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**The Erosion Of Home Rule Through The  
Emergence Of State-Interests In Land  
Use Control**

**John R. Nolon\***

Of course, the Agency Act prevents localities within the Adirondack Park from freely exercising their zoning and planning powers. That indeed is its purpose and effect, not because the motive is to impair home rule but because the motive is to serve a supervening State concern transcending local interests.

Court of Appeals

*Wambat Realty Corp. v. New York*<sup>1</sup>

I. Introduction

A. "Here, there is no plan."

Twenty years ago, in *Golden v. Planning Board of Ramapo*,<sup>2</sup> the New York Court of Appeals called for the state legislature to adopt a system of "State-wide or regional con-

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1. 41 N.Y.2d 490, 494-95, 362 N.E.2d 581, 584, 393 N.Y.S.2d 949, 952 (1977).

2. 30 N.Y.2d 359, 285 N.E.2d 791, 334 N.Y.S.2d 138 (1972).

trol of [land use] planning" to "insure that interests broader than that of the municipality underlie various land use policies."<sup>3</sup> The state's highest court minced no words in 1972. It stated that New York's "zoning enabling legislation is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government . . . ."<sup>4</sup> Under this system of local control, "questions of broader public interest have commonly been ignored."<sup>5</sup> The court referenced criticisms of community autonomy finding that local land use control suffers from "pronounced insularism" and produces "distortions in metropolitan growth patterns."<sup>6</sup> It noted that local control has the effect of "crippling efforts toward regional and State-wide problem solving, be it pollution, decent housing, or public transportation."<sup>7</sup>

Returning to this subject after twenty years, the Court of Appeals, in *Long Island Pine Barrens Society, Inc. v. Planning Board of Brookhaven*, recently confronted the costs of fractured land use planning in a dramatic setting.<sup>8</sup> It was front page news that the litigation caused a "prolonged delay" of more than 200 development projects and great financial hardship to property owners.<sup>9</sup> The appellate division decision, which required that these projects, located in three separate towns, be subjected to a cumulative environmental impact analysis, alarmed home rule advocates who saw it as a threat to the authority of local governments to make land use decisions.<sup>10</sup> The Court of Appeals reversed that decision and noted that "[h]ere . . . there is no plan" on which such a cu-

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3. 30 N.Y.2d at 376.

4. *Id.* at 374 (citation omitted).

5. *Id.* at 374.

6. *Id.*

7. *Id.*

8. 80 N.Y.2d 500, 606 N.E.2d 1373, 591 N.Y.S.2d 982 (1992); see *infra* text accompanying notes 279-97.

9. Sarah Lyall, *Court Clears Way for Building on Pine Barrens of Long Island*, N.Y. TIMES, Nov. 25, 1992 at A1, B5.

10. *Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven*, 178 A.D.2d 18, 581 N.Y.S.2d 803, *rev'd*, 80 N.Y.2d 500 (1992).

mulative impact analysis can be based.<sup>11</sup> The Court of Appeals' decision now disarms environmentalists who had seen the appellate division decision as a mandate for cumulative environmental impact analysis of major projects affecting the critical natural resource areas in the state.<sup>12</sup> New York's highest court referred this matter of "urgent public concern" to the legislature, as it had done twenty years earlier in *Golden*.<sup>13</sup> How the regional impacts of local land use decisions are to be controlled is an enduring problem still seeking a solution in this state.

### B. The Enigmatic Nature of New York Land Law

Despite the repeated urgings of the judicial branch, the legislature seems reluctant to create new mechanisms effective to produce healthy regions, if it is at the expense of local political autonomy. Meanwhile, the present system is failing, to the detriment of local governments, local economies, and the local environment.<sup>14</sup>

There are several reasons for this failure. First, housing markets, watersheds and commuting patterns are regional in nature but the principal technique of controlling how land is used is the local zoning ordinance. Unlike neighboring states, New York has no comprehensive method of influencing local decisions so that its regions develop in a balanced and orderly way.

Second, state law requires that local zoning carry out the objectives of comprehensive land use plans,<sup>15</sup> prepared with full public participation in advance of regulation. But, state law does not require local governments to adopt such plans.<sup>16</sup>

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11. 80 N.Y.2d at 514.

12. Lyall, *supra* note 9, at A1.

13. 80 N.Y.2d at 517.

14. DR. ALISTAIR HANNA, SURVEY OF STAKEHOLDERS IN NEW YORK'S LAND USE SYSTEM (1993).

15. N.Y. TOWN LAW § 263 (McKinney 1987 & Supp. 1993); N.Y. VILLAGE LAW § 7-704 (McKinney 1973 & Supp. 1993); N.Y. GEN. CITY LAW § 20(25) (McKinney 1989 & Supp. 1993).

16. N.Y. GEN. CITY LAW § 28-a; N.Y. TOWN LAW § 272-a; N.Y. VILLAGE LAW § 7-722.

In most municipalities, planning is not done, or it is not kept up to date. Further, the law does not define what a comprehensive land use plan is or should be. Rather, state requirements that each project be subjected to environmental analysis at the developer's expense tend to produce case-by-case, rather than comprehensive planning by budget-conscious local governments. Statutory provisions for cumulative environmental impact studies and generic environmental impact statements further confuse the land planning regime in New York.<sup>17</sup>

Third, because of the inability of local regulation to protect regional interests, numerous statutes have been adopted that preempt local control, in circumscribed ways. Such preemptive regulations have been passed in the interest of protecting estuaries, wetlands, drinking water reservoirs, wildernesses and rivers, among many other public objectives.<sup>18</sup>

Fourth, there is no means for coordinating local development decisions with the objectives of critical federal legislation, such as the Clean Air and Clean Water Acts. How can federal and state agencies reduce air and water pollution in the absence of any mechanism competent to produce sensible regional development patterns?

Fifth, local, state and federal budget officials plan their expenditures for roads, bridges, water and sewer systems, and public transit without any means of coordinating their plans or synchronizing these capital projects with the unforeseeable development patterns that occur under New York's unmanaged system. Instead of effective coordination of public expenditures to support and shape development patterns, the state has a fractured and reactive system of public infrastructure development. A recent study in New Jersey found that taxpayers would save over \$400 million annually in capital facility expenditures and operating expenses if development were guided by a state development plan as compared with an unmanaged system.<sup>19</sup>

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17. See *infra* text accompanying notes 264-66.

18. See *infra* text accompanying notes 139-88.

19. CENTER FOR URBAN POLICY RESEARCH, IMPACT ASSESSMENT OF THE NEW

As will be demonstrated later, the conventional wisdom is that New York's failure to adopt a comprehensive state-wide land use system is due to reluctance of the state legislature to diminish local control of land use. The purpose of this article is to explore that assumption as part of a larger examination of the proper course of land law reform in New York.<sup>20</sup> The case and statutory law that have developed since the experiences of the early 1970s indicate that local "home rule" authority is neither a legal nor a political barrier to effective land use legislation in the broader state interest. Part II briefly reviews the progress of other states in considering and adopting comprehensive land use strategies and reflects on why New York has failed to follow their lead. Part III documents the courts' clear determination that home rule is subordinate to state-wide interests as determined by the legislature. Part IV illustrates that there are numerous objectives that have motivated the state government to preempt, affect, guide and shape local control of the use of the land. The statutes examined indicate a clear trend of eroding local authority through narrowly focused, rather than comprehensive, land use legislation. The conclusion argues that if and when it is perceived that unguided local control of regional growth and development is detrimental to the state's environmental quality, economic competitiveness, or other interests, the legislature can and will act to reform the land use system that determines how and where growth and development should occur.

## II. Land Law Reform in Other States

### A. Efforts by Neighboring States

New York is surrounded by states that are modernizing their land use control systems. New Jersey has a state-wide development guide,<sup>21</sup> enforced by the courts,<sup>22</sup> that has ena-

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JERSEY INTERIM STATE DEVELOPMENT AND REDEVELOPMENT PLAN - EXECUTIVE SUMMARY 11 (1992).

20. See John R. Nolon, *Comprehensive Land Use Planning and Regulation: Deciding How and Where to Grow*, 13 PACE L. REV. (1993) and related articles in a symposium issue on reforming New York's land use law.

21. N.J. STAT. ANN. § 52:18A-19b to 52:18A-20b. (West 1980 & Supp. 1992).

bled it to become the nation's leading developer of unsubsidized affordable housing. Connecticut adopted its first state-wide environmental plan in 1979.<sup>23</sup> In 1987, the Connecticut legislature created the Council on Environmental Quality to study adopting regional plans and coordinating local land use decisions with such plans.<sup>24</sup>

Pennsylvania has held public hearings to consider proposals for reform. This year, a state-wide growth management statute is expected to be considered by its legislature.<sup>25</sup> Vermont and Maine have adopted growth management statutes that encourage local governments to adopt comprehensive land use plans consistent with state established land use goals.<sup>26</sup>

At least nine states have adopted state-wide growth management statutes. These statutes establish land use goals at the state level, designate regions for data collection and planning, encourage local governments to adopt land use plans, and require consistency among local, regional and state-wide plans. They also coordinate public expenditures for roads, bridges, and water and sewer systems to support development patterns defined in these plans.<sup>27</sup>

## B. Reluctance to Change in New York

In contrast, there has been no such far-sighted action in New York State. The legislature has entertained no land use law reform proposals of this type and no task force has been formed to study the impressive record of other states. Land use law reform in New York has consisted of improving the

22. See *South Burlington County N.A.A.C.P. v. Township of Mt. Laurel*, 92 N.J. 158, 215, 223-48, 456 A.2d 390, 418, 422-36 (1983).

23. CONN. GEN. STAT. ANN. § 22a-8 (West 1985 & Supp. 1992).

24. CONN. GEN. STAT. ANN. § 22a-11 (West 1985 & Supp. 1992).

25. A similar bill was introduced in the 1991 legislative session. See H. RES. 20, 1991 PENN. SESS. LAW.

26. See Vermont Growth Management Act of 1988 (Act 200), VT. STAT. ANN. tit. 3, § 67 & tit. 24, § 117 (1992); Maine Comprehensive Planning and Land Use Regulation Act of 1988, ME. REV. STAT. ANN. tit. 30-A, § 4312 (West 1992).

27. See James P. Horan & Dwight H. Merrian, *State Regulatory Activity*, 750 A.L.I.-A.B.A. 593 (1992) (describing state-wide and regional planning statutes).

operation of the existing, locally-centered system<sup>28</sup> and designing highly-focused mechanisms to stimulate economic development, abate pollution or protect resources. These measures are a meek attempt to guide the otherwise unfettered course charted by localities acting in their "insular" interests.<sup>29</sup>

Among the reasons that explain this reluctance to change in New York is the bitter recollection of the events of the early 1970's when two farsighted initiatives were buried in an avalanche of public opposition. The first was S. 9028, the Land Use and Development Law,<sup>30</sup> proposed in 1970. The second was the Urban Development Corporation's 1972 proposal to construct low and moderate income housing in Westchester County's affluent suburbs.<sup>31</sup>

The proposed Land Use and Development Law, considered by the legislature in 1970, preceded Florida and Oregon's much-heralded state-wide land use statutes<sup>32</sup> as well as the New York Court of Appeals' call for state-wide or regional planning in *Golden v. Ramapo*.<sup>33</sup> The proposal called for a state-wide comprehensive land use plan, regional plans and county plans, all compatible and consistent with one another.<sup>34</sup> County plans were to direct development into high density areas and away from agricultural and rural lands.<sup>35</sup> Local governments were to exercise their land use authority in conformance with the county plans.<sup>36</sup> By these means, an integrated state-wide planning system was to be created that coordinated the land use initiatives of each level of government.

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28. James A. Coon & Sheldon W. Damsky, *Revisions to State Zoning Laws Enacted*, MUN. LAW. (MUN. LAW RESOURCE CTR. AND THE N.Y. ST. BAR ASS'N), Sept.-Oct. 1991, at 1.

29. See *supra* note 6.

30. S. 9028, 193d Ann. Legis. Sess. (1970).

31. E.F. Roberts, *The New Frontier*, 31 SYRACUSE L. REV. 685, 698-99 (1980).

32. FLA. STAT. ANN. §§ 186.001-187.201 (West 1987 & Supp. 1993) (Florida State Comprehensive Planning Act of 1972); OR. REV. STAT. § 197.005-.860 (1991) (Comprehensive Land Use Planning Coordination). See also Horan, *supra* note 27.

33. 30 N.Y.2d 359 (1972).

