

Law Offices

HOLLAND & KNIGHT LLP

131 South Dearborn Street
30th Floor
Chicago, Illinois 60603

312-263-3600 Phone
312-578-6666 Fax
<http://www.hklaw.com>

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MEMORANDUM

Peter M. Friedman
312-578-6566

Internet Address:
peter.friedman@hklaw.com

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TO: Metropolitan Mayors Caucus

FROM: Peter M. Friedman
Holland & Knight LLP

RE: Affordable Housing Planning and Appeal Act
Home Rule Application

We serve on the Caucus' Ad-hoc Model Affordable Housing Plan Committee. We have been asked by the Housing Director and the Caucus to give our opinion on whether Public Act 93-5095, the Affordable Housing Planning and Appeal Act, 310 ILCS 67/1 et seq. ("**Affordable Housing Act**"), applies to Illinois home rule units of local government.

Based on the recognized methods of preemption authorized under the Illinois Constitution and Illinois Supreme Court cases, it is our opinion that the Affordable Housing Act does not preempt home rule authority and thus does not apply to home rule units of local government. We note, however, that the Illinois Housing Development Authority ("**IHDA**") has indicated its belief that the Affordable Housing Act does preempt home rule and apply to home rule governments. Thus, notwithstanding our view and the analysis below, we caution home rule municipalities that choose not to comply with the Affordable Housing Act that IHDA may challenge that position in the future.

We also note that legislation has been introduced in the General Assembly (SB 2724) to make several changes to the Affordable Housing Act. In considering SB 2724, the legislature might be urged to consider taking the steps

(and securing the requisite votes) to confirm or otherwise clarify whether the statute was intended to preempt home rule authority.

I. The Affordable Housing Act.

A. Determination of "Exempt" and "Non-Exempt" Local Governments

Under the Affordable Housing Act, beginning January 1, 2006, IHDA is required to identify "exempt" and "non-exempt" local governments. IHDA is required to publish the list of exempt and non-exempt local governments on an annual basis thereafter.

A local government will be "non-exempt" if less than 10 percent of its total year-round housing units are "affordable." Local governments that exceed the 10 percent minimum will be "exempt" and will not be required to comply with the specific affordable housing planning requirements of the Act. Under Sections 30(a) and 30(b) of the Act, an "exempt" local government also will not be subject to appeals to the newly created State Housing Appeals Board.

As used in the Act, the terms "exempt" and "non-exempt" do not relate to whether the Act applies to home rule governments. In light of our opinion that the Act does not apply to home rule governments, IDHA's "exempt" and "non-exempt" determinations should only be made from the pool of non home rule Illinois local governments. Home rule units are not subject to being identified by IDHA as "non-exempt" under the Act.

B. Affordable Housing Plans.

Notwithstanding IHDA's January 1, 2006 start date for reporting, the Act requires all applicable (i.e., non home rule) local governments that do not meet the exempt requirements to approve an affordable housing plan prior to July 1, 2004.¹ The affordable housing plan must provide the following information: (1) the total number of affordable housing units required for the local government to reach exempt status under the Act; (2) identification of lands that are appropriate for affordable housing; (3) incentives that the local government may provide to affordable housing developers; and (4) a stated goal that 15 percent of all new development will provide affordable housing, or that the current affordable housing stock in the local government will increase 3 percent, or that the local government will achieve the overall 10 percent affordable housing threshold.

¹ This discrepancy is one of the changes to the Affordable Housing Act being consider as part of SB 2724.

C. Appeals.

The Act provides an appeal procedure for aggrieved developers of affordable housing. Beginning January 1, 2009, developers of affordable housing that have an application denied, or that have an application approved with conditions that the developer feels will render the provision of affordable housing infeasible, may appeal the decision to a new State Housing Appeals Board created under the Act. Prior to January 1, 2009, the Board will act solely as an information repository. However, after January 1, 2009, the Board will have the authority to overturn local government actions regarding the challenged decisions. The Board is prohibited, however, from interfering with a decision based on local requirements that protect the public health and safety, including building, electrical, fire, and plumbing code requirements. Decisions of the Board may only be appealed directly to the Illinois Appellate Court.

As previously noted, a non home rule government that IDHA determines is "exempt" – that is, a government that meets the 10 percent affordable housing minimum requirement -- is not subject to the appeal process of the new Housing Appeals Board.

II. Home Rule Preemption

You asked us specifically whether the Affordable Housing Act applies to home rule local governments. We understand that IDHA, which is the agency charged with overseeing compliance with the Act, has at least informally asserted that affordable housing is a matter of exclusive statewide concern, as opposed to local concern, and that the Act therefore impliedly preempts home rule. We do not agree that the Affordable Housing Act preempts home rule.

The Illinois Constitution sets forth three specific methods for the State to preempt home rule powers.

