Iowa League of Cities

Special Report

Home Rule Special Report

Part I of this report will examine why and how home rule came to be in Iowa as an amendment to the Iowa Constitution, how it has been implemented by the Iowa Legislature, and the inconsistent manner in which our courts interpreted and applied home rule in the 30 year period after its approval by the voters of Iowa.

Part II will examine more recent court decisions interpreting and applying home rule, which chart a more encouraging road ahead for Iowa's cities.

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Part I: The Path Traveled – 1968 to 1998

In 1968, the voters of Iowa, by an overwhelming vote, approved an amendment to the Iowa Constitution giving cities "home rule power and authority". That amendment was proposed and adopted as a means of repudiating and overturning a long-standing principle of jurisprudence in Iowa known as "Dillon's Rule", named for Supreme Court Justice John Dillon, who established the rule in a series of cases dating back to 1868. Under the Dillon Rule, municipal corporations were deemed to owe their origin to, and to derive their powers and rights wholly from, the state legislature. Without express authority from the legislature to act in any given manner, cities were powerless to act.

The disadvantages of Dillon's Rule were that: (a) a city needed legislation to make sure that it had the necessary express power to carry out its functions of governing; (b) the legislature spent an inordinate amount of time dealing with essentially local matters; (c) the legislature either would fail to grant the power or would hamstring the exercise of the power; and (d) city attorneys were frequently unable to ascertain whether their cities had the necessary authority to act in given circumstances. In sum, Dillon's Rule created a straightjacket of sorts, restricting the power of city governments in local affairs. Dillon's Rule was followed not only in Iowa, but was widely cited and applied by courts in other states.

Early in the twentieth century, a nationwide movement arose to give cities the power to determine their form government and the authority to exercise their municipal powers as they determined to be in the best interests of their citizenry. This concept became known as "home rule". Given that home rule was adopted in Iowa by constitutional amendment, it is now a constitutional right enjoyed by cities and their residents. **Iowa's home rule amendment provides that every city, large and small, has the right to exercise home rule**. The home rule amendment provides as follows:

> *Municipal Corporations are granted home rule power and authority not inconsistent with the laws of the General Assembly to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the General Assembly. The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this State. (Iowa Constitution. Art. III, Sec. 38A)*

Iowa's home rule amendment limits the exercise of home rule power in several ways: home rule power cannot be exercised *inconsistently* with the laws of the General Assembly; it is limited to *local affairs and government*; and it *does not include the power to levy any tax* unless expressly authorized by the General Assembly.

Four years after the home rule amendment was adopted, the legislature enacted a comprehensive piece of legislation (Acts of the 64th General Assembly, Chapter 1088, 1972) which repealed old laws authorizing municipal action in narrow and minute detail, enacted new laws authorizing municipal action in broad, sweeping and unfettered strokes, and outlined the relationship between laws enacted by the legislature and the exercise of home rule power by cities.[1]

[1] Note that home rule for counties followed a decade later, with adoption of a county home rule amendment to the Iowa Constitution in 1978, and with enactment of comprehensive county home rule legislation in 1981. City and county home rule amendments and implementing legislation are for all intents identical, and court decisions as to the exercise of city home rule power apply with equal weight to the exercise of county home rule power, and vice-versa. Consequently, any analysis herein of the exercise of municipal home rule power, and of court cases affecting the exercise of that power, applies equally to the exercise of home rule power by cities or counties.

The home rule amendment directed that home rule power could only be exercised "in a manner *not inconsistent with* the laws that the General Assembly". In the comprehensive legislation which it passed in 1972, the legislature provided the following guidance and rules of construction as to when and in what circumstances the legislature would consider an exercise of home rule power to be " i*nconsistent with the laws of the general assembly:*

(1) "A city may exercise its general powers subject only to limitations *expressly imposed* by a state or city law."
(2) "An exercise of a city power is not inconsistent with a state law unless it is *irreconcilable* with state law."
(3) "A city may not set standards and requirements which are lower or less stringent than those imposed by state law, *but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.*" Sections 364.2 and 364.3, *Code of Iowa.*