34. S. 9028, §§ 3-106(2), 3-104, 4-101, & 4-102(1)(c).

35. § 3-301.

36. § 3-106(2).



The reaction to the Land Use and Development Law was severe. Not only did it fail to reach the full Senate,<sup>37</sup> but the state agency that proposed it was disbanded by the legislature shortly thereafter.<sup>38</sup> Two years later, the State Urban Development Corporation (UDC) was stripped of its power to override town and village zoning for its residential developments shortly after it announced a proposal to build subsidized housing in nine communities in Westchester County.<sup>39</sup>

### C. Local Land Use Control as a Barrier to State Action

The votes in the state legislature against the Land Use and Development Law and the UDC were votes in favor of local control of land use. They were not votes against sound land use policies.<sup>40</sup> Among the arguments heard at the time, whose echoes endure to the present, was that the authority to make land use decisions is inherent in the home rule authority of New York's cities, towns and villages.<sup>41</sup> Recent judicial decisions make it clear that those arguments were in error and that local home rule authority is not a barrier to comprehensive state land use legislation.

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37. S. 9028 died in committee. See 1970 N.Y. Legis. Rec. & Index S. 677.

38. 1971 CONSOL. LAWS OF N.Y., ch. 75, § 11 (eliminated the New York Office of Planning Coordination).

39. N.Y. UNCONSOL. LAWS § 6265(5) (McKinney 1979), signed into law on June 5, 1973. The bill prevented the UDC from undertaking a residential development in a town or village if the local legislative body filed a formal written objection to such project.

40. There is no evidence that state legislators in the early 1970s argued against the provision of housing for workers in suburbs where jobs were moving or the intelligent coordination of land use policy so that the environment is protected and that growth occurs in serviceable and efficient patterns. If the Court of Appeals is a reliable reporter of ensuing events, however, a workable system of controlling land use in the interest of job development, housing provision, and environmental protection has yet to be developed in New York. See *Long Island Pine Barrens Soc'y v. Planning Bd. of Brookhaven*, 80 N.Y.2d 500, 517-18, 606 N.E.2d 1373, 1380-81, 591 N.Y.S.2d 982, 989-90 (1992); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 241-42, 378 N.Y.S.2d 672, 681-82 (1975); and *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 373-76, 285 N.E.2d 291, 301-03, 334 N.Y.S.2d 138, 147-50 (1972).

41. This information is based on the author's recollection of the arguments made at local meetings on UDC's Nine Towns Proposal urging that the state legislature eliminate UDC's authority to override local zoning.

### III. Home Rule as a Legal Obstacle to Regional Land Use Solutions

#### A. *Historical Review of Home Rule*

In order to understand the ability of the state legislature to restrict local actions to achieve broader state objectives, it is helpful to examine the history of home rule in New York and its constitutional and statutory limitations. Home rule is the right of self-government in local affairs.<sup>42</sup> Alternatively, it has been described as a method by which a state government can transfer a portion of its governmental power to a local government.<sup>43</sup> Its purpose is to permit local control over matters that are best handled locally and without state interference.

In most states, the right of self-government is not considered inherent, but rather, is derived from either constitutional provision or legislative delegation. Regardless of the source of municipal power, the principle of home rule has been limited in application to matters of purely local concern. Thus, municipalities are not empowered to act in matters of state interest.<sup>44</sup> Although home rule was the result of local desire to move away from complete legislative control by the state, it was never intended to create municipal independence from the state.<sup>45</sup> Rather, the concept was intended merely to allow

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42. *People v. State Bd. of Tax Comm'rs*, 174 N.Y. 417, 431, 67 N.E. 69, 70 (1903), *aff'd* 199 U.S. 1 (1905).

43. James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule,"* 59 ST. JOHN'S L. REV. 713 (1985).

44. It has been held that matters of statewide concern are "beyond the purview of home rule." *Procaccino v. Board of Elections of New York*, 73 Misc. 2d 462, 465, 341 N.Y.S.2d 810, 814 (Sup. Ct. N.Y. County 1973). *But see* N.Y. CONST. art. IX, § 2(c)(ii); N.Y. HOME RULE LAW § 10(1)(ii) (allowing localities, in the absence of inconsistent state law or preemption, to legislate in matters of state interest).

45. "[C]ities are 'political institutions erected to be employed in the internal government of the State' and are subject to legislative power except as expressly restricted by the Constitution . . . ." *Procaccino*, 73 Misc.2d at 466, *quoting* *City of New York v. Village of Lawrence*, 250 N.Y. 429, 437, 165 N.E. 836, 838 (1929). *See* *MacMullen v. City of Middletown*, 187 N.Y. 37, 79 N.E. 863 (1907).

A municipal corporation is a political, or governmental, agency of the state, which has been constituted for the local government of the territorial division described and which exercises, by delegation, a portion of the sovereign

local governments to operate more effectively.<sup>46</sup>

The origin of home rule is ancient:

The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution. Even prior to Magna Carta some cities, boroughs and towns had various customs and liberties which had been granted by the crown or had subsisted through long use, and among them was the right to elect certain local officers from their own citizens and, with some restrictions, to manage their own purely local affairs. These customs and liberties, with other rights, had been so often trampled upon by the king as to arouse deep hatred of centralization of power, and we find among the many grants of the Great Charter that "the city of London shall have all its ancient liberties and its free customs as well by land as by water. Furthermore, we will and grant that all other cities and burghs and towns . . . shall have all their liberties and free customs."<sup>47</sup>

From colonial times to the Civil War, there was a struggle between the state's power to control local matters and dissatisfaction with the subservient character of local government. The colonists had brought with them a dedication to independence and were both frustrated with, and fearful of, attempts by a central government to control local conduct. The concept of home rule was a logical expression of a desire to establish some limitations upon the state's power over local affairs.<sup>48</sup>

Early drafts of the New York State Constitution indirectly recognized the existence of local self-government by enumerating restraints to be placed upon it. Analysis of subsequent drafts reveals a continuing intent to preserve and ex-

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power for the public good. In its organization and in the assignment of its powers and duties, the legislature acts supremely.

187 N.Y. at 41.

46. Carmin R. Putrino, Comment, *Home Rule: A Fresh Start*, 14 BUFF. L. REV. 484 (1964).

47. *People v. State Bd. of Tax Comm'rs*, 174 N.Y. 417, 431-32 (1903). See Joseph L. Weiner, *Municipal Home Rule in New York*, 37 COLUM. L. REV. 557 (1937).

48. SHO SATO, *STATE AND LOCAL GOVERNMENT LAW* 134 (1977).

pand local governmental authority. Throughout the nineteenth century, the increasing need for governmental activity<sup>49</sup> led to the realization that local governments needed authority to act without legislative approval<sup>50</sup> because of the fundamental problems created by such dependence. Deliberation on local matters by the legislature consumed its time and resources, especially since such matters were not of primary concern to state representatives acting in that capacity. Moreover, the cost to the locality of legislative support for a particular grant of local power was often the sacrifice of municipal power over other matters of state interest.<sup>51</sup> In this environment, the doctrine of home rule was devised, conferring a degree of self-government to municipalities, but always with regard to purely local matters.

#### B. The Maturation of Home Rule Authority in New York

All of the legislative power of the state is vested in the legislature.<sup>52</sup> Since zoning regulations are enacted and enforced pursuant to this power, "it follows that authority to impose land use restrictions rests initially with the state legislature."<sup>53</sup> Therefore, municipalities must use their power to zone in accordance with constitutional and statutory prescriptions.<sup>54</sup>

The New York Constitution of 1846 provided for the organization of cities and villages, while restricting the scope of local legislative powers.<sup>55</sup> In an attempt to provide a clearer

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49. The economic revolution of the nineteenth century, along with rapid urbanization, rising levels of immigration and technological development, created an increased demand on the government to respond. *Id.*

50. Because local governments had little or no authority to respond, they turned to the legislature for narrow statutory grants of power. Consequently, the state government became overwhelmed with such requests and became inefficient in meeting local needs. *Id.*

51. See Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role For the Courts*, 48 MINN. L. REV. 643 (1964).

52. N.Y. CONST. art. III, § 1.

53. 1 ROBERT M. ANDERSON, *NEW YORK ZONING LAW AND PRACTICE* § 2.02 (3d ed. 1984).

54. Terry Rice, *Zoning and Land Use*, 40 SYRACUSE L. REV. 641, 643 (1989).

55. N.Y. CONST. of 1846, art. VIII, § 9.

definition of local legislative powers, the 1894 Constitutional Convention amended the constitution to provide a sphere of authority for local action that was immunized to some degree from invasion by the state legislature.<sup>56</sup> It provided that " 'laws relating to the property, affairs or government of cities' be divided into 'general' and 'special city laws' " and it restricted local legislative authority to the latter category.<sup>57</sup> In this way, local legislatures were authorized to act with regard to their local property, affairs and government, as long as the matter was not dealt with by a state law generally applicable to municipalities throughout the state.

Between 1919 and 1923, New York's Executive Office delivered three separate messages to the state legislature suggesting the need for a broader grant of power to municipalities.<sup>58</sup> However, it was not until 1923 that the concept of broader local power was introduced into the state constitution. In that year, sections two through seven, collectively known as the home rule amendment, were added to article XII of the constitution in order to provide adequately for the interests of local governments.

During the Constitutional Convention of 1938, sections two and three of article XII were renumbered and incorporated into sections eleven and twelve of article IX. However, in an attempt to resolve the ambiguity contained in the language of sections eleven and twelve, sections one through fourteen of article IX were repealed in 1963, and a new article IX was adopted. Elements of sections eleven and twelve were incorporated into section two of the new article IX.

Article XII, section two, had denied the state legislature power to act regarding matters involving the property, affairs or government of local governments other than by general

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56. N.Y. CONST. of 1894, art. XII, § 1 (known as the "Bill of Rights for Local Governments").

57. Lewis A. Millenbach, Comment, *Municipal Home Rule in New York*, 22 SYRACUSE L. REV. 736, 737 (1971) (quoting W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 321 (1954)).

58. New York Leg. Doc., The Governor's Message, at 10 (1919); New York Leg. Doc., The Governor's Message, at 32 (1920); New York Leg. Doc., The Governor's Message, at 7 (1923).

laws or by an executive declaration of emergency, requiring the concurrent action of two-thirds of the members of each house of the legislature.<sup>59</sup> In effect, section two imposed restrictions upon the legislature when acting with respect to local affairs in order to protect the powers granted to municipalities over such matters.

While section three of article XII had granted an affirmative power to local governments to legislate within certain enumerated areas, it failed to delegate general authority to localities to act with respect to local "property, affairs or government."<sup>60</sup> This omission raised a question regarding local authority: Could local legislatures act when the subject did not fall within one of the enumerated powers, but affected local property, affairs or government? The problem arose because, historically, local governments have been found powerless to act other than pursuant to those areas of authority specifically delegated to them in state statutes.<sup>61</sup> Although the home rule amendment of 1923 was an attempt to preclude legislative intrusion into matters of local concern,<sup>62</sup> it resulted in a limited and ill-defined sphere of local autonomy.<sup>63</sup> This resulted in a troublesome lack of certainty regarding the local authority to legislate.

In an attempt to resolve this ambiguity, a new article IX was adopted in 1964. The express language of article IX, and legislation passed pursuant to it, suggests that local governments are given broad home rule powers.<sup>64</sup> Section one, for

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59. Section 2 of the 1924 Constitution stated that:

The legislature shall not pass any law relating to the property affairs or government of cities, which shall be special or local either in its terms or in its effect, but shall act in relation to the property, affairs or government of any city only by general laws which shall in terms and in effect apply alike to all cities except on message from the governor declaring that an emergency exists and the concurrent action of two thirds of the members of each house of the legislature.

N.Y. CONST. of 1924, art. XII, § 2.

60. N.Y. CONST. of 1924, art. XII, § 3.

61. *Browne v. City of New York*, 241 N.Y. 96, 119-20, 149 N.E. 211, 218 (1925).

62. Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1147 (1966).

63. *Id.*, referring to N.Y. CONST. of 1924, art. XII, § 3.

64. N.Y. CONST. art. IX.

example, is a bill of rights for local governments.<sup>65</sup> Section two directs the legislature to provide for the creation and organization of local governments so as to secure the rights, powers, privileges and immunities granted by the constitution.<sup>66</sup> The state legislature implemented article IX with the enactment of the Municipal Home Rule Law and the Statute of Local Governments, both of which were to be "liberally construed."<sup>67</sup> However, this grant of powers to local governments is far from absolute. It is qualified by both article IX provisions and section eleven of the Statute of Local Governments. These contain language that reserves to the legislature the power to enact laws relating to matters of state concern, or, as stated in the constitution, "[m]atters other than the property, affairs or government of a local government."<sup>68</sup>

65. N.Y. CONST. art. IX, § 1.

66. N.Y. CONST. art. IX, § 2.

(b) Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:

(1) Shall enact, and may from time to time amend, a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article. A power granted in such statute may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year.