First, the General Assembly may expressly pre-empt home rule authority by a three-fifths vote (Ill. Const., Art. VII, Sec. 6(g)). The Illinois Supreme Court has held that the mere fact that the General Assembly passes a law relating to the powers of municipalities generally does not mean that the law restricts home rule power -- instead, the General Assembly must include an explicit statement that it intends to restrict the powers of home rule municipalities. *See Scadron v. City of Des Plaines*, 153 Ill. 2d 164, 187 (1992) (*quoting Rozner v. Korshak*, 55 Ill. 2d 430, 435 (1973)). The Affordable Housing Act does not contain any explicit home rule preemption.

Second, the General Assembly may specifically provide for the State to exercise a power exclusively (Ill. Const., Art. VII, Sec. 6(h)). Under this Section, the General Assembly must make an express statement that the subject is one of

purely statewide interest. See *Schillerstrom Homes, Inc. v. City of Naperville*, 198 Ill. 2d 281, 291 (2001). The Affordable Housing Act does not contain any express statement that affordable housing is purely a statewide interest. Moreover, the State has not exercised authority exclusively over affordable housing under the Affordable Housing Act. Rather, the Act requires each non-exempt local government to establish its own plans and policies for achieving levels of affordable housing that will vary among communities based on decisions that communities will make locally. Such a legislative structure is not consistent with the type of exclusivity that courts have recognized as triggering a home rule preemption.

Third, Article VII, Sec. 6(i) of the Illinois Constitution provides that home rule units may exercise powers and perform functions concurrently with the state, "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." The Affordable Housing Act does not specifically limit local governments' concurrent exercise or specifically declare the State's exercise to be exclusive. To the contrary, as noted above, the Affordable Housing Act calls for local exercise of authority and discretion in establishing plans and implementing regulations relating to affordable housing.

The Affordable Housing Act does not preempt home rule powers under any of these three Constitutional methods.

The only other way that the Affordable Housing Act could be deemed to apply to home rule governments, is to argue that the subject of the Act – the provision of affordable housing – does not fall within the general home rule powers of home rule governments (i.e., the provision of affordable housing does not pertain specifically to the “government and affairs” of home rule units and is not a matter of purely local concern) (Ill. Const., Art. VII, Sec. 6(a)).

In this regard, the following should be noted:

- While the State may have adopted affordable housing policies, including the Governor's Executive Order No. 2003-18, establishing a comprehensive housing initiative, the mere existence of even a comprehensive statutory scheme like the Affordable Housing Act does not produce an inadvertent preemption or the conclusion that a specific matter is beyond home rule authority. *Chicago Park District v. City of Chicago*, 111 Ill. 2d 7 (1986).
- "Whether a particular problem is of statewide rather than local dimension must be decided not on the basis of a specific formula or listing set forth in the Constitution but with regard for the nature and extent of the problem, the units of government which have the

most vital interest in its solution, and the role traditionally played by local and statewide authorities in dealing with it." *Schillerstrom Homes*, 198 Ill. 2d at 290 (quoting *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 501 (1984)).

- In connection with the Affordable Housing Act, it does not expressly pre-empt home rule authority. Additionally, because the Act itself calls upon each affected municipality to develop its own affordable housing plan, it cannot be claimed that the State has decided to exercise exclusively authority relating to affordable housing. Moreover, the purpose of the Act (Section 10) makes plain that, while affordable housing may be a concern of the State, the Act is intended to have "counties and municipalities ... meet the [affordable housing] needs of their county or community."
- While the floor debate and legislative history of the Affordable Housing Act is neither binding nor crystal clear, there are numerous statements and representations by House members that the Act was not intended to apply to home rule. There is also an indication that the House Parliamentarian opined that the Act did not preempt home rule.

In light of all of this, we believe that the Act does not apply to home rule local governments. The bases for pre-empting home rule powers do not appear obvious or sufficient in the Act. Needless to say, no court has yet ruled on this issue. The ultimate determination regarding the applicability of the Act to home rule units may have to await clarification from the General Assembly (see below) or the courts.

III. Pending Legislation.

On February 4, 2004, Senator Jeff Schoenberg introduced SB 2724 to make various changes to the Affordable Housing Act. The changes proposed in SB 2724, and in subsequent amendments filed regarding this legislation, relate to various deadlines and timing provisions of the Act, as well as to the definition of low and moderate-income housing.

The pending legislation does not, however, contain any provisions regarding home rule. In light of the uncertainty held by local and state government officials and attorneys as to whether the Act was intended to preempt home rule, the Caucus should urge the General Assembly to clarify and confirm this issue in conjunction with other changes to the Act. This clarification should be made now, during the 93rd General Assembly, so that home rule governments can determine whether they have requirements and obligations under the Act.