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THE POWERS OF MUNICIPAL CORPORATIONS

CHESTER J. ANTEAU*

Non-home rule cities possess those powers expressly conferred upon them by state constitutions and legislatures. There are customarily general grants of power to contract, sue and hold property to all cities of the state1 and, in addition thereto, there are innumerable grants of specific powers scattered through the statutes of every non-home rule state.2 Non-home rule cities also possess rather restricted implied powers. The orthodox position is that of Mr. Chief Justice Waite of the United States Supreme Court: "Municipal corporations . . . have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No power can be implied except such as are essential to the objects and purposes of the corporation. . . ."3 Unanimity in recognition of the rule has not, however, produced uniformity of result. As elsewhere, application of a subjective standard has produced a considerable diversity of holding, and there are conflicting decisions concerning the "necessary implications" to be drawn from the express grant of almost every particular power.4 Customarily such a narrow interpretation is applied even to the "general welfare clauses" usually contained in general legislative grants of power to municipalities,5 although there are well-reasoned decisions refusing to apply a rule of strict construction to these clauses.6

*Professor of Law, Detroit College of Law.
1. E.g., KAN. GEN. STAT, § 12-101 (1935); ILL. REV. STAT. c. 24, art. 23 (1949); OKLA. STAT. Tit 11, § 568 (1941).
2. Following a holding that the power to create crimes can not be delegated to counties, State ex rel. Keefe v. Schmiege, 251 Wis. 79, 28 N.W. 2d 345 (1947), it was claimed that the power to create crimes can not be delegated to municipalities, Note, 27 NEB. L. REV. 473 (1948). This conclusion is unsound and the frequent legislative authorizations of municipal power to create and punish crimes are clearly valid. See Note, 2 OKLA. L. REV. 98 (1949).
4. Compare State v. City of Hutchinson, 144 Kan. 700, 62 Pac. 2d 865, (1936); Attorney-General v. Common Council of Detroit, 150 Mich. 310, 113 N.W. 1107 (1907); Schneider v. Menasha, 118 Wis. 298, 95 N.W. 94 (1903); Ellinwood v. Reedsburg, 91 Wis. 131, 64 N.W. 885 (1895).
6. "... general welfare clauses are not useless appendages to the charter powers of municipal corporations. They are designed to confer other powers than those especially named. The difficulty in making specific enumeration of all such powers as may be properly delegated to municipal corporations renders it necessary to confer such powers in general terms." City of St. Louis v. Schoenbusch, 95 Mo. 618, 622, 8 S.W. 791, 792, (1888). See also Gundling v. City of Chicago, 176 Ill. 340, 52 N.E. 44 (1898), and Gardenhire v. State, 26 Ariz. 14, 221 Pac. 228 (1923).

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Home rule cities possess those powers expressly conferred by legislatures upon all cities of the state, and those necessarily implied therefrom. In addition thereto, the constitutional and statutory home rule provisions frequently confer specific powers upon home rule cities. Beyond this, the scope of further powers of home rule cities is a subject of varying judicial decision. Some courts, such as those of Michigan, have interpreted home rule to additionally confer only powers "essential" or "necessary" to "local self-government." When these courts recognize an exclusive or plenary power over "local" affairs in home rule cities, they are apt to have reference only to the control by a city over its municipally owned properties. Here the home rule cities in exercising police powers must depend largely, as before, upon specific grants from the state legislature and the necessary implications therefrom.

Home rule powers are vastly different in a state such as California where the courts have interpreted home rule to confer not only exclusive power over all local affairs, "governmental" as well as "proprietary," but also, if the charter so grants, concurrent power over municipal concerns of


9. Clements v. McCabe, 210 Mich. 207, 177 N.W. 722 (1920); City of Kalamazoo v. Titus, 208 Mich. 252, 175 N.W. 480, 484 (1919). See also State v. Missouri and Kansas Telephone Co., 189 Mo. 83, 83 S.W. 41, 43 (1905), where the court stated that home rule cities have that power "necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulations of the duties of the inhabitants in the city as between themselves." This language was adopted by the Nebraska Court in Consumers Coal Co. v. Lincoln, 109 Neb. 51, 189 N.W. 643, 646 (1922).


11. "We may admit that the legal incorporation and organization of a city for local governmental purposes necessarily invests it with certain primary police powers within the conceded sphere of such power fundamentally essential to the ends for which it was created. But beyond the comparatively narrow limits of such necessary implication, the police power, like any other power conferred on a municipality, must be expressly delegated by the Constitution or Legislature of the state." Clements v. McCabe, 210 Mich. 207, 177 N.W. 722, 725 (1920). See also State ex rel. Thomas v. Semple, 112 Ohio St. 559, 148 N.E. 342 (1925).

