1-1-1988

Municipal Corporations, 12 S. Ill. U. L.J. 1045 (1988)

Ardath A. Hamann
John Marshall Law School

Municipal Corporations

Ardath A. Hamann*

Municipal corporations law is very diverse. This article is divided into five major areas: zoning, annexation, home rule, tort immunity, and employee discharge and addresses Illinois decisions during the period of November 1, 1986, until December 30, 1987.[1] Only four of these cases were decided by the Illinois Supreme Court; three of them involved home rule.

I. ZONING

In the area of zoning, the Illinois Supreme Court upheld the use of zoning to restrict the location of "adult" businesses. The Second District addressed the question of a municipality's ability to limit zoning changes by an adjacent municipality. The Fourth District decided a question that also involved home rule issues: the effect of the Illinois Highway Advertising Control Act on zoning for signs along highways.

A. Zoning for "Adult" Uses

In 1977, Cook County enacted a zoning ordinance that required operators of adult businesses to obtain special use permits and locate

---

* B.S. 1974, Purdue University; J.D. 1977, Marshall-Wythe School of Law, College of William and Mary; LL.M. 1986, The John Marshall Law School; Assistant Professor of Law, The John Marshall Law School. Professor Hamann was formerly an Assistant Illinois Attorney General in the Antitrust Division. The author gratefully acknowledges the assistance of her research assistant, Michael Bersani, in the preparation of this article.

1. Four cases decided in February and March of 1988 were also included. The Illinois Supreme Court decisions in *County of Cook v. Renaissance Arcade and Bookstore*, and *City of Decatur v. The American Federation of State, County and Municipal Employees, Local 268*, were included because the appellate court opinions which the supreme court reversed were decided in November, 1986. *See County of Cook infra* note 5 and accompanying text and *City of Decatur infra* note 91 and accompanying text. *People ex rel. Bernardi v. City of Highland Park* was included because it was originally decided by the Illinois Supreme Court on November 20, 1986. *See infra* note 66 and accompanying text. *National Advertising Co. v. Downers Grove* was included because it relied on Dingeman Advertising, Inc. v. Village of Mt. Zion, 157 Ill. App. 3d 461, 510 N.E.2d 539 (4th Dist.), *appeal denied*, 116 Ill. 2d 552, 515 N.E.2d 105 (1987), which is discussed at length in this article. *See infra* note 41 and accompanying text.

only in certain commercially zoned areas.[2] After the First District held the 1977 ordinance unconstitutional as a prior restraint on protected speech,[3] the Cook County Board adopted an amendment to the ordinance which allowed adult uses as permitted uses in 78 industrially zoned areas[4] and as special uses in 245 commercially zoned areas[5] so long as the adult uses were not within 1,000 feet of each other in the commercial areas.[6] Neither the original ordinance nor the amendment contained a grandfather clause.

In 1983, Cook County sued to obtain an injunction against the defendant businesses which had not complied with the ordinance. The trial court enjoined the defendants from operating in their current locations, holding that the zoning ordinance was constitutional.

The Illinois Appellate Court, First District reversed and held the statute unconstitutional in *County of Cook v. Renaissance Arcade and Bookstore*.[7] The court relied on the United States Supreme Court decision of *Schad v. Borough of Mount Ephraim*,[8] which held unconstitutional an ordinance that prohibited all live entertainment. The appellate court reasoned that while the Cook County ordinance does not ban adult businesses, it requires relocation to undesirable areas. "[T]here is no significant difference, for first amendment purposes, between driving lawful speech beyond the municipal borders and forcing it to an undesirable location."[9] Relegating adult

---

2. The zoning ordinance classification was C-3. Cook County, IL., Zoning Ordinance § 13.16 (1977).

3. County of Cook v. World Wide News Agency, 98 Ill. App. 3d 1094, 424 N.E.2d 1173 (1st Dist. 1981).

4. County of Cook v. Renaissance Arcade and Bookstore, 150 Ill. App. 3d 6, 10, 501 N.E.2d 133, 136 (1st Dist. 1986). These areas were zoned I-2, I-3, and I-4.

5. 150 Ill. App. 3d at 10, 501 N.E.2d at 136. These areas were zoned C-3, C-4, C-6, and C-8.

6. Cook County, IL., Zoning Ordinance, art 13, § 6 provides in part:

> There are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent and nearby residential and commercial areas where nurseries, schools, nursing homes, churches and similar uses are located. . . . To prevent concentration of such uses from having an adverse effect upon the adjacent and nearby residential and commercial areas above referred to, such uses are hereby established as permitted uses in all the 78 industrially zoned areas of I-2, I-3, and I-4 and as special uses in all the 245 commercially zoned areas of C-3, C-4, C-6, and C-8. To prevent such uses from having an adverse effect upon adjacent areas in the C-3, C-4, C-6, and C-8 commercial zones, not more than two such uses shall be established within one thousand feet of each other. (quoted in 150 Ill. App. 3d at 10, 501 N.E.2d at 136.)

7. 150 Ill. App. 3d 6, 501 N.E.2d 133 (1st Dist. 1986).

8. 452 U.S. 61 (1981).

9. *County of Cook*, 150 Ill. App. 3d at 17, 501 N.E.2d at 141.

businesses to industrial zones that are undeveloped by commercial enterprises, largely inaccessible to the public and without access to water, sewers and utilities has the practical effect of denying them the opportunity to operate.

In March of 1988, the Illinois Supreme Court reversed the decision of the First District and held that the Cook County Ordinance was constitutional. The Illinois Supreme Court analyzed the statute under the standard in *City of Renton v. Playtime Theatres, Inc.*,[10] instead of *Schad v. Borough of Mount Ephraim*.[11] The Illinois Supreme Court concluded that because Cook County did not attempt to ban adult businesses, and did "not unreasonably limit alternative avenues of communication" the ordinance was not unconstitutional.[12] The court briefly reasoned that the ordinance was also content neutral and served the substantial governmental interests of preventing crime and preserving real estate values.

The court then detailed the expert testimony presented by the plaintiff and defendants at trial. It noted that there was a wide diversity of sites in the industrially zoned areas that varied in size, price, location and availability. The court concluded that "*Renton* does not require the county to provide the defendants with land tailor-made to conform to the defendant's requirements. . . . Even though the defendants may have to expend a certain amount of money to relocate, the defendants 'are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land use regulation.'"[13]

Next, the court concluded that failure to include a grandfather clause did not render the statute unconstitutional. The court noted that while both *Young* and *Renton* only applied to new businesses, subsequent state and federal decisions have upheld ordinances similar to Cook County's so long as there was a reasonable period for amortization. The court concluded that a one year period[14] for amortization was reasonable.[15]

---

10. 475 U.S. 41 (1986). The Renton ordinance prohibited any adult use within 1,000 feet of churches, schools or homes. The result was that adult uses were limited to approximately 5% of the city.

11. 452 U.S. 61 (1981).

12. County of Cook v. Renaissance Arcade and Bookstore, 122 Ill. 2d 123, 133, 522 N.E.2d 73, 77 (1988) (quoting *Renton*, 475 U.S. at 47).

13. *Id.* at 139, 522 N.E.2d at 79 (quoting Young v. American Mini Theatre, Inc., 427 U.S. 50, 78 (1976)).

14. The ordinance provided for an initial period of six months and an automatic six month renewal upon application.

15. The court held that there was a presumption of validity for such provisions, and

Finally, the defendants had argued that the requirement of special use permits for location in commercially zoned areas rendered the ordinance unconstitutional. The court reasoned that because county officials had complete discretion in issuing special use permits, this provision unconstitutionally allowed them to discriminate based on content.[16] However, the court severed this provision from the remainder of the ordinance because the remainder of the ordinance could withstand constitutional scrutiny independent of the severed portion.

B. Zoning by Adjacent Municipalities

The Second District in *Village of Riverwoods v. Village of Buffalo Grove*[17] decided the limits of a municipality's ability to contest rezoning within another municipality's borders. Buffalo Grove, by ordinance, approved development of two 12-story office buildings for a 17.6 acre parcel located within its corporate limits. Riverwoods, which is separated from this parcel by a forest preserve and a river, challenged the ordinance.

The court held that the plaintiff had no standing because Riverwoods' primary concern was increased traffic. The court reasoned that only when a municipality is directly injured in its corporate capacity, does it have standing to contest the rezoning of property within the corporate limits of another municipality.[18] For example, a decrease in tax revenues resulting from a decrease in assessed valuation of property, an increase in costs for police protection,[19] and costs resulting from a legal obligation to supply sewers and water to the property[20] are injuries which give rise to standing. However, since traffic congestion was already a serious problem in the area, the incremental effect of the construction would be minimal.

---

15. The court held that there was a presumption of validity for such provisions, and since the defendants had presented no evidence of financial injury, they could not rebut the presumption.

16. *Renaissance Arcade*, 122 Ill. 2d at 151, 522 N.E.2d at 85. This conclusion appears to be consistent with the First District's decision on the 1977 ordinance. *See World Wide News Agency*, 98 Ill. App. 3d at 1099, 424 N.E.2d at 1178.

17. 159 Ill. App. 3d 208, 511 N.E.2d 184 (2d Dist.), *appeal denied*, 116 Ill. 2d 575, 515 N.E.2d 128 (1987).

18. *Id.* at 212, 511 N.E.2d at 186.

19. *Village of Barrington Hills v. Village of Hoffman Estates*, 81 Ill. 2d 392, 398, 410 N.E.2d 37, 40 (1980), *cert. denied*, 449 U.S. 1126 (1981).

20. City of Hickory Hills v. Village of Bridgeview, 67 Ill. 2d 399, 367 N.E.2d 1305 (1977).

Moreover, the court concluded that the evidence of other potential injury was speculative at best and held that Riverwoods had no standing to contest the rezoning.

On the surface this case is difficult to reconcile with the Illinois Supreme Court decision in *Village of Barrington Hills v. Village of Hoffman Estates*.[21] In that case, Hoffman Estates attempted to rezone residential property for business uses, specifically a large open air theater.[22] The court held that Barrington Hills had standing to challenge the zoning change because of increased costs due to traffic congestion and decreased revenues due to lower property values.[23] These were the same allegations as those in *Village of Riverwoods*; the evidence presented in both courts was also similar. However, the Second District characterized the plaintiff's evidence as "generalized and speculative."[24] Moreover, it noted that because traffic in the area was "[a]lready heavy, and expected to increase even if the site remains undeveloped, any impact by the development upon Riverwoods municipal expenditures is *de minimus*."[25]

There may have been an unarticulated reason for distinguishing *Village of Barrington Hills*. While Riverwoods was attempting to prevent Buffalo Grove from increasing its commercial uses, Riverwoods already was the site of the Commerce Clearing House headquarters and Riverwoods had approved the development of another corporate headquarters.[26] While the development at issue was substantially larger than others in either municipality, the court may have believed that it was unreasonable for Riverwoods to contest new commercial development in a neighboring municipality that was consistent with previous development within its own borders.

C. *Zoning Limits on Advertising Along Federal-Aid Highways*

The issues of the final zoning case overlap with home rule questions. In *Dingeman Advertising, Inc. v. Village of Mt. Zion*,[27] the plaintiff sought a declaratory judgment allowing him to construct an advertising sign twice as large as was allowed by the Mt. Zion

21. 81 Ill. 2d 392, 410 N.E.2d 37 (1980), *cert. denied*, 449 U.S. 1126 (1981).
22. It is now known as Poplar Creek Music Theater.
23. *Village of Barrington Hills*, 81 Ill. 2d at 398, 410 N.E.2d at 40.
24. *Village of Riverwoods*, 159 Ill. App. 3d at 212, 511 N.E.2d at 186.
25. *Id.*
26. *Id.* at 210, 511 N.E.2d at 185.
27. 157 Ill. App. 3d 461, 510 N.E.2d 539 (4th Dist.), *appeal denied*, 116 Ill. 2d 552, 515 N.E.2d 105 (1987).

ordinance. The sign would have been located along a federally funded highway which bisects the village. The court stated that it was faced with an issue of first impression:[28] whether the Illinois Highway Advertising Control Act[29] preempts municipal zoning powers.