(2) Shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (a) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b), except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in his judgment constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.

§ 2(b)(1) and (2).

67. N.Y. MUN. HOME RULE LAW § 51 (McKinney 1969 & Supp. 1993); N.Y. STAT. LOC. GOV'TS § 20(5) (McKinney 1993).

68. N.Y. CONST. art. IX, § 3(a)(3); N.Y. STAT. LOC. GOV'TS, § 2-11. *See also* City of Amsterdam v. Helsby, 37 N.Y.2d 19, 332 N.E.2d 290, 371 N.Y.S.2d 404 (1975); Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929), and N.Y. CONST. art. IX, § 2(b)(2). The state retains power to act with respect to matters of local property, affairs or government by general law, or by special law where both local and state

The earlier ambiguity in the scope of local authority was removed by these amendments. Under the Municipal Home Rule Law section ten, paragraph one, local governments may adopt and amend local laws relating to their property, affairs or government.<sup>69</sup> Local governments may also pass legislation relating to enumerated subject areas, whether or not related to their property, affairs or government.<sup>70</sup> All such local laws must not be inconsistent with any general laws or the constitution. This grant of authority is hedged by a provision giving the legislature the authority to "restrict the adoption of such a local law relating to [areas] other than the property, affairs or government of such a local government."<sup>71</sup> The authority left to local legislatures, under these provisions, is within the narrow circumference of local "property, affairs or government." This phrase is defined by the courts as controversies arise. Despite the limitations on local authority in these provisions, the adoption of the revised article IX in 1964 was regarded as a legislative endorsement of local self government, an impression that no doubt contributed to the legislature's

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interests are involved.

69. N.Y. MUN. HOME RULE LAW § 10.1.

70. A local government may legislate regarding:

- 1) The powers, duties, qualifications, number, compensation, selection, removal, terms and hours of its officers and employees;
- 2) The membership and composition of its legislative body;
- 3) The transaction of its business;
- 4) The incurring of its obligations;
- 5) The presentation, ascertainment, disposition, and discharge of claims against it;
- 6) The acquisition, care, management, and use of its highways, roads, and property;
- 7) The acquisition, operation, and ownership of its transit facilities;
- 8) The levy and administration of authorized local taxes;
- 9) The collection of authorized local taxes;
- 10) The fixing, levy, collection and administration of government rentals, charges, rates or fees, penalties, liens, and interest thereon;
- 11) The wages, hours and protection of contractors and subcontractors performing services for it;
- 12) The government, protection, order, conduct, safety, health and well-being of persons or property therein;
- 13) The powers granted to it in the statute of local governments.

MUN. HOME RULE LAW § 10(1)(ii)(A).

71. N.Y. MUN. HOME RULE LAW, § 10(1)(ii).



actions in the early 1970s rejecting state control of land use decisions.

### C. Limiting the Scope of Local "Property, Affairs or Government"

The phrase, "property, affairs or government," has been the subject of litigation since it first appeared in the 1894 constitutional amendment.<sup>72</sup> In 1929, the Court of Appeals in *Adler v. Deegan* introduced the doctrine of "state concern" as a means of limiting local authority over matters previously thought to be subject only to local power.<sup>73</sup> In *Adler*, the Multiple Dwelling Law<sup>74</sup> regulating the conditions of multi-family housing was challenged by New York City as an intrusion into its constitutionally granted home rule authority and a violation of the protection afforded to cities by article XII, section two of the state constitution.<sup>75</sup> The court acknowledged that the Multiple Dwelling Law "was passed in the manner in which other State legislation is adopted, that is, by a majority vote, and not as an emergency measure, by the concurrent vote of two-thirds of the members of each house of the Legislature."<sup>76</sup> A special or local law could only be enacted upon a message from the governor declaring that an emergency existed and upon the concurrent vote of two-thirds of each house of the legislature. This more difficult route to the adoption of a special law served "as another safeguard against possible legislative circumvention of home rule."<sup>77</sup>

In order to determine whether the Multiple Dwelling Law violated the home rule guarantees to local government, the court considered whether the subject matter of the law was within the scope of the "property, affairs or government" of

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72. N.Y. CONST. art. XII, § 1 (1894); Cole, *supra* note 43, at 713.

73. *Adler v. Deegan*, 251 N.Y. 467 (1929).

74. N.Y. MULT. DWELL. LAW, §§ 1-366 (McKinney 1946).

75. *Adler*, 251 N.Y. at 471; see *supra* text accompanying notes 58-59.

76. 251 N.Y. at 471. The state constitution provided that the legislature could only act with regard to the property, affairs or government of a city by a general law, which is a law that by its terms and its effect applied alike to all cities. N.Y. CONST. art. XII, § 2 (1924). See *supra* notes 59 and 66.

77. Cole, *supra* note 43, at 716 n.10.

the city. The court, recognizing that the constitution did not define the phrase, stated it must look beyond the phrase's common meaning into the "limited meaning" that it had been given at law.<sup>78</sup> The court stated that the Multiple Dwelling Law was a health measure and, therefore, a valid exercise of the police power of the state. Since "anything that affects the health and welfare of the city of New York, touches almost directly the welfare of the State as a whole,"<sup>79</sup> the court concluded that the health and welfare of the inhabitants of New York City is a valid state concern and "should not now be limited or whittled away by the reform known as Home Rule."<sup>80</sup>

The concurring opinion by Chief Justice Cardozo identified three categories into which regulatory subjects could be placed: (1) matters of state concern; (2) matters of local concern; and (3) matters that fall into the area where state and local concerns overlap.<sup>81</sup> With regard to matters that fall into the third category, Judge Cardozo wrote that the test as to whether these matters constitute a state concern is whether the state has a "substantial" interest in the matter.<sup>82</sup> If it is determined that it does, then the matter will not be considered the property, affairs or government of a local government.<sup>83</sup> A matter of state concern will be subject to regulation by the state through the usual forms of legislation because the legislature is "unfettered" with regard to these matters.<sup>84</sup> Since healthy human beings are the "mainstay of the State, the source and the pledge of its prosperity and power . . .,"<sup>85</sup> Judge Cardozo agreed that the health and safety of the residents of New York City is a matter of concern to the state as a whole and not merely a local concern of the city of New York.

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78. *Adler*, 251 N.Y. at 472.

79. *Id.* at 477-80.

80. *Id.* at 478.

81. *Alder*, 251 N.Y. at 489 (Cardozo, C.J., concurring).

82. *Id.* at 491 (Cardozo, C.J., concurring).

83. *Id.* at 471 (Cardozo, C.J., concurring).

84. *Id.* at 489-90 (Cardozo, C.J., concurring).

85. *Id.* at 486 (Cardozo, C.J., concurring).

In a separate concurring opinion, Judge Pound found that although the Multiple Dwelling Law "applies to cities having a population of 800,000 inhabitants or more"<sup>86</sup> it is a "general health law."<sup>87</sup> When construing the meaning of the phrase "property, affairs or government of local governments," Judge Pound stated that the determination of what is a state concern and what is a local concern must be made on a case-by-case basis.<sup>88</sup> Judge Pound concluded that "the life, health and safety of the inhabitants of the city of New York are not, under the Home Rule Amendment, a city concern which can be localized and delimited by the city boundaries, but are the concern of the whole State."<sup>89</sup>

The decision in *Adler*, illuminated as it was by the lights of no less than Judges Cardozo and Pound, has been called the "Court of Appeals definition" of the phrase "property, affairs or government."<sup>90</sup> Consistently, it has been cited to narrow the scope of the home rule authority of local governments.<sup>91</sup> As one commentator noted, "the roots of home rule had barely taken hold when the state's highest court established a rubric for the expansion of state powers at the expense of local authority."<sup>92</sup>

In 1964 when new home rule amendments were adopted, the legislature had an opportunity to address the restrictive interpretation applied by the courts to the phrase "property, affairs or government." Instead, the legislature chose to continue the use of the phrase in the implementing legislation. This was explained later by the Court of Appeals as follows: "[i]t is unlikely that a term of art so heavily laden with the judicial gloss of the pre-1963 cases . . . favoring the State's power would have been used had State concerns been contemplated to be subordinate to local powers . . . ."<sup>93</sup>

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86. *Id.* at 478 (Pound, J., concurring).

87. *Id.* at 483 (Pound, J., concurring).

88. *Id.* at 480 (Pound, J., concurring).

89. *Id.* at 483 (Pound, J., concurring).

90. Cole, *supra* note 43, at 718.

91. *Id.*

92. *Id.* at 714-15.

93. *Wambat Realty Corp. v. New York*, 41 N.Y.2d 490, 497 (1977).

#### D. Increasing the Scope of Statewide Concern

The Court of Appeals' holding in *Uniformed Firefighters v. City of New York*<sup>94</sup> that the residence of New York City's police, fire, correction and sanitation department employees is a "matter of Statewide concern not subject to municipal home rule," further narrowed the scope of home rule authority.<sup>95</sup> The City of New York enacted Local Law No. 20 in 1978,<sup>96</sup> establishing residency requirements in the city for these employees. The city based its authority for the adoption of this law on the affirmative grant of powers contained in the constitution and the Municipal Home Rule Law, which provide that a local government may enact local laws with regard to the qualifications of its employees.<sup>97</sup>

Local Law No. 20, however, was challenged in *Firefighters* as being inconsistent with the Public Officers Law, sections of which establish liberal residency requirements for these municipal employees.<sup>98</sup> The city argued that the Public Officers Law was a special, not a general law, and therefore was invalid because it was not enacted pursuant to the procedural requirements of article IX applicable to special laws. Without specifying why, the Court of Appeals held that the residence of city employees did not relate to the "property, affairs or government" of New York City. As a result, the state was free to legislate, unrestricted by the home rule provisions of article IX, and the city was without home rule authority to supersede the Public Officers Law.

The court further determined that since the Public Officers Law dealt with matters of state concern, the fact that it classified the cities affected by the size of their population did not disqualify the statute as a general law,<sup>99</sup> provided that the classification was reasonable and related to the subject of the

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94. 50 N.Y.2d 85, 405 N.E.2d 679, 428 N.Y.S.2d 197 (1980).

95. 50 N.Y.2d at 92.

96. N.Y. CITY ADMIN. CODE § B49-4.0-2 (1978).

97. N.Y. CONST. art. IX, § 2(c); N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(1) (1993).

98. N.Y. PUB. OFF. LAW §§ 3(2), (2-a), (99), 30(4), (4-a), (4-b), 5.

99. *Firefighters*, 50 N.Y.2d at 92.

statute. The court distinguished between the local government's home rule authority to determine the structure and control of its municipal departments from "the residence of their members, unrelated to job performance or departmental organization."<sup>100</sup> The court also stated that the city had failed to meet its burden of showing the "insubstantiality of the State's interest in affording residential mobility to members of the civil service."<sup>101</sup>

For proponents of strong home rule authority, the decision in *Firefighters* is disturbing. One commentator characterized the erosion of home rule authority effected by the decision as follows: "[t]he Court's questionable conclusion that the residence of employees did not involve the property, affairs or government of the city may have demonstrated the authority of the state and possibly eliminated one source of local power."<sup>102</sup> Home rule advocates argue that legitimate local goals are promoted by requiring municipal employees to reside within the municipality.<sup>103</sup> Curiously, the Court of Appeals did not indicate what "substantial state interest was served by establishing the liberal residency provisions for these officers."<sup>104</sup> The court in *Firefighters* further diminished home rule aspirations by placing on the municipality the burden of showing that the state's interest was insubstantial.<sup>105</sup> The clear effect of the decision is to recreate the historical ambiguity that has plagued local legislative authority and to subject it to erosion by state actions advancing a "state concern," a notion that is greatly malleable and elastic.<sup>106</sup>

100. *Id.*

101. *Id.*

102. Bruce B. Roswig, *Local Government*, 33 SYRACUSE L. REV. 423, 424 (1982).

103. See *Kelley v. McGee*, 57 N.Y.2d 522, 539, 443 N.E.2d 908, 457 N.Y.S.2d 434 (1982) where the court set out the reasons why it believed the salary of the District Attorney is a matter of Statewide concern.