12. Morgan v. City of Los Angeles, 182 Cal. 407, 187 Pac. 1050, 1052 (1920); Cole v. City of Los Angeles, 180 Cal. 617, 182 Pac. 436, 438 (1919); Civic Center Assn. v. R.R. Comm. of California, 175 Cal. 441, 166 Pac. 351 (1917). See also Froehlich v. Cleveland, 99 Ohio St. 175, 124 N.E. 212 (1919); City of Fremont v. Keating, 96 Ohio St. 468, 118 N.E. 114 (1917). Billings v. Cleveland Ry., 92 Ohio St. 478, 111 N.E. 155 (1915); Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).
13. "The powers of the cities are not derived from the Legislature, but from a freeholders' charter directly provided for by the Constitution. The city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by the general laws. The powers of the city are all-embracing, restricted and limited by the charter only, and free from the interference of the state by general laws. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force. If its charter gives it powers concerning them, it has those powers. If its charter is silent as to any such power, no general law can confer it. As to municipal affairs the charter, instead of being a grant of power, is, in effect, a limitation of powers. The city can exercise the power if the charter does not prohibit it. In a case not involving a purely municipal affair, one in which the state is directly concerned, the city may exercise the power where its charter contains an express grant." Bank v. Bell, 217 Pac. 538, 542 (Cal. App. 1923, hearing den. Calif. Sup. Ct. 1923); Wilton v. Henkin, 126 P. 2d 425 (Cal. App. 1942); Peppin, Municipal Home Rule in California, 32 Calif. L. Rev. 341, 365-6 (1944). The approach of the Arizona court is the same: "... where a home rule city has power by its charter, it may act in conformity with such power not only in matters of local concern, but also in matters of state-wide concern, within its territorial limits, unless the Legislature has appropriated the field. . . ." City of Tucson v. Tucson Sunshine Climate Club, 64 Ariz. 164 P. 2d 598, 601 (1946).

Similar, too, is the language of the Nebraska court: "It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, until it speaks." Consumers Coal Co. v. Lincoln, 109 Neb. 51, 189 N. W. 643, 646 (1922). Semble: Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933); Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1922); Strange v. City of Cleveland, 94 Ohio St. 377, 114 N.E. 261 (1916); Xydas Amusement Co. v. Houston, 185 S.W. 415 (Tex Civ. App. 1916); State ex rel Wilkinson v. Selz, 191 S.W. 2d 756 (Tex Civ. App. 1945).

14. Ibid. See also Ex parte Iverson, 199 Cal. 582, 250 Pac. 681 (1926); Le Gois v. Texas, 80 Tex. Cr. R. 356, 190 S.W. 724 (1916).


POWERS OF MUNICIPAL CORPORATIONS

CONFLICTS WITH STATE LAW AND POLICY

Municipal power is generally denied when it conflicts with the law of the state. When a state law of general applicability bans certain activity a municipality cannot ordinarily permit the same. With almost equal uniformity it is usually said that a city cannot prohibit what the state has permitted. Similarly, where there are other direct conflicts on matters of state concern, municipal regulations are customarily held invalid.

However, if the matter is one of "local" concern, the power of constitutional home rule cities will override the power of the legislature. Legislative


20. City of Pasadena v. Charleville, 215 Cal. 384, 10 P. 2d 745 (1942) (water system); Loop Lumber Co. v. Van Lubensels, 173 Cal. 228, 159 Pac. 600
enactments on matters of local concern have also been invalidated by courts recognizing the by now generally discredited "inherent right of local self-government,"21 and by courts in states having constitutional provisions to the effect that the control of municipal affairs shall not be diverted to bodies not responsible to the electorate of the city.22

Even though additional regulations in effect prohibit what the state permits, complementary regulation is generally valid.23 A California court


23. "It is no objection to a municipal ordinance not in contravention of a state law that it affords additional regulation complementary to the end state legislation would effect." Standard Chemical and Oil Co. v. Troy, 201 Ala. 89, 77 So. 383, 386 (1917) (license on mfg. plant); Adler v. Martin, 179 Ala. 97, 59 So. 579 (1912) (traffic); Flynn v. Bledsoe Co., 92 Cal. App. 145, 267 Pac. 887 (1928) (parking); Ex parte Iverson, 199 Cal. 582, 250 Pac. 681 (1926) (liquor); Mann v. Scott, 180 Cal. 550, 182 Pac. 281 (1919) (traffic reg.); In re Hoffman, 155 Cal. 114, 99 Pac. 517 (1909) (milk); Ex parte Hong, 98 Cal. 681, 33 Pac. 799 (1893) (opium); Interstate Business Exchange v. Denver, 68 Colo., 318, 190 Pac. 508 (1920) (emt. exchanges); Provident Loan Society v. Denver, 64 Colo. 400, 172 Pac. 10 (1918) (pawnbroking); Sims v. Martin, 33 Ga. App. 486, 126 S.E. 872 (1925) (traffic); City of Chicago v. Union Ice Cream Mfg. Co., 252 Ill. 311, 96 N.E. 872 (1911) (food); City of Chicago v. Schmidlinger, 243 Ill. 167, 90 N.E. 369 (1909) (bread); City of Chicago v. Bowman Dairy Co., 234 Ill. 294, 84 N.E. 913 (1908) (milk); Kansas City v. Henre, 96 Kan. 794, 153 Pac. 548 (1915) (milk); Brennan v. Connolly, 207 Mich. 35, 173 N.W. 511 (1919) (traffic); Roper v. City of Greenspwn, 272 Mo. 288, 198 S.W. 1107 (1917) (traffic); City of St. Louis v. Klausmeier, 213 Mo. 119, 112 S.W. 516 (1908) (milk); Christensen v. Tate, 87 Neb. 488, 128 N.W. 622 (1910) (traffic); Chait v. East Orange, 136 N.J.L. 375, 56 A. 2d 599 (1948) (used car dealers); Kolankiewiz v. Burke, 91 N.J.L. 567, 103 Atl. 249 (1918) (traffic); City of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923) (liquor); Brazier v. Philadelphia, 215 Pa. 297, 64 Atl. 508 (1906) (traffic); Keats v. Bd. of Police Commrs. 42 R.I. 240, 107 Atl. 74 (1919) (police force); Lamar & Smith v. Stroud, 5 S.W. 2d 824 (Tex. Civ. App. 1928) (traffic); City of Bellingham v. Cisnna, 44 Wash. 397, 87 Pac. 481 (1906) (traffic); La Crosse Rendering Works v. City of La Crosse, 231 Wis. 148, 251 N.W. 393 (1939) (rendering plant); Fox v. City of Racine, 225 Wis. 542, 275 N.W. 513 (1937) (endurance contest); Caerdes v. Platteville, 213 Wis. 344, 251 N.W. 245 (1933) (theaters); Milwaukee v. Childs, 195 Wis. 148, 217 N.W. 703 (1928) (milk); Brittingham & Dixon...
has said: "... it has long been the established general rule, in determining whether a conflict exists between a general and local law, that where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable." There are, however, cases denying the power of a municipality to supplement state regulation. There is also a conflict on whether cities can penalize what the state punishes. "... the ordinance may prohibit the same acts which are forbidden by the state law, in which case the ordinance is void to the extent that it duplicates the state enactment." So holds the view finding "conflict" in duplication. The contra, and better, cases hold that "an act may be a penal offense under the laws of the state and further penalties, under proper legislative authority, may be imposed for its commission by municipal ordinances." The decisions can frequently be distinguished on the existence or absence of legislative grants of municipal power to punish. Where there