The Fourth District noted that two sections of the Highway Advertising Act conflicted. The act was originally passed to prevent the loss of federal highway funds after the federal Highway Beautification Act of 1965[30] was enacted. Section 1 of the Illinois statute provides in part, "[o]utdoor advertising is a legitimate, commercial use of private property adjacent to roads and highways; . . . outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy which serves to promote and protect private investments in commerce and industry and should be allowed to operate in business areas . . . ."[31] The language in section 1 was obviously included to protect the interests of the advertisers.[32]

The purpose of section 7 on the other hand was to protect municipalities that wished to further limit advertising along highways.[33] Section 7 provides: "In zoned commercial and industrial areas, whenever a State, county or municipal zoning authority has adopted laws or ordinances, which include regulations with respect to the size, lighting and spacing of signs . . . the provisions of section 6 [which sets forth the maximum limitations on advertising] shall not apply to the erection of signs in such areas."[34]

---

28. While this case was one of first impression in state courts in Illinois, a similar issue was decided by the Third District and the same issue was decided by the Seventh Circuit. In Dolson Outdoor Advertising Co. v. City of Macomb, 46 Ill. App. 3d 116, 121, 360 N.E.2d 805, 809 (3d Dist. 1977), the Third District held that a city ordinance which *prohibited* off-premise signs from areas zoned for business uses conflicted with the Highway Advertising Act. The Seventh Circuit, in the context of a civil rights action, did hold that the act preempted municipal zoning regulation of advertising signs along highways. National Advertising Co. v. City of Rolling Meadows, 789 F.2d 57 (7th Cir. 1986). The court in *Dingeman* dismissed this decision because of the "absence of adequate briefing of the preemption issue." 157 Ill. App. 3d at 464, 510 N.E.2d at 541. This may be a misreading of the Seventh Circuit's opinion. The Seventh Circuit discussed at length its attempts to understand counsel's argument and concluded that plaintiff's counsel had incorrectly framed the issue. The court then "called for briefs on the statutory issue." 789 F.2d at 574. Nowhere was there any indication that the preemption issue had not been adequately briefed.

29. ILL. REV. STAT. ch. 121, ¶¶ 501-16 (1985).

30. 23 U.S.C. § 131 (1982).

31. ILL. REV. STAT. ch. 121, ¶ 501 (1985).

32. 157 Ill. App. 3d at 464, 510 N.E.2d at 541.

33. *Id.*

34. ILL. REV. STAT. ch. 121, ¶ 507 (1985).

The legislature did not indicate whose interests should predominate: advertisers or municipalities. However, the court held that because one of the purposes in section 1 was "to preserve natural beauty and to promote the reasonable, orderly and effective display of such signs. . ."[35], municipalities could regulate advertising signs "consistent with customary use."[36]

The court never discussed two other reasons which would require the same result.[37] First, if the court held, as the plaintiff argued, that a municipality cannot enact limitations that are more stringent than the state limits in the Highway Advertising Act,[38] the language in section 7 of the Act, "whenever a State, county or municipal zoning authority has adopted laws or ordinances. . ." would become meaningless. Second, the plaintiff's interpretation would also render meaningless the phrase in section 7, "the provisions of Section 6 shall not apply."[39]

---

35. ILL. REV. STAT. ch. 121, ¶ 501 (1985).

36. 157 Ill. App. 3d at 465, 510 N.E.2d at 541. The court never defined the term "customary use." The term is used in both sections 1 and 7 of the statute. The court discussed, without deciding, varying interpretations of the term. *Id.* at 463, 510 N.E.2d at 540. Its only conclusion was that "[A] conflict definitely exists within the Act." *Id.* The court then essentially made its decision on policy grounds.

37. The court also did not discuss Dolson Outdoor Advertising Co. v. City of Macomb, 46 Ill. App. 3d 116, 360 N.E.2d 805 (3d Dist. 1977), in detail; it merely noted that the holding was limited to prohibitions on advertising signs. While the characterization of the *Dolson* decision was accurate, two points were raised in that case which are relevant to the decision in *Dingeman*.

The Third District in *Dolson* analyzed the legislative history of the Illinois statute. *Id.* at 119, 360 N.E.2d at 807. Two sections which would have required signs to comply with local zoning ordinances were deleted, and the language "customary use" was substituted prior to enactment. In addition, the court also referred to Section 14.01 of the act, which provides that the Department may establish rules for the purpose of implementing the act, but it may not "add to, or increase the severity of the regulatory standards set forth in Section 6 of the Act." *Id.* at 120-21, 360 N.E. 2d at 808; *See* ILL. REV. STAT. ch. 121, ¶ 514.01 (1985). Based on these two points, the court concluded that a non home rule municipality could not ban advertising adjacent to federally funded highways. *Dolson*, 46 Ill. App. 3d at 121, 360 N.E.2d at 808.

The *Dolson* analysis would not change the result in *Dingeman*. The decision in *Dingeman* was based on the fact that the language in certain sections of the statute conflicted with the language in other sections. The legislative history does not reconcile those provisions; it only points out the scope of the dispute between the business and environmental lobbies at the time the legislation was enacted.

38. *Dingeman*, 157 Ill. App. 3d at 464-65, 510 N.E.2d at 541. The relevant provisions of the Illinois Highway Advertising Control Act of 1971 are in ILL. REV. STAT. ch. 121 ¶¶ 506-506.04 (1985).

39. The Seventh Circuit addressed this argument in National Advertising Company v. City of Rolling Meadows, 789 F.2d 571 (7th Cir. 1986). The court suggested that municipalities could regulate the style of the sign or the total height of the structure (by regulating the height

More recently, the Second District relied on *Dingeman* in two cases against Downers Grove which were consolidated as *National Advertising Co. v. Village of Downers Grove*.[40] Downers Grove, a home rule municipality, enacted an ordinance that limited the size and location of signs. Plaintiffs sought to construct signs, larger than those permitted by ordinance, adjacent to a federally funded highway. The court briefly discussed the three cases construing the Illinois statute and decided to follow the decision in *Dingeman*.[41]

II. ANNEXATION

One of the controversial issues in the annexation area remains the contiguity requirement. In three cases, all in the Second District, the appellate court considered contiguity questions.

In *People ex rel Ryan v. Village of Bartlett*,[42] the court construed an exception to the requirement that property to be annexed be contiguous to the municipality. The exception provides that "[t]erritory which is not contiguous to a municipality but is separated therefrom only by a forest preserve district may be annexed to the municipality. . . ."[43] The plaintiff argued that there was property other than the forest preserve which separated the property from the city; therefore the territory was not separated from the city "only" by the forest preserve. The appellate court properly rejected the argument because under that interpretation, the only property that could be annexed under this statutory exception would be an island completely surrounded by a forest preserve.[44]

---

of the base). While this analysis may be technically correct, it is overly narrow. Most municipalities (and for that matter the federal government by enacting the highway beautification bill) are much more concerned with the size of signs than their style.

The court also suggested that the legislature was allowing regulation of signs more than 660 feet from the road or in areas zoned residential or for farming. However, that analysis begs the question. The Illinois statute does not attempt to regulate signs in those situations, so there would be no need to create the exception in section 7 for such regulation.

40. Nos. 2-87-0184 and 2-87-0184 (Ill. App. Feb. 9, 1988) (available March 19, 1988, on LEXIS, State library, Dist. file).

41. The court distinguished *Dolson Outdoor Advertising Co. v. City of Macomb* on the basis that Macomb, unlike Downers Grove, was not a home rule municipality. The court also refused to follow the Seventh Circuit decision in *National Advertising Co. v. City of Rolling Meadows* which did involve a home rule municipality. However, the court did not analyze the Seventh Circuit decision which discussed at length whether home rule regulation was preempted by the state statute.

42. 151 Ill. App. 3d 533, 502 N.E.2d 443 (2d Dist. 1986).

43. ILL. REV. STAT. ch. 24, ¶ 7-1-1 (1985).

44. 151 Ill. App. 3d at 536, 502 N.E.2d at 446.

In *People ex rel First National Bank of Chicago v. City of North Chicago*,[45] the plaintiffs sought to have two annexations declared invalid.[46] In 1977, North Chicago annexed a parcel that included a roadway strip that extended beyond the city's border. In 1982, North Chicago annexed a triangular parcel that was bordered on side one by the 1977 roadway annexation, on side two by North Chicago and on side three by Waukegan. North Chicago annexed the property pursuant to a section that allows the annexation of unincorporated property that is wholly surrounded by one or more municipalities.[47]

The court noted that in 1977, the property owners did not have the "special interest" required for standing to challenge the annexation because they did not own the annexed property and the annexation did not affect their property. However, when North Chicago annexed the plaintiffs' property in 1982, they did acquire standing to contest not only the 1982 annexation but also the 1977 annexation on which it was based.

The contiguity question arose in the context of the statute of limitations. The defendants argued that the plaintiffs were barred from challenging the 1977 annexation by the one year statute of limitations.[48] There is an exception to the one year limitations period if the annexed territory "was not contiguous at the time of the annexation and is not contiguous at the time an action is brought to contest such annexation."[49] The 1981 amendment to the statute added the second requirement that allows the noncontiguity to be cor-

---

45. 158 Ill. App. 3d 85, 510 N.E.2d 577 (2d Dist.), *appeal denied*, 116 Ill. 2d 574, 515 N.E.2d 124 (1987).

46. As noted in the opinion, this was the second appeal in this case. *City of North Chicago*, 158 Ill. App. 3d at 89, 510 N.E.2d at 579. In an unpublished decision in 1984, the appellate court reversed the decision of the Circuit Court of Lake County and held that the plaintiffs should have been allowed to file their *quo warranto* complaint. *Id.*

47. ILL. REV. STAT. ch. 24, ¶ 7-1-13 (1985) provides in part:

> Whenever any unincorporated territory containing 60 acres or less is wholly bounded by (a) one or more municipalities, . . . that territory may be annexed by any municipality by which it is bounded in whole or in part, by the passage of an ordinance to that effect after notice is given as provided in this Section.

48. ILL. REV. STAT. ch. 24, ¶ 7-1-46 (1985) provides in part:

> [No person] shall commence an action contesting either directly or indirectly the annexation of any territory to a municipality unless initiated within one year after the date such annexation becomes final . . . except that the limitation of this Section shall not apply to annexations of territory which was not contiguous at the time of annexation and is not contiguous at the time an action is brought to contest such annexation.

49. *Id.*

rected.[50] North Chicago's 1982 annexation of the triangular parcel did not, however, cure the noncontiguity of the 1977 strip annexation. The 1982 parcel had already been annexed by Waukegan and was the subject of a *quo warranto* proceeding at the time of the North Chicago annexation; therefore, the 1982 parcel was not unincorporated as required by statute.[51] Consequently, the 1977 annexation was subject to attack.

If Waukegan had not annexed the 1982 parcel before North Chicago tried to annex it, the court would apparently have allowed North Chicago to bootstrap its 1977 strip annexation. The plaintiff had alleged that the 1982 annexation was invalid because the 1977 annexation was invalid. However, the court did not rule independently on the 1977 annexation. The court ruled that because the 1982 annexation was invalid for other reasons, the 1977 strip annexation had not been cured and thus was invalid.[52] If this sounds confusing, it is.

The second provision of the statute of limitations section should protect a strip annexation only if a subsequent legal annexation makes the strip annexation contiguous. For example, if North Chicago had annexed the triangular property with the consent of the landowners, the 1977 strip annexation would have become immune to attack by landowners in subsequent cases. However, the 1977 strip annexation by North Chicago was used as the method of annexing the 1982 triangular parcel which would then have ratified the 1977 strip annexation. Thus the court's construction is not a logical interpretation of the exception to the statute of limitations.

