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SPRINGFIELD

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FILE NO. 82-036

HOME RULE:
Powers of Home
Rule Units

Honorable Edward F. Petka
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Courthouse
Joliet, Illinois 60431

Dear Mr. Petka:

I have your letter in which you inquire whether a home rule unit may enact an ordinance authorizing the establishment and operation of a gambling casino within its boundaries. For the reasons hereinafter stated, I agree with your conclusion that the enactment of such an ordinance would exceed the powers granted to home rule units by the constitution.

It is within the plenary police power of the State to regulate or completely prohibit all forms of gambling. (Finish Line Express, Inc. v. City of Chicago (1978), 72 Ill. 2d 131, 138-40; Booth v. People (1900), 186 Ill. 43, 49.) Through the

exercise of its police power, the State has enacted, as part of its uniform criminal code, a comprehensive regulatory scheme which prohibits gambling activities.

With regard to the application of the provisions of the Criminal Code of 1961, section 1-5 thereof (Ill. Rev. Stat. 1981, ch. 38, par. 1-5) provides in pertinent part:

> "State Criminal Jurisdiction. (a) A person is subject to prosecution in this State for an offense which he commits, while either within or outside the State, by his own conduct or that of another for which he is legally accountable, if:
>
> (1) The offense is committed either wholly or partly within the State; * * *
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> * * * "

Section 2-12 of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 2-12) provides:

> "'Offense'. 'Offense' means a violation of any penal statute of this State."

Based upon these provisions, it is clear that a person is subject to prosecution under the provisions of the Criminal Code of 1961 whenever that person violates a penal statute anywhere within the State.

Section 28-1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 28-1) provides in part:

> "Gambling. (a) A person commits gambling when he:
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> (1) Plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section; or

> (2) Makes a wager upon the result of any game, contest, or any political nomination, appointment or election; or
>
> (3) Operates, keeps, owns, uses, purchases, exhibits, rents, sells, bargains for the sale or lease of, manufactures or distributes any gambling device; or
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> * * *
>
> (5) Knowingly owns or possesses any book, instrument or apparatus by means of which bets or wagers have been, or are, recorded or registered, or knowingly possesses any money which he has received in the course of a bet or wager; * * *
>
> * * * "

Additionally, section 28-3 of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 28-3) provides in pertinent part:

> "Keeping a Gambling Place. A 'gambling place' is any real estate, vehicle, boat or any other property whatsoever used for the purposes of gambling. Any person who knowingly permits any premises or property owned or occupied by him or under his control to be used as a gambling place commits a Class A misdemeanor. Each subsequent offense is a Class 4 felony. * * *
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> * * * "

The operation of a gambling casino would necessarily result in the violation of sections 28-1 and 28-3 of the Criminal Code of 1961. Therefore, in order to respond to your question, it must be determined whether home rule units possess the power to supersede the provisions of the Criminal Code of 1961 by enacting conflicting ordinances which pertain to the same subject as the Code.

The powers of home rule units are set forth in article VII, section 6 of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VII, § 6), which provides in pertinent part:

"SECTION 6. POWERS OF HOME RULE UNITS

(a) * * * 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.

* * *

(d) A home rule unit does not have the power * * * (2) to define and provide for the punishment of a felony.

(e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months * * * .

* * * "

(Emphasis added.)

It has been held in certain circumstances that an ordinance enacted by a home rule unit pursuant to the powers granted by section 6(a) of article VII of the Constitution will supersede a conflicting statute. (See City of Evanston v. Create, Inc. (1981), 85 Ill. 2d 101, 108-09.) Therefore, the question which arises is whether an ordinance authorizing casino gambling pertains to the government and affairs of a home rule unit and thus, could supersede the provisions of the Criminal Code of 1961 within the boundaries of the unit. The resolution of that question calls for an analysis of section 6 of article VII and, in particular, the phrase "pertaining to its government and affairs".

If the regulation or prohibition of gambling is a matter pertaining to the government and affairs of a home rule unit, that unit is free to legislate on the subject without reference to article 28 of the Criminal Code of 1961. If, however, it is a matter of state-wide concern, not pertaining to a home rule unit's government and affairs, such unit may exercise only such powers in that respect as are granted to it by the General Assembly. See Ampersand Inc. v. Finley (1975), 61 Ill. 2d 537, 542-43; see also City of Chicago v. Clark (1935), 359 Ill. 374, 376-77; Ill. Rev. Stat. 1981, ch. 24, par. 11-5-1; ch. 85, par. 2301 et seq.

In its report to the Sixth Constitutional Convention, the Committee on Local Government stated with reference to the creation of home rule units and the grant of powers thereto:

> " * * *
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> * * * The intent of * * * the Committee's proposal, is to give broad powers to deal with local problems to local authorities * * *." (Emphasis added.) (7 Record of Proceedings, Sixth Illinois Constitutional Convention 1622 (hereinafter cited as Proceedings).)