104. Cole, *supra* note 43, at 741.

105. *Id.* But see *Town of Monroe v. Carey*, 96 Misc. 2d 238, 412 N.Y.S.2d 939 (Sup. Ct. Orange County 1977), *aff'd mem.*, 46 N.Y.2d 847, 386 N.E.2d 1335, 414 N.Y.S.2d 314 (1979). The court stated that "mere concern by the legislature that the subject matter of a statute is a state concern . . . does not . . . create a state concern nor does it afford a statute such presumption." *Id.* at 241.

106. As one commentator noted, "[t]he courts have, without reluctance, used the

### E. State Authority To Preempt Local Home Rule Authority

In *Albany Area Builders Ass'n v. Town of Guilderland*,<sup>107</sup> the Court of Appeals explored the limiting effect of preemptive state laws on local authority to exercise powers otherwise granted to them under the Municipal Home Rule Law and other enabling statutes.<sup>108</sup> The court reviewed the legality of a locally enacted Transportation Impact Fee Law, adopted by the Town of Guilderland. The local law required developers of certain types of projects to pay a transportation impact fee as

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State concern doctrine as a rubric for invalidating local laws inconsistent with State laws." James D. Cole, *Local Authority to Supersede State Statutes*, N.Y. ST. B.J., Oct. 1991, at 34, 37 (citations omitted).

107. 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989).

108. In 1976 the state legislature amended section 10 of the Municipal Home Rule Law to provide towns with a limited exception to the general rule that local laws may not be inconsistent with a general state law. N.Y. MUN. HOME RULE LAW, § 10(1)(ii)(d)(3). The amendment allows towns to amend or supersede:

any provisions of the Town Law relating to the property, affairs or government of the town or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law . . . .

*Id.* This supersession authority allows a town to use its delegated powers, "in a narrow, well-demarcated area of purely local concern." *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 430, 547 N.E.2d 346, 349, 548 N.Y.S.2d 144, 147 (1989). The N.Y. MUN. HOME RULE LAW § 10(1)(ii)(e)(3) confers similar supersession powers on villages. The court in *Kamhi* recognized the legislature's grant of supersession authority to towns and villages, while at the same time noting the limitations of the supersession authority and its application to matters of a purely local nature:

We conclude that the Town had the power to adopt a local law requiring parkland-or-money exactions in connection with site plan approval for R-3 developments. This is hardly License for an 'arrogation of undelegated power' or a 'profound change \* \* \* giving municipalities virtually unconstrained authority to act' . . . . Rather, our conclusion represents a faithful application of the dictates of the Municipal Home Rule Law, which — within narrow confines — permits the Town of Yorktown to adjust a provision of the Town Law so that in its local application it will have exactly the effect intended by the Legislature.

*Kahmi*, 74 N.Y.2d at 434 (quoting *concurring opinion* 74 N.Y.2d at 442).

The court ultimately held that because the town had failed to comply with the formal requirements of the Municipal Home Rule Law with respect to exercising its supersession authority, Local Law No. 6 was invalid. The town had failed to declare with "definiteness and explicitness" its intention to supersede the Town Law, as required by § 22 of the Municipal Home Rule Law. *Id.* See also *Turnpike Woods v. Town of Stony Point*, 70 N.Y.2d 735, 514 N.E.2d 380, 519 N.Y.S.2d 960 (1987).

a condition for the town's permission to build. The funds collected were to be spent on capital improvement and expansion of the roads and transportation facilities within the town, necessitated by the additional traffic projected as a result of the new developments.<sup>109</sup>

In defending its transportation initiative, the town cited the grant of home rule powers in the constitution and various sections of the Municipal Home Rule Law as authority. The court stated, however, that there was no need to consider whether the local law fell within the delegated powers because the general area had been preempted by state law.<sup>110</sup> The power to adopt local laws is limited by the preemption doctrine, which the court in *Albany Area Builders* described as "a fundamental limitation on home rule powers."<sup>111</sup> It applies when a local law is in conflict with a state law and when the legislature "has evidenced its intent to occupy the field."<sup>112</sup> If the intent to occupy the field can be ascertained from the nature of the subject matter regulated, the purpose and scope of the state legislative scheme and the need for statewide uniformity in a given area, then local laws in the area are preempted.<sup>113</sup> This is so whether or not the legislature has ex-

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109. *Albany Area Builders*, 74 N.Y.2d at 376.

110. *Id.* at 379. For a more extensive discussion of state preemption of local legislative authority, see *infra* text accompanying notes 140-88.

111. *Albany Area Builders*, 74 N.Y.2d at 377. "Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute." *Id.*

112. *Id.* The court noted that the Town Law and Highway Law enacted by the state legislature provided comprehensive and detailed regulations on the budgeting and financing of roadway improvements, and on the manner in which the moneys were to be expended for those improvements. The court stated that the "purpose, number and specificity of these statutes make clear that the State perceived no real distinction between the particular needs of any one locality and other parts of the State with respect to the funding of roadway improvements, and thus created a uniform scheme to regulate this subject matter." *Id.* at 378-79. The court concluded that this uniform and comprehensive scheme evidenced the legislature's intent to occupy the field; therefore, the local law was preempted. *Id.* at 379.

113. See *Town of Islip v. Cuomo*, 64 N.Y.2d 50, 473 N.E.2d 756, 484 N.Y.S.2d 528 (1984) for an example of a special law of the state affecting local property, affairs and government that is upheld because it relates to a matter of state concern: the siting of solid waste facilities.

pressly restricted the local government from legislating regarding the subject.<sup>114</sup> The state has adopted a comprehensive legislative scheme regarding transportation improvements. Therefore, the court held, the Town of Guilderland was preempted from entering the field.

This evolution of local home rule authority and exploration of relevant judicial decisions leads to several obvious conclusions. First, New York's constitutional conventions, its legislature and the courts have frustrated all attempts to insulate local legislative authority from state legislative intrusions in the broader interests of the state. Second, there is no legal obstacle, under the rubric of "home rule" that prevents the state from legislating to ensure that local land use actions consider or accommodate regional or state-wide land use needs. Third, in the view of the state's highest court, some type of state planning is necessary to guide or direct local use decisions in the interests of growth, economic development, affordable housing and environmental protection.

As the next part of this article demonstrates, the state legislature has used this unrestrained authority to preempt, direct, influence and shape local land use authority in order to serve a wide variety of state interests. The number of these state intrusions, and the diversity of methods employed, evidence a trend toward state-wide control of land use, as suggested by the Court of Appeals. The one element missing from these many examples of state action in the land use area is comprehensiveness.<sup>115</sup>

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114. It has been noted that the court severely limited the scope of home rule authority by holding that the legislature's intent to preempt a field can be ascertained through judicial construction rather than by requiring the legislature to expressly restrict the field. Cole, *supra* note 43, at 722-23 n.34.

115. See *infra* text accompanying notes 279-97.



#### IV. The Erosion of Home Rule Authority Through State Action

##### A. Counting the Ways the State Directs Land Use Outcomes

By restricting the definition of "local property, affairs and government,"<sup>116</sup> expanding the definition of "state-concern"<sup>117</sup> and upholding state legislation that preempts local land use authority,<sup>118</sup> the judiciary has made it clear that the scope of home rule authority is as broad or as narrow as the legislature says it is.

The state's interest in land use is growing and statutory efforts to advance those interests have quickened in recent years.<sup>119</sup> The many illustrations discussed below represent a sampling of relatively recent state actions that affect local land use. There is a discussion, for example, of the State Urban Development Corporation and the Adirondack Park Agency, which are empowered by the state legislature to override local zoning directly. The examples discussed below range from this type of direct preemption of local authority to less invasive techniques such as the Sole Source Aquifer Act which is to guide local land use decisions. The illustrations are presented in a sequence ranging from those that are most preemptive of local authority to those that influence and shape local land use decisions. This examination reveals that state

116. *Alder*, 251 N.Y. at 489; see *supra* text accompanying notes 72-92.

117. See *supra* text accompanying notes 94-106.

118. See *supra* text accompanying notes 107-14.

119. How extensively the state has intruded is a matter of some debate. Eight years ago, Robert M. Anderson characterized the matter as follows:

As zoning regulations are enacted and enforced pursuant to the police power, it follows that authority to impose land-use regulations rests initially with the state legislature. The power to regulate the use of land has not been widely used by state bodies in New York or elsewhere . . . The assumption that exclusive local control over the use of land serves the public has been challenged and the state legislature has responded with planning legislation which to a modest degree increases state participation in the planning process and invades the previously local preserve of comprehensive planning.

1 ANDERSON, *supra* note 53, at § 2.02. Anderson also argues that local zoning does not protect the ecological interests of the state and is not concerned with regional impact. *Id.* Note that many of the statutes reviewed in this section were adopted since Anderson's observation was made nine years ago.

statutes operate in an impressive number of ways to determine land uses at the local level despite the emphasis in New York on local control of these matters.

## B. State Preemption of Local Zoning

### 1. Express Preemption of Local Zoning

Akin to the state's authority to take property by eminent domain<sup>120</sup> and its power to limit the delegated authority of local governments,<sup>121</sup> is its ability to preempt local land use regulations for state purposes. When the state legislature expresses directly its intention to usurp local control to achieve broader state interests, the courts routinely uphold such declarations.<sup>122</sup> The discussion later in this section of the authority granted to the Adirondack Park Agency amply demonstrates the point.

The familiar applications of this power are the construction of state facilities such as educational institutions,<sup>123</sup> utilities,<sup>124</sup> prisons, state office buildings, roads,<sup>125</sup> bridges, sewers and similar projects. A less familiar application of the power is seen in state legislative efforts to develop housing, commercial or industrial projects over the often strenuous objections of local residents.

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120. N.Y. EM. DOM. PROC. LAW §§ 101-709 (McKinney 1979 & Supp. 1993). *See* *People v. Adirondack R. Co.*, 160 N.Y. 225, 231-38, 54 N.E. 689, 692-93 (1899), *aff'd* 176 U.S. 335.

121. *See* N.Y. CONST. of 1846, art. VIII, *see also* § 9; N.Y. CONST. art. I., § 2(b)(i).

122. *See also* *Zubli v. Community Mainstreaming Assocs., Inc.*, 102 Misc. 2d 320, 423 N.Y.S.2d 982 (Sup. Ct. N.Y. County 1979), *aff'd* 74 A.D. 624 (2d Dep't), *appeal denied*, 49 N.Y.2d 915 (1980).

123. N.Y. EDUC. LAW §§ 401, 407, 408 (McKinney 1985); N.Y. COMP. R. & REGS. tit. 8, §§ 155.1, 155.4 (1992); *Board of Educ. of the City of Buffalo v. City of Buffalo*, 32 A.D.2d 98, 302 N.Y.S.2d 71 (4th Dep't 1969) (city ordinance that restricted construction of schools was preempted by state law). *See also* *Wiltwyck Sch. for Boys, Inc. v. Hill*, 11 N.Y.2d 182, 182 N.E.2d 268, 227 N.Y.S.2d 655 (1962) and *Summit Sch. v. Neugent*, 82 A.D.2d 463, 442 N.Y.S.2d 73 (2d Dep't 1981).

124. *See, e.g., New York State Elec. & Gas Corp. v. McCabe*, 32 Misc. 2d 898, 224 N.Y.S.2d 527 (Sup. Ct. Westchester County 1961) and *Consolidated Edison Co. v. Village of Briarcliff Manor*, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct. Nassau County 1955).

125. *In re Mair Realty Corp.*, N.Y. L.J., Aug. 21, 1969, at 12, Sup. Ct. N.Y. County, *aff'd* 34 A.D.2d 735 (2d Dep't 1970).