In *People ex rel Village of Long Grove v. Village of Buffalo Grove*,[53] Buffalo Grove attempted to annex a 95 acre parcel based on a six hundred foot common boundary. The parcel was bounded on three and a half of its four sides by Long Grove. The court focused on the statutory definition of contiguous, specifically the legislature's rejection of strip, corridor and cornering annexations. The Second District held that taking into consideration the size of the parcel in proportion to the common boundary, the parcel was not, as a matter of law, contiguous to Buffalo Grove.[54]

---

50. Amended by P.A. 82-211, § 1 (eff. Aug. 14, 1981).

51. ILL. REV. STAT. ch. 24, ¶ 7-1-13 (1985).

52. *City of North Chicago*, 158 Ill. App. 3d at 109, 510 N.E.2d at 593.

53. 160 Ill. App. 3d 455, 513 N.E.2d 408 (2d Dist. 1987), *appeal denied*, 118 Ill. 2d 551, 520 N.E.2d 392 (1988).

54. *Id.* at 462, 513 N.E.2d at 413.

Several procedural questions were also decided in this case. First the court held that a municipality must record the annexation ordinance for the annexation to become effective.[55] Second, there was no *de facto* annexation of the property because the property was not used or improved by the city; in fact, the property was vacant and unused.[56] Finally, Buffalo Grove's attempted annexation included half of the right of ways of two streets bordering the property. Long Grove contended that those streets were within its corporate borders. Zoning maps of both parties to this action showed those streets as within Long Grove. Consequently, the Second District held that Buffalo Grove did not meet its burden of proving that all the property was unincorporated. The court noted that on that basis alone the approval of the annexation must be reversed.[57]

In *In re Petition of Village of Long Grove to Annex Certain Territory*,[58] the court held that an annexation petition lost its priority over another municipality which was attempting to annex the same property because six years had elapsed between the filing of the petition before the court and any substantive action; twenty-six continuances were obtained during that period. When more than one municipality file annexation petitions concurrently, the court cannot consider them simultaneously; they must be heard consecutively. In this case, another municipality had filed a petition six months before Long Grove's petition. However, the fact that the other municipality's annexation petition was pending during much of the six year period did not relieve Long Grove of its responsibility for taking affirmative acts on its own petition. The court noted first that the earlier annexation petition was defective on its face; second, Long Grove probably knew from press and other sources that the other municipality was not pursuing its annexation; and finally, the other municipality's failure to act allowed Long Grove to conclude that the other municipality had abandoned its action. Therefore, Long Grove had a duty to actively pursue its annexation petition.[59]

While the result in this case is probably correct, the court should not have imputed notice to Long Grove of the other municipality's

55. *Id.* at 458, 513 N.E.2d at 410; ILL. REV. STAT. ch. 24, ¶ 7-1-9 (1985) provides that when a municipality annexes property that it owns, it must record the relevant ordinance.

56. *Village of Long Grove*, 160 Ill. App. 3d. at 459, 513 N.E.2d at 411.

57. *Id.* at 461, 513 N.E.2d at 412.

58. 156 Ill. App. 3d 1056, 1060-61, 509 N.E.2d 1041, 1044 (2d Dist.), *appeal denied*, 116 Ill. 2d 558, 515 N.E.2d 128 (1987).

59. *Id.* at 1062-63, 509 N.E.2d at 1045-46.

abandonment of its claim. While municipalities often know what neighboring municipalities are doing, this does not constitute notice. The court's finding that the first municipality's petition was defective on its face was sufficient to support its decision, and the court should not have speculated on the question of actual knowledge.

In *In re Petition of the Village of Kildeer to Annex Certain Property*,[60] the village filed three annexation petitions before three separate judges. All three judges approved the petitions and authorized referenda for the next election. Together the annexations created a hollow quadrilateral with the apparent purpose of preventing any annexation of the surrounded territory.[61] The property owners filed motions to vacate the orders because they did not learn of the proposed annexation until four months after the judges had approved the petitions.[62] The thrust of Kildeer's argument was that the time provided by statute for objections had past, and therefore, the trial courts could not vacate their prior orders.

The Second District held that even though Kildeer had technically complied with all the requirements of the municipal code, it would allow the motion to vacate because substantial fraud was involved.[63] The city had divided the property into three segments to avoid application of statutory limits on annexation.[64] At several points in the opinion, the court noted that there was no question that the attempted annexation was illegal. Moreover, notice of the proposed

---

60. 162 Ill. App. 3d 262, 514 N.E.2d 1020 (2d Dist. 1987), *appeal granted*, No. 66205 (Ill. Feb. 3, 1988).

61. In July, 1986, the Village of Lake Zurich adopted an annexation ordinance which overlapped some of the property at issue in this case. In December, after the trial court decision but before the appellate court decision, the Village of Kildeer filed a *quo warranto* action challenging the Village of Lake Zurich's annexation ordinance. On cross motions for summary judgment, the circuit court entered judgment for Kildeer because Kildeer's annexation ordinances had priority because they had not been defeated in the collateral action. The Second District reversed and held that in a *quo warranto* proceeding, Lake Zurich had a right to attack the validity of Kildeer's annexation ordinances. The court then remanded the case for a complete determination of the issues. Village of Kildeer v. Village of Lake Zurich, No. 2-87-0646 (2d Dist. April 7, 1988) (available on WESTLAW, IL-CS Database). Although this decision is on Westlaw, it has not yet been released and is therefore subject to revision or withdrawal.

62. *Petition of Kildeer*, 162 Ill. App. 3d at 266, 514 N.E.2d at 1023; ILL. REV. STAT. ch. 110, ¶ 2-1401 (1985) allows relief from final orders and judgments in situations where the trial court was not aware of facts that would have changed the court's decision.

63. *Petition of Kildeer*, 162 Ill. App. 3d at 278, 514 N.E.2d at 1030-31.

64. ILL. REV. STAT. ch. 24, ¶ 7-1-2 (1985) provides that, absent a few exceptions not applicable to the facts in *Petition of Kildeer*, no more than 10 acres can be carved from any parcel for annexation without the owner's consent.

annexation was published in the Chicago Sun-Times, not the local newspaper as had been the past practice. Finally, even after the objectors discovered the annexation attempt, Kildeer refused to provide them with maps and other documents. Thus, the court refused to allow the municipality to use procedural devices to block enforcement of statutory requirements, particularly when there was evidence of bad faith on the part of the municipality.

III. Home Rule

The Illinois Supreme Court decided perhaps the most important municipal corporation case this year in the home rule area. The primary issue in *People ex rel. Bernardi v. City of Highland Park*[65] was whether a home rule unit must comply with the Illinois Prevailing Wage Act.[66]

In 1983, the City of Highland Park, a home rule municipality, issued contract specifications for a water treatment project that did not require contractors to comply with the Prevailing Wage Act. The Illinois Department of Labor sought an injunction preventing the awarding of the contract. The Circuit Court of Lake County dismissed the action, and the Illinois Appellate Court for the Second District affirmed.[67] The Illinois Supreme Court affirmed on November 20, 1986.[68] The court then granted plaintiff's petition for a rehearing.[69] In February, 1988, the Illinois Supreme Court reversed its previous decision.[70]

The Illinois Constitution of 1970 created home rule municipalities and gave them the power to "perform any function pertaining to its government and affairs. . . ."[71] The powers granted to home rule

65. 135 Ill. App. 3d 580, 482 N.E.2d 114 (2d Dist. 1985), *rev'd*, 121 Ill. 2d 1, 520 N.E.2d 316 (1988).

66. Ill. Rev. Stat. ch. 48, ¶¶ 39s-1-39s-12 (1985).

67. *Bernardi*, 135 Ill. App. 3d at 581, 584, 482 N.E.2d at 115, 117.

68. No. 62419 (Ill. Nov. 20, 1986) (Westlaw).

69. In the interim, Justice Goldenhersh of the Fifth District retired and Justice Cunningham was appointed in his place.

70. People *ex rel* Bernardi v. City of Highland Park, 121 Ill. 2d 1, 520 N.E.2d 316 (1988). The court first held that the case was not moot even though the defendant's public works project had already been completed. *Id.* at 6-8, 520 N.E.2d at 318-19.

71. Ill. Const. art. VII, § 6(a). The full text of this section is as follows:

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

municipalities only allow the municipalities to exercise their powers to address local problems.[72] A municipality cannot exercise powers when the problem is of a statewide nature or is one that is traditionally addressed by state government.[73]

The Prevailing Wage Act requires that workers on all public works projects paid for in whole or in part with public funds[74] be paid "no less than the general prevailing hourly rate as paid for work of a similar character in the locality. . . ."[75] The public body must ascertain the prevailing wage and include it as a specification in the contract.[76]

The home rule question is whether the provisions of the Prevailing Wage Act concern matters that are primarily local or statewide.[77] The Illinois Supreme Court, in an opinion written by Justice Simon, held that a home rule municipality was bound by the Prevailing Wage Act for two reasons. First, "[d]eparture from the prevailing wage . . . directly affects matters and individuals outside the territorial boundaries of Highland Park."[78] The prevailing wage in a locality is determined by computations using only the wages paid on public works projects in the area.[79] Consequently, the prevailing wage throughout Lake County would become depressed and income of workers would decrease if Highland Park were allowed to refuse to comply with the Prevailing Wage Act. Second, the Prevailing Wage Act is legislation in an area traditionally regulated by the state. The court enumerated many state statutes in the labor area including child labor legislation,[80] workmen's compensation legislation[81]

---

72. *See* City of Des Plaines v. Chicago & N. W. Ry., 65 Ill. 2d 1, 7, 357 N.E.2d 433, 436 (1976). The Illinois Supreme Court recognized that noise pollution is a matter of statewide concern and held that the power to regulate noise pollution emissions was not within constitutional home rule power.

73. Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 470 N.E.2d 266 (1984).

74. ILL. REV. STAT. ch. 48, ¶ 39s-2 (1985).

75. ILL. REV. STAT. ch. 48, ¶ 39s-1 (1985). The full text of this section 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.

76. ILL. REV. STAT. ch. 48, ¶¶ 39s-4, 39s-9 (1985).

77. *See* ILL. REV. STAT. ch. 48, ¶¶ 39s-1-39s-12 (1985). The Prevailing Wage Act does not include a provision that preempts action by a home rule unit. *Id.*

78. People *ex rel* Bernardi v. City of Highland Park, 121 Ill. 2d 1, 13, 520 N.E.2d 316, 321 (1988).

79. ILL. REV. STAT. ch. 48, ¶ 39s-2 (1985).

80. ILL. REV. STAT. ch. 48, ¶ 31.1-31.22 (1985).

81. ILL. REV. STAT. ch. 48, ¶ 138.1-138.30 (1985).

and legislation abolishing wage discrimination.[82] The Prevailing Wage Act promotes a favorable labor climate by both mitigating "against an impoverished work force and 'support[ing] the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector.'"[83] Justice Simon then noted that allowing home rule units to legislate in this area would "put at risk all of the State's labor laws."[84]

In dissent, Justice Miller focused on the legislature's failure in the Prevailing Wage Act, to specifically preempt action by home rule municipalities. The Constitution provides two methods for limiting the exercise of home rule authority: the legislature by three fifths vote may limit a unit's exercise of a power; and the legislature may, by statute, specifically allow only the state to exercise a power.[85] In the absence of the exercise of these powers by the state, a home rule unit may exercise its powers concurrently with the state.[86] Because the legislature did not specifically prohibit home rule action in the area of prevailing wage rates,[87] the dissent would hold that Highland Park's action was allowed.

Justice Miller characterized the majority's fears as "exaggerated" and "unfounded."[88] He suggested that in computing the prevailing wage rates, the Department of Labor was not required by statute to include wages paid by home rule units which did not follow the Act.[89] He also noted that the Prevailing Wage Act is different from

---

82. ILL. REV. STAT. ch. 48, ¶ 4a (1985).

83. *Bernardi*, 121 Ill. 2d at 14, 520 N.E.2d at 322 (quoting State *ex rel.* Evans v. Moore, 69 Ohio St. 2d 88, 91, 431 N.E.2d 311, 313 (1982)).

84. *Id.* at 15, 520 N.E.2d at 322.