The genius of this home rule formulation is that it allows concurrent and harmonious exercise of power by both the state and cities in areas of mutual concern. On one hand, the legislature can regulate in areas of statewide concern with laws that of necessity must employ a one-size-fits-all approach, with remedies suited to state enforcement capabilities and procedures. Home rule, on the other hand, allows cities to regulate in those same areas and to fine tune and tailor similar regulations to fit local conditions, needs and concerns, with remedies suited to their enforcement capabilities. Cities cannot use their home rule power to water-down state standards and requirements, but they can use that power to set more stringent local standards and requirements, and to establish local procedures to enforce those standards and requirements.

It must of course be realized that no matter how broadly or plainly a constitutional or statutory provision is written, there will always be those who will test its limits, requiring the intervention of courts to settle disputes. Thus, although the municipal home rule amendment was much utilized by cities in the first decade after its adoption in 1968, it was tested in the courts, and was there both recognized and accepted. In Bryan v. City of Des Moines, 261 N.W.2d 685 (1978), city police officers challenged the city's adoption of a one year of college education requirement for promotion to police sergeant, contending that the authority to impose promotional requirements was vested exclusively in the civil service commission pursuant to Chapter 400 of the *Code of Iowa*. The Supreme Court determined that it was appropriate for a city council to establish promotional requirements, holding that:

> *"Home rule empowers a city to set standards 'more stringent than those imposed by state law, unless a state law provides otherwise.' Sec 364.3(3), The Code. Any limitation on a city's powers by state law must be expressly imposed. Sec 364.2(2), The Code…."*

City of Council Bluffs v. Cain, (1983) involved a challenge to a city ordinance requiring a city license for the keeping of farm animals in the city under additional and more stringent requirements than was provided in applicable provisions of the *Code*. While the Court recognized that Council Bluffs had home rule power to adopt an ordinance establishing more stringent requirements for the keeping of farm animals, it nonetheless began something of a retreat from the home rule position it staked out in the Bryan case, stating that it was:

> *"a well established principle that municipal governments may not undertake to legislate those matters which the legislative branch of state government has preserved to itself. There are alternative ways for a state legislature to show such a preservation. One is of course by specific expression in a statute. Another is, as defendant suggests, by covering a subject by statutes in such a manner as to demonstrate* ***a legislative intention that the field is preempted by state law****. (Citations omitted). Cities are not necessarily precluded from enacting ordinances on matters which have been the subject of state statute.* ***The traditional test has been whether an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute.****" (Emphasis supplied).*

This is one of the first instances in which the Supreme Court began to consider and give weight to the concept of "preemption" in home rule cases. Preemption is a judicial doctrine, which in application to state law, holds that a state law displaces a local law or regulation that is in the same field and is in conflict or inconsistent with the state law.

Later cases further added to the confusion regarding the true nature and extent of municipal home rule power, and the application of preemption doctrine. Goodell v. Humboldt County (1998) involved the right of county government to adopt ordinances regulating livestock confinement operations pursuant to the county home rule amendment, when the state already regulated such operations. In that case, the Supreme Court acknowledged that there was no Iowa statute expressly preempting a county from regulating livestock confinement, nor did the Court find "any statement that uniformity or statewide regulation is the goal of the general assembly." However, instead of following the precedent set in Council Bluffs v. Cain, the Goodell Court went on to fashion and apply a rule of "*implied preemption*", determining that the county ordinances in question were impliedly preempted by virtue of the legislature's adoption of House File 519, a bill regulating animal feeding operations that had recently been enacted by the general assembly. The Court's implied preemption analysis rested on the proposition that the livestock confinement requirements in the county's ordinances were inconsistent with – irreconcilably in conflict with - state law, because the application of county requirements would necessarily prohibit that activity by persons who complied with the lesser requirements found in state law – House File 519. Which is to say that the county ordinances would prohibit that which was permitted under state law. Further, while state law placed limitations on nuisance suits brought against animal feeding operations based on odors produced by those operations, the county ordinance restricting offsite emissions of hydrogen sulfides provided that in the event of a violation, the county could seek an order of abatement through a civil action in district court. The Supreme Court determined this to be an irreconcilable conflict between the state's regulatory scheme and the county ordinance.

In a long and articulate dissent from the majority opinion in Goodell, Justice Snell conducted an exhaustive review of home rule jurisprudence since inception of the home rule amendment and home rule implementing legislation. Citing the Bryan case and other prior home decisions of the Supreme Court, Justice Snell stated that:

> *"The clear import of these cases applying home rule constitutional and statutory law is that only a high degree of inconsistency will invalidate a local ordinance. Moreover, before a subject area may be deemed to be preempted,* ***the legislature must expressly declare it to be preempted by unambiguous statutory language****. I believe that the legislature in enacting House File 519 did not include unambiguous language of subject-wide preemption that invalidates the Humboldt County ordinances. All of these ordinances fit within the sphere of home rule as authorized by our constitution and statutes." (Emphasis supplied).*

Citing the provision of the county home rule implementing legislation that allows counties, like cities, to "set standards and requirements which are higher or more stringent than those imposed by state law," Justice Snell offered the following concluding observations:

> *"These laws (allowing cities to set higher standards and requirements) are given only passing recognition and are in fact ignored by the majority in its analysis that embraces the idea that "any attempt by a local government to add to [state] requirements would conflict with state law."* ***In deciding this case through this analysis, the majority*** *has failed to follow the precedents set by our cases and* ***has, as Justice Harris decries, returned to the Dillon rule that was rejected by the home rule constitutional amendment. Whether the Dillon rule has been excavated from the grave or preemption has re-emerged under the new name of inconsistency, or inconsistency has swallowed the law permitting higher and more stringent standards, the majority has drained the vitality from home rule. Little is left to local government that could withstand the avarice of an inconsistency meaning so pervasive…."***

> *"If the legislature believes the subject matter of the Humboldt County ordinances should be preempted by state statutes, the law provides the clear means. An express preemption statement of unambiguous language would determine the issue, if that is the will of the legislature. Contentious issues of policy should not be left to travel the circuitous, linguistic paths of the courts". (Emphasis supplied)."*

Part II: The Road Ahead

Since the Supreme Court's decision in Goodell v. Humboldt County, the Iowa Court of Appeals and the Supreme Court have on two occasions interpreted and applied the provision of the home rule implementing legislation which allows cities to "set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." In Beerite Tire Disposal/Recyling v. City of Rhodes (2002), the Court of Appeals was called upon to review the validity of a city ordinance which imposed more stringent requirements on a tire storage facility than did a state law that also regulated the storage of tires. In applying the implied preemption analysis from Goodell, the Court of Appeals first outlined the essential elements of the Humboldt County animal confinement ordinances that resulted in them being held invalid.

> *"The contradictory ordinances in those cases bypassed statutorily-mandated routes to relief, authorized rights of action or created violations which were disallowed by statute (not just merely unmentioned by statute), and/or they regulated action in areas where regulation had been expressly delegated to another entity.*

> *"In contrast the City of Rhodes's ordinances further restrict the already-enforceable restrictions under Iowa Code Section 455D.11, thereby further promoting the underlying policy of that statute, but with greater force: they require a permit for storing a minimum of 100 plus tires, rather than a minimum of 500 plus tires; they limit the storage space to 45,648 cubic feet rather than 50,000 cubic feet; (etc)…."*

The Court of Appeals then concluded that "We find no statutory scheme which would be either bypassed, contradicted, or overridden by the City of Rhodes's tire disposal regulations in the manner that the local livestock confinement regulations contradicted the legislative scheme in Goodell." On that basis, the Court of Appeals upheld the City of Rhodes ordinance.

In City of Davenport v. Seymour (2008), the Iowa Supreme Court was called upon to review the City of Davenport's "Automated Traffic Enforcement" (ATE) ordinance, which authorized the installation of video cameras and vehicle sensors at various locations to make images of vehicles that ran red lights or that were speeding.

The images recorded by the cameras included the license number of each offending vehicle, and resulted in the issuance of a notice of violation to the vehicle's registered owner, advising that the owner's vehicle had been involved in a violation of traffic regulation, and requiring the owner to pay a civil fine. If the owner disputed the violation, a municipal infraction citation would be issued, thereby entitling the owner to a trial before a judge or magistrate.

The ATE enforcement scheme is in contrast to the more traditional traffic law enforcement scheme under Chapter 321 of the *Code of Iowa*, where the driver of a vehicle involved in red light or speeding violation receives a criminal citation (traffic ticket) from a police officer who observes the violation. If the driver pleads guilty or is found guilty at trial, he or she is then required to pay a criminal fine established by state law, and the violation is reported to the IDOT where it becomes a blemish on the violator's driving record.

Defendant Seymour received notice of a speeding violation under the ATE ordinance, and the violation was eventually tried in a civil proceeding in magistrate's court, where he alleged that the ordinance was invalid because it was preempted by Chapter 321 of the *Code*. Seymour's claims were rejected in the lower courts, resulting in his appeal to the Iowa Supreme Court.

In its opinion in City of Davenport v. Seymour (Seymour), the Supreme Court first engaged in an analysis of preemption principles found in its prior cases, outlining the three types of preemption that it recognizes.

Express Preemption

The first and most obvious type of preemption recognized by the Court was *express preemption*. Express preemption is the easiest kind of preemption to recognize, as when for instance the legislature amended the new statewide plumbing code to provide that after January 1 of 2009, all plumbing and mechanical licensing provisions adopted by governmental subdivisions would be null and void.

The Seymour Court then went on to identify two types of *implied preemption* that it had recognized – field preemption and conflict preemption.

Field Preemption

The Seymour Court outlined the attributes and theory of "field preemption", stating that field preemption

> *"occurs when the legislature has so covered a subject by statute as to demonstrate a legislative intent that regulation in the field is preempted by state law. Like implied preemption based on conflict, the test for field preemption is stringent. Extensive regulation of an area alone is not sufficient…. In order to invoke the doctrine of field preemption, there must be some clear expression of legislative intent to preempt a field from regulation by local authorities, or a statement of the legislature's desire to have uniform regulations statewide…. The notion behind field preemption is that the legislature need not employ "magic words" to close the door on municipal authority. Yet, courts are not to speculate on legislative intent, even in a highly regulated field. There must be persuasive concrete evidence of an intent to preempt the field in the language that the legislature actually chose to employ…. Field preemption is a narrow doctrine that cannot be enlarged by judicial policy preferences. In determining the applicability of field preemption, this court does not entertain arguments that statewide regulation is preferable to local regulation or vice versa, but focuses solely on legislative intent as demonstrated through the language and structure of a statute.*

Conflict Preemption

According to the Court, under the conflict preemption branch of implied preemption, the theory "is that even though an ordinance may not be expressly preempted by the legislature, the ordinance cannot exist harmoniously with a state statute because the ordinance is diametrically in opposition to it." The Court further observed that the legal standard for its application is demanding.

"In order to qualify for this branch of implied preemption, a local law must be 'irreconcilable' with state law…. (O)ur cases teach that, if possible, we are to "interpret the state law in such a manner as to render it harmonious with the ordinance…. In applying implied preemption analysis, we presume that the municipal ordinance is valid. The cumulative result of these principles is that for implied preemption to occur based on conflict with state law, the conflict must be obvious, unavoidable, and not a matter of reasonable debate.

In Seymour, the Supreme Court was first asked to declare the Davenport ATE ordinance preempted under field preemption. The argument was that the state has a comprehensive system of traffic enforcement which is found in Chapter 321 of the *Code*, and that Section 321.235 declares that all traffic laws in the state have to be uniform. This provision invites the conclusion that in adopting Chapter 321, it was the legislature's intention to preempt the field of traffic regulation. However, Section 321.235 also provides that "(L)ocal authorities may…adopt a*dditional traffic regulations*…not in conflict with the provisions of this chapter." The Supreme Court concluded that given the provision allowing additional local traffic regulations, it could not conclude there was a legislative intent to preempt the field of traffic regulation.

The Davenport ordinance was also challenged under the conflict preemption theory of implied preemption because the ordinance enforced speeding and red light violations in a manner allegedly inconsistent with the state's enforcement scheme. The Davenport ordinance enforced such violations by issuance of a civil citation to the owner of the vehicle, requiring the payment of a civil penalty, whereas the state enforced such violations by issuance of a criminal citation, resulting in the assessment of a fine. Addressing this argument, the Court stated that:

> *"In order to be 'irreconcilable', the conflict must be unresolvable short of choosing one enactment over the other. No such bitter choice is presented in this case. The Davenport ATE ordinance simply cannot be said to authorize what the legislature has expressly prohibited, or to prohibit what the legislature has authorized. Nothing in (the Iowa Code) addresses the question of whether a municipality may impose civil penalties on owners of vehicles through an ATE regime. Whether such penalties may be imposed by a municipality can only be characterized as a question which the legislature did not address."*

The Supreme Court concluded that the nub of the preemption issue is whether an old rule of statutory construction applies in home rule cases. That rule of construction ("Expressio unius est exclusio alterius") translates literally to "the expression of one thing is the exclusion of other things." Applied in the context of a statutory requirement, it would mean that if a statute provides that a statutory mandate be carried out in one way, it implies a prohibition against doing it another way. So if state law says that speeders and red light violators are to get a criminal citation and pay a criminal fine, does this statutory rule of construction mean that cities are prohibited from doing it another way – are they prohibited from charging the owner of the vehicle with a civil infraction violation and levying a civil penalty?

The Supreme Court concluded that this rule of statutory construction should not be applied to invalidate an exercise of home rule power, stating that

> *"Unless the long-deceased Dillon Rule is resurrected, the notion that the mere failure of the legislature to authorize invalidates municipal action is without merit. Under our case law, the state statute and the municipal action must be irreconcilable. The fact that state law does not authorize the state to enforce its statute through certain remedial options does not mean that it forbids municipalities from the same course of action. In the context of state-local preemption, the silence of the legislature is not prohibitory but permissive."*

In City of Sioux City v. Jacobsma (2015), the Supreme Court upheld the Seymour decision. In the case, Jacobsma was issued a citation for speeding under the city's ATE ordinance and sought dismissal of the citation, claiming enforcement of the ordinance violated the due process clauses of the Iowa and Federal Constitutions, the inalienable rights clause of the Iowa Constitution, and the home rule amendment that prohibits cities from enacting ordinances that conflict with state law.

Similar to the Seymour case, Jacobsma claimed the city's ATE ordinance was invalid because it was preempted by Chapter 321 of the *Code*. The Court again cited Section 321.235 as providing cities the ability to adopt additional traffic regulations not in conflict with the state code and found that the state code was not irreconcilable with the city's ATE ordinance.

In another recent case, Madden v. City of Iowa City and State of Iowa (2014), the Supreme Court was called upon to review a Johnson County District Court decision in a tort lawsuit where the City of Iowa City had been sued by a cyclist who had been injured in a fall on a city sidewalk abutting University of Iowa property, wherein the allegation of negligence was that the sidewalk had not been maintained in a safe condition. The city moved to add the State of Iowa as a third-party defendant, arguing that the city had adopted an ordinance permitted under *Code* Section 364.12(2)(c) providing that *"the abutting property owner shall maintain the sidewalk in a safe condition, in a state of good repair, and free from defects", and that "(T)he abutting property owner may be liable for damages caused by failure to maintain the sidewalk."*

The District Court granted the city's motion and the city then filed a cross-petition against the state alleging entitlement to contribution. The state then filed a motion to dismiss the city's cross-claim alleging, among other things, that the claim was fatally flawed because while Section 364.12(2)(c) imposes a duty on an abutting property owner to maintain the sidewalk, it does not impose liability for failure to do so.

The District Court overruled the state's motion to dismiss, and the state appealed. In its appeal, the state contended that the provisions of *Code* Section 364.12(2)(c) do not shift liability to abutting property owners for failure to maintain or repair sidewalks, arguing that at common law there is no negligence action for sidewalk maintenance against the abutting landowner. The state takes the position that the statute does not alter the common law rule, but only requires an abutting land owner *to maintain* the sidewalk. The state argues that if the abutting property owner fails to repair the sidewalk after notice, the city's only option is to perform the work and bill the abutting landowner "for collection in the same manner as a property tax under Iowa Code § 364.12(2)(d) - (e)."

The city countered that the *Code* does not expressly preempt a city's imposition of liability for sidewalk maintenance and repair on abutting landowners, and as a result, the case turns on implied field and conflict preemption.

After determining that the state had not claimed that the legislature had expressly preempted Iowa City's ordinance, and that the state had not claimed that the legislature had enacted a comprehensive regulatory framework allowing them to apply implied field preemption analysis to the ordinance, the Court concluded that Iowa City's ordinance was not preempted, offering the following analysis:

> *"Although we think it quite clear that Iowa Code Section 364.12(2)(b) does not create a stand-alone cause of action for damages with respect to the failure of an abutting landowner to maintain or repair sidewalks, nothing in the statute expressly or impliedly prohibits cities from doing so. The statute indicates an abutting property owner "may be required" by ordinance to maintain property, Iowa Code § 364.12(2)(c), but does not prohibit an ordinance that also creates a damages remedy. While legislative silence on the issue may be a powerful indicator that the legislature has not created an implied cause of action under the statute, we do not think legislative silence can be interpreted as a prohibition of local action under home rule in light of our obligation to harmonize and reconcile a statute with an ordinance whenever possible. In order to be irreconcilable, the conflict must be "obvious, unavoidable, and not a matter of reasonable debate." (citations omitted). Here, there is no such conflict between the statute, which relates to maintenance of sidewalks, and the City's ordinance, which expressly states that abutting landowners are liable for damages resulting from sidewalk defects."*

Conclusion

In the Seymour case, it is clear that a majority of the Supreme Court was uncomfortable with the analysis of implied preemption put forth in the Goodell decision. A five-justice majority of the Court recognized and imposed upon itself significant constraints in the application of the implied preemption doctrine, and now recognizes that just because the legislature has authorized something to be done one way, it doesn't necessarily preclude cities from doing it another way. In Madden, the Supreme Court faithfully applied the rigorous implied preemption tests and limitations that it imposed upon itself in Seymour.

While Seymour and Madden chart a more encouraging course forward in home rule jurisprudence, it remains to be seen if the Court's self imposed constraints on the use of implied preemption will prevent further unwarranted intrusions into municipal home rule power.

This more favorable analysis of implied preemption in Seymour and Madden still falls short of the import of Justice Snell's dissent in Goodell, where he urged the rejection of the doctrine of implied preemption as a reincarnation of the Dillon Rule, and a return to the Bryan Court's recognition that cities and counties do indeed have home rule power to "set standards and requirements which are higher or more stringent than those imposed by state law," even if it means that on occasion a city or county prohibits something that the state permits. The power of cities and counties to set more stringent standards and requirements should be recognized and upheld, even if it results in the prohibition of something that the state permits, because the legislature ceded that power to cities and counties unless a state law provides otherwise. Under the legislature's own proscription, a state law "providing otherwise" is a limitation that must be "expressly stated."

Finally and most importantly, cities must continue to freely exercise and zealously preserve the powers granted to them by Iowa's electorate under the home rule amendment to the Iowa Constitution. Not only must cities resist challenges to their home rule powers under an overreaching preemption doctrine, but they must also resist the urge to seek explicit authority from the legislature to act when the home rule amendment provides them all the authority they need.

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We also acknowledge as a resource the scholarly analysis of Iowa home rule jurisprudence found in Mr. Jay P. Syverson's Fall 2008 Drake Law Review article, "The Inconsistent State of Municipal Home Rule in Iowa".