Lumber Co. v. Sparth, 157 Wis. 345, 147 N.W. 635 (1914) (coal); Peppin, Municipal Home Rule In California, 32 CALIF. L. REV. 341, 382ff. (1944).
27. In re Portnay, 21 Cal. 2d 237, 131 P. 2d 1 (1942) (gambling); Jones v. City of Atlanta, 124 Ga. 1, 52 S.E. 76 (1905) (gambling); City of Wink v. Griffith Amusement Co., 129 Tex. 40, 100 S.W. 2d 695 (1936) (lotteries).
28. Town of Van Buren v. Wells, 53 Ark. 368, 14 S.W. 38 (1890) (carrying concealed weapons; disturbing the peace; selling liquor on Sunday); City of Quincy v. O'Brien, 24 Ill. App. 591 (1887) (animals); Baldwin v. Murphy, 82 Ill. 485 (1876) (liquor); Town of Bloomfield v. Trimble, 54 Iowa 399, 6 N.W. 586 (1880) (intoxication) Ex parte Simmons, 40 Kan. 662, 112 Pac. 951 (1911) (liquor); Rossberg v. State, 111 Md. 394, 74 Atl. 581 (1909) (narcotics); State v. Ludvig, 21 Minn. 202 (1875) (liquor); State ex re City of Butte v. District Court, 37 Mont. 202, 95 Pac. 841 (1908) (vagrancy); Hunter v. Mayor, 128 N.J.L. 164, 24 A. 2d 553 (1942) (gambling); Village of Leipsic v. Folk, 38 Ohio App. 177, 176 N.E. 95 (1931) (disturbing the peace); Seattle v. Mac Donald, 47 Wash. 298, 91 Pac. 952 (1907) (gambling). Additional cases are collected in 17 L.R.A. (n.s.) 63; 21 A.L.R. 1186; 64 A.L.R. 593; 147 A.L.R. 566. Relevant, too, are the cases finding no double jeopardy in separate punishments under statute and ordinance: State v. Lee, 29 Minn. 445, 13 N.W. 913 (1882); Koch v. State, 53 Ohio St. 453, 41 N.E. 689 (1895).
is constitutional home rule or broad legislative grant to protect the public safety, cities should possess the power to punish violators of municipal ordinances, even though the same activity is punishable under state law.\textsuperscript{30} There are many liberal decisions upholding the assertion of municipal power unless \textit{irreconcilable} with state law.\textsuperscript{31} There are, however, many strict decisions denying municipal power whenever there is a discernible deviation from state statute,\textsuperscript{32} or even state policy.\textsuperscript{33} The "occupation of the field" concept, familiar in demarcating respective state-federal competences under the commerce clause,\textsuperscript{34} is used here to invalidate municipal power when courts conclude that the field has been "occupied" by state authority.\textsuperscript{35} As said by one court, "a state law may fully occupy a particular field of legislation so that there is no room for local regulation, in which case a local ordinance attempting to impose any additional regulation in that field will be regarded as conflicting with the state law, and for that reason void, even though the particular regulation set forth in the ordinance does not directly duplicate or otherwise directly conflict with any express pro-

\textsuperscript{30} Note, 2 Okla. L. Rev. 98 (1949); Note, 96 U. of Pa. L. Rev. 582 (1948).