85. ILL. CONST. art VII, § 6(g), (h) (1970) provides:

> (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 (l) 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 of function specified in subsection (l) of this Section.

86. ILL. CONST. art VII, § 6(i) (1970) provides:

> (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.

87. The dissent points out that in other legislation in the labor area, the legislature did specifically preempt action by home rule units. *See* ILL. REV. STAT. ch. 48, ¶ 1615(c) (1985) (Illinois Public Labor Relations Act).

88. *Bernardi*, 121 Ill. 2d at 20, 520 N.E.2d at 325.

89. ILL. REV. STAT. ch. 48, ¶ 39s-4 (1985).

other protective labor legislation. The Act applies only to public projects, and wages under the Act can vary depending on the locality. The other labor laws impose minimum standards throughout the state.

At issue in *City of Decatur v. American Federation of State, County, and Municipal Employees, Local 268*,[90] was the construction of the section of the Illinois Public Labor Relations Act [91] which requires a city to bargain collectively with a bargaining representative of its employees on the question of "wages, hours, and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law."[92]

The union had proposed that matters of discipline be submitted to mandatory arbitration. The city claimed that it had no duty to bargain on this issue because it had adopted the civil service sections of the municipal code. The Illinois State Labor Relations Board rejected the municipality's argument and ordered it to bargain. The Illinois Appellate Court, Fourth District held that the duty to bargain conflicted with provisions of the municipal code; consequently, by the express provisions of the Labor Relations Act, the duty to bargain must give way to the municipal code.[93]

---

90. Nos. 64464 & 64483 (Ill. March 30, 1988), *rev'g* City of Decatur v. Illinois State Labor Relations Bd., 149 Ill. App. 3d 319, 500 N.E.2d 573 (4th Dist. 1986) (available on WESTLAW, IL-CS Database).

91. ILL REV. STAT. ch. 48, ¶ 1601-27 (1985).

92. ILL. REV. STAT. ch. 48, ¶ 1607 (1985) provides:

> A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.
>
> For the purposes of this Act, 'to bargain collectively' means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budgetmaking process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.
>
> The duty 'to bargain collectively' shall also include an obligation to negotiate over any matter with respect to wages, hours, and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty 'to bargain collectively' and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

93. City of Decatur v. Illinois State Labor Relations Bd., 149 Ill. App. 3d 319, 325, 500 N.E.2d 573, 576-77 (4th Dist. 1986), *rev'd sub nom.* City of Decatur v. American Federation of State, County, and Municipal Employees, Local 268, Nos. 64464 & 64483 (Ill. March 30, 1988).

The Illinois Supreme Court rejected the position of the Labor Relations Board that the duty to bargain prevails over any conflicting statutory provisions.[94] The court also rejected the Fourth District's position that section 10-1-18 of the Municipal Code, which provides for disciplinary procedures, limited the duty to bargain with the union.[95]

The supreme court first concluded that the duty to bargain could be limited by statute because the labor statute includes the modifying language "not specifically provided for in any other law or not specifically in violation of the provisions of any law."[96] However, based on the final sentence in the paragraph, the duty to bargain could not be limited by another statute if that statute only "pertain[ed], in part, to. . .[or] supplemented[ed], implement[ed] or relate[d] to" the duty to bargain.[97] The question thus became which of these two provisions was applicable to section 10-1-18 of the Municipal Code.

The court noted that in construing the statutory provision, it must determine the legislature's intent by considering the statute as a whole. The court concluded that because the Labor Relations Act is a comprehensive scheme for collective bargaining, it was unlikely that "the legislature intended to make the broad duties imposed by the Act hostage to the myriad of State statutes and local ordinances pertaining to matters of public employment."[98]

The court then analyzed the relevant section of the Municipal Code. It noted that this section is optional; no municipality is required to adopt the civil service provisions. Moreover, a municipality can choose which sections to adopt and can, by ordinance, modify any section it does adopt.[99] Consequently, the court concluded that "[g]iven the purpose of the [Labor Relations] Act, the nature of that part of

94. City of Decatur v. American Federation of State, County, and Municipal Employees, Local 268, Nos. 64464 & 64483, slip op. at 5 (Ill. March 30, 1988).

95. *Id.* at 9.

96. *Id.* at 5 quoting ILL. REV. STAT. ch. 48, ¶ 1607 (1985).

97. *Id.*

98. *Id.* at 7.

99. In the appellate court, the union argued that a holding in favor of the city would allow home rule units to insulate themselves from collective bargaining. The Fourth District responded to the union's concerns by focusing on the word, "law," in the Labor Relations Act. The appellate court held that "law" included only acts of the legislature; it did not include ordinances enacted by home rule municipalities. 149 Ill. App. 3d at 323, 500 N.E.2d at 576. The supreme court apparently agreed with this analysis but questioned why the civil service sections of the municipal code should be considered "law" since they were adopted by referendum of the voters in Decatur, not imposed by the state legislature. Slip op. at 4-5.

the civil service system at issue here, and the legislature's express preference for arbitration as a method for resolving disputes'' under labor contracts, the city had a duty to bargain on the question of arbitration of disciplinary disputes.[100]

Litigation attacking two taxes imposed by the Chicago City Council reached the courts this year. In *Forsberg v. City of Chicago*,[101] four individuals and two boat owners' associations[102] sued the city, claiming that the imposition of a boat mooring tax was unconstitutional on several different bases. This was the second case that attacked the constitutionality of the mooring tax. In January, 1986, the Illinois Supreme Court, in *Chicago Park District v. City of Chicago*,[103] held that the tax was within the powers granted to a home rule unit under the 1970 Illinois Constitution. The power to tax is included in home rule municipalities' power to perform any function of government.[104] Illinois case law dictates that the exercise of the power to tax, like other home rule powers, is broad and should be construed liberally.[105] The *Chicago Park District* court refused to find that the tax equal to 50% of the fee charged by the Park District for mooring was an unreasonable burden or an abuse of the city's home rule power.[106]

Many of the issues decided by the supreme court were raised again by the plaintiffs in *Forsberg*. The First District briefly rejected those arguments. One issue common to both the *Forsberg* litigation and the tax in *Chicago Health Clubs, Inc. v. Picur*[107] was whether the tax was an occupation tax prohibited by the Illinois Constitution.[108] The First District noted that the Illinois Constitution provides

---

100. Slip op. at 9.

101. 151 Ill. App. 3d 354, 502 N.E.2d 283 (1st Dist. 1986), *appeal denied*, 114 Ill. 2d 545, 508 N.E. 2d 727 (1987).

102. The court held that the boating associations had no standing to challenge the tax because they had not suffered direct injury, and the associations could not sue in their representative capacity because Illinois does not follow the federal standard of representative capacity.

103. 111 Ill. 2d 7, 16-17, 488 N.E.2d 968, 973 (1986).

104. ILL. CONST. art VII, § 6(a) (1970).

105. Mulligan v. Dunne, 61 Ill. 2d 544, 549-51, 338 N.E.2d 6, 10-11 (1975), *cert. denied*, 425 U.S. 916 (1976).

106. In *Chicago Park Dist.*, 111 Ill. 2d at 16, 488 N.E.2d at 973, the court noted that if the legislature believed that the 50% tax was an abuse of home rule power, the legislature could remedy the situation.

107. 155 Ill. App. 3d 482, 488-89, 508 N.E.2d 742, 746-47 (1st Dist. 1987). *See infra* note 114 and accompanying text.

108. *Forsberg*, 151 Ill. App. 3d at 368, 502 N.E.2d at 295. The court also upheld the tax

that home rule units may not impose occupation taxes.[109] "An occupation tax either regulates or controls a given business or occupation, or imposes a tax for the privilege of exercising, undertaking or operating a given occupation, trade or possession." [110] However, an excise tax does not become an occupation tax merely because some boat owners subject to the tax use the boats in their businesses.

The First District also upheld Chicago's tax on health clubs[111] in *Chicago Health Clubs, Inc. v. Picur*,[112] through the statutory authorization for amusement taxes.[113] The plaintiffs argued that the

---

against several other attacks not related to home rule issues. First, the court held that the tax is not extraterritorial since it is imposed on those who enter Chicago harbors, use Chicago facilities and pay mooring and docking fees in Chicago even though they may reside outside of Chicago. *Id.* at 361, 502 N.E.2d at 290. Second, the tax is not invalid as a tax on the affairs of the tax exempt park district because it is a tax on the patrons, not on the harbor or district. *Id.* at 362, 502 N.E.2d at 291. Third, the size of the tax and the penalties (6 months imprisonment) does not shock the conscience of reasonable persons and hence does not violate due process. *Id.* at 363, 502 N.E.2d at 292. Fourth, the city council is permitted to define a subclass without imposing a tax on all boat owners. *Id.* at 364, 502 N.E.2d at 292. Fifth, the mooring tax does not restrict movement upon navigable waters in violation of interstate commerce clause; it is only imposed for use of facilities within Chicago. *Id.* at 365-66, 502 N.E.2d at 293. Sixth the general revenue mooring tax need not be supported by specific benefits for those who are being taxed. *Id.* at 367, 502 N.E.2d at 294. Seventh, the tax is not a penalty on persons who have exercised their right to travel since it is imposed regardless of whether they have recently arrived or never left the city. *Id.*

109. ILL. CONST. art. VII, § 6(e) (1970) provides in part: "(e) A home rule unit shall have only the power that the General Assembly may provide by law . . . (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations."

110. 151 Ill. App. 3d at 368, 502 N.E.2d at 295.

111. Chicago, IL., MUNICIPAL CODE §§ 104-1-104-8 (1984) creates a tax on the right to participate or view amusements. In December of 1985, the city council amended the list of amusements in the ordinance to include "racquetball or health clubs . . ., tennis, racquetball, swimming, weightlifting, body building or similar activities. . . ." Chicago, IL., MUNICIPAL CODE § 104-1(2).

When an amusement is located both within and without the City of Chicago, the tax is only imposed on the percentage of the fee allocated to participation in the city. The owner of the amusement collects the tax, but the customer is liable if the owner fails to pay.

112. 155 Ill. App. 3d 482, 508 N.E.2d 742 (1st Dist.), *appeal granted*, 116 Ill. 2d 549, 515 N.E.2d 103 (1987).

113. The court discussed several other issues in deciding this case. The court held that the tax was not unconstitutionally overbroad because the threshold requirement of a constitutionally protected right did not exist. *Id.* at 491, 508 N.E.2d at 748. The court also held that the tax was not unconstitutionally vague or overbroad because its definition of amusement was adequate. *Id.* at 492, 508 N.E.2d at 749. Next, the court held that the tax did not violate the equal protection clause because the classifications contained in the statute were reasonable. *Id.* at 493, 508 N.E.2d at 750.

The court also held that the tax also did not violate the prohibition against extraterritorial taxes because suburban members of some health clubs are only paying for the privilege of using facilities located within the city. *Id.* at 495, 508 N.E.2d at 750. It is irrelevant that some

tax on health clubs was an occupation tax prohibited by the Illinois Constitution.[114] However, the court refused to discuss whether the tax on health clubs was an occupation tax because the Illinois Supreme Court recently "confused" the issue when it decided *Commercial National Bank v. City of Chicago.*[115] Instead, it held that the tax was an amusement tax authorized by the Municipal Code.[116] The section of the Illinois Constitution that prohibits occupation taxes includes an exception for those which are allowed pursuant to statute.[117] Therefore, the court held that because health and racquetball clubs fall within the definition of amusements, the health club tax is constitutional because there is statutory authorization for amusement taxes.[118]

The dissent focused specifically on *Commercial National Bank*.[119] In 1981, the Chicago City Council enacted a service tax ordinance which was challenged as an unconstitutional occupation tax.[120] The Illinois Supreme Court discussed at length the debate at the 1970 Illinois constitutional convention on the provision prohibiting home rule units from enacting occupation taxes. The court concluded that because the service tax had the effect of taxing occupations, it was an unconstitutional occupation tax.[121] The court noted that merely imposing the tax on the purchaser (while giving the seller the duty of collection) did not change the nature of the tax.[122]

---

may not choose to use those facilities. The Court relied on the mooring tax case of *Forsberg*, *see supra* note 89. The dissent questioned the extraterritorial effect of the tax because, as drafted, an individual could purchase a membership from a club located outside of the city, never enter the city and yet be taxed based on square footage of club facilities located within the city. *Id.* at 510, 508 N.E.2d at 760. Neither the majority nor the dissent noted that *Forsberg* is distinguishable because the seller of the mooring, the Chicago Park District, was only located within the city.