A recent controversy in the Town of Huntington pits the preemptive authority of the Urban Development Corporation (UDC) against local land use authority. In the interest of securing 500-600 jobs for the people of the state, the UDC is using its authority to assist the Olympus Corporation to relocate its headquarters to the town of Huntington before its present lease in Lake Success expires in 1994.<sup>126</sup> For UDC to succeed, it must override the town's zoning of the site which calls for single family homes on two acre lots. UDC, a state agency, was created by the legislature in 1968 and given the authority to acquire land by eminent domain, raise money by issuing tax exempt bonds, and override local land use processes and restrictions,<sup>127</sup> in the interests of providing jobs and housing.<sup>128</sup> Although UDC was stripped of its early authority to override town and village zoning for residential projects,<sup>129</sup> it has retained that authority in cities and with respect to commercial projects throughout the state.<sup>130</sup>

With regard to these direct actions of state agencies, the courts generally apply a "superior sovereign" test, the result of which is to immunize their activities from the restrictions of local zoning.<sup>131</sup> This doctrine applies where the legislature's intention to preempt local zoning is direct, as seen in the

126. John Rather, *State Bypasses Town in Zoning Dispute*, N.Y. TIMES, Dec. 6, 1992, sec. 13, at 6.

127. See *Floyd v. New York State Urban Dev. Corp.*, 33 N.Y.2d 1, 300 N.E.2d 704, 347 N.Y.S.2d 161 (1973).

128. N.Y. UNCONSOL. LAWS §§ 6251-6285 (McKinney 1979). This invention of New York State was praised and recommended for wider adoption by a national advisory panel: "The states should establish governmental entities, comparable to New York's Urban Development Corporation [with] power . . . to overcome the barriers that now prevent most developers from operating at the larger scales that the public interest requires." ROCKEFELLER BROTHER'S FUND TASK FORCE REP., A CITIZEN'S GUIDE TO THE USE OF LAND, 261 (1973).

129. See *supra* text accompanying note 39.

130. The proposed Olympus headquarters is located in an area that may affect the sole source aquifer discussed in the *Long Island Pine Barrens* case. See *supra* text accompanying notes 8-12 and, *infra* text accompanying notes 268-97. An interesting question arises as to how UDC, a state agency, is to resolve the potential conflict between its statutory purpose and the state concern expressed in the Sole Source Aquifer Law.

131. See, e.g., *Washington County Cease, Inc. v. Persico*, 120 Misc. 2d 207, 465 N.Y.S.2d 965, 971 (1983) *aff'd* 64 N.Y.2d 923 (1984).

above example of the Urban Development Corporation.<sup>132</sup>

## 2. Implied Preemption of Local Zoning

In a variety of other contexts, however, the courts in New York have found an implied intention to preempt local zoning. When the declaration of intent to preempt is indirect, the court proceeds with a bit more caution. Instead of deferring to the state, as a court does in applying the superior sovereign test, it balances the interests of the state with those of the affected locality. This test was applied recently in *In re Monroe County*<sup>133</sup> which exempted a county airport expansion project from local land use jurisdiction.<sup>134</sup>

After reviewing a variety of factors, the court in *Monroe* exempted the county's project from local land use oversight. Among the factors considered by the court were that the county's own procedures provided for public notice and hearing, the importance of the project to the locality and the state, the lack of other appropriate locations, and the impact on adjacent owners. Under *Monroe*, when the state's intention to preempt is not express, the project is subjected to local land use scrutiny. If the locality does not approve the activity, the court will use a balancing of interests test to determine the reasonableness of that determination.<sup>135</sup>

Implied preemption of local zoning has been found even regarding the projects of independent non-profit organizations that are not creatures of state government, but whose activities are simply aided by the state. In several cases, the courts have found that the state legislature intended to occupy and

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132. See *supra* notes 127-30.

133. 72 N.Y.2d 338, 530 N.E.2d 202, 533 N.Y.S.2d 702 (1988). In this case the Court of Appeals discarded the long-used distinction between the governmental activities of the superior sovereign, which were found to preempt local zoning, and its proprietary activities, which subjected them to local review. The usefulness of this distinction was called "outlived." 72 N.Y.2d at 341.

134. *Id.* at 343. "This balancing approach subjects the encroaching governmental unit in the first instance, in the absence of an expression of contrary legislative intent, to the zoning requirements of the host governmental unit where the extraterritorial land use would be employed." *Id.*

135. *Id.* at 343-44.

control the field of providing drug abuse facilities as a matter of state policy.<sup>136</sup> In another, a city's zoning was held to violate the State Mental Hygiene Law because the zoning restriction was inconsistent with a state legislative scheme for providing housing for the mentally ill.<sup>137</sup> In another case, a statutory provision that all duly licensed community residential facilities shall constitute family units was found to override conflicting local zoning regulations.<sup>138</sup>

### 3. Preemption of Zoning for Regional Interests

In the early 1970s, the state legislature preempted local zoning authority for state purposes in a land mass that covers one-fifth of the state. In this vast area, there is a regional plan, a regional agency, regional regulation, and coordination between regional and local land use functions. In this one place, the New York state legislature became one of the earliest state chambers to design a comprehensive regional planning framework. The structure of this program has been paralleled in the innovative state-wide growth management plans since adopted by numerous other state legislatures.<sup>139</sup>

#### a. The Adirondacks

In 1971, the legislature enacted the Adirondack Park Agency Act to focus the responsibility for land use in the Adirondack Park Agency (APA).<sup>140</sup> The New York state legislature specifically stated that the preservation of the park's

136. *Town of Oyster Bay v. Syosset's Concern about its Neighborhood (SCAN)*, 173 A.D.2d 813, 570 N.Y.S.2d 840 (2d Dep't), *appeal dismissed*, 78 N.Y.2d 1006 (1990); *People v. Saint Agatha Home for Children*, 47 N.Y.2d 46, 389 N.E.2d 1098, 416 N.Y.S.2d 577, *cert. denied*, 444 U.S. 869, (1979); *Unitarian Universalist Church of Central Nassau v. Shorten*, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup. Ct. Nassau County 1970).

137. *Community Resource Ctr. for the Developmentally Disabled, Inc. v. City of Yonkers*, 140 Misc. 2d 1018, 532 N.Y.S.2d 332 (Sup. Ct. Westchester County 1988).

138. *Zubli v. Community Mainstreaming Assocs., Inc.*, 102 Misc. 2d 320, 423 N.Y.S.2d 982 (1979). *See also* *Incorporated Village of Old Field v. Introne*, 104 Misc. 2d 122, 430 N.Y.S.2d 192 (Sup. Ct. Suffolk County 1980).

139. *See supra* text accompanying notes 21-27.

140. N.Y. EXEC. LAW §§ 800-820 (McKinney 1982). *See infra* text accompanying notes 152-61 for a discussion of *Wambat Realty*.

resources was a matter of state, regional and local concern. The nearly 2.5 million acres in the park that are owned by the state are protected from misuse by appropriate provisions of the state constitution.<sup>141</sup> The APA Act significantly preempts local land use authority regarding land use matters throughout an immense geographical region, encompassing 20 percent of the state's land area and 20 percent of its counties.

One purpose of the APA Act is to concentrate land use authority in an agency that reflects the statewide concern that the park be properly used and protected. That agency is to "recognize the major state interest in the conservation, use and development of the park's resources and the preservation of its open space character . . . ."<sup>142</sup> The APA Act accomplishes its goals by imposing comprehensive land use controls on the privately owned land within the park. In order to protect the area of the park that is privately owned, the state legislature created the Adirondack Park Agency and adopted the Adirondack Park Land Use and Development Plan in 1973.<sup>143</sup> It requires the APA to prepare and file an official map which is given specific planning and regulatory effect.<sup>144</sup> The plan and map divide land within the park into several designated land use classifications.<sup>145</sup> With respect to each classification, the APA Act describes its character, the policies and objectives to be achieved in the area, and the types and intensity of uses permitted.<sup>146</sup>

The APA has jurisdiction to review and approve projects with definable regional impacts. Its authority is exclusive to approve critical regional projects, as defined by their location

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141. N.Y. CONST. art. XIV, § 1. The six million acre park contains both public and private land and encompasses twelve counties, 92 towns and 15 incorporated villages. Forty-two percent of the six million acres is owned by the state. The Adirondack Park is the largest park in the continental United States. The park is the home of 130,000 year-round residents and 250,000 seasonal residents.

142. N.Y. EXEC. LAW § 801.

143. N.Y. EXEC. LAW §§ 800-820 (McKinney 1982 & Supp. 1993).

144. *Id.*

145. *Id.* See *Helms v. Reid*, 90 Misc. 2d 583, 394 N.Y.S.2d 987 (Sup. Ct. N.Y. 1977), holding that the division of lands in the park into land use classifications was valid under the state constitution. *Id.* at 584.

146. N.Y. EXEC. LAW § 805.

in a critical environmental area or by the intensity of their impact.<sup>147</sup> The APA also has jurisdiction to review and approve other regional projects in any area not governed by an approved and validly adopted local land use program. The APA is directed to consult and work closely with local governments and county and regional planning agencies as part of the ongoing planning process.<sup>148</sup> It is empowered to review and approve or disapprove local land use plans.<sup>149</sup> The APA has approved land use programs submitted to it by fourteen towns within its jurisdiction. Once a local plan is approved, the locality assumes authority for reviewing and approving all but critical regional projects within its borders.<sup>150</sup>

New York state courts have consistently upheld the Adirondack Park Agency Act.<sup>151</sup> For example, the APA Act

147. N.Y. EXEC. LAW §§ 808-810.

148. The Adirondack Park Agency has been granted authority to administer the Adirondack Park Agency Act, the Freshwater Wetlands Act within the Adirondack Park and the Wild, Scenic and Recreational Rivers System Act. N.Y. COMP. CODES R. & REGS. tit. 8, § 570.1 (1992). But, in another case it was held that the APA does not have jurisdiction under its statute to regulate extractive mining operations in the Adirondack Park. See *In re Hunt Bros., Inc. v. Glennon*, 180 A.D.2d 157, 585 N.Y.S.2d 228 (3d Dep't), *appeal granted* 80 N.Y.2d 758 (1992). This holding was based on the express provisions of another state statute, the Mined Land Reclamation Law, N.Y. ENVTL. CONSERV. LAW §§ 23-2701 to 23-2727, which the court found to supersede the provisions of the APA Act with respect to the regulation of such operations. *Id.* at 159-63. See *infra* text accompanying notes 245-55.

149. N.Y. EXEC. LAW §§ 805 & 807. Sections 808-810 provide for the application review and approval process for certain types of land development designated a class A or class B regional projects. Class A and B regional projects are defined separately for each land use classification. Regional projects are designated as class A or class B depending on their 1) location within a critical environmental area (e.g. wetland) 2) type of use 3) size. §§ 808-810. In fact the majority of local governments do not have validly enacted or adopted local land use programs, so the APA actually has jurisdiction over all of class A and almost all of class B regional projects. § 809.

150. N.Y. EXEC. LAW §§ 807-810.

151. *Horizon Adirondack Corp. v. New York*, 88 Misc. 2d 619, 388 N.Y.S.2d 235 (Ct. Cl. 1976) (aesthetic, open space and the environment are valid reasons for the APA to impose land use controls on privately owned land within the park, the burden on the owner was balanced with the regional and state interests); *Long v. APA*, 76 N.Y.2d 416, 559 N.E.2d 635, 559 N.Y.S.2d 941 (1990) (APA authorized to reverse town zoning ordinance); *Grinspan v. APA*, 106 Misc. 2d 501, 434 N.Y.S.2d 90 (Sup. Ct. N.Y. County 1980) (agency authorized to disapprove subdivision and variance); *Franklin County v. Connelie*, 68 A.D.2d 1000, 415 N.Y.S.2d 110 (3d Dep't 1979) (SEQRA did not apply to APA review of relocation project); *Town of Monroe v. Ca-*

was attacked in 1977 as an unconstitutional interference with the authority of local government to zone and control land use.<sup>152</sup> The constitution provides that the powers granted in the Statute of Local Governments can be "repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the reenactment and approval of such statute in the following calendar year."<sup>153</sup> The plaintiff argued that the APA Act was invalid because it was not enacted as required by article IX of the state constitution.<sup>154</sup>

The Court of Appeals framed the issue before it in terms of whether the "future of a cherished regional park is a matter of State concern . . . [that is, a matter involving] 'other than . . . local government' . . . ."<sup>155</sup> If so identified, the matter would fall into the area reserved to the state by the state constitution and the Statute of Local Governments.<sup>156</sup> The Court of Appeals held that the future of the regional park is a matter of state concern:

To categorize as a matter of purely local concern the future of the forests, open spaces and natural resources of the vast Adirondack Park region would doubtless offend aesthetic, ecological and conservation principles. But more important, such a categorization would give a sub-

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rey, 96 Misc. 2d 238, 412 N.Y.S.2d 939 (Sup. Ct. Orange County 1977) (state wetlands law allowing county to adopt or implement a freshwater protection law or ordinance within proscribed period is not unconstitutional as impairing home rule powers of local governments); *Wambat Realty Corp. v. New York*, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977) (comprehensive zoning authorized in APA Act is not invalid and does not violate home rule even though it encroaches on the powers of the local government); *McCormick v. Lawrence*, 83 Misc. 2d 64, 372 N.Y.S.2d 156 (Sup. Ct. N.Y. County 1975), *aff'd*, 54 A.D.2d 123 (3d Dep't 1976), *appeal denied*, 41 N.Y.2d 801 (1977) (APA can prohibit development based on aesthetic scenic and visual considerations).