33. "Municipal authorities . . . cannot adopt ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state." City of Marengo v. Rowland, 263 Ill. 551, 105 N.E. 285, 286 (1914). "Ordinances . . . must be in harmony with the general law and with its public policy . . ." Shelton v. City of Shelton, 111 Conn. 433, 150 Atl. 811, 813 (1930). \textit{In re Porterfield}, 28 Cal. 2d 91, 168 P. 2d 706 (1946); City of Harlan v. Scott, 220 Ky. 585, 162 S.W. 2d 8 (1942); City of Baton Rouge v. Weis, 141 La. 99, 74 So. 709 (1917).


vision of the state law." As elsewhere, it is difficult to forecast whether
the state has "occupied the field." "The mere fact that a state law contains
detailed and comprehensive regulations of a subject does not, of itself, estab-
lish the intent of the legislature to occupy the entire field to the exclusion
of local legislation." Though the beacons are usually obscure and few,
capturing the legislative psyche is both intriguing and necessary. Occasion-
ally the legislature will state that they do, or do not, intend to occupy the
entire field. And courts will scrutinize closely the language of the enact-
ment for intimations of legislative intent. As stated aptly by one court,
"whether the legislature has undertaken to occupy exclusively a given field
of legislation is to be determined in every case upon an analysis of the
statute and of the facts and circumstances upon which it was intended to
operate." So long as the "occupation of the field" concept survives, it is
suggested that the preferred approach is that of the California Court, name-
ly: "The only way the legislature can inhibit local legislative bodies from
enacting rules and police regulations is by the state itself occupying the
same legislative field so completely that legislation on the subject by local
legislative bodies will necessarily be inconsistent with the state act." One
suspects that the concept is but a handy tool to judges unsympathetic to
the particular exercise of municipal power, and it is generally unserviceable
to the bar and bench. A given court may find "occupation of the field" most
reluctantly on one subject of municipal regulation, and most avidly on
another. And witness the statement of an Illinois court: "Both the city

37. Id at 728.
38. CALIF. VEHICLE CODE, sec. 459.1 (as amended 1943).
Lindenbaum v. Barbour, 213 Cal. 277, 2 P. d 161 (1931); Ex parte Iver son, 199
Cal. 582, 250 Pac. 681 (1926); In re Simmons, 199 Cal. 590, 250 Pac. 684 (1926).
"... whether the legislature has or has not occupied the field seems so far to have
been influenced almost entirely by whether the legislature has affirmatively de-
clared its intent to do so by prohibiting local regulations therein." Peppin,
40. Ex parte Iver son, 199 Cal. 582, 250 Pac. 681, 682 (1926).
41. Ibid.
42. Compare: Clemons v. Wilson, 151 Kan. 250, 98 P. 2d 423 (1940) (slot
machines); Trimble v. Topeka, 147 Kan. 111, 75 P. 2d 241 (1938) (barbering);
Dorssom v. Atchison, 155 Kan. 225, 124 P. 2d 475 (1942) (milk); Ash v. Gibson,
146 Kan. 756, 74 P. 2d 136 (1937) (gas transp.); or Ex parte Iver son, 199 Cal. 582,
250 Pac. 681 (1926) with Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal.
660, 262 Pac. 334 (1927) and Ex parte Simmons, 235 Pac. 1029 (Cal. App. 1925);
or Xydias Amusement Co. v. Houston, 185 S.W. 415 (Tex. Civ. App. 1916) with
and the state may occupy the same field of regulation. . . .”

Use of the concept to demarcate municipal competences should be discouraged.

**EXTRATERRITORIALITY**

The general rule is that municipal power, proprietary as well as governmental, must be exercised within the city limits, unless extra-mural powers are expressly conferred by the state legislature or necessarily implied. As observed by the Illinois Supreme Court: “An inherent or implied limitation upon the city in the exercise of the powers delegated to it by the Legislature is that such powers shall be exercised within the corporate bounds of the municipalities. Ordinances cannot have extraterritorial effect unless power is plainly conferred upon the corporation. Municipal ordinances are, therefore, necessarily local in their application, operating usually only in the territory of the municipality by which they are enacted and without force beyond it.”

Municipalities are frequently authorized by legislatures to own and operate properties outside the city limits, and ownership is fairly common of outside waterworks, water distributing systems, airports, sewage disposal facilities, recreational facilities, bridges and ferries. This granted