Finally, the court held that the tax did not violate the Illinois constitutional prohibition against special legislation because by its very terms, the section only applies to the General Assembly. *Id.* at 495, 508 N.E. 2d at 751; *see* ILL. CONST. art. IV, § 13 (1970).

114. *See supra* note 109 and accompanying text.

115. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

116. ILL. REV. STAT. ch. 24, ¶ 11-42-5 (1985).

117. *See supra* note 110 and accompanying text.

118. *Picur*, 155 Ill. App. 3d at 487, 502 N.E.2d at 746. The First District has held on two occasions that Section 11-42-5 of the Municipal Code survived the adoption of the 1970 Illinois Constitution. Wellington v. City of Chicago, 144 Ill. App. 3d 774, 494 N.E.2d 603 (1st Dist. 1986); Isberian v. Village of Gurnee, 116 Ill. App. 3d 146, 452 N.E.2d 10 (1st Dist. 1983).

119. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

120. *Id.* at 48, 432 N.E.2d at 228.

121. *Id.* at 49, 432 N.E.2d at 229.

122. *Id.* at 80, 432 N.E.2d at 244.

The dissent in *Chicago Health Clubs* stated that it was impossible to address the constitutionality of the tax on health clubs without first determining whether it was a forbidden service tax under *Commercial National Bank*.[123] The dissent argued that only if the tax was determined not to be an occupation (or service) tax, can the court then analyze whether it was within the authorization for amusement taxes.

While the majority should not have ignored the Illinois Supreme Court decision in *Commercial National Bank*, the majority, and not the dissent, was correct in its analysis of the health club tax. The Illinois Constitution provides in section 6(e) that home rule units only have the power to tax occupations provided by statute. It is irrelevant whether the tax on health clubs is an occupation tax if it is provided for by statute. If the tax on health clubs is properly characterized as an amusement,[124] then it is provided for by statute and is, therefore, a constitutional exercise of the home rule power.

In *Beverly Bank v. County of Cook*,[125] the plaintiffs sought a zoning change which would allow them to develop a sanitary landfill and reclamation project.[126] The trial court held that the zoning ordinance was both reasonable and constitutional. The plaintiffs appealed the question of whether Cook County's zoning authority is preempted by the Illinois Surface-Mined Land Conservation and Reclamation Act.[127] The plaintiffs relied on *American Smelting & Refining Co. v. County of Knox*,[128] which held that a county could not use zoning to affect strip-mining reclamation standards. The county argued that *American Smelting* was distinguishable because it did not involve a home rule county.[129]

---

123. *Id.*

124. Whether membership in a health club is properly characterized as an amusement depends largely on one's attitude toward exercise.

125. 157 Ill. App. 3d 601, 510 N.E.2d 941 (1st Dist.), *appeal denied*, 117 Ill. 2d 541, 517 N.E.2d 1084 (1987).

126. In 1975, this plaintiff filed an action against the Illinois Environmental Protection Agency seeking to declare invalid the requirement of a zoning change by the county as a condition of building the landfill. This court in Carlson v. Briceland, 61 Ill. App. 3d 247, 377 N.E.2d 1138 (1st Dist. 1978), *modified*, 75 Ill. 2d 589, 401 N.E.2d 1390 (1979), held that the permit was subject to county zoning. The Illinois Supreme Court remanded the case for further consideration in light of its decision in County of Cook v. John Sexton Contractors Co., 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

127. ILL. REV. STAT. ch. 96 1/2, ¶¶ 4501-4520 (1985).

128. 60 Ill. 2d 133, 324 N.E.2d 398 (1974).

129. *Beverly Bank*, 157 Ill. App. 3d at 162, 510 N.E.2d at 945.

The First District noted that both the Reclamation Act and the Environmental Protection Act[130] regulate sanitary landfills.[131] The court reasoned that the Illinois Supreme Court has consistently held that determination of locations of landfills in home rule units is within the sole jurisdiction of those units.[132] Cook County is a home rule unit, and home rule units may act concurrently with the state so long as a statute does not expressly designate an area exclusively state controlled. The court distinguished *American Smelting* because Knox and Peoria Counties were not home rule units.[133] Thus, the court held that Cook County, a home rule unit, could regulate reclamation of sanitary landfills concurrently with the state.[134]

---

130. ILL. REV. STAT. ch. 111 1/2, ¶¶ 1001-1052 (1985).

131. *Beverly Bank*, 157 Ill. App. 3d at 162, 510 N.E.2d at 945.

132. *Id.*; *See* County of Cook v. John Sexton Contractors Co., 75 Ill. 2d 494, 389 N.E.2d 553 (1979); Cosmopolitan Nat'l Bank v. County of Cook, 103 Ill. 2d 302, 469 N.E.2d 183 (1984).

133. Although the First District distinguished *American Smelting* on the basis that the counties were not home rule units, the Illinois Supreme Court in *American Smelting* did not discuss the home rule issue. In *American Smelting*, the court's holding that there was "simply no demonstrable basis upon which concurrent State and county regulation of reclamation standards may be permitted" was not limited to non home rule units. 60 Ill. 2d at 140, 324 N.E.2d at 402. The court relied on its earlier decision in O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972) which had held that county zoning powers could not be used to prevent or regulate the building of a sanitary landfill that had been approved by the Illinois Environmental Protection Agency under the Environmental Protection Act.

However, after the decisions in *American Smelting* and *O'Connor*, the Illinois Supreme Court decided County of Cook v. John Sexton Contractors Co., 75 Ill. 2d 494, 389 N.E.2d 553 (1979). In *Sexton*, the Environmental Protection Agency had issued a permit to Sexton for the operation of a sanitary landfill. The issue was whether Cook County, a home rule unit, could require Sexton to comply with its zoning regulations. The supreme court analyzed its preceding decisions in *O'Connor* and City of Chicago v. Pollution Control Bd., 59 Ill. 2d 484, 322 N.E.2d 11 (1974). The supreme court, in *O'Connor*, held that the Environmental Protection Act prevents regulation by local governmental units; the supreme court, in *Chicago v. Pollution Control Bd.*, held that a local governmental unit can act concurrently with the Environmental Protection Agency under the Environmental Protection Act. The supreme court, in *Sexton*, reconciled these two cases by limiting the *O'Connor* holding to non home rule units and limiting *Chicago v. Pollution Control Bd.* to home rule units.

The supreme court in *Sexton* did not address the *American Smelting* decision. However, the supreme court in *American Smelting* had analogized the Environmental Protection Act to the Reclamation Act. Consequently, it is reasonable to conclude that after *Sexton*, *American Smelting* is properly limited to non home rule units. Since the supreme court has considered the preemption question at length in the analogous areas of environmental control and reclamation, it is probable that these decisions, including the First District's decision in *Beverly Bank,* are probably not affected by *People ex rel. Bernardi v. City of Highland Park*.

134. *Beverly Bank*, 157 Ill. App. 2d at 163, 510 N.E.2d at 946. The court also refused to estop the county from enforcing its zoning ordinances merely because it had failed to object to the plaintiff's mining permit or reclamation plans. The court noted that mere inaction by a governmental unit is not sufficient to invoke estoppel. Here, the county had never indicated

The Seventh Circuit certified two questions to the Illinois Supreme Court in *Pesticide Public Policy Foundation v. Village of Wauconda*.[135] A non home rule unit passed an ordinance regulating the use of pesticides. The ordinance requires commercial pest control operators to register with the village, to post certain notices after application of pesticides and limits applications of certain pesticides when winds are high. The two questions presented were: 1) Does a non home rule unit have the authority to enact such an ordinance? and 2)"Is the ordinance preempted by the Illinois Pesticide Act and the Illinois Structural Pest Control Act?"[136]

The court first analyzed the origin of municipal powers. Non home rule units only have powers granted by the Illinois Constitution[137] and those granted by the legislature. Thus "municipalities possess only those powers expressly granted, powers incident to those expressly granted, and powers indispensable to the accomplishment of the declared objects and purposes of the municipal corporation."[138] Municipalities are not expressly granted the power to regulate pesticides; neither is that power indispensable to the accomplishment of municipal purposes. Therefore, the power must be incident to a power expressly granted to municipalities.

Statutes granting power to a municipal corporation are construed strictly against the municipality claiming the right to exercise the power.[139] Illinois Municipal Code section 11-20-5 provides: "The corporate authorities of each municipality may do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of diseases. . . ." This ordinance is within the village's authority to promote the public health. Therefore,

---

that the zoning change was approved; therefore, mere inaction by the county did not invoke estoppel. Moreover, the grant of a special use permit in 1960 allowing strip mining was not the type of action which would invoke estoppel. The court noted first that while the strip mining did create a situation that requires reclamation, this does not entitle the landowner to create a sanitary landfill as the method of reclamation. Finally, a permit issued 15 years ago does not forever bind a governmental unit when health and safety concerns are involved.

135. 117 Ill. 2d 107, 510 N.E.2d 858 (1987).

136. *Id.*

137. ILL. CONST. art. VII, § 7 (1970).

138. *Pesticide Public Policy Foundation*, 117 Ill. 2d at 112, 510 N.E.2d at 861.

139. The court first rejected the argument that the power to regulate pesticides could be based on section 11-19.1-11 of the Municipal Code. That section authorizes municipalities to regulate activities that cause air contamination for the purpose of lessening the contamination. Since this ordinance does not lessen the discharge of pesticides but only regulates the time and location of application, power to enact it cannot be implied from this section of the municipal code. Moreover, the ordinance also applies to solid pesticides and pesticides used indoors.

the supreme court held that Wauconda had the authority to enact the ordinance regulating pesticides.[140]

The court then addressed the preemption issue. The Illinois Pesticide Act of 1979 and the Structural Pest Control Act are broad in scope and are enforced by the Departments of Agriculture and Public Health and the State Environmental Protection Agency.[141] The Wauconda ordinance regulates activities that are within the powers of these departments. Since the legislature has enacted a comprehensive scheme of regulation, there is no room for additional regulation by municipalities.[142] The state statutes have no provision delegating authority to or allowing regulation by units of local government. Moreover, these acts specifically empower the departments to act for the purposes of insuring uniformity.[143] Clearly, the legislature intended that the state alone occupy the field of pesticide regulation.

IV. Tort Liability

A. Intoxicated Drivers

In recent years societal concern about the problem of drunk driving has increased exponentially. One outgrowth of the concern has been litigation against police officers who fail to arrest drunk drivers they have stopped. In the landmark decision of *Irwin v. Town of Ware*,[144] the Supreme Judicial Court of Massachusetts held

---

140. *Pesticide Public Policy Foundation*, 117 Ill. 2d at 113, 510 N.E.2d at 864.

141. The supreme court discussed at length its decision in *Sexton*, *see supra* note 134 and accompanying text, and again drew the distinction between home rule and non home rule units in the environmental field. Thus, it is unlikely that this decision would affect the outcome of *Beverly Bank*. *See supra* note 129.

142. *Pesticide Public Policy Foundation*, 117 Ill. 2d at 110, 510 N.E.2d at 861. American Smelting & Refining Co. v. County of Knox, 60 Ill. 2d 133, 324 N.E.2d 398 (1974); Chicago School Transit, Inc. v. City of Chicago, 35 Ill. 2d 82, 219 N.E.2d 522 (1966).

143. The court rejected the municipality's argument that there was no desire for uniformity because there was no prohibition against regulation by home rule units. While not deciding the question of whether regulation by home rule units would be preempted under this act, the court noted that in other areas where the state desired uniformity, home rule units were still allowed to regulate. *Compare* County of Cook v. John Sexton Contractors Co., 75 Ill. 2d 494, 389 N.E.2d 553 (1979) (home rule unit) *with* County of Kendall v. Avery Gravel Co., 101 Ill. 2d 428, 463 N.E.2d 723 (1984) (non home rule unit).

