Strengthening Home Rule

Although it is not always clear, the NYS Constitution does grant local governments fairly broad home rule powers to adopt local laws. The powers granted in Article IX of the Constitution and implemented by the Municipal Home Rule Law give authority to municipalities to act by local law with respect to (1) its "property, affairs, or government," and (2) other powers granted in statute whether or not they relate to its property, affairs, or government. However, many would argue that true "home rule" exists only if there is some constitutional curb on the power of the State to deal directly in the affairs of a local government.

Despite being described as a home rule state, and the protections that the Constitution purports to grant local governments, localities actually have very little immunity from state intervention. There is no limit on the State's power to act by general laws.[1] Even the prohibition on special laws not requested by a municipality but nevertheless concerning particular municipalities' "property, affairs, or government" has been eroded by court decisions upholding the authority of the State to act by special law on questions of "state concern."[2] There is no easy solution to this issue. Strong local immunity from the state would require a sharp demarcation between state and local matters, but that line is inherently difficult to draw and will probably change over time. A different but related issue is that by the Legislature acting on matters of "state concern," even local matters, it has the effect of preempting local legislation in that subject area.[3]

The other aspect of home rule, as mentioned, is the constitutional grant of authority to local governments to enact local laws in relation to various subjects. Like limits on state intrusion into local matters, this local law-making authority has likewise been diminished by the courts. Local laws may not be inconsistent with provisions of the Constitution or any general law. However, the state courts have often interpreted state law on a subject as precluding local legislation on the same subject even if the state law is not literally in conflict with or does not literally prohibit the local law. Where a local government is otherwise authorized to act, it will be prohibited from legislating in a subject area if the State is found to have preempted local regulation of that subject. The State's intent to preempt local legislation may be expressed in a statute or other declaration of State policy, or it may be inferred. The Court of Appeals has said that preemption "…need not be express. It is enough that the Legislature has impliedly

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[1] A "general law" is defined as a State statute which in terms and effect applies alike to all counties, all counties outside NYC, all cities, all towns, or all villages. It is contrasted with a "special law" which is a State statute that in terms or effect applies to one or more, but not all, counties, counties outside NYC, cities, towns, or villages.

[2] "Matter of state concern" is a phrase born in judicial opinions rather than in the Constitution or statutes. Court cases, construing the home rule grants, have indicated that "state concern" includes such matters as taxation, incurring debt, education, water supply, highways and transportation, health, parks, social services, even residency of local officers.

[3] Mayor of City of New York v. Council of New York, 4 Misc.3d 151 (Sup Ct, NY Co 2004)

evinced its desire to do so."[4] It is often difficult to tell, however, whether state and local laws are inconsistent, i.e. whether local laws are preempted.

There are two types of preemption: conflict, either express or implied, and the State "occupying the field." Outright conflict focuses on whether the state and local governments have issued conflicting demands. In certain instances there is a clear expression in the law itself to the effect that the State has exercised the right of jurisdiction, e.g. Village Law § 5-532 reads: "No local law shall be adopted changing, amending or superseding any of the provisions of this article." In other cases, the preemption is not express, but the conflict is clear. For example, where a State law says to drive on the right side of the road and the local law requires driving on the left side of the road.[5]

Most state and local conflicts are more subtle than this. A state law establishing minimum standards for certain activity could be read as prohibiting local laws setting higher or additional standards. An example of this was the unsuccessful attempt of the City of New York in the 1960s to establish a minimum wage by local law where a general State law already existed. The City felt that the State law set the floor, but that it had the authority to raise the minimum wage within the city by local law. The NYC law was struck down as being in conflict with the State law. The effect of that holding[6] was to significantly restrict local law making authority. Under the Court's reasoning, once the State has passed a law on a subject, any activity not prohibited by the State is thereby protected, and any local law on the subject that is not mere duplication of the State would be preempted.

In recent years, the courts appear to have recognized the narrowing effect of such an approach and have tended to reject a finding of outright conflict when the locality adopted a more extensive regulation than the state. For example, in 1987 the Court of Appeals upheld New York City's ban on discrimination in certain private clubs even though such discrimination had been exempted from the anti-discrimination requirements of the State's human rights law.

Another type of implied preemption is "occupation of the field" by the State of a particular subject of regulation, which is somewhat analogous to "matters of state concern." Occupation of the field is another judicial invention where the courts attempt to interpret the intent of the Legislature. Usually, the courts will find that the State has "occupied the field," thereby preempting local legislation, from the State having enacted a comprehensive and detailed regulatory scheme. The Legislature rarely makes a clear declaration of policy, so the courts have no clear standard for determining when State regulation is so "comprehensive" that it thereby "occupies the field" and preempts local regulation. For example, a Suffolk County local law prohibiting the display of material

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[4] Consolidated Edison v. Town of Red Hook, 60 NY2d 99 (1983)

[5] Richard Briffault, *Intergovernmental Relations*, *in* THE NEW YORK STATE CONSTITUTION – A BRIEFING BOOK

[6] Wholesale Laundry Board of Trade v. City of New York, 12 NY2d 998 (1963)

deemed obscene was held to be preempted by the State's legislative scheme concerning obscenity and the need for a statewide standard.[7]

Under the current system, local governments are left to guess whether or not the local law they wish to implement is authorized or preempted by the State "occupying the field." An example of current confusion is with sex offender residency local laws. The State has an entire regulatory scheme on sex offenders, however, many counties have passed local laws restricting where sex offenders of certain levels may live. The terms of the various local laws are inconsistent, and the State has not regulated residency limitations specifically. Still, many believe these local laws to be preempted, as the State has effectively "occupied the field." At the time of this writing, the issue has yet to be resolved by the courts.

The two types of implied preemption – implied conflict and occupation of the field – have caused great confusion and undermined home rule authority. One approach to alleviate this problem is to prospectively eliminate application of the judicial doctrine of "implied preemption." A constitutional amendment requiring the State to "expressly" preempt local legislation on a given subject when it so desires, would lessen the confusion and uncertainty that the judicially created doctrine of "implied preemption" has caused. Requiring express preemption by the State would serve to reverse some of the erosion of Article IX of the Constitution.

Other states deal with this issue in their respective constitutions in different ways.[8] The Illinois Constitution offers an appropriate model. There, the local governments are granted home rule authority concurrently with the State, unless the State expressly declares the State's authority to be exclusive. Importantly, this approach does not limit the State's power to preempt, but rather, it would force the Legislature to assert its intent to preempt local legislation where it sees fit. It would also serve to end judicially created preemption where none was intended.

[7] Penny Lane/East Hampton, Inc. v. County of Suffolk, 191 AD2d 19 (2nd Dept 1993)

[8] New Mexico and Alaska, for example, essentially grant all legislative powers to certain municipalities that are not specifically denied by law.