152. *Wambat Realty Corp. v. New York*, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977).

153. N.Y. CONST. art. IX, § 2(b)(1).

154. *Wambat Realty*, 41 N.Y.2d at 491-93.

155. *Id.*

156. See N.Y. CONST. art. IX, § 3 and N.Y. STAT. LOC. GOV'T § 11, (4).



stantially more expansive meaning to the phrase "property, affairs or government" of a local government than has been accorded it in a long line of cases interpreting successive amendments to the home rule article.<sup>157</sup>

The Court of Appeals held that the APA Act does not violate the home rule provisions of the state constitution.<sup>158</sup> It reasoned that to use home rule principles to allow local control of land use in the Adirondack Park region would mean that local interests would be promoted at the expense of state interests.<sup>159</sup>

Of course, the Agency Act prevents localities within the Adirondack Park from freely exercising their zoning and planning powers. That indeed is its purpose and effect, not because the motive is to impair home rule but because the motive is to serve a supervening State concern transcending local interests.<sup>160</sup>

The Court of Appeals has also held that the APA is authorized to review and reverse local zoning variances. This is an exclusive function of local government in other parts of the state. The court in this instance reasoned that because of the pressing state interest in preserving the park, the local home rule authority must yield.<sup>161</sup>

In summary, the regional planning initiative for this part of New York is complete.<sup>162</sup> The state legislature articulated

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157. *Wambat Realty Corp.*, 41 N.Y.2d at 491. The Court also wrote: In the face of increasing threats to and concern with the environment, it is no longer, if it ever was, true that the preservation and development of the vast Adirondack spaces, with their unique abundance of natural resources — land, timber, wildlife and water — should not be of the greatest moment to all the people of the State. These too relate to life, health and quality of life.

*Id.* at 495.

158. *Wambat Realty Corp.*, 41 N.Y.2d at 490.

159. *Id.* at 497-98.

160. *Id.* at 494-95.

161. *Long*, 76 N.Y.2d at 418. The court held that because of the pressing state interest in preserving the Adirondack Park, the home rule article did not apply. The court cited a recent advisory report that concluded "that the importance and urgency of the APA's mission may require even broader powers." *Id.* at 421.

162. Although the APA Act constitutes a complete regional land use regulatory

state-wide objectives for the area's conservation and development. It created a regional planning and land use agency. That agency adopted a comprehensive land use map consistent with established state-wide goals. The state statute created varying uses for each of several categories of land areas. The APA reviews and approves land use actions of regional significance. The respective roles of the local and regional governments in land use are established. Within its jurisdiction, the regional agency serves a valuable coordinating function regarding the implementation of other state statutes affecting land use within the area.

In addition to sustaining the state legislature's initiative in the Adirondack Park, the New York Court of Appeals has urged the state legislature to adopt sound regional land use plans for other areas of the state.<sup>163</sup> The court has been moved by regional needs such as environmental protection,<sup>164</sup> affordable housing,<sup>165</sup> and growth management,<sup>166</sup> to call on

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regime, it is not without controversy. There has been a significant increase in development in the past two decades leading to recommendations by a gubernatorial commission that the APA's authority be strengthened to preserve the wilderness area from additional development. Under the APA Act, it is estimated that up to 400,000 additional houses could be built legally in the region. Opponents of more extensive regulation point to the lack of economic progress the area and its effects on the park's permanent residents. They question the need for more extensive regulation. See Sam Howe Verhovek, *For 100 Years, "Forever Wild" and Forever in Dispute*, N.Y. TIMES, May 19, 1992, at B1.

163. See *supra* notes 2-13.

164. *Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven*, 80 N.Y.2d 500, 606 N.E.2d 1373, 581 N.Y.S.2d 982 (1992).

165. In *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975), the Court created a two-pronged test to evaluate the validity of a local regulation: first, whether the municipality has provided a properly balanced and well-ordered plan for the community; and secondly, whether consideration was given to regional needs and requirements in enacting a zoning ordinance. 38 N.Y.2d at 110-12. In commenting on the second prong, the court said that "there must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met." *Id.* at 110 (emphasis in original). For a lengthier discussion of New York cases on the subject of exclusionary zoning see *infra* text accompanying notes 301-14.

166. In *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), the Court of Appeals addressed the conflict between regional growth trends and local efforts to exclude growth and population. In effect it prohibited localities from insulating themselves from the pressures of growth: "What we will

the state legislature to provide a broader framework for public land use management. State-wide or regional land use planning is needed, in the court's view, because local land use decision-making suffers from "pronounced insularism" and can create "distortions in metropolitan growth patterns."<sup>167</sup>

#### b. The Hudson River Greenway

The most recent regional planning strategy created by the state legislature differs from the Adirondack plan in that it is voluntary and encourages participation through financial and regulatory incentives. In 1991, the Hudson River Valley Greenway Act became law.<sup>168</sup> The legislation designated the ten counties that adjoin the Hudson River from Westchester and Rockland, in the south, to Albany and Rensselaer, in the north, as the Greenway area. The legislation established a council of local and state representatives, called the Hudson River Valley Greenway Communities Council, and a public benefit corporation, called the Greenway Heritage Conservancy. These organizations are intertwined and work closely together to implement a program whose principal goal is to establish a regional land use accord among the municipalities of the Hudson River valley. In this case, the regional land use plan is to be generated by the affected municipalities, not imposed on them by a state agency.<sup>169</sup>

Municipalities can participate in the Greenway by agree-

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not countenance under any guise, is community efforts at immunization or exclusion." 30 N.Y.2d at 378. "Zoning [however,] is a means by which a governmental body can plan for the future - it may not be used as a means to deny the future." *Id.*, citing *National Land & Inv. Co. v. Easttown Twp. Bd. of Adj.*, 215 A.2d 597, 610 (Penn. 1965).

167. *Id.* at 374.

168. N.Y. ENVTL. CONSERV. LAW §§ 44-0101 to 44-0201 (McKinney 1984 & Supp. 1993).

169. § 44-0119(3). Subsection 3 states:

If the local officials in any [subregion] fail to produce a regional plan for their district or submit such plan which the council cannot approve, the council may prepare or cause to be prepared a district plan which cities, towns and villages in such district may voluntarily adopt by local law to become participating communities.

*Id.*

ing to update their local planning and to engage with neighboring municipalities in regional planning. Participating municipalities receive financial and technical assistance to do this work. Once a regional plan has been adopted, a number of regulatory benefits become available. The most noteworthy is that state agencies are required to take cognizance of the plan and conform their actions to the goals of the plan. In addition, projects identified and assessed in the plan are exempted from time-consuming and expensive environmental review procedures.

Although Hudson River localities are under no compunction to join the compact,<sup>170</sup> their failure to participate makes them ineligible for the technical and financial assistance and indemnification from legal liability provided by the Council.<sup>171</sup> In drafting the legislation, attempts were made to give the Council the power to review and shape local development decisions to ensure that regional concerns were properly reflected. That provision did not survive final drafting. In the end, the Council emerged with no legal authority to achieve the objectives of the legislation other than the use of the stipulated incentives. Local land use control is affected only by the consent of the constituent municipalities.

### C. State Protection of Natural Resources

#### 1. State Agency Zoning Authority to Protect Natural Resources

Land use authority, such as that exercised by the Adirondack Park Agency,<sup>172</sup> is also delegated in a fashion to the Department of Environmental Conservation (DEC)<sup>173</sup> over

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170. See § 44-0119(1). "The council shall guide and support a cooperative planning process to establish a voluntary regional compact amongst the counties, cities, towns and villages of the greenway to further the recommended criteria of natural and cultural resource protection, regional planning, economic development, public access and heritage education . . . ." *Id.*

171. § 44-0119(7)&(9).

172. See *supra* text accompanying notes 140-67.

173. Under the Environmental Conservation Law, the legislature formed the Department of Environmental Conservation (DEC) in 1970. N.Y. ENVTL. CONSERV. LAW §§ 3-0101 to 3-0307. The Department was given responsibility over all areas of state

lands adjacent to the state's wild, scenic and recreational rivers. The Wild, Scenic and Recreational Rivers System Act (Wild Rivers Act)<sup>174</sup> specifically lists development activities that are allowed or prohibited adjacent to wild, scenic and recreational river areas.<sup>175</sup> "Development" is defined broadly to include "any activity which materially affects the existing condition, use or appearance of any land . . . ."<sup>176</sup> Under the authority of the Wild Rivers Act, local authority is compromised in that no new structures are permitted to be constructed in certain river areas<sup>177</sup> and, in others, the intensity of development that is permitted is prescribed.<sup>178</sup> The Wild Rivers Act was enacted by the legislature to preserve certain rivers for the benefit and enjoyment of present and future generations.<sup>179</sup> The statute designates specific rivers in New

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environmental law and environmental decision making. The DEC is required by state law to formulate and revise statewide environmental plans for the management and protection of the quality of the environment and the natural resources of the state.

174. N.Y. ENVTL. CONSERV. LAW §§ 15-2701 to 15-2723.

175. N.Y. ENVTL. CONSERV. LAW § 15-2709. These provisions give the DEC authority over non-conforming uses, traditionally exercised by local zoning boards of appeal, call for no new structures to be constructed in wild river areas, and include and exclude certain types of uses in river areas, the traditional function of the local zoning ordinance. *Id.*

176. § 15-2703(3).

177. § 15-2709(2)(a).

178. § 15-2709(2)(c).

179. § 15-2701. This section includes this provision: "It is hereby declared to be the policy of this state that certain selected rivers of the state . . . shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations." § 15-2701(3).

"Wild" rivers are defined as: "Those rivers or sections of rivers that are free of diversions and impoundments, inaccessible to the general public except by water, foot or horse trail, and with river areas primitive and undeveloped in nature and with development, if any, limited to forest management and foot bridges." § 15-2707(2)(a).

"Scenic" rivers are defined as:

Those rivers, or sections of rivers, that are free of diversions or impoundments except for log dams, with limited road access and with river areas largely primitive and largely undeveloped or which are partially or predominantly used for agriculture, forest management and other dispersed human activities which do not substantially interfere with public use and enjoyment of the rivers and their shores.

§ 15-2707(2)(b).

"Recreational" rivers are defined as: "Those rivers, or sections of rivers, that are

York state to be protected.<sup>180</sup> Other wild, scenic and recreational rivers are eligible for later inclusion in the river system.<sup>181</sup>

The Commissioner of the DEC is given authority to make and enforce regulations necessary for the management, protection, and enhancement of and control of land use and development affecting included rivers.<sup>182</sup> DEC's regulations call for the preparation of river area management plans which are, in essence, land use plans.<sup>183</sup> While this planning authority allows local participation, the Wild Rivers Act preserves DEC's control of the process by stipulating that the agency must approve every plan.<sup>184</sup>

A 1990 case illustrates how seriously local land use authority is preempted by the Wild Rivers Act. In September of 1990, the DEC established a sixteen mile long protected area along the Peconic River on Long Island.<sup>185</sup> In that area, the Wild Rivers Act banned non-river related commercial development and strictly limited any other development.<sup>186</sup> The Town of Riverhead claimed that the DEC's actions emasculated the town's zoning of approximately 300 acres for industry.<sup>187</sup> The town brought an action claiming that the DEC had

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readily accessible by road or railroad, that may have development in their river area and that may have undergone some impoundment or diversion in the past." § 15-2707(2)(c).

180. See, e.g., N.Y. ENVTL. CONSERV. LAW §§ 15-2710, 15-2713, 15-2714, & 15-2715.

181. § 15-2707.

182. § 15-2703. A moratorium on development enacted to enable the DEC to promulgate land use restrictions under this statute on Long Island was upheld by the courts. *Hawes v. State*, 161 A.D.2d 745, 556 N.Y.S.2d 101 (2d Dep't.), *appeal dismissed in part, denied in part*, 76 N.Y.2d 918 (1990). See N.Y. ENVTL. CONSERV. LAW § 15-2710.

183. N.Y. COMP. R. & REGS. tit. 6, § 666.5 (1992). If an affected city, town and village declines to plan to protect designated areas, "or is denied such delegation by the commissioner, a county may assume such authority." § 666.5(b).

184. § 666.6.

185. The Peconic Bay and Pine Barrens are also designated as a major resource area under the state open space plan. DEPARTMENT OF ENVIRONMENTAL CONSERVATION, *CONSERVING OPEN SPACE IN NEW YORK STATE - A SUMMARY*, p. 6. See *infra* note 333.