144. 392 Mass. 745, 467 N.E.2d 1292 (1984). In *Irwin*, two police officers stopped a driver for speeding. They admitted that they smelled alcohol on his breath but neither took him into custody nor even gave him a field sobriety test. A nurse, who was an eyewitness to the stop, testified to the driver's obvious signs of intoxication. Ten minutes after the police stop, the driver hit another car and killed two of its occupants.

that a municipality can be held liable for injuries caused by the failure of its police officers to take an intoxicated motorist into custody.[145] Likewise, in *Fudge v. City of Kansas City*,[146] the Kansas Supreme Court held that police officers can be held liable when they are required to follow internal guidelines relating to detaining intoxicated individuals.[147] Five Illinois decisions in the past year[148] in three

---

145. The Fifth District in Luber v. City of Highland, 151 Ill. App. 3d 758, 502 N.E.2d 1243 (5th Dist. 1986), *appeal denied*, 114 Ill. 2d 547, 508 N.E.2d 729 (1987), and the Fourth District in Fessler v. R.E.J. Inc., 161 Ill. App. 3d 290, 514 N.E.2d 515 (4th Dist. 1987), *appeal denied*, 118 Ill. 2d 542, 520 N.E.2d 385 (1988), specifically refused to follow *Irwin*. Although not discussed by these cases, the Massachusetts Tort Claims Act is significantly different from Illinois'.

The Massachusetts act provides that "[p]ublic employers shall be liable for injury . . . caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment in the same manner and to the same extent as a private individual under like circumstances." G.L.C. 258 § 2 (1978). There is an exception to liability for failure to exercise a discretionary function. G.L.C. § 10(b). However, there is no exemption for liability analogous to §§ 4-102 and 4-107 of Illinois' act which preclude liability for police officers who fail to enforce statutes.

The court in *Irwin* noted that under Massachusetts law, discretionary acts are ones which require substantial discretion in weighing public policy choices; discretion does not mean acting in accord with established plans. Hence, the decision of a police officer to remove an intoxicated driver from the roadway is not discretionary.

The court then held that police have a duty to protect the general public from intoxicated drivers. Because the defendant could reasonably foresee the harm to the plaintiff, a "special relationship" was created which gave rise to liability.

The court remanded for a new trial because certain evidence was improperly admitted. In addition, damages were limited to $100,000 per plaintiff pursuant to statute.

146. 239 Kan. 369, 720 P.2d 1093 (1986). In *Fudge*, a bartender called the police when a drunk customer who was belligerent refused to leave. When the police arrived, the drunk was in the parking lot with others; the police approached to within five feet and told everyone to leave. The man was visibly intoxicated, but the police officers did not stop him from driving his car. As the drunk driver pulled out of the parking lot he almost collided with another police car, but the officers did not stop him. A few minutes later, the drunk driver hit Fudge's van; Fudge died of injuries received in the accident. The drunk driver's blood alcohol level was .26.

147. *Id.* The Kansas Supreme Court first considered whether the police officers owed Fudge a duty. The court considered whether this case was within the special duty exception to the public duty doctrine. The Kansas City Police Department procedures required that officers must take into protective custody any individual who was alcohol impaired and was likely to injure himself or others. Relying on earlier Kansas decisions, the court concluded that because the Kansas City Police Department's guidelines were mandatory, the officers had no discretion and hence, had a duty to take the drunk driver into custody. Utilizing the RESTATEMENT (SECOND) OF TORTS § 324A (1965), the court held that it was foreseeable that the drunk driver would cause injury to third parties; therefore, the special duty to the drunk driver became a duty to Fudge. The Fourth District in *Fessler* characterized this analysis by the Kansas Supreme Court as a "leap in reasoning." 161 Ill. App. 3d at 301, 514 N.E.2d at 522 (1987).

The Kansas Supreme Court next considered whether any statutory immunity provisions were applicable. These provisions are similar to Illinois'. The court concluded that the language

appellate districts[149] refused to hold the police liable in this type of situation. The courts rejected liability on two bases: tort immunity and lack of a special duty.

In *Luber v. City of Highland*,[150] the plaintiff was injured when he was struck by a car driven by a drunk driver. Six minutes prior to the accident, the police had stopped the drunk driver for erratic driving. The Fifth District upheld the trial court's dismissal of the complaint because the Local Governmental and Governmental Employees Tort Immunity Act[151] protects a municipality for failure of its agents to enforce the law. Specifically, section 4-102 insulates a municipality and its agents from liability for "failure to prevent the commission of crimes"[152] and section 4-107 precludes liability for "failure [of an officer] to make an arrest."[153] The court also held that the city would not be liable even if the officer's actions constituted willful and wanton misconduct because the sections insulating the municipality and officers from liability prevail over the language which gives rise to liability for willful and wanton misconduct.[154]

The court in *Luber* also rejected the "special duty" exception to the tort immunity doctrine. The Illinois Supreme Court recognized this exception in *Huey v. Town of Cicero*,[155] and, in *Curtis v. County*

"failure to provide, or the method of providing police or fire protection," K.S.A. 75-6104(m), was not intended to immunize a police department on every aspect of negligent police protection but was only directed at matters such as the number of police officers hired. Next, the court decided that the liability exception for "enforcement of or failure to enforce a law," K.S.A. 75-6104(c), was not applicable because liability in this case was premised on the officer's failure to follow internal rules, not failure to enforce a law. Finally, the exception from liability for "discretionary acts," K.S.A. 75-6104(d), was held inapplicable because the officers had no discretion because they were required to follow mandatory procedures.

After considering other issues, the Kansas Supreme Court affirmed a comparative negligence verdict against the city for 18% fault on a damage award of $1 million.

148. November, 1986 - November, 1987.

149. First, fourth and fifth.

150. 151 Ill. App. 3d 758, 502 N.E.2d 1243 (5th Dist. 1986), *appeal denied*, 114 Ill. 2d 547, 508 N.E.2d 729 (1987).

151. ILL. REV. STAT. ch. 85, ¶¶ 1-101 - 10-101 (1985).

152. ILL. REV. STAT. ch. 85, ¶ 4-102 (1985) provides:

> Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes and failure to apprehend criminals.

153. ILL. REV. STAT. ch. 85, ¶ 4-107 (1985) provides: "Neither a local public entity nor a public employee is liable for an injury caused by the failure to make an arrest or by releasing a person in custody."

154. ILL. REV. STAT. ch. 85, ¶ 2-202 (1985).

155. 41 Ill. 2d 361, 243 N.E.2d 214 (1968).

of Cook,[156] rephrased it as a four prong test. The test requires that: "(1) the municipality must be uniquely aware of the particular danger or risk to which plaintiff is exposed; (2) there must be allegations of specific acts or omissions on the part of the municipality; (3) the specific acts or omissions must be either affirmative or willful in nature; and (4) the injury must occur while the plaintiff is under the direct and immediate control of employees or agents of the municipality."[157] When all four elements are present, a special duty exists and the municipality can be held liable. In *Luber*, the court held that because there was no claim that the driver injured the plaintiff while the driver was under the direct control of police, the plaintiff did not satisfy the fourth prong of the special duty test and could not recover.

All the other intoxicated motorist cases in Illinois this year also focus on the fourth prong of the test in rejecting plaintiffs' allegations of special duty. In *Hernandez v. Village of Cicero*,[158] a police officer stopped and ticketed the plaintiff's decedent for speeding; less than 10 minutes later another officer stopped and ticketed the decedent for speeding. Fifteen minutes later he was killed when his car struck a traffic light; he was intoxicated. The First District held that stopping the decedent for traffic violations and issuing traffic citations were not the equivalent of taking him into custody. Because he was not in custody, the police were not exercising the control over him at the time of the accident as required by the fourth prong of the special duty test. Therefore, because the special duty exception was not satisfied, the municipality was not liable for his death.

In *Seibring v. Parcell's Inc.*,[159] two police officers broke up a fight involving the decedent. The officers then transported the intoxicated decedent back to his automobile. The Fourth District followed *Hernandez* and held that the officers did not have a special duty to the decedent because they did not have direct and immediate control over the decedent at the time he was killed.[160]

---

156. 19 Ill. App. 3d 400, 440 N.E.2d 942 (1st Dist. 1982), *aff'd in part and rev'd in part*, 98 Ill. 2d 158, 456 N.E.2d 116 (1983).

157. *Id.* at 407, 440 N.E.2d at 947.

158. 151 Ill. App. 3d 170, 502 N.E.2d 1226 (1st Dist. 1986), *appeal denied*, 115 Ill. 2d 541, 511 N.E.2d 428 (1987).

159. 59 Ill. App. 3d 676, 512 N.E.2d 394 (4th Dist. 1987).

160. *Accord* Fessler v. R.E.J. Inc., 161 Ill. App. 3d 290, 514 N.E.2d 515 (4th Dist. 1987), *appeal denied*, 118 Ill. 2d 542, 520 N.E.2d 385 (1988).

The most recent case decided on this issue is *Schaffrath v. Village of Buffalo Grove*.[161] A Buffalo Grove police officer stopped a driver because the car's muffler was noisy. Eight miles later, in another town, the driver crossed the center line and hit a concrete abutment. The driver's blood alcohol level was .09.[162] Because the defendant municipality carried liability insurance, it waived its immunities; therefore, the court could not rely on the tort immunity act.[163] The court began its analysis by stating that police have only a general duty to the public which does not give rise to liability. The court then considered whether the police had a special duty to these individual members of the public under the four prong test discussed above. Since the accident occurred in another town, the court held that the police obviously had no control over the driver, and hence, the city was not liable because the police did not owe the driver a special duty.[164]

The application of the special duty exception also arose in litigation following the strike by Chicago firefighters in February of 1980. In *Jackson v. Chicago Firefighters Union*,[165] the owners of property that was damaged by fire during the strike sued the firefighters' union, the city and various governmental officials. The court held, on two grounds, that the firefighters had no legal duty to the property owners. First, if the firefighters were not acting within the scope of their employment at the time they failed to tend the fire, then they were private citizens and had no duty to provide fire protection. Alternatively, if the defendants were acting as firefighters, they were protected by the tort immunity act.

The plaintiff contended that the firefighters' refusal to comply with the injunction ordering them back to work and their failure to tend a fire constituted willful and wanton misconduct.[166] Section 2-202 of the Tort Immunity Act, which creates the general rule that a

---

161. 160 Ill. App. 3d 999, 513 N.E.2d 1026 (1st. Dist.), *appeal denied*, 117 Ill. 2d 553, 517 N.E.2d 1095 (1987).

162. A blood alcohol level of .10 is required for conviction of driving while under the influence of alcohol. ILL. REV. STAT. ch. 95 1/2, ¶ 11-501(a)(1) (1985).

163. *Schaffrath*, 160 Ill. App. 3d at 1002, 513 N.E. 2d at 1028.

164. *Id.* at 1002, 513 N.E.2d at 1029. The court also refused to create an exception because the passenger was a minor or because there is a strong public policy against drunk driving. Moreover the court held that there was no cause of action under 42 U.S.C § 1983 for failure of the police to adequately protect the public since there is no constitutional right to basic public services.

165. 160 Ill. App. 3d 975, 513 N.E.2d 1002 (1st Dist. 1987).

166. *Id.* at 976, 513 N.E.2d at 1003.

governmental employee is not liable for his negligence, includes an exception for willful and wanton misconduct.[167] However, section 5-101 immunizes municipalities for failure "to provide fire protection service" and section 5-102 precludes liability "for an injury resulting from the failure to suppress or contain a fire. . . ." Like the immunity available to police officers,[168] the immunity for firefighters is unconditional; it is not limited by the exception in section 2-202.

Finally, the court analyzed the question of liability based on a "special duty" theory. The court held that the fact that the fire station was across the street from the property did not constitute control. Even if the firefighters actually knew of the fire, their knowledge would not constitute control. "The pivotal fact is whether . . . the firefighter was responsible for the occurrence which gave rise to the need for protection."[169] Since the firefighters were not responsible for the fire, they were not in control and had no "special duty" to the owners of the premises.[170]

B. Intended Users

The Governmental Tort Immunity Act provides in section 3-102a that a governmental entity only has a duty of ordinary care to those "whom the entity intended and permitted to use the property."[171] This "intended user" doctrine is frequently employed to relieve a municipality of liability when the plaintiff was injured while violating a municipal ordinance.

In *Risner v City of Chicago*,[172] plaintiff was injured when he crossed a street in the middle of a block and was hit by a bus. The First District held that city owed no duty to the plaintiff because he

---

167. ILL. REV. STAT. ch. 85, ¶ 2-202 (1985) provides: "A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton negligence."

168. *See Luber*, 151 Ill. App. 3d 758, 502 N.E.2d 1243 (1986).

169. *Jackson*, 160 Ill. App. 3d at 982, 513 N.E.2d at 1007.

170. *Id.*

171. ILL. REV. STAT. ch. 85, ¶ 3-102(a) (1985) provides:
> Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used. . . .

172. 150 Ill. App. 3d 827, 502 N.E.2d 357 (1st Dist. 1986), *appeal denied*, 114 Ill. 2d 557, 508 N.E. 2d 735 (1987).

was a jaywalker and hence not a permitted or intended user[173] as required by the statute.[174]

In *Durham v. Forest Preserve District of Cook County*,[175] a sixteen year old drowned in a muddy retention pond in a forest preserve. The boys had turned a picnic table upside down and used it as a raft. "No Swimming" signs were posted around the pond. The court held on two independent grounds that there was no liability. First, there was no duty because the pond was an open and obvious danger of which plaintiff should have been aware.[176] Second, under section 3-102 of the tort immunity act, plaintiff was not within the class of intended users.

C. *Discretionary Acts*

In *Midamerica Trust Company v. Moffatt*,[177] the plaintiff, guardian of the estates of three minor children, sued the Illinois Department of Children and Family Services ("DCFS"). Two of the three children[178] had been removed from the custody of their natural mother and made wards of DCFS. Fourteen months later, they were returned to their mother who subsequently injured them. The Fifth District upheld the trial court's grant of the department's motion to dismiss because a social worker for DCFS is entitled to public official immunity for discretionary acts which are not corrupt or malicious. This immunity is not lost for willful and wanton misconduct. The court also noted that while an exception exists for professionals such as physicians who have duties to individuals independent of their status as governmental employees, an unlicensed social worker is not such a professional.[179]

---

173. *Id.* at 826, 502 N.E.2d at 359. The court also rejected the argument that because the plaintiff's use was foreseeable, the city had a duty. The court held that the word foreseeable in section 3-102(a) modifies times of use, not the existence of a duty.

174. *Id.* The court held that duty was a question of law to be decided by the judge.

175. 152 Ill. App. 3d 472, 504 N.E.2d 899 (1st Dist. 1987).

176. The court relied on Corcoran v. Village of Libertyville, 73 Ill. 2d 316, 383 N.E.2d 177 (1978) and succeeding cases for the proposition that a property owner has no duty "to remedy conditions the obvious risks of which children generally would be expected to appreciate and avoid." *Id.* at 474, 504 N.E.2d at 901.

177. 158 Ill. App. 3d 372, 511 N.E.2d 964 (5th Dist. 1987).

178. *Id.* The DCFS never was guardian of the third child. The Department was merely required to "monitor" the third child who was in the mother's custody.

179. *Id.* at 375, 511 N.E.2d at 969.

D. Notice[180]

The Tort Immunity Act requires that within one year after the injury has occurred, the plaintiff must serve written notice on the defendant-governmental entity.[181] The one-year notice period is independent of the two year statute of limitations. The notice must include the facts surrounding the accident, the name and address of the plaintiff and the name and address of both the attending physician and the hospital. Failure to include any of these factors is fatal to the notice.[182] However, so long as there is substantial compliance with the statute, notice will be sufficient.

The purpose of the notice is to allow a governmental unit to investigate the accident while the events and witnesses are still fresh.[183] Moreover, it allows the governmental unit to correct any problems to avoid future accidents.

In *Carroll v. Chicago Housing Authority*,[184] the notice stated the "Claimant was caused to become injured due to the negligence of the Chicago Housing Authority."[185] The First District held that although the notice requirement is to be liberally construed, specifying only that it was a negligence personal injury claim was not sufficient.[186]

---

180. The section of the tort immunity act on notice was repealed effective November 25, 1986. (Pub. Act 84-1431, Art. I, § 3). In addition, there is now a one year statute of limitations for all tort actions against municipalities. (Pub. Act 84-1431, Art. I, § 2). Those causes of action which arose prior to November 25, 1986, still have a two year statute of limitations, and consequently, plaintiffs were still required to file notice within one year.

181. ILL. REV. STAT. ch. 85, ¶ 8-102 (1985) provides:

> Within 1 year from the date that the injury or cause of action, referred to in Sections 8-101, 8-102 and 8-103, was received or accrued, any person who is about to commence any civil action for damages on account of such injury against a local public entity, or against any of its employees whose act or omission committed while acting in the scope of his employment as such employee caused the injury, must serve, either by personal service or by registered or certified mail, return receipt requested, a written notice on the Secretary or Clerk, as the case may be, for the entity against whom or against whose employee the action is contemplated a written statement, signed by himself, his agent or attorney, giving in substance the following information: the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, the general nature of the accident, the name and address of the attending physician, if any, and the name and address of the treating hospital or hospitals, if any.

182. *See* Shortt v. City of Chicago, 160 Ill. App. 3d 933, 514 N.E.2d 3 (1st Dist.), *appeal denied*, 117 Ill. 2d 553, 516 N.E.2d 271 (1987).

183. *Id.*

184. 155 Ill. App. 3d 710, 508 N.E.2d 285 (1st Dist. 1987).

185. *Id.* at 711, 508 N.E.2d at 286.

186. *Id.*

In *Shortt v. Chicago*,[187] notice was sent to the corporation counsel, not the city clerk. The First District held that such notice did not comply with the requirements of the tort immunity act; actual notice to the city is inadequate.[188] Moreover, the city is not estopped from arguing that notice was improper merely because it filed an answer, conducted discovery and entered settlement negotiations over a five year period.

In contrast, the plaintiff in *Whitney v. City of Chicago*,[189] filed an amended complaint which alleged new causes of action. The First District held that the complaint could not be dismissed for failure to give statutory notice because the new actions were based on the same facts. The court reasoned that the statutory requirement of notice to the city under the tort immunity act only requires general notice of the facts surrounding the accident not nature of the cause of action. Moreover, the notice requirement must be strictly construed against the city so long as the city was not misled or prejudiced.

In *Grady v. Bi-State Development Agency*,[190] the court first held that the Bi-State Development Agency is a local public entity and therefore covered by the Tort Immunity Act.[191] The court then held that plaintiff did not substantially comply with the notice requirements of the tort immunity act because several elements were completely omitted from the notice: specifically, the notice did not include the plaintiff's address, the time of the accident, the nature of the accident or the name of the attending physician or hospital.

The dissent concluded that there was no prejudice and there was substantial compliance.[192] The dissent correctly determined that the notice indicated that this was a bus accident resulting in personal injuries, and such information should be sufficient to satisfy the requirement of notice of the nature of the accident.

---

187. 160 Ill. App. 3d 933, 514 N.E.2d 3 (1st Dist.), *appeal denied*, 117 Ill. 2d 553, 516 N.E. 2d 271 (1987).

188. *See* Repaskey v. Chicago Transit Authority, 60 Ill. 2d 185, 326 N.E.2d 771 (1975).

189. 155 Ill. App. 3d 714, 508 N.E.2d 293 (1st Dist. 1987).

190. 151 Ill. App. 3d 748, 502 N.E.2d 1087 (5th Dist. 1986).

191. *Id.* The court based its decision on two statutes. First, The act under which the defendant was established provides that it "shall be a body corporate and politic." ILL. REV. STAT. ch. 127, ¶ 63r-1 (1985). Second, the defendant is an interstate transportation authority. The definition of such an authority is "any political subdivision created by compact between this State and another state. . . ." The court concluded that a political subdivision was a local public entity under the tort immunity act.

192. *Id.* at 751, 502 N.E.2d at 1090.

The dissent then explained why the other missing elements were either not important or were easily ascertainable by defense counsel.[193] This analysis is inconsistent with established case law in Illinois that no element required by statute to be included in the notice can be missing; only if an element of notice is present can it be construed in a light favorable to the plaintiff. Therefore, the mere fact that the purposes of the act were satisfied and there was no prejudice has historically not been relevant.

Finally, in *Cooper v. Bi-State Development Agency*,[194] the plaintiff argued that notice was not required because public carriers were excluded from the act under section 2-101(b).[195] The court held that this section means that public carriers owe their passengers the highest degree of care in contrast to the lower standard of care applicable to other public entities. The language in section 2-101(b) does not, however, exempt a plaintiff from the notice requirement. The court noted that to eliminate the notice requirement would be illogical in light of the fact that the Chicago Transit Authority has a six month notice requirement. It is unlikely that the legislature would require a six month notice period for one transit company but dispense entirely with notice to all other common carriers.

E. Duty

In *Curry v. Chicago Housing Authority*,[196] a woman died when paramedics had to climb seven stories to get to her and then carry her down seven stories because the elevator in the public housing project was out of service. The court held that the Chicago Housing Authority had no duty to repair an elevator in order to put it back into service within a specified period of time. The court also held that various statutes relating to maintenance of elevators are either requirements for inspection or only relate to operation of unsafe elevators. They do not create a duty to keep an elevator operable. "While an inoperable elevator may cause some discomfort, it is

193. *Id.*

194. 158 Ill. App. 3d 19, 510 N.E.2d 1288 (5th Dist.), *appeal denied*, 116 Ill. 2d 550, 515 N.E.2d 104 (1987).

195. ILL. REV. STAT. ch. 85, ¶ 2-101 (1985) provides:

> Nothing in this Act affects the right to obtain relief other than damages against a local public entity or public employee. Nothing in the Act affects the liability, if any, of a local public entity or public employee, based on: . . . (b) Operation as a common carrier; and this Act does not apply to any entity organized under or subject to the 'Metropolitan Transit Authority Act' . . . .

196. 150 Ill. App. 3d 862, 503 N.E.2d 1055 (1st Dist. 1986).

nonetheless, not the type of circumstance in which public policy would be furthered. . .''[197] by imposing a duty. It is in society's best interest that elevators which may be dangerous are not kept in operation merely to avoid tort liability.

In *Charpentier v. City of Chicago*,[198] the plaintiffs were injured when a car driving the opposite direction crossed the center line and hit the plaintiffs. There were no median barriers separating traffic flowing in opposite directions. The common law requires municipalities to keep public property in a reasonably safe condition. However, the court noted that this responsibility does not extend to undertaking capital improvements. Thus, the city had no common law duty to install median barriers. Section 3-103a of the tort immunity act[199] creates no new duties; it only articulates the common law duty to maintain roadways in a reasonably safe condition.

F. Scope of Employment

In *Bates v. Doria*,[200] the plaintiff was raped by an off duty deputy sheriff. The court affirmed the dismissal of the cause of action because, as a matter of law, the defendant's actions were so outrageous as to be outside the scope of his employment. The court also held that the motion to dismiss the cause of action for negligent hiring was properly granted because, as a matter of law, there was no proximate cause between the hiring and the injury: the defendant was not on duty at the time of the rape, he was not using departmental weapons or wearing his uniform, and he was not conducting any sheriff's duties.

In *Wolf v. Liberis*,[201] the court held that even though police officers are on duty at all times, the city can only be liable for actions that fall within the scope of their employment. The mere fact that the officer told bystanders that he was on duty, did not render his actions within the scope of his employment.

