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FILE NO. S-952

CONSTITUTION:
Power of a Home Rule Unit
To Establish a Housing Authority

Frank A. Kirk, Director
Department of Local Government Affairs
303 East Monroe Street
Springfield, Illinois 62706

Dear Mr. Kirk:

I have your letter wherein you state:

"An inquiry has been made to this Department by the City of Mound City concerning its power to establish a local housing authority pursuant to the 'Housing Authorities Act' (Chapter 67 1/2, Paragraph 1 et seq, Illinois Revised Statutes).

Section 2 of the Act provides that municipalities having more than 25,000 inhabitants may establish a housing authority, subject to the approval of the State Housing Board. Pursuant to Section 68.3 of the 'Civil Administrative Code of Illinois'

(Chapter 127, Paragraph 63b14.3, Illinois Revised Statutes) this Department now exercises the power of approval of creation of local housing authorities and other duties relating to such authorities, previously exercised by the State Housing Board.

Mound City has fewer than 25,000 inhabitants, but has become a home rule unit by referendum.

Your opinion is, therefore, requested as to the following:

1. Is Mound City exempt from the 25,000 population requirement by reason of being a home rule unit and, therefore, authorized to create a housing authority eligible for the same rights and privileges and subject to the same statutory regulations as other authorities supervised by this Department?

2. If the answer to the first question is in the negative, is Mound City authorized by Section 6, Article VII of the Illinois Constitution to create an agency to perform the functions and duties of a housing authority established pursuant to the 'Housing Authorities Act', without approval or subsequent supervision or regulation by this Department?

3. If the answer to the second question is in the affirmative, is such an agency entitled to apply for and receive allocations of funds from this Department pursuant to Section 46.1 of the 'State Housing Act' (Chapter 67 1/2, paragraph 196.1, Illinois Revised Statutes) or to claim any other statutory benefit specifically accruing to housing authorities established pursuant to the 'Housing Authorities Act'?"

The Housing Authorities Act (Ill. Rev. Stat. 1973, ch. 67 1/2, pars. 1 et seq., as amended by P.A. 79-140, effective October 1, 1975) originally became effective in 1934. Section 3 of said Act (Ill. Rev. Stat. 1973, ch. 67 1/2, par. 3) reads, in pertinent part, as follows:

> "§ 3. The governing body of any city, village or incorporated town having more than 25,000 inhabitants, or of any county of this State, may, by resolution, determine that there is need for a housing authority in such city, village, incorporated town or county. Upon adoption, such resolution shall be forwarded to the State Housing Board together with a statement of reasons or findings supporting such resolution. The State Housing Board shall thereupon issue a certificate to the presiding officer of such city, village, incorporated town or county for the creation of such authority if it shall find (a) that unsanitary or unsafe inhabited dwelling accommodations exist in such city, village, incorporated town or county, or (b) that there is a shortage of safe or sanitary dwelling accommodations in such city, village, incorporated town or county available to persons who lack the amount of income which is necessary (as determined by said Board) to enable them without financial assistance to live in decent, safe and sanitary dwellings without over-crowding. In determining whether dwelling accommodations are unsafe or unsanitary the State Housing Board may take into consideration the degree of over-crowding, the percentage of land coverage, the light, air, space and access available to the inhabitants of such dwelling accommodations, the size and arrangement of the

> rooms, the sanitary facilities and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes. The State Housing Board shall also have authority upon its own initiative or upon petition of not less than one per cent of the qualified voters of such city, village, incorporated town or county to make a finding as above provided and to issue a certificate for the creation of such an Authority.
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> * * *

The words "State Housing Board" have been deleted by Public Act 79-140 which becomes effective on October 1, 1975, and have been replaced by "Department of Local Government Affairs". The powers and duties of the State Housing Board have been transferred to the Department of Local Government Affairs. See, Ill. Rev. Stat. 1973, ch. 127, par. 63b14.3.