In explaining the nature of the proposed grant of home rule powers, the Committee also stated in its report:

> " * * *
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> * * * It is clear * * * that the powers of home-rule units relate to their own problems, not to those of the state or the nation. Their powers should not extend to such matters as divorce, real property law, trusts, contracts, etc. which are generally recognized as falling within the competence of state

> rather than local authorities. Thus the proposed grant of powers to local governments extends only to matters 'pertaining to their government and affairs.' * * *" (7 Proceedings 1621.)

Although it was intended that home rule units be granted broad powers:

> "* * * Section 6(a) of Article VII gives a home rule unit authority to exercise only those powers and to perform only those functions 'pertaining to its government and affairs.' * * *
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> The 'pertaining to . . .' language of section 6(a) was designed to restrict home rule powers to local subjects. * * *
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> * * * "
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> (Emphasis added.) (Baum, A Tentative Survey of Illinois Home Rule (Part 1): Powers and Limitations, 1972 U.Ill. L.F. 137, 152-53.)

In construing a constitutional provision, it is proper to consult the debates of the members of the Convention which framed it. (People ex rel. Keenan v. McGuane (1958), 13 Ill. 2d 520, 527; Vil. of Elmwood Park v. Forest Preserve of Cook Co. (1974), 21 Ill. App. 3d 597, 600.) Constitutional provisions should be construed to effectuate the intent of the framers. People v. Turner (1964), 31 Ill. 2d 197, 199; Walinski v. Morrison & Morrison (1978), 60 Ill. App. 3d 616, 619.

The debates concerning the adoption of proposed section 3.1 of the Report of the Local Government Committee (subsequently adopted in substance as subsection 6(a) of the Local Government Article) provide little guidance on the scope

of powers of home rule units to enact penal ordinances. Those debates most illustrative of the intent of the Convention with regard to the powers of home rule units to legislate in the area of criminal law, concerned the adoption of proposed section 3.4 of the Report of the Local Government Committee (subsequently adopted in substance as subsection 6(d)(2) of the Local Government Article). Proposed section 3.4 provided that the police powers of home rule units did not include the power to define or provide for the punishment of felonies. (7 Proceedings 1579.) Upon first reading, Delegate Weisberg offered an amended section 3.4 which would have denied home rule units the power to define any crime or to punish violations of local ordinances by other than reasonable fines, unless authorized by the General Assembly. (4 Proceedings 3127; see generally Anderson and Lousin, From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Illinois Constitution (1976), 9 J. Mar. J. Prac. & Proc. 698, 752-53.) It is evident from the debate on adoption of proposed section 3.4 that the delegates contemplated that any exercise of police power by a home rule unit would be required to conform to and be consistent with the State's uniform criminal code provisions, and could not supersede a conflicting statute.

Delegate Butler, summarizing the intended effect of the Committee's proposal as regards the provisions of the State's uniform criminal code, indicated that a home rule

unit's power to enact ordinances was subordinate to the State's power:

" * * *

> * * * The fact that a city doesn't enact an ordinance making something punishable for its violation does not mean that a violator, or a person who does violate the law--the state statute--could not then be prosecuted. In other words, I do not believe that we will have a void situation where somebody can come in and undertake to commit an act--to do an act--which would be a violation if there were an ordinance to take care of it. Anytime you have a violation, I think, any place in the state, of a state statute, it doesn't matter whether or not the city or county has enacted an ordinance of similar import. The person who has violated the state statute can still be prosecuted under that. I cannot conceive of a situation where a person could run inside a city and commit some kind of an act which would be punishable by the state statute but not be susceptible to prosecution because he commits the act within the corporate limits of the city, when perhaps if he were out in the county, he could be prosecuted for the violation of the state statute.
>
> * * * "

(Emphasis added.) (4 Proceedings 3134.)

Delegate Weisberg, summarizing his proposed amendment, expressed the intent that a home rule unit's enactment of penal ordinances would have to be consistent with the State's criminal laws:

" * * *

> The only intention and significance of the amendment which you are now about to vote on is to assure that the cities will not have the authority to create entire new bodies of criminal law of their own with severe sentences without people knowing what their laws are--because, as Delegate Kinney pointed out, you can't even find the ordinances--without the protection that the defendant has to be proved guilty

> beyond a reasonable doubt, and without the other protections that the action has to be consistent--
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> * * *
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> * * * --and without the protection that the criminal laws that would go beyond those already in existence at the local level would have to be consistent with the criminal laws of the state." (Emphasis added.) (4 Proceedings 3135.)

It is apparent from the statements of both proponents and opponents of the Local Government Committee's proposed section 3.4 that the general grant of powers to home rule units did not extend to the enactment of penal ordinances inconsistent with the State's uniform criminal statutes. (See generally 4 Proceedings 3127-3138.)

Later in the debate, Delegate Parkhurst proposed the addition of a limitation upon the powers of home rule units to punish by imprisonment for more than six months except as provided by the General Assembly. This limitation was adopted and became subsection 6(e)(1) of article VII. In explaining the proposal, Delegate Parkhurst stated:

> " * * * The amendment, which is really not mine--this is a composite of the committee's thinking--the majority of the committee--and Delegate Weisberg and others--is before you, I believe. Let me briefly explain it.
>
> You will recall the discussion and the amendment by Delegate Weisberg the first time around on 3.4, which in its essence was this: The proposal of the majority now only limits the powers of home rule units to define and provide for the punishment of a felony. It was suggested by Delegate Weisberg through his amendment that the possible declaration and punishment

> for a misdemeanor was, therefore, unlimited; and since by definition a felony is a crime for which punishment--for which imprisonment in the penitentiary is the sanction, that if we don't provide for some other limitation on the power for punishing for a misdemeanor for which there is potential imprisonment in the county jail, we have opened up the possibility that a local home rule unit could assess a fine for an ordinance violation of $10 or twenty years in jail; and that is not the intention of the committee. And this amendment is an attempt to restate what is the statute law now in the state of Illinois and to provide that will be the limitation on criminal punishments by local home rule units, unless the General Assembly provides otherwise." (Emphasis added.) (4 Proceedings 3360.)

Delegate Parkhurst was apparently referring in his comments to section 1-2-1.1 of the Illinois Municipal Code, which had been specifically mentioned by Delegate Weisberg earlier in the debates. (See 4 Proceedings 3137.) Section 1-2-1.1 of the Illinois Municipal Code (Ill. Rev. Stat. 1981, ch. 24, par. 1-2-1.1), which was in effect at the time of the debates concerning the passage of section 3.4 of the proposed Local Government Article, provides in pertinent part:

> "The corporate authorities of each municipality may pass ordinances, not inconsistent with the criminal laws of this State, to regulate any matter expressly within the authorized powers of the municipality, or incidental thereto, making violation thereof a misdemeanor punishable by incarceration in a penal institution other than the penitentiary not to exceed 6 months * * *
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> * * * "
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> (Emphasis added.)

It is apparent that the framers of the Constitution did not intend to grant to home rule units the power to super-

sede provisions of the State's uniform criminal code by the enactment of inconsistent ordinances. Rather, it is clear that home rule units possess only such powers in this area as those possessed by municipalities prior to the adoption of the Illinois Constitution of 1970 -- the power to enact penal ordinances complementary to the State's uniform criminal code, so long as such ordinances are not inconsistent with State criminal statutes pertaining to the same subject. Arrington v. City of Chicago (1970), 45 Ill. 2d 316; Brown v. City of Chicago (1969), 42 Ill. 2d 501; Ill. Rev. Stat. 1981, ch. 24, par. 1-2-1.1.

Further, in People v. Valentine (1977), 50 Ill. App. 3d 447, the court addressed the precise issue presented here: if a home rule municipality's ordinance conflicts with a provision of the State's statutes pertaining to criminal law and procedure, does the local ordinance supersede the inconsistent statute? It was stated therein, at 451-52:

" * * *

> The city of Carbondale is a home rule municipality. It has broad powers to enact ordinances regulating its own affairs in matters relating to public health, safety, morals and welfare (Ill. Const. 1970, art. VII, § 6(a)); however, the statute here under consideration is an integral part of the comprehensive law of Illinois dealing with criminal law and procedure, specifically criminal identification and investigation (Ill. Rev. Stat. 1975, ch. 38, par. 206-1 et seq.) and is a traditional area of statewide legislation and concern. The city suggests that the statute is in conflict with a city ordinance, although no ordinance conflicting with section 5 has been

> called to our attention. If such an ordinance does exist it must yield to the supremacy of State law in an area where, by the nature of the subject matter and its comprehensive regulation by the State for many years, State power to act must be deemed exclusive. In other words, this is not an area pertaining to the government and affairs of the city, and therefore, an appropriate subject for the exercise of municipal home rule power. We would note that the expungement provisions of the statute are concerned with the right of privacy of all persons, regardless of residence or place of arrest. [Citations.]
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> While the home rule provisions of the Illinois Constitution of 1970 have changed the relationship of the State to home rule municipalities and counties in many respects (see Ill. Const. 1970, art. VII, §6), the State still retains the general power to control its political subdivisions.
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> * * *
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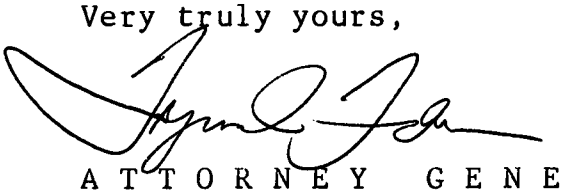
> (Emphasis added.)

Article 28 of the Criminal Code of 1961 is clearly "an integral part of the comprehensive law of Illinois dealing with criminal law and procedure", and further, is concerned with the rights and liabilities of all persons, regardless of residence or place of arrest.

Therefore, it is my opinion that the home rule powers granted by article VII, section 6 of the Illinois Constitution of 1970 do not authorize a home rule unit to enact ordinances inconsistent with provisions of the Criminal Code of 1961. Since an ordinance such as you have described exceeds the powers granted to a home rule unit, it would be ineffective to preclude the prosecution and conviction of persons violating

the provisions of article 28 of the Criminal Code of 1961 within the unit's boundaries.

Very truly yours,



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