186. *Cerisse Anderson, Ruling for Riverhead Allows Zoning Suit*, N.Y. L.J., Nov. 6, 1990, at 1.

187. *Id.*

not properly exercised its jurisdiction over the Peconic River.<sup>188</sup> Although the disposition of the case depended on technical matters, the fact that the town did not dispute DEC's jurisdiction itself illustrates the extent of state control over matters within the scope of land use authority historically exercised by local governments.

## 2. Directing Development To Protect a Critical State Resource

Article 11 of the New York State Public Health Law<sup>189</sup> authorizes the State Department of Health (DOH) to issue rules and regulations to protect New York State and New York City drinking water.<sup>190</sup> This act also specifically authorizes the Commissioner of the New York City Department of Environmental Protection to make rules and regulations, subject to the approval of the DOH, to protect the city drinking water supply from contamination.<sup>191</sup> This power to protect the New York City drinking water includes the power to regulate the sources of this drinking water.<sup>192</sup> These sources are located outside of New York City in a 2,000 square mile area encompassing numerous cities, towns and villages.

The standards for water purity are established by the federal government under the Safe Drinking Water Act.<sup>193</sup> In 1989, the federal Environmental Protection Agency (EPA) is-

188. *Town of Riverhead v. DEC*, N.Y. L.J., Nov. 6, 1990, at 35 (Sup. Ct. Suffolk County).

189. N.Y. PUB. HEALTH LAW §§ 1100-1108 (McKinney 1985).

190. N.Y. PUB. HEALTH LAW § 1100. The section states: "[t]he department may make rules and regulations for the protection from contamination of any or all public supplies of potable waters and water supplies of the state or United States, institutions, parks, reservations or posts and their sources within the state . . . ." § 1100(1).

191. According to section 1100 of the Public Health Law, [t]he commissioner of environmental protection of the city of New York and the board of water supply of the city of New York may make such rules and regulations subject to the approval of the [New York State] [D]epartment [of Health] for the protection from contamination of any or all public supplies of potable waters and their sources within the state where the same constitute a part of the source of the public water supply of said City. § 1100.

192. § 1100.

193. 42 U.S.C. §§ 300f-300j-26 (1989).

sued the Federal Surface Water Treatment Rule (SWTR) to establish water quality standards in compliance with the Safe Drinking Water Act Amendments of 1986.<sup>194</sup> According to the SWTR, filtration of city drinking water is required if criteria of the Safe Drinking Water Act for protecting unfiltered water cannot be met.<sup>195</sup> The City's Department of Environmental Protection and the State DOH are responsible for compliance with these standards in the New York City watershed.<sup>196</sup>

Like the other examples in this part, the city's watershed problems raise critical land use issues and demonstrate the inability of the state land use regime to meet contemporary challenges. The New York City water system consists of 19 gravity-fed reservoirs and three controlled lakes.<sup>197</sup> It stretches out 125 miles from the city and includes 300 miles of tunnels and aqueducts.<sup>198</sup> The watershed encompasses three reservoir systems: the Croton to the east of the Hudson River, covering 375 square miles, and the Catskill and Delaware to the west, encompassing 1,600 square miles.<sup>199</sup> The Croton system overlaps the jurisdictions of three counties and 18 towns.<sup>200</sup> The Catskill and Delaware system touches five counties and over 38 towns.<sup>201</sup> The population of the Catskill and Delaware watersheds increased by 13 percent between 1970 and 1990.<sup>202</sup> In some counties in this watershed, population is

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194. 40 C.F.R. §§ 141.70-141.75 (1992); see National Primary Drinking Water Regulations, 54 Fed. Reg. 27,486, 27,526 (1989).

195. 40 C.F.R. § 141.73.

A public water system that uses a surface water source . . . , and does not meet all of the criteria in Sec. 141.71(a) and (b) for avoiding filtration, must provide treatment consisting of both disinfection . . . and filtration treatment . . . by June 29, 1993, or within 18 months of the failure to meet any one of the criteria for avoiding filtration . . . whichever is later.

*Id.*

196. See *supra* text accompanying note 192.

197. DAVID K. GORDON & ROBERT F. KENNEDY, JR., *THE LEGEND OF CITY WATER: RECOMMENDATIONS FOR RESCUING THE NEW YORK CITY WATER SUPPLY* 1 (1991).

198. *Id.*

199. *Id.*

200. *Id.* at 5.

201. *Id.* at 4.

202. GORDON & KENNEDY, *supra* note 197, at 5.



projected to increase by 25 percent in the next 25 years.<sup>203</sup> Uncontrolled population growth in the watershed will have a direct and immediate effect on the quality of water in the unfiltered city system. Many of the local governments in the Catskill and Delaware system do not have comprehensive land use plans or even zoning ordinances. Those that do are not required to plan or zone to avoid degradation of the city's water system.<sup>204</sup>

Based on draft watershed regulations issued by the DEP to enforce the federal SWTR standard, the EPA and the DOH have found the city eligible to avoid the cost of water filtration.<sup>205</sup> Filtration is estimated to cost the city anywhere from six billion<sup>206</sup> to eight billion dollars.<sup>207</sup> Quite obviously, these costs, which exceed the price paid for every dam built in New York State over the past 100 years,<sup>208</sup> would be extremely onerous for the ratepayers who consume city water.

The city confronted the challenge of uncontrolled growth in an early draft of its watershed regulations issued in September, 1990.<sup>209</sup> These regulations required 500 foot buffer zones between new septic systems and water courses and limited new construction in buffer zones to ten percent of the land area.<sup>210</sup> These proposed restrictions<sup>211</sup> greatly exceeded

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203. *Id.*

204. Under The State Environmental Quality Review Act, all land use actions, including subdivision and site plan approvals, are subject to review by the responsible agency for potential negative impacts on the environment, which includes streams, rivers, and water systems. See *infra* text accompanying notes 256-66. Such case-by-case reviews cannot guarantee development patterns that will respect watershed protection objectives. See, e.g., *Long Island Pine Barrens Society v. Planning Bd. of Brookhaven*, 80 N.Y.2d 500, 606 N.E.2d 1373, 591 N.Y.S.2d 982 (1992) and *supra* text accompanying notes 8-13.

205. *City's Water Gets Clean Bill of Health*, REP. DISPATCH, Jan. 20, 1993, at 7A [hereinafter *City's Water*].

206. Michael Specter, *New York City Feels Pressure to Protect Precious Watershed*, N.Y. TIMES, Dec. 20, 1992, at 1.

207. *City's Water*, *supra* note 205, at 7A.

208. Specter, *supra* note 206, at 46.

209. Discussion Draft, Proposed Regulations for the Protection from Contamination, Degradation and Pollution of the New York City Water Supply and Its Sources, Sept. 1990, issued by the New York City Department of Environmental Protection.

210. *Id.*

211. The regulations authorized by article 11 of the New York State Public

local zoning provisions and state wetlands restrictions and prompted concerns that urban areas along watershed streams and rivers would no longer be able to expand, greatly reducing the density of rural land development.<sup>212</sup> Public opposition and litigation leveled at these draft regulations precipitated a change of strategy in later drafts of the proposed regulations. The Department of Environmental Protection has adopted a more collaborative approach in recent months, suggesting that watershed localities adopt comprehensive land use plans and land use regulations that allow growth and economic development but, at the same time, protect the watershed from degradation.<sup>213</sup>

The public issues involved here, erosion of local control, water supply degradation and arrested economic development, have led to a renewed reliance on the ancient predicate of land use regulation, that is, comprehensive land use planning. It is being called into service in an unfamiliar regional setting, pitting the self interests of the state's largest city against those of a host of awakening rural towns and villages. The absence of any comprehensive state land use policy balancing and harmonizing these interests is particularly obvious in this context.

#### D. State Veto of Local Projects

##### 1. Selective Veto by the State of Individual Projects

The ability of local governments in New York to regulate the development of wetlands has been affected by a series of

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Health Law have not been revised since 1953. "Changing social, economic and environmental conditions in the watershed and stricter Federal and State water quality standards have made it imperative for the City to develop new Regulations that will protect the quality of the drinking water supply used by half the State's population." New York City Department of Environmental Protection, *Questions & Answers about the Revision of the 1953 Regulations Governing Activities in the New York City Watershed*, April 1991.

212. Diana Shaman, *Upstate Developers Irked at City's Plans*, N.Y. TIMES, Sept. 20, 1991, at A24.

213. Information is based on interviews by the author of members of the Institutional Arrangements Working Group, a coalition of representatives of local governments, the city, state agencies and other concerned parties.

state and federal statutes. Freshwater wetlands that are at least 12.4 acres in size, or of unusual importance, may not be developed unless a permit is secured from the Commissioner of the Department of Environmental Conservation (DEC).<sup>214</sup> Smaller and less significant freshwater wetlands are subject to local regulation.<sup>215</sup> In addition, localities may regulate state designated wetlands if local provisions are at least as strict as those of the state.<sup>216</sup>

The stewardship of tidal wetlands in New York is a matter of state concern, as well.<sup>217</sup> Tidal wetlands include banks, meadows, and marshes subject to tides and areas that border on or lie beneath tidal waters.<sup>218</sup> Tidal wetlands of all sizes are regulated by the state. Under DEC's regulations, principal structures must be set back 75 feet from the edge of tidal wetlands. Septic systems must be at least 100 feet landward of the tidal wetland's edge.<sup>219</sup> All development and other activities affecting tidal wetlands cannot proceed without a permit from the DEC Commissioner. DEC has established minimum criteria to protect tidal wetlands. Local governments may only enact ordinances that are at least as strict as the state standards. Under both the freshwater<sup>220</sup> and tidal<sup>221</sup> wetlands statutes, the Commissioner is authorized to prepare an inventory of all wetlands in the state, to map them and establish their boundaries.

In addition to the wetlands statutes, the state may also

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214. See N.Y. ENVTL. CONSERV. LAW §§ 24-0101 to 24-1305 (McKinney 1984).

215. *Drexler v. Town of New Castle*, 62 N.Y.2d 413, 465 N.E.2d 836, 477 N.Y.S.2d 116 (1984).

216. § 24-0501. Local freshwater wetlands protection procedures provide that: no local freshwater wetlands protection law or ordinance enacted pursuant to subdivision one hereof shall be less protective of freshwater wetlands or effectiveness of administrative and judicial review, than the procedures set forth in this article, nor shall such local law or ordinance affect the activities exempted from permit by section 24-0701 of title seven hereof.

§24-0501(2). See also § 24-0509.

217. N.Y. ENVTL. CONSERV. LAW §§ 25-0101 to 25-0602 (McKinney 1984 & Supp. 1993).

218. § 25-0103(1).

219. See N.Y. COMP. CODES R. & REGS. tit. 6, § 661.6 (1986).

220. N.Y. ENVTL. CONSERV. LAW § 24-0301.

221. § 25-0201.

veto individual projects through its protection of coastal zones, stream beds, navigable waters, and wild, scenic, and recreational rivers. The Coastal Erosion Hazard Areas Act authorizes the Commissioner to designate coastal erosion hazard areas.<sup>222</sup> DEC regulations under this authority ban virtually all construction seaward of a coastal erosion hazard line and restrict severely the ability of a property owner to rebuild a substantially damaged structure that pre-existed the statute.<sup>223</sup> Under another statute that protects stream beds and navigable waters, development activity that changes, modifies or disturbs the course of any channel or bed of any stream is prohibited in New York unless permitted by the Commissioner.<sup>224</sup> Restrictions on local land use authority adjacent to wild, scenic and recreational rivers in the state, under the Wild Rivers Act, are discussed above.<sup>225</sup>

Perhaps the most broadly applicable of all such statutes is yet another legislative program, one that regulates the discharge of pollution, particularly from sewage systems serving developed land, into the waters of the state.<sup>226</sup> The State Pollutant Discharge Elimination System (SPDES) regulates the discharge of pollutants into both the surface waters and the groundwaters of the state.<sup>227</sup> The DEC is in charge of issuing regulations and enforcing the legislated pollution elimination standards.<sup>228</sup>

Under SPDES authority, local control has been preempted<sup>229</sup> and development has been halted, from time to

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222. N.Y. ENVTL. CONSERV. LAW §§ 34-0101 to 34-0113 (1984).