There are two fundamental legal reasons why Mound City is not "exempt" from the 25,000 population requirement of section 3 of the Housing Authorities Act and why any housing authority established under its home rule authority would not become eligible for the same rights and privileges and subject to the same statutory regulations as housing

authorities created by cities having a population of 25,000 or more.

First, the legislature in adopting section 3 of the act did not intend by establishing the 25,000 population test to imply that a home rule city of smaller size would automatically be entitled to participate in the State program. By coincidence, Illinois municipalities having 25,000 or more inhabitants automatically achieve home rule authority under section 6(a) of article VII of the Illinois Constitution. However, the history of the Housing Authorities Act discloses that the 25,000 population requirement of section 3 pre-dates and therefore has no relationship whatever to whether a municipality has home rule authority. Section 3 as originally enacted provided that only municipalities with a population of 50,000 or more could organize a housing authority. That provision was amended in 1937 and the population requirement was lowered to 25,000. Inasmuch as the Constitution became effective on July 1, 1971, the 25,000 limitation of the statute obviously has no relationship whatever to home rule status.

Also, you are advised that House Bill 1956, which lowers the 25,000 population requirement to 10,000, has passed the General Assembly and is presently awaiting gubernatorial action.

Further, the statutory requirement of a population of 25,000 constitutes a fundamental, substantive provision of the State housing program. In Krause v. Peoria Housing Authority, 370 Ill. 356, the Illinois Supreme Court upheld that statutory classification based on population on the grounds that a reasonable relationship existed between the population requirements and the object and purposes of the statute. The Supreme Court of Illinois said at page 371:

> "Appellants contend that the limitation of power to create a housing authority to cities having a population of over 25,000, and counties, constitutes an arbitrary classification. Classifications based on population have been upheld whenever there is a reasonable relation between the population and the objects and purposes of the act. (Mathews v. City of Chicago, 342 Ill. 120.) Admittedly the housing problem is more acute in large communities than in small ones. The provision with reference to counties shows that the legislature considered the slum-clearance

> problem one that is Statewide. By this provision the need for slum clearance in smaller cities is met. The classification of cities by population has a reasonable relation to the objects sought to be obtained. Neither it, nor the provision as to counties, is arbitrary."

Therefore, in the light of this history and judicial interpretation, it is clear that only the General Assembly possesses the authority to alter the population requirement of the statute. The Department of Local Government Affairs may not enlarge its responsibilities and duties of supervision under the statute by ignoring the integral and substantive population requirement of 25,000.

The inherent nature of home rule contains a second reason why your first question must be answered in the negative. Although Mound City as a home rule unit has the power to create an agency to deal with the local housing problems of its citizens (discussed at length below), it does not follow that Mound City possesses a home rule power to create a housing authority eligible for the same rights and privileges and subject to the same statutory regulations as other authorities

supervised by your Department. As expressly stated in the Housing Authorities Act, the purpose of that legislation is to deal with problems of statewide concern and to provide statewide solutions, utilizing the resources of the State itself. The Housing Authorities Act thus is an exercise by the State of a power held concurrently with municipalities which State power in no manner has been diminished by the advent of home rule.

Section 6(a) of article VII of the Illinois Constitution of 1970 contains both general and specific grants of power to home rule units and it reads as follows:

> "(a) 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."

Prior to the adoption of this constitutional provision, the Illinois municipalities were totally dependent upon the General Assembly for authority to carry on local activities. This dependent status was described in a passage from Judge Dillon's treatise on municipal law and became known as Dillon's Rule.

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

In its report to the Sixth Illinois Constitutional Convention, the Local Government Committee unanimously called for inclusion of a system of home rule in the new Constitution. At page 31 of its report, the Committee states:

> "The fundamental reason for favoring home rule over the existing system of legislative supremacy is this: Local governments must be authorized to exercise broad powers and to undertake creative and extensive projects if they are to contribute

> effectively to solving the immense problems that have been created by the increasing urbanization of our society.
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> The Committee believes local government should be strengthened because it is closer to the people it serves than are other forms of government and, as a result, on balance is likely to be more responsible to the citizenry, more sensitive to community needs and more efficient and effective in meeting those needs. In addition, broadening the powers of local governments will reduce the number of bills dealing with local matters which now overburden the General Assembly, will strengthen the role of local officials in determining local issues and diminish the power of state legislators who are less familiar with local conditions, and reduce the amount of state control over local affairs." (VII Record of Proceedings 1605.)