48. Ebrite v. Crawford, 215 Cal. 724, 12 P. 2d 937 (1932); Howard v. Atlanta, 190 Ga. 730, 10 S.E. 2d 190 (1940); Wichita v. Clapp, 123 Kan. 100, 263 Pac. 12 (1928) (airport and park); McLaughlin v. Chattanooga, 180 Tenn. 638, 177 S.W. 2d 823 (1944); Silverman v. Chattanooga, 165 Tenn. 642, 57 S.W. 2d 552 (1933).
49. Cummins v. City of Seymour, 79 Ind. 491, 41 Am. Rep. 618 (1881); Naperville v. Wehrle, 340 Ill. 579, 173 N.E. 165 (1930); City of Lexington v. Jones, 289 Ky. 719, 160 S.W. 2d 19 (1942); “The power of the Legislature to confer on a municipality the authority to extend to the public, beyond its own territorial limits, services similar to those enjoyed by its own inhabitants, such as light, water, sewerage, is well established.” City of Charlotte v. Heath, 226 N.C. 750, 40 S.E. 2d 600, 605 (1946).
50. Mayor of Detroit v. Moran, 46 Mich. 602, 7 N.W. 180 (1880); Booth v. City of Minneapolis, 163 Minn. 223, 203 N.W. 625 (1925); City of Nashville v. Vaughn, 158 Tenn. 498, 14 S.W. 2d 716 (1919).
51. Helm v. City of Grayville, 224 Ill. 274, 79 N.E. 689 (1906); Peterson v. City of Jordan, 135 Minn. 384, 160 N. W. 1026 (1917); Haeussler v. City of St. Louis 205 Mo. 656, 103 S.W. 1034 (1907); Hafner v. St. Louis, 161 Mo. 34, 61
power to acquire outside property can usually be exercised even within the confines of other municipalities.\textsuperscript{52} To acquire such outside properties the municipalities regularly receive grants of extraterritorial powers of eminent domain.\textsuperscript{53}

Courts have recognized an implied power to acquire and hold property extraterritorially when the city was expressly granted power to acquire the property which could not practicably or reasonably be secured within the city limits.\textsuperscript{54} "The general rule is . . . ," says the Georgia Supreme Court, "subject to the qualification that a municipal corporation may also do those things which are fairly or necessarily implied in or incidental to the powers expressly granted. . . . Thus in \textit{Langley v. City Council of Augusta}, 118 Ga. 590, 45 S.E. 486, it was said that an express grant of authority to a city to construct sewers and drains should be held to include the power to construct them beyond the corporate limits, where it is found by the authorities to be reasonably necessary in order to establish a complete and useful system of sewerage. The court took cognizance that it would be impracticable and most undesirable to require a municipality to confine such works within its limits. . . . In \textit{Hall v. Town of Calhoun}, 140 Ga. 611, 79 S.E. 533, the court held that the City of Calhoun had authority under the terms of its charter to establish and construct a system of water works, and that under this grant it could, where necessary, obtain by contract a source of water beyond its limits. . . . It is a matter of common knowledge that an airport requires an extensive tract of land, and it is evident that in the majority of cases it would be most im-

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  \item S.W. 632 (1901) (wharf); Hagood v. Hutton, 33 Mo. 244 (1862); Power v. Village of Athens, 99 N.Y. 592, 2 N.E. 699 (1885); People ex rel Murphy v. Kelly, 76 N.Y. 475 (1879). Generally see Anderson, \textit{The Extraterritorial Powers of Cities}, 10 MINN. L. REV. 475 (1926).
  \item See cases cited in note 56.
  \item Howard v. City of Atlanta, 190 Ga. 730, 10 S.E. 2d 190 (1940); City of Charlotte v. Heath, 226 N.C. 750, 40 S.E. 2d 600 (1946); State ex rel Mullins v. Port of Astoria, 79 Ore. 1, 154 Pac. 399 (1916). And it can even be implied from the power to own outside property. Helm v. City of Grayville, 224 Ill. 274, 79 N.E. 689 (1906).
\end{itemize}
practicable and undesirable to set aside so much land within the confines of a municipality for such purpose. From this and other considerations that might be mentioned, it is at least not entirely clear that the grant of power to municipalities to condemn land for the purpose of establishing and expanding airports . . . even though strictly construed would not in and of itself be sufficient authority for a municipality to condemn land beyond its limits where it is reasonably necessary.\textsuperscript{55}

Municipalities have even been permitted the implied power to acquire and hold property within the confines of another municipality,\textsuperscript{56} although such power has been opposed on occasion because "the invaded municipality would in effect be stripped of its police powers over that portion of its territory taken, as well as the right to tax it for municipal purposes."\textsuperscript{57}

There are a number of early cases that denied an implied power to own property outside the city limits for the purpose of distributing to non-residents services such as gas and water,\textsuperscript{58} but "it is generally held that a municipality may go outside its limits to distribute \textit{surplus} water, light, power or gas."\textsuperscript{59}

When municipalities receive express grants to own property outside the city limits, they oftentimes are granted police powers over these properties,\textsuperscript{60} and such police power has even been implied on rare occasions from

\begin{itemize}
\item 55. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E. 2d 190, 192 (1940).
\item 56. Crandall v. Town of Safford, 47 Ariz. 402, 56 P. 2d 660 (1936) (water dist. system); Howard v. City of Atlanta, 190 Ga. 730, 10 S.E. 2d 190 (1940) (airport); City of Somerville v. City of Waltham, 170 Mass. 160, 48 N.E. 2d 1092 (1898) (gravel pit).
\item 57. Dissenting opinion of Chief Justice Reid in Howard v. City of Atlanta, 190 Ga. 730, 10 S.E. 2d 190, 196 (1940).
\item 58. Mayor of Gainesville v. Dunlop, 147 Ga. 344, 94 S.E. 247 (1917); Dyer v. City of Newport, 29 Ky. L.R. 656, 94 S.W. 25 (1906); Simson v. Parker, 190 N.Y. 19, 82 N.E. 732 (1907); Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911); Farwell v. City of Seattle, 43 Wash. 141, 86 Pac. 217 (1906).
\item 60. City of Birmingham v. Lake, 243 Ala. 367, 10 So. 2d 24 (1942); Ebrite v. Crawford, 215 Cal. 724, 12 P. 2d 937 (1932); Dunham v. New Britain, 55 Conn. 378, 11 Atl. 354 (1887); State \textit{ex rel} Humphrey v. Franklin, 40 Kan. 410, 19 Pac. 801 (1887); Sprague v. Minon, 195 Mass. 581, 81 N.E. 284 (1907); Silverman v. City of Chattanooga, 165 Tenn. 642, 57 S.W. 2d 552 (1932); Salt Lake City v. Young, 45 Utah 349, 145 Pac. 1047 (1915). \textit{Cf.} Brown v. City of Cle Elum, 145 Wash. 588, 255 Pac. 961, 261 Pac. 112 (1927), holding invalid under a constitutional provision authorizing cities to exercise police powers only within the city.
the grant to own and operate.\textsuperscript{61} Whether a municipality can, in conjunction with an airport owned under express grant, zone the surrounding area to reduce flight hazards is a matter that is as yet unsettled,\textsuperscript{62} although legislative grants of such power should be sustained.

There are many specific grants of extraterritorial police power unrelated to any extra-murally owned municipal property.\textsuperscript{63} The North Carolina Court has observed: "... on the criminal side, municipalities have been allowed extraterritorial police powers. ... The town line means nothing to the breezes which blow across the city carrying malodorous exhalations, or to the minute wings laden with the germs of diseases and death."\textsuperscript{64} Accordingly, cities are frequently authorized, for instance, to inspect herds and dairy facilities outside the city,\textsuperscript{65} to control and abate stockyards,\textsuperscript{66} and to regulate the sale of liquor within a designated distance of the city.\textsuperscript{67}

In the absence of express grants extraterritorial police powers will not ordinarily be implied.\textsuperscript{68} Nevertheless, it should be recognized that intra-

limits a legislative grant of municipal power to prohibit the pollution of its extra-mural water supply.

\textsuperscript{61} Dunham v. City of New Britain, 55 Conn. 378, 11 Atl. 354 (1887); City of Lexington v. Jones, 289 Ky. 719, 160 S.W. 2d 19 (1942); Chambers v. City of St. Louis, 29 Mo. 543, 575 (1860) (dictum); Silverman v. City of Chattanooga, 165 Tenn. 642, 57 S.W. 2d 552 (1933).

\textsuperscript{62} Note Yara Engineering Corp. v. Newark, 132 N.J.L. 370, 40 A. 2d 559 (1945).

\textsuperscript{63} Alabama Gas Co. v. City of Montgomery, 249 Ala. 257, 30 So. 2d 651 (1947); White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932); Standard Chemical and Oil Co. v. Troy, 201 Ala. 89, 77 So. 383 (1917); State ex rel Humphrey v. Franklin, 40 Kan. 410, 19 Pac. 801 (1888); Town of Gower v. Agee, 128 Mo. App. 427, 107 S.W. 999 (1908); State v. Rice, 158 N.C. 635, 74 S.E. 582 (1912); Salt Lake City v. Young, 45 Utah 349, 145 Pac. 1047 (1915); City of Charlottesville v. Marks' Shows, 179 Va. 321, 18 S.E. 2d 890 (1942). Cases are collected in 86 A.L.R. 917 and 55 A.L.R. 1182. Note, 28 Tex. L. Rev. 862 (1950).

\textsuperscript{64} City of Charlotte v. Heath, 226 N.C. 750, 40 S.E. 2d 600, 606 (1946).

\textsuperscript{65} Stephens v. Oklahoma City, 150 Okla. 199, 1 P. 2d 367 (1931); Hill v. Fetherolf, 236 Pa. 70, 84 Atl. 677 (1912). Additional cases are collected in 155 A.L.R. 1383.

\textsuperscript{66} Boyd v. City Council of Montgomery, 117 Ala. 677, 23 So. 663 (1898); Chicago Packing and Provision Co. v. City of Chicago, 88 Ill. 221, 30 Am. Rep. 545 (1878) (packing house was licensed by municipality in which it operated; nevertheless, it was subject to regulation by the City of Chicago). Note the present Illinois statute [ILL. REV. STAT. c. 24, sec. 8(1) (1949)], providing that "The corporate authorities in all municipalities have jurisdiction in and over all places within one-half mile of the corporate limits for the purpose of enforcing health and quarantine regulations."


\textsuperscript{68} Dean Milk Co. v. City of Waukegan, 403 Ill. 597, 87 N.E. 2d 751 (1949); Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N.E. 2d 827 (1949); City of Rockford v. Hey, 366 Ill. 526, 9 N.E. 2d 317 (1937); State v. Franklin, 40 Kan.
mural privileges often hinge upon proper extramural conduct, and there are many implied, as well as express, powers authorizing regulations within the city which have considerable effect upon businesses and residents outside the walls.⁶⁹

Where extraterritorial police power is granted or necessarily implied, it has ordinarily been limited strictly.⁷⁰ And extra-mural power will readily be invalidated where extraterritorial action is not reasonably necessary to protect the public health, safety, morals or general welfare,⁷¹ or where it is but a subterfuge to protect local economic interests.⁷² There is the possibility, too, that extraterritorial exercise of the police power will be held unconstitutional as permitting government of the people in the area by officials whom they have not chosen and whom they cannot control.⁷³

Exercise of the Power

Express powers to perform non-regulatory deeds will not ordinarily be subjected to a test of reasonableness by the courts.⁷⁴ Implied powers will, however, the courts suggesting that the legislature would not have intended that any unreasonable powers be conferred.⁷⁵

Regulatory ordinances must be clear and offer adequate guidance to

410, 19 Pac. 801 (1888); City of Duluth v. Orr. 115 Minn. 267, 132 N.W. 265 (1911).


70. Alabama Gas Co. v. City of Montgomery, 249 Ala. 257, 30 So. 2d 651 (1947); Higgins v. City of Galesburg, 401 Ill. 87, 81 N.E. 2d 520 (1948); City of Rockford v. Hey, 366 Ill. 526, 9 N.E. 2d 317 (1937); State ex rel Humphrey v. Franklin, 40 Kan. 410, 19 Pac. 801 (1888); City of Shreveport v. Case, 198 La. 702, 45 So. 2d 801 (1941); Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907); City of Charlottesville v. Marks’ Shows, 179 Va. 321, 18 S.E. 2d 890 (1942). Note, 55 A.L.R. 1182.


72. Dean Milk Co. v. City of Waukegan, 403 Ill. 597, 87 N.E. 2d 751 (1949); Higgins v. City of Galesburg, 401 Ill. 87, 81 N.E. 2d 520 (1948). See also cases cited in note 107.

73. State v. Eason, 114 N.C. 787, 19 S.E. 88 (1894); Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907); Robinson v. City of Norfolk, 108 Va. 14, 60 S.E. 762 (1908); Brown v. City of Cle Elum, 145 Wash. 588, 261 Pac. 112 (1927).


75. Flynn v. Little Falls Electric and Water Co., 74 Minn. 180, 77 N.W. 38 (1898).
one who would be law-abiding. Furthermore, due process demands that they be reasonable and have a reasonable tendency to protect and safeguard the public health, safety, morality or general welfare. There is, however, in effect, a presumption of validity to municipal ordinances, except those abridging First Amendment freedoms.

Municipal powers cannot be exercised so as to unreasonably classify or unfairly discriminate against groups or individuals. Accordingly, the rather frequent municipal attempts to unreasonably prefer local businesses with concomitant unfair discrimination against those from out of the city or state find little judicial encouragement. Nor can municipal powers be permitted to impair the obligations of contracts. The commerce clause of the United States Constitution will permit only reasonable municipal interference with interstate commerce. Accordingly, municipal bans on, or regulations of, drummers for out-of-state merchants are frequently invalidated, as are unreasonable exactions from interstate carriers for the use of the city streets. Municipal ordinances will be invalid when they conflict with federal rules or concern a field occupied by the federal government under the commerce clause or other paramount power. Similarly, when they

82. Northern Pacific Ry. v. Minnesota ex rel City of Duluth, 208 U.S. 583 (1908); Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65 (1902).
83. Jewel Tea Co. v. City of Troy, 80 F. 2d 366 (C.A.A. 7th 1935); City of Chicago v. Cuda, 403 Ill. 381, 86 N.E. 2d 192 (1949).
85. Sprout v. South Bend, 277 U.S. 163 (1928); Western Auto Transports v. City of Cheyenne, 57 Wyo. 351, 120 P. 2d 590 (1942).
conflict with a valid treaty. The problem is presented frequently in the limitation of property uses. Clearly unconstitutional is an attempt to automatically impose restrictions upon the private property of one person upon the signature of petitions by other private individuals, without any decision by the governing body of the municipality. Probably the majority of state courts consider invalid all arrangements whereby use of property hinges upon securing the consent of neighbors. However, a minority of courts have drawn a distinction between initiating the restriction and waiving it, and uphold the waiver of property restrictions imposed by the governing body upon the securing of private consents. The distinction is of doubtful logic and desirability. There is a far better chance of survival for ordinances requiring the filing of consents with the governing body of the municipality as a condition precedent to its granting a permit.

89. Oglesby v. Fort Smith, 105 Ark. 506, 152 S.W. 145 (1912); Lowery v. City of Lexington, 115 Ky. 157, 75 S.W. 202 (1903); Wagner v. City of Milwaukee, 177 Wis. 410, 188 N.W. 487 (1922); Note, 8 Va. L. Rev. 450 (1922).
91. In re Quong Woo, 13 Fed. 229 (C.C. Cal. 1882); Ex parte Sing Lee, 96 Cal. 354, 31 Pac. 245 (1892); Tilford v. Belknap, 126 Ky. 244, 103 S.W. 289 (1907); Hays v. City of Poplar Bluff, 263 Mo. 516, 163 S.W. 676 (1915); City of St. Louis v. Russell, 116 Mo. 248, 22 S.W. 470 (1893); State ex rel Omaha Gas Co. v. Withnell, 78 Neb. 33, 110 N.W. 680 (1907); Levy v. Mravlag, 96 N.J.L. 367, 115 Atl. 350 (1921); Willis v. Town of Woodruff, 200 S.C. 266, 20 S.E. 2d 699 (1942); Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921); State ex rel Nehrbass v. Harber, 162 Wis. 589, 156 N.W. 941 (1916); other cases collected in 43 A.L.R. 834, 46 A.L.R. 88. See also McBain, Law Making by Property Owners, 36 Pol. Sci. Q. 617 (1921).
94. City of Stockton v. Frisbie and Latta, 93 Cal. App. 277, 270 Pac. 270
It is usually stated that "legislative" or "discretionary" powers cannot be delegated by the governing body of the municipality even to subordinate public officials.95 They can be delegated powers judicially labeled "administrative" or "ministerial."96 The initial determination of whether there should be a law and what it should contain is everywhere "legislative,"97 and, on the other hand, it is equally agreed that the decision of whether there exists the factual state of affairs that makes applicable the law is "administrative."98 Beyond this the use of these labels is anything but certain, and probably only a temptation to mechanical jurisprudence.

Where powers can be delegated to municipal officers, boards or committees, the legislative body of the city must designate reasonably adequate standards to guide the officials. The law is well stated by the Missouri Supreme Court: "The general rule is that any ordinance which attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance, is an unwarranted attempt to delegate legislative functions to such officer, and for that reason is unconstitutional. . . . The exceptions to the general rule are in situations and circumstances where necessity would require the vesting of discretion in the officer charged with the enforcement of an ordinance, as where it would be either impracticable or impossible to fix a definite rule or standard, or where the discretion vested in the officer relates to the enforcement of a police regulation requir-

95. Bolton v. Gilleran, 105 Cal. 244, 38 Pac. 881 (1894); City of Elkhart v. Murray, 165 Ind. 304, 75 N.E. 593 (1905); City of St. Louis v. Clemens, 52 Mo. 133 (1873); State ex rel Srigley v. Woodworth, 33 Ohio App. 406, 169 N.E. 713 (1929). See also Duff & Whiteside, Delegata Potestas non Potest Delegari: A Maxim of American Constitutional Law, 14 CORN. L.Q. 168 (1928).

96. Walker v. Toyle, 156 Ind. 639, 59 N.E. 20 (1901); City of Mayfield v. Phipps, 203 Ky. 532, 263 S.W. 37 (1924); City of Biddiford v. Yates, 104 Me. 506, 72 Atl. 335 (1908); City of Centralia v. Smith, 105 Mo. App. 438 (1903).

97. "The law making power in Ohio is vested in legislative bodies . . . but not yet in the police departments of her many cities. Those departments have enough to do to enforce the laws properly made, without having the added burden of increasing the number of laws to be enforced." Albrecht Grocery v. Overfield, 32 Ohio App. 512, 165 N.E. 386 (1929). See also: Robinson v. Detroit, 107 Mich. 168, 65 N.W. 10 (1895); Cincinnati v. Cook, 107 Ohio St. 223, 140 N.E. 655 (1923).

98. "The legislative body cannot delegate its power to make a law or ordinance; but it can make a law or ordinance to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own act depend." City of Scranton v. Hollenberg, 152 Pa. Super. 138, 31 A. 2d 437, 441 (1943), citing cases. People v. Grand Trunk Western Ry., 232 Ill. 292, 83 N.E. 839 (1908).
ing prompt exercise of judgment." What is an adequate standard is a frequent problem in municipal licensing, zoning, traffic control, and many other areas. It can only be noted generally that the adequacy of standard to the judiciary depends upon the nature of the task to be performed, and courts are generally willing to consider the limitations of semantic communication, the social utility of the activity, the professional competence of the public servant, the frequency of slightly varying problem situations, and the existence of emergencies. Where municipal powers can be delegated, the municipal officer must, in the exercise of the power, avoid acting in an "arbitrary, tyrannical or unreasonable" way.

Although municipal authorities have been sustained in contracting away limited parts of their proprietary or business powers for reasonable times, the general rule forbids contracting away the legislative or "governmental" power of municipalities.

Courts usually profess not to examine the motives of municipal legislative bodies in exercising corporate powers, unless fraud is alleged, but


102. Staley v. Vaughn, 92 Colo. 6, 17 P. 2d 299 (1932); State ex rel. Harkow v. McCarthy, 126 Fla. 433, 171 So. 314 (1936); City of Chicago v. Mariotto, 332 Ill. 44, 163 N.E. 369 (1928); City of Shreveport v. Herndon, 139 La. 113, 105 So. 244 (1925); City of Cleveland v. Gustafson, 124 Ohio St. 607, 180 N.E. 59 (1932); Hendricks v. City of Minneapolis, 207 Minn. 151, 290 N.W. 428 (1940).


when the ordinances are seemingly motivated by desire to protect the economic interests of particular groups, the judiciary has shown a willingness to invalidate the particular exercise of power as not having a reasonable tendency to protect the public health, safety, morality or general welfare.¹⁰⁷

CONCLUSION

Although home rule cities can generally possess all powers over local affairs and additional powers of general concern until the state acts, non-home rule cities must find their authority in specific grants from the legislature or in necessary implications therefrom. Even home rule cities will be denied power to conflict with state law on matters of general concern. There is increasing evidence of extraterritorial powers by municipalities, but their existence everywhere will principally hinge upon legislative grant. The exercise of municipal powers must always be within the framework of generally accepted constitutional principles.