V. Employee Discharge

There were a substantial number of appellate court decisions this year on the subject of wrongful discharge. Most of them involved

197. *Id.* at 866, 503 N.E.2d at 1057.

198. 150 Ill. App. 3d 988, 502 N.E.2d 385 (1st Dist. 1986).

199. Ill. Rev. Stat. ch. 85, ¶ 3-103a (1985).

200. 150 Ill. App. 3d 1025, 502 N.E.2d 454 (2d Dist. 1986).

201. 153 Ill. App. 3d 488, 505 N.E.2d 1202 (1st Dist.), *appeal denied*, 115 Ill. 2d 552, 511 N.E.2d 438 (1987).

termination of police officers and firefighters. These were primarily factual issues reviewed under the "against the manifest weight of the evidence" standard. The other two cases involved political firing and retaliatory discharge.

A. Political Firing

In *Worthen v. Secretary of State*,[202] all employees within the Auto Dealer Services Division of the Secretary of State's Office were laid off when the division was closed. These employees primarily distributed plates and forms, fielded procedural questions, and conducted informational or public relations seminars within their regions. Just prior to this layoff, several new employees were hired as financial institutions field representatives. These representatives' primary duties were to audit; however, there was an issue as to whether the new employees performed some of the same duties as the discharged employees. The new hirees were all Republicans although the trial court refused to admit this evidence. None of those laid off were allowed to apply for the new positions. Pursuant to office policy, those laid off were placed on the re-employment list for similar jobs in their department in their county of residence for the next year. The hearing officer and the State of Illinois Merit Commission agreed that the layoffs were proper, and that while the discharged employees should have been put on the re-employment list for all counties that they had previously served instead of just their residence county, they were not entitled to reinstatement.

On review, the appellate court focused on the time frame of the layoffs as compared to that of the creation of the new positions. The auditing positions were created and the training of the employees occurred between August and October of 1984. The evaluation of the effectiveness of the Auto Dealership division and the subsequent layoffs occurred during approximately the same time period. The court noted that the timing was suspect. The court said that there should have been greater inquiry into the time frame, and the plaintiffs should have been allowed to introduce evidence of party affiliation.[203] The court remanded the case for further proceedings.

---

202. 160 Ill. App. 3d 325, 513 N.E.2d 475 (4th Dist. 1987), *appeal denied*, 118 Ill. 2d 552, 520 N.E.2d 394 (1988).

203. The reviewing court did not disagree with the finding that the employees performed different duties; however, the court noted that the new jobs were not that difficult and that training was provided.

The court noted that on remand, the employees will still bear the burden of proving bad faith. Proof of political motivation alone will not constitute bad faith. Moreover, the Secretary of State had complied with all the procedural requirements for a layoff except the employees' annual performance records; however, since the whole department was laid off, that deficiency will not necessarily invalidate the layoff. Finally, even if the trial court determined on remand that money was not saved by the reorganization, increasing efficiency is also a sufficient reason for the decision. The court did not discuss the reemployment lists in detail but noted that they should be reconsidered on remand as part of the package along with the timing issues.

B. Retaliatory Discharge

In *Carter v. City of Elmwood, Peoria County*,[204] the plaintiff's complaint for retaliatory discharge was dismissed by the trial court.[205] The city council by ordinance had eliminated one of two full time police officer positions three months after plaintiff had complained that the other officer, the chief, had violated the law. The Third District held that section 2-205 of the Tort Immunity Act[206] protected the mayor and council members from suit. The court also held that there is no exception for willful and wanton misconduct. The court reasoned that the words "willful and wanton" do not appear in the statute; if the legislature wanted to include that exception, it could have added that language as it did in other sections of the same act. The court noted that the retaliatory discharge case, *Palmateer v. International Harvester Co.*,[207] was inapplicable because the plaintiff was incapable of crossing the threshold question of immunity.

C. Standard of Review for Discharge Decisions

The standard for reviewing the findings of fact under the Administrative Procedures Act is whether the decision of the review

---

204. 162 Ill. App. 3d 235, 515 N.E.2d 415 (3d Dist. 1987).

205. *Id.* Plaintiff's complaint contained a second count for violation of 42 U.S.C. § 1983. This count was not dismissed by the trial court. Pursuant to Illinois Supreme Court Rule 304(a), plaintiffs were allowed to appeal the dismissal of the retaliatory discharge complaint even though the section 1983 claim was still pending.

206. ILL. REV. STAT. ch. 85, ¶ 2-205 (1985) provides: "A public employee is not liable for an injury caused by his adoption of, or failure to adopy, an enactment, or by his failure to enforce any law."

207. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

board is against the manifest weight of the evidence.[208] It is for the board to consider conflicting testimony and the credibility of witnesses.[209]

The courts generally uphold the boards' determination of facts; the courts' review is generally limited to whether the sanction was appropriate. The standard for reviewing the discipline imposed is whether it is unreasonable, arbitrary or unrelated to the requirements of the department.[210] A finding that a government employee violated department rules, standing alone, is not sufficient for dismissal.[211]

In *Burgett v. Collinsville Board of Fire and Police Commissioners*,[212] the appellate court affirmed the board's finding that Burgett was outside the city limits and failed to patrol for almost 3 hours. However, the court reversed on the question of discipline because the officer's conduct, although improper, was so trivial that it did not warrant the ultimate sanction of discharge.

In *Sheehan v. Board of Fire and Police Commissioners of the City of Des Plaines*,[213] the court held that the board's decision was not against the manifest weight of the evidence because the officer never adequately explained documentary evidence such as time sheets and payroll checks that indicated that he was being paid for two off duty jobs at the same time. The court also held that the sanction of discharge was fully warranted by the officer's continuous pattern and practice of deceiving the two off duty employers.

In *Martin v. Matthys*,[214] the First District affirmed the dismissal of an officer who had accepted security work outside the village in violation of a rule and several direct orders because the officer's deliberate and continuing disobedience undermined the authority and weakened the entire structure of the police department. Similarly, the Fourth District[215] affirmed the commission's decision suspending a Department of Revenue employee who was late in filing his

208. *See* Burgett v. Collinsville Bd. of Fire & Police Comm'rs., 149 Ill. App. 3d 420, 500 N.E.2d 951 (5th Dist. 1986).

209. *See* Sier v. Board of Fire & Police Comm'rs. of the City of Peoria, 157 Ill. App. 3d 1097, 510 N.E.2d 633 (3d Dist. 1987).

210. *See* Martin v. Matthys, 149 Ill. App. 3d 800, 501 N.E.2d 286 (1st Dist. 1986).

211. *Id.*

212. 149 Ill. App. 3d 421, 500 N.E.2d 951 (5th Dist. 1986).

213. 158 Ill. App. 3d 275, 509 N.E.2d 467 (1st Dist. 1987).

214. 149 Ill. App. 3d 800, 501 N.E.2d 286 (1st Dist. 1986).

215. *See* Department of Revenue v. Smith, 150 Ill. App. 3d 1039, 501 N.E.2d 1370 (4th Dist. 1986), *appeal denied*, 508 N.E.2d 726 (1987).

returns[216] for two years and used a tax amnesty program to avoid sanctions[217] because his actions affected the effectiveness of the agency.

The courts have also consistently held that boards need not conform to strict evidentiary rules. In *Schlobohm v. Rice*,[218] a police officer's urine test indicated the presence of cocaine. The First District held that a discharge hearing is not a criminal case; therefore, notice need not conform to the requirements for an indictment, and the standard of review is manifestly erroneous, not proof beyond a reasonable doubt.

The First District in *Sheehan v. Board of Fire and Police Commissioners of the City of Des Plaines*,[219] also refused to require the same evidentiary and procedural limitations to a discharge proceeding that are required in criminal actions. The court held that no prejudice was shown by the failure of the board to adopt comprehensive rules on the conduct of the hearing because the officer received a fair and impartial hearing. Counsel for the board, who did not act as prosecutor, ruled on many evidentiary issues and motions even though the board retained the authority to overrule him. Since a review of the proceedings indicated that he acted in a fair and impartial manner, the court did not disprove this procedure.

A probationary officer has no right to a hearing or to seek review of his discharge.[220] However, a city, by rule, can provide a probationary police officer with more protection than state law.[221] In *Lewis v. Hayes*,[222] the City of Bradley specifically provided that there must be cause and a hearing before dismissal of even a probationary officer. Therefore, plaintiff had a protectable property interest in employment as a probationary police officer. The officer had been told at the time he took the exam that although residency was a requirement, he would have 90 days to comply.[223] However, when

---

216. *Id.* He was in the middle of a divorce and the information contained in the returns could have affected the property distribution.

217. *Id.* The court held that filing under the tax amnesty program did not protect him from administrative sanctions because he was disciplined for violating department rules, not for a statutory violation.

218. 157 Ill. App. 3d 90, 510 N.E.2d 43 (1st Dist. 1987).

219. 158 Ill. App. 3d 275, 509 N.E.2d 467 (1st Dist. 1987).

220. *See* Potratz v. State Dep't of Law Enforcement, 154 Ill. App. 3d 682, 506 N.E.2d 1050 (4th Dist. 1987).

221. *See* Lewis v. Hayes, 152 Ill. App. 3d 1020, 505 N.E.2d 408 (3d Dist. 1987).

222. 152 Ill. App. 3d 1020, 505 N.E.2d 408 (3d Dist. 1987).

223. *Id.* The only other non resident hired by the department had been given 90 days to establish residency.

his name reached the top of the hiring list, they refused to hire him because he was not a resident and refused to give him the 90 days to comply with the requirement. Since there was no rational connection between the facts considered and the decision made, the board acted arbitrarily and capriciously in failing to hire him.[224]

On review, the board attempted to justify its decision on grounds other than that given to the officer at the time he was not hired. The plaintiff, in response to the question on his application, "Were you ever discharged or forced to resign because of misconduct or unsatisfactory service or while under investigation?" had answered "no, voluntarily resigned." In fact his previous employer had given him the choice of resigning or having charges filed against him. The court did not decide the semantic question of whether this constituted a misrepresentation; however, it did hold that the city should have been given the opportunity to present evidence of the underlying misconduct as an affirmative defense.

Finally, in cases from the First and Third Districts, the appellate court issued conflicting decisions on the interpretation of the statutory provision on the length of suspensions.[225] In *Sheehan v. Board of Fire and Police Commissioners of the City of Des Plaines*,[226] the First District upheld the officer's suspension for more than 30 days during the pendancy of the hearing.[227] However, only a month later, in *Sier v. Board of Fire and Police Commissioners of the City of Peoria*,[228] the Third District held that, by agreeing to continuances, a suspended officer does not waive the 30 day limitation on pre-hearing suspensions. The court noted that allowing a board to impose multiple 30 day suspensions would render the statutory 30 day

---

224. *Id.* Therefore, the plaintiff stated a valid cause of action under 42 U.S.C. § 1983.

225. ILL. REV. STAT. ch. 24, ¶ 10-2.1-17 (1985) provides:

> The board of fire and police commissioners shall conduct a fair and impartial hearing of the charges, to be commenced within 30 days of filing thereof, which hearing may be continued from time to time. In case an officer or member is found guilty, the board may discharge him, or may suspend him not exceeding 30 days without pay. The board may suspend any officer or member pending the hearing with or without pay, but not to exceed 30 days.

226. 158 Ill. App. 3d 275, 509 N.E.2d 467 (1st Dist. 1987).

227. *Id.* The court relied on McCoy v. Kamradt, 136 Ill. App. 3d 551, 483 N.E.2d 544 (1st Dist. 1985).

228. 157 Ill. App. 3d 1097, 510 N.E.2d 633 (3d Dist. 1987). A police officer was suspended for dropping and striking an unconscious prisoner and filing a false report about the incident. On another issue the court held that because this issue was merely one of conflicting testimony and credibility of witnesses, and because it was not contrary to the manifest weight of the evidence, the administrative determination should be sustained.

limitation meaningless. The Third District did not mention *Sheehan* in its decision.[229]

229. *Id.* The Third District also did not discuss *McCoy*. *See supra* note 228.