It should be noted that the home rule provisions of section 6 give no authority to a home rule unit to act unless the action is one "pertaining to its government and affairs". Amending State statutes which regulate on a statewide basis is not the exercise of a power pertaining to a home rule unit's government and affairs. To allow a municipality like Mound City to include itself in a State program like the Housing Authorities Act by adopting standards or exempting itself

from qualifying requirements therein stated would constitute an amendment of such a State statute in violation of the provisions of article IV of the Constitution.

Clearly the problem of local housing pertains to the government and affairs of Mound City. By the same token the problem of housing throughout the State is a concern of State government which may be dealt with by the General Assembly without interference by a home rule unit. The judgment of the General Assembly that there is a rational and significant relationship between the 25,000 population requirement and the solving of statewide housing concerns and problems cannot be revised or changed by the exercise of home rule powers in areas of concurrent power and function. The home rule power of Mound City is purely local. Even though concurrent with the State's power, the local power cannot be exercised in the State's domain because Mound City has no power to supersede or amend what the State has done within its field of action.

In addition, it is clear that even in the absence

of the exercise of the exclusivity power or preemption by the General Assembly under section 6(g), (h) or (i) of article VII of the Illinois Constitution which has not occurred to date in a manner pertinent to this opinion, there are inherent limitations on the home rule power found in the phrase of section 6(a) "pertaining to its government and affairs". This language was designed to restrict home rule powers to local subjects.

The Committee on Local Government Affairs of the Sixth Illinois Constitutional Convention stated in its report to the convention:

> "It is clear * * * that the powers of home rule units relate to their own problems, not those of the state or the nation * * *. Thus, the proposed grant of powers to local governments extends only to matters 'pertaining to their government and affairs'." (VII Record of Proceedings 1621.)

The committee report further states:

> "The intent of this draft, as in the committee's proposal, is to give broad powers to deal with local problems to local authorities; * * *" (VII Record of Proceedings 1622; see, also, Baum, a Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations, 1972 U. Ill. L. Forum, 137, 153.)

In the cases where the Illinois Supreme Court upheld the validity of home rule action that superseded

State law, the home rule unit, by ordinance or resolution, acted positively pursuant to a specific, constitutional grant of power or in a manner that clearly pertained to its own government and affairs. Kanellos v. County of Cook, 53 Ill. 2d 161; People ex rel. Hanrahan v. Beck, 54 Ill. 2d 561; Clarke v. Village of Arlington Heights, 57 Ill. 2d 50; Peters v. City of Springfield, 57 Ill. 2d 142.

However, in Bridgeman v. Korzen, 54 Ill. 2d 74, an ordinance proposed by Cook County called for the payment of real estate taxes in four installments instead of two installments as provided in the Revenue Act of 1939. The court, at page 78, declared the ordinance invalid, stating:

> "Although obviously there are powers and functions of county government which pertain to its government and affairs within the contemplation of section 6 of article VII (Kanellos v. County of Cook, 53 Ill. 2d 161), the collection of property taxes is not one of them. In the process of collecting and distributing tax monies the county acts both for itself and the other taxing bodies authorized to levy taxes on property within the county, and the

> function thus performed does not pertain to its government and affairs to any greater extent than to the government and affairs of the other taxing bodies for whose benefit it acts. We find no provision in the constitution of 1970 or in the proceedings of the convention which leads us to believe that the collection of property taxes is a home-rule power or function within the contemplation of section 6 of article VII."

Accordingly, even though Mound City is a home rule unit, it is not exempt from the 25,000 population requirement of section 3 of the Housing Authorities Act, because a home rule unit's powers do not extend to amending a State statute regulating on a statewide basis a statewide problem.

With respect to your second question, at present the General Assembly has not exercised any of its powers of preemption with regard to the Housing Authorities Act. In fact, section 2 of the Housing Authorities Act (Ill. Rev. Stat. 1973, ch. 67 1/2, par. 2, as amended by P.A. 79-140) declares that to protect the health, welfare, safety and morals of the public, housing authorities are needed to alleviate or prevent the occurrence of a shortage in safe, decent and sanitary housing. Without question, home rule units have the inherent power to protect the health, welfare, safety and morals of

their own citizens, and pursuant to these powers may undertake to prevent or alleviate a shortage of housing. The specific procedures by which this may be accomplished must be left to each home rule unit to decide for itself based on conditions within each unit. Therefore, a home rule unit would have power to create its own housing agency outside of and not pursuant to the Housing Authorities Act.

Finally, in answer to your third question, paragraph (a) of section 46.1 of the State Housing Act (Ill. Rev. Stat. 1973, ch. 67 1/2, par. 196.1) provides:

" * * *

> Within the limitations provided in this Section, the Department of Local Government Affairs may expend or withdraw monies from the Housing Fund for any or all of the following purposes:
>
> (a) to make allocations to local housing authorities and land clearance commissions in accordance with 'An Act to facilitate the development and construction of housing, to provide governmental assistance therefor, and to repeal an Act herein named', approved July 2, 1947, as amended, 'An Act making appropriations for certain additional ordinary contingent and distributive expenses of State government', approved July 21, 1947,

> and upon the approval of such allocation, such monies shall be remitted from the Housing Fund to the local housing authority or land clearance commission for which approval of request for a grant and instructions for allocation from the Housing Fund have been made.
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> * * *

Section 2 of "AN ACT to facilitate the development and construction of housing, to provide governmental assistance therefor, and to repeal an Act herein named" (Ill. Rev. Stat. 1973, ch. 67 1/2, par. 54) reads as follows:

> "§2. Any housing authority now or hereafter organized under the 'Housing Authorities Act', approved March 19, 1934, as amended, and any Land Clearance Commission heretofore organized under the Act herein repealed or hereafter organized under the provisions of the 'Blighted Areas Redevelopment Act of 1947,' enacted by the 65th General Assembly, may make application to the State Housing Board for a grant of state funds from the appropriation designated for the making of grants under this Act. * * *"

The appropriations act referred to in section 46.1(a) of the State Housing Act was passed in 1947, (Laws of 1947, p. 205) and appropriated $6,567,000 to the State Housing Board for making grants pursuant to "AN ACT to facilitate

the development and construction of housing, to provide governmental assistance therefor, and to repeal an Act named therein".

I am of the opinion that only housing authorities created pursuant to the Housing Authorities Act are eligible to receive funds allocated pursuant to section 46.1(a) of the State Housing Act.

The Department of Local Government Affairs has only those powers delegated to it by law. (People ex rel. Brundage v. Righeimer, 298 Ill. 611 (1921); People ex rel. Baird v. Stevenson, 270 Ill. 569 (1915); Dept. of Public Works and Buildings v. Schlict, 359 Ill. 337 (1935); Department of Public Works and Buildings v. Ryan, 357 Ill. 150 (1934).) Thus, the Department of Local Government Affairs when authorized to make grants to housing authorities created pursuant to the Housing Authorities Act (Ill. Rev. Stat. 1973, ch. 67 1/2, par. 196.1 and par. 54) may not allocate such grant money to home rule units or agencies created by a home rule unit.

Only those housing authorities established pursuant to the Housing Authorities Act are entitled to receive grants and funds from the State. Those housing authorities not established pursuant to the act are ineligible. Hence, any housing agency established by a home rule unit outside of and not pursuant to the Housing Authorities Act would not be eligible to apply for and receive allocations pursuant to the State Housing Act. Ill. Rev. Stat. 1973, ch. 67 1/2, par. 196.1.

Very truly yours,

ATTORNEY GENERAL