223. N.Y. COMP. CODES R. & REGS. tit. 6, § 505.7-505.8 (1988).

224. N.Y. ENVTL. CONSERV. LAW §§ 15-0503 & 15-0505 (McKinney 1984).

225. See *supra* text accompanying notes 174-88.

226. Under the federal Clean Water Act a national system was created requiring states to establish water quality protection standards. Clean Water Act, § 319, 33 U.S.C. § 1319 (1988); 40 C.F.R. §§ 124, 125.

227. N.Y. ENVTL. CONSERV. LAW § 17-0701. "It shall be unlawful for any person, until a written SPDES permit therefor has been granted by the commissioner . . . to: . . . b. Construct or operate and use a disposal system for the discharge of sewage . . . into the waters of the state . . ." *Id.*

228. N.Y. ENVTL. CONSERV. LAW §§ 17-0101 to 17-1907 (McKinney 1984); N.Y. COMP. CODES R. & REGS. tit. 6 §§ 750-757 (1985).

229. The preemptive effect on local land use authority of this power to regulate pollution discharge into state waters was discussed in *In re Bri-Mar Corp. v. Town*

time, in many areas of the state. This has been done in the interest of protecting the integrity of the state's waters. For example, this SPDES authority led to a two year moratorium on all development in an extensive area of Westchester County served by the Yonkers sewage treatment plant.<sup>230</sup> Projects pending construction in most of western Westchester were halted and locally issued building permits were negated. This same authority also has led to periodic denials of permission to individual projects to connect to existing sewer systems and the denial of permission to sewer authorities to expand their systems. The effect of these denials is to stop development that has been approved by local land use agencies.

SPDES authority also allows the DEC to classify, and to change the classification of, streams. If a stream's classification is restrictive, the DEC can prohibit surface discharges of sewage effluent in and around the stream. For example, when a stream is classified as a "class AA-special" stream "there shall be no discharge or disposal of sewage, industrial wastes or other wastes into these waters."<sup>231</sup> This has a significant

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Bd. of the Town of Knox, 145 A.D.2d 704, 534 N.Y.S.2d 831 (3d Dep't 1988). Petitioners had a SPDES permit for their 25 unit mobile home park. 145 A.D.2d at 704. They wanted to expand the number of units in the park, applied to the town and were subsequently turned down because the sewage disposal method was contrary to town's sanitary code. *Id.* at 704.

Petitioners brought action, asserting that the local law was invalid as inconsistent with state and county laws. *Id.* Under a SPDES permit, surface dumping of sewage which ultimately affects groundwater is allowed when adequately treated. N.Y. ENVTL. CONSERV. LAW § 17-0803. Under the local law, there was a blanket prohibition against such disposal. 145 A.D.2d at 707. The court held that the local law prohibited sewage disposal that was allowed by the state. *Id.* A local ordinance that prohibits conduct specifically permitted by the state cannot stand. *Id.* The town's disapproval of petitioner's application for expansion based on that local ordinance was annulled. *Id.*

230. Lisa W. Foderaro, *Ban on Sewer Connections Unnerves Builders*, N.Y. TIMES, Nov. 20, 1989, at B6. "Much of the County's new construction has come to a halt . . . [D]evelopers, who must extend sewer mains before erecting homes, now own land they can neither build on or sell." *Id.*

231. N.Y. COMP. R. & REGS. tit. 6, § 701.3.

Class AA-Special (AA-S) fresh surface waters. (a) The best usages of Class AA-S waters are: a source of water supply for drinking, culinary or food processing purposes; primary and secondary contact recreation; and fishing. The waters shall be suitable for fish propagation and survival . . . (c) There shall be no discharge or disposal of sewage, industrial wastes or other wastes

effect on the type and density of development in the stream's watershed.

Finally, SPDES authority can be used by DEC to influence New York City's watershed protection efforts. The way that DEC issues, fails to issue, or conditions the issuance of permits for sewage systems, in the interests of water quality integrity, will directly affect the pace and quantity of development in the watershed.<sup>232</sup>

## 2. Veto of Public Facility Projects

New York State statutes regulating the location of solid waste landfills and hazardous waste facilities<sup>233</sup> provide another example of the full authority the state enjoys in the land use field. By regulating landfill location, the state has restricted local control of an important land use and affected the ability of localities to absorb new development and the increased quantity of solid waste that it generates. These statutes provide a review of the limitations of local land use authority and an introduction to an area of land use regulation where authority is shared by the state and the locality.

The State of New York enacted the Solid Waste Management and Resource Recovery Facilities Act<sup>234</sup> to prevent or reduce water, air, and noise pollution, obnoxious odors, unsightly conditions and other conditions of concern to public health, safety and welfare. The statute prohibits the operation of solid waste management facilities unless they have secured a permit from the state.<sup>235</sup> Local governments may enact laws

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into these waters.

*Id.*

232. See memorandum dated Jan. 8, 1992 from DEC to Putnam County Health Department. "In the interim, the Putnam County Health Department, as a DEC agent, is directed *not* to approve any plans for any new sewerage systems that would cause new surface water discharge to the West Branch Reservoir [a component of the New York City water system]." *Id.* (emphasis in the original).

233. Solid Waste Management and Resource Recovery Act, N.Y. ENVTL. CONSERV. LAW §§ 27-0701 to 27-0719 (McKinney 1984 & Supp. 1993).

234. N.Y. ENVTL. CONSERV. LAW §§ 27-070.1 to 27-0719.

235. § 27-0707. See *Town of East Hampton v. Cuomo*, N.Y. L.J., May 13, 1992, at 21 (App. Div. 2d Dep't), *appeal dismissed*, No. 1306 (Ct. App. Feb. 18, 1993), upholding the constitutionality of the Long Island Landfill Law as applied to the

regulating solid waste management, but the local laws must be at least as stringent as the state laws and regulations.<sup>236</sup>

In *Town of Islip v. Cuomo*,<sup>237</sup> the court determined that the state legislature is free to legislate when a matter, such as solid waste management, is of sufficient state interest. This is so even when the legislation may have a direct effect on what seems to be the most basic of local interests.<sup>238</sup> The court upheld provisions of the Solid Waste Management and Resource Recovery Facilities Act<sup>239</sup> that limited the number of solid waste disposal landfills in Nassau and Suffolk counties. The court sustained the state's permitting authority even though it directly affected the town's right to continue to use an existing landfill. The court held that the legislation was based upon the state's interest in protecting the drinking water of a large portion of the state. In this instance, a land use authorized by the local government was vetoed by the state by failing to issue a landfill permit.

Although the state can override local initiatives in this area, the Solid Waste Management and Resource Recovery Facilities Act is not wholly preemptive.<sup>240</sup> It envisions a compatible role for localities, within the limits set by the state. In

Towns of Easthampton, Riverhead and Southold. See N.Y. ENVTL. CONSERV. LAW § 27-0704.

236. § 27-0711; see also N.Y. COMP. R. & REGS. tit. 6, § 360.

237. 64 N.Y.2d 50, 473 N.E.2d 756, 484 N.Y.S.2d 528 (1984).

238. *Id.* at 52.

The limitation upon the power of the Legislature to act by special law in relation to the property, affairs or government of a local government contained in article IX (§ 2, par. [b], cl. [2]) of the New York Constitution must be read together with § 3 of the same article . . . so read, the limitation applies only to a special law which is directly concerned with the property, affairs or government of a local government *and* unrelated to matter or proper concern to State government.

*Id.* (emphasis added). This language is a reminder that it is not enough that a subject affects local affairs; it must also not relate to a matter of state concern. Only then may a locality act unfettered by the intervention of the state. This is so, in this case, even when the state is acting by special law.

239. N.Y. ENVTL. CONSERV. LAW § 27-0704.

240. "Title 7 of article 27 of the ECL dealing with solid waste disposal does not attempt to preempt the regulation of solid waste and industrial waste management." *Niagara Recycling, Inc. v. Town of Niagara*, 83 A.D.2d 316, 330, 443 N.Y.S.2d 939, 949 (4th Dep't 1981).

*Town of Clarkstown v. C & A Carbone, Inc.*,<sup>241</sup> the court upheld a town's local law that solid waste be processed and handled at a town's transfer facility, and that other recycling facility operations cease handling waste.<sup>242</sup> The New York courts have also held that a town may altogether ban solid waste management facilities from its territorial limits.<sup>243</sup>

On the other hand, where the state's interests require complete preemption regarding solid waste, it is clear that home rule is no obstacle. For example, provisions of the Environmental Conservation Law regulating the siting of hazardous waste facilities contain no provisions allowing local governments a role in regulating this activity.<sup>244</sup>

Although these statutes and cases are limited in application to the regulation and siting of a few types of facilities, they illustrate the overriding authority of the state to regulate as it sees fit when the general welfare of the public is involved. In the solid waste management field, the state may veto local decisions through its permitting authority. In the hazardous waste siting field, the state has preempted decision making altogether.

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241. 182 A.D.2d 213, 587 N.Y.S.2d 681 (2d Dep't 1992). New York Environmental Conservation Law section 27-0711 authorizes local governments to enact local laws which are consistent with the provision of the Solid Waste Management and Resource Recovery Facilities Act. "[W]hile obviously fostering State-wide or regional approaches designed to encourage 'economical' projects for present and future waste collection, [the Act] also contemplate[s] and encourage[s] the active involvement of local governments in the development of local solutions and local plans." 182 A.D.2d at 221.

242. 182 A.D.2d at 213.

243. *Town of Islip v. Zalak*, 165 A.D.2d 83, 88, 566 N.Y.S.2d 306, 309 (2d Dep't 1991) (citing *Town of LaGrange v. Giovenetti Enters.*, 123 A.D.2d 688, 507 N.Y.S.2d 54 (2d Dep't 1986)).

244. See *Niagara Recycling, Inc. v. Town of Niagara*, 83 A.D.2d 316, 330, 443 N.Y.S.2d 939, 949 (4th Dep't 1981).

Title 11, which deals with the siting of hazardous waste facilities, contains no provision corresponding to ECL 27-0711 expressly permitting local governments to enact local laws not inconsistent with Title 7 . . . [T]he legislature has evidently decided to grant more authority to local governments to legislate in the field of solid waste management than in the field of hazardous waste treatment, storage and disposal facilities.

83 A.D.2d at 330 n.4.



### 3. Overriding Local Approval of Business Development

The New York legislature has exercised much the same type of control over private sector mining activities as it has over solid waste operations. The New York State Mined Land Reclamation Law was enacted to encourage the development of a mining industry in the state that is compatible with protection of the environment.<sup>245</sup> This state law clearly provides that it supersedes all other state and local laws relating to the extractive mining industry.<sup>246</sup> It does not, however, prevent a local government from enacting or enforcing local zoning ordinances that determine permissible uses in zoning districts.<sup>247</sup> While the statute states that it does not preempt local zoning ordinances from governing mine locations, local governments may not regulate the operation of mines.

Despite the provision of this state law that allows some local regulation of mining, the law significantly limits local prerogatives. For example, in *Hoffay v. Tift*<sup>248</sup> a landowner challenged a decision of a town zoning board that prohibited the landowner from operating a rock crusher at its gravel mine.<sup>249</sup> The town of Sand Lake adopted a zoning ordinance in 1972 designating the site of the gravel mine as an agricultural district, in which a mine was allowed to operate by receiving a special exception use permit.<sup>250</sup> Subsequently, the town denied the request of the gravel company to operate a rock crusher at the mine.<sup>251</sup> The court overturned the denial. It reasoned that such a denial related to the operation of the mine, which is within the state's jurisdiction under the statute.<sup>252</sup> Similarly, in *Hawkins v. Town of Preble*,<sup>253</sup> the court

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245. N.Y. ENVTL. CONSERV. LAW §§ 23-2701 to 23-2727. Among other things, the Department of Environmental Conservation is authorized under this statute to establish criteria for the operation of mining. § 23-2709(1)(c). The DEC is also authorized to examine and pass on applications for permits, bonds and land-use plans, including mining and reclamation plans. § 23-2711.

246. § 23-2703(2).

247. *Id.*

248. *Hoffay v. Tift*, 164 A.D.2d 94, 562 N.Y.S.2d 995 (3d Dep't. 1990).

249. *Id.* at 94.

250. *Id.* at 95.

251. *Id.* at 96.

252. *Id.* at 98.

limited the locality's traditional land use authority.<sup>254</sup> It held that a local prohibition on mining below the water table was an express regulation of mining operations, and thus beyond the scope of the locality's authority.<sup>255</sup>

## E. Mandated Planning and Procedures

### 1. Mandated Procedures Shaping Local Development Decisions

The state legislature has prescribed in some detail how local planning and zoning authorities must proceed in regulