSALS, vol. VII, *supra* note 1, at 1645:

The solution proposed here is novel and unique. It proposes, as it must, to preserve state sovereignty when the General Assembly expresses its intent to prohibit local government activity. But absent such an expression of intent, local governments are left free to complement the state activity. The purpose of distinguishing between statutes which express exclusively [*sic*] and those which do not is to minimize the area where courts might have to struggle to find legislative intent. It is a guideline to the courts that concurrent local action is to be permitted unless a contrary legislative intent is expressed.

69. *Part II*, *supra* note 67, at 572:

The fact that the state has occupied some field of governmental endeavor, or that home rule ordinances are in some way inconsistent with state statutes, is not in itself sufficient to invalidate the local ordinances.

70. 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

ing to restrict a home rule unit's authority must specifically declare this intent.<sup>71</sup> The Illinois Supreme Court has very recently reaffirmed this position in *Stryker v. Village of Oak Park*,<sup>72</sup> where the court acknowledged that: "A statute intended to limit or deny home rule powers must contain an express statement to that effect."<sup>73</sup> In the absence of such specificity, section 6(i) provides that the home rule unit can concurrently engage in the activity with the state.

In addition, section 9 of the constitution's transition schedule provides that statutes enacted prior to the 1970 constitution shall remain effective unless inconsistent with affirmative home rule statutes passed pursuant to section 6 of article VII.<sup>74</sup> The Illinois Supreme Court has held that pre-existing statutory limitations do not restrict the authority of home rule units in the absence of affirmative steps taken subsequent to the adoption of the 1970 constitution, pursuant to the provisions of sections 6(g), (h), and (i).<sup>75</sup> It has been argued that "permitting preexisting statutes to prevail over home rule powers would virtually destroy home rule as contemplated in the constitution."<sup>76</sup>

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71. *Id.* at 435, 303 N.E.2d at 392:

While section 6(g) of article VII authorized the General Assembly, by a law approved by three-fifths of the members of each house, to deny or limit the power of a home-rule unit, it does not follow that every statute relating to the powers of municipalities generally will, if adopted by a three-fifths vote, have a bearing upon the powers of those municipalities which are home-rule units. The powers which those units have received under section 6 of article VII of the constitution of 1970 are in addition to the powers heretofore or hereafter granted by the General Assembly to other municipalities. The kind of inadvertent restriction of the authority of home-rule units for which the plaintiff contends can be avoided if statutes that are intended to limit or deny home-rule powers contain an express statement to that effect. The statute before us contains no indication of a restrictive purpose, and we hold that it had no restrictive effect.

72. 62 Ill. 2d 523, 343 N.E.2d 919 (1976).

73. *Id.* at 528, 343 N.E.2d at 923 (citations omitted).

74. ILL. CONST. transition schedule, § 9:

The rights and duties of all public bodies shall remain as if this Constitution had not been adopted with the exception of such changes as are contained in this Constitution. All laws, ordinances, regulations are rules of court not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution. . . .

75. *Kanellos v. County of Cook*, 53 Ill. 2d 161, 290 N.E.2d 240 (1972); *People ex rel. Hanrahan v. Beck*, 54 Ill. 2d 561, 301 N.E.2d 281 (1973); *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973); *Clarke v. Village of Arlington Heights*, 57 Ill. 2d 50, 309 N.E.2d 576 (1974); *Peters v. City of Springfield*, 57 Ill. 2d 142, 311 N.E.2d 107 (1974); *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975); *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 343 N.E.2d 919 (1976).

76. *Part II, supra* note 67, at 578.

## JUDICIAL RESPONSE

Recent court tests involving conflicts between home rule statutes and previously enacted state statutes have been supportive of the home rule unit. The Illinois Supreme Court recognized home rule units' authority over matters pertaining to government and affairs by "clearly defining the principle that home rule units may supersede the apparent effects of state laws which have not been enacted according to the constitutional provisions for preempting home rule powers."<sup>77</sup>

The leading case in this area is *Kanellos v. Cook County*,<sup>78</sup> which has been characterized by the chairman of the Local Government Committee as finally placing an end to any doubts of the continuing effect of statutes enacted prior to the constitution.<sup>79</sup> *Kanellos* involved a pre-home rule statute requiring a county referendum as a condition precedent to the issuance of general obligation bonds.<sup>80</sup> In August of 1971 the Cook County Board adopted a resolution calling for the issuance of \$10,000,000 in general obligation bonds without first establishing the consent of the voters of Cook County by way of referendum. The action was brought to enjoin the issuance of the bonds on the ground that the previously enacted statute was in full force and effect.<sup>81</sup>

The supreme court held that the pre-existing statute was inapplicable to Cook County as a home rule unit because the statute was enacted prior to the 1970 constitution.<sup>82</sup> Since state government failed to comply with the provisions of section 6 of article VII, the referendum requirement as it applied to Cook County was invalid.

Another supreme court decision, *People ex rel. Hanrahan v. Beck*,<sup>83</sup> involved a dispute between a pre-1970 constitution statute and a Cook County home rule ordinance. The Cook County Board of Commissioners adopted an ordinance creating the office of Cook

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77. Froehlich, *Illinois Home Rule in the Courts*, 63 ILL. B.J. 320 (1975).

78. 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

79. *Two Years Later*, *supra* note 10, at 24.

80. ILL. REV. STAT. ch. 34, § 306 (1971). This was also referred to in the case as section 40 of the Counties Act.

81. The second issue in the case was whether a referendum was required before a home rule unit could issue general obligation bonds.

82. 53 Ill. 2d 161, 166, 290 N.E.2d 240, 243 (1972):

We therefore hold that this statute is inapplicable as applied to a home-rule county. It was enacted prior to and not in anticipation of the constitution of 1970 which introduced the concepts of home-rule and the related limitation of section 6(g) and 6(h). Such considerations were totally foreign in the contemplation of legislation adopted prior to the 1970 constitution. The statute is therefore inconsistent with the provisions of section 6(g) and the transition schedule.

83. 54 Ill. 2d 561, 301 N.E.2d 281 (1973).

County Comptroller in lieu of a prior state statute mandating that the Cook County Clerk perform the duties and functions of the comptroller.<sup>84</sup> The county ordinance specifically acknowledged that it was intended to supersede the existing statute. The court, relying extensively on its *Kanellos* decision, stated:

We hold that the Cook County Board, acting pursuant to its home-rule power found in section 6(a), has authority to transfer powers, duties and functions among county officers even to the extent that such exercise conflicts with a statute enacted prior to the adoption of the 1970 constitution unless otherwise limited by legislative action or a positive constitutional restriction.<sup>85</sup>

The *Beck* case is significant because it expanded the holding of *Kanellos*. In *Kanellos* the court found that the existing statute conflicted with the home rule provisions of the 1970 constitution, and was, therefore, displaced under section 9 of the transition schedule. The court in *Beck*, however, upheld the county's home rule powers without a finding that the county clerk's responsibilities under the statute conflicted with the constitution.<sup>86</sup>

In *Peters v. City of Springfield*,<sup>87</sup> the supreme court fortified *Kanellos* and *Beck*:

We hold that the doctrine of *Kanellos* and *Beck* is applicable to the ordinance, and that in its enactment the defendant City did not contravene the provisions of section 6(i) of article VII.<sup>88</sup>

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84. ILL. REV. STAT. ch. 34, § 1142 (1971).

85. 54 Ill. 2d 561 at 565, 301 N.E.2d at 283.

86. *Home Rule in Illinois*, *supra* note 10, at 328.

87. 57 Ill. 2d 142, 311 N.E.2d 107 (1974). The court held that a home rule unit, pursuant to the home rule powers of section 6(a) of article VII of the 1970 constitution, can alter the mandatory retirement age of its policemen and firemen, since the General Assembly has not specifically limited the concurrent exercise of this power nor has it declared the state's exercise of this power to be exclusive.

88. *Id.* at 149, 311 N.E.2d at 111. Other Illinois Supreme Court cases in accord with this position are *Clarke v. Village of Arlington Heights*, 57 Ill. 2d 50, 309 N.E.2d 576 (1974) (two prior enacted sections of the Illinois Municipal Code had not preempted the village's home rule ordinance); *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975) (the state statute providing for the taxation and regulation of the liquor industry did not express exclusivity and therefore Cook County's home rule ordinance providing a tax on the retail sale of alcoholic beverages was upheld); *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973) (in holding that the City of Chicago, a home rule unit, could constitutionally enact its Wheel Tax Ordinance, pre-existing statutes are inapplicable to home rule units); and *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 527, 343 N.E.2d 919, 922 (1976), where Justice Goldenhersh affirmed the holdings of the preceding cases:

Since the adoption of the Constitution of 1970 this court has consistently held that an ordinance enacted by a home rule unit under the grant of power found in section 6(a) supersedes a conflicting statute enacted prior to the effective date of the Constitution.

It is evident that the decisional law prior to *Briceland* severely limited the effect of priorly enacted statutes upon home rule activities. *Briceland* marks a departure from this well established precedent. The Environmental Protection Act, which was not enacted pursuant to the 1970 Illinois constitution, cannot act to preempt a home rule unit's power to zone sanitary landfills.

#### LEGISLATIVE REACTION

The court's decision in *Carlson v. Village of Worth*,<sup>89</sup> and its subsequent application in *Carlson v. Briceland*,<sup>90</sup> have raised doubts in the minds of Illinois legislators regarding the scope of the home rule power under the 1970 constitution. This trepidation is reflected by the introduction of two bills in the General Assembly, both of which seek to amend the Environmental Protection Act in order to expand local authority.<sup>91</sup>

House Bill 3851 is a Republican sponsored bill which amends sections 21, 22, 30, 31, 37, 39, 40, 41, 42, and 44 of the Environmental Protection Act.<sup>92</sup> The amended section 39 would require that the EPA condition the issuance of permits for the development of sanitary landfills upon compliance with local zoning requirements of the governing unit within which the landfill is located. An exception is provided for sanitary landfills operated by the state or federal governments.

The Democratic sponsored bill, House Bill 3955, has a broader scope than its Republican counterpart in that it relates to all aspects of pollution, and not specifically sanitary landfills. The bill states that nothing within the Environmental Protection Act is intended to limit the power of any unit of local government to pass and enforce any ordinance. To the extent that such power is also exercised by the Environmental Protection Agency or the Pollution Control Board, that power is to be exercised concurrently. Furthermore, it is clear from the language of the synopsis of the bill that the intent of its drafters was to provide counties with the authority to pass and enforce zoning ordinances which would be applicable to sanitary landfills, so long as such ordinances comply with the minimum requirements of the Environmental Protection Act.

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Commentators have expressed the doctrine of *Kanellos* and *Beck* as stating:

A pre-1970-constitution law may be inconsistent with the constitution in the face of a conflicting home rule ordinance, and therefore the ordinance prevails over the law.

Froehlich, *Illinois Home Rule in the Courts*, 63 ILL. B.J. 320, 321 (1975).

89. 62 Ill. 2d 406, 343 N.E.2d 493 (1976).

90. 75 L. 12530 (Cir. Ct. Cook Co., decided Aug. 9, 1976).

91. H.B. 3851 and H.B. 3955, 79th Gen. Assembly (1976).

92. ILL. REV. STAT. ch. 111½, §§ 1001-51 (1975).

While both bills passed the House, they are presently stalled in the Local Government Affairs Committee of the Senate. Even though most observers believe that the legislature will resolve this conflict, one sponsor of the remedial legislation stated that he believes neither bill will come before the full senate in the near future.<sup>93</sup>

#### CONCLUSION

The drafters of the Local Government Article clearly intended that any power which came within section 6(a) of article VII could only be limited by legislative action taken subsequent to the adoption of the 1970 constitution and passed pursuant to sections 6(g) and 6(h).<sup>94</sup> Even though the Environmental Protection Act asserts that its purpose is to establish a unified state-wide system of environmental protection,<sup>95</sup> the Act does not portend to bring zoning within the exclusive jurisdiction of the State of Illinois. Therefore, the sole preemption provision upon which the Act could rely is section 6(g), which requires a three-fifths vote by both houses of the General Assembly in order to deny or limit any power or function of a home rule unit. However, no such rare act by the legislature is likely to occur until there has been an enunciation of such home rule powers or functions. Furthermore, the Act contains no specific declaration of an intent to deny or limit the county's home rule powers, as required by the decisions of the Illinois Supreme Court.

Due to cases such as *Carlson v. Briceland*, the real problem in Illinois becomes whether home rule, as it was intended by its drafters, will survive judicial interpretations. The Illinois courts, in an attempt to define the roles to be fulfilled by the various governmental bodies under section 6 of article VII, are losing sight of the goal of its drafters, which was to avoid restrictive judicial preemption. The following excerpt is an illuminating statement by the chairman of the Local Government Committee regarding the intent

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93. Interview with legislative assistant to Rep. William Mahar (October 28, 1976).

94. COMMITTEE PROPOSALS, vol. VII, *supra* note 1, at 1656-57. Example 20 involves the effect of a pre-existing statute on a home rule city's taxing power (paragraphs 3.1(a) and 3.2(a) became respectively sections 6(a) and 6(g) of article VII):

Home-Rule City levies a property tax yielding an amount which would exceed existing statutory limits on rates of municipal property taxation. The levy is valid. The power to levy a property tax falls within the home-rule powers granted by paragraph 3.1(a) and the pre-existing statutory limitation is not effective to diminish this power. The General Assembly could impose new property-tax rate limitations only by enacting a new statute by a three-fifths vote of each house under paragraph 3.2(a).

95. ILL. REV. STAT. ch. 111½, § 1002(b) (1975).

and aspirations of the drafters of the home rule provision of the 1970 Illinois constitution:

[T]he goal of the Committee and the Convention was to be bold, be innovative, and to create a constitutional system of viable local government in Illinois which can be a model for the nation. We have freed our counties and our cities from the shackles of 1870, we have deposited ultimate sovereignty back in the people, and we have designed systems of structural flexibility and governmental interplay between the state and its satellites which should give Illinois a constitutional framework it can be proud of for the decades to come.<sup>96</sup>

The drafters of the Local Government Article, with the adoption of the 1970 constitution, accomplished what they set out to do. This was to remedy deficiencies in the 1870 constitution. The problems of a modern technological society require solutions which become effective at the local level. The Local Government Article, as it is written, attempts to alleviate the pre-home rule problem of inflexible delegation of narrowly construed legislative power to numerous governmental units. One is now left to ponder whether one of the most progressive provisions of the 1970 Illinois constitution will be emasculated by the Illinois courts, thereby causing Illinois to be in no better position with regard to local governmental power than it was under the prior 1870 constitution. The Illinois courts will determine whether the Illinois home rule provision remains the workable, innovative system envisaged by its drafters, or whether it will merely go the way of most other such provisions—rendered ineffective by the courts.

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96. *Article VII, supra* note 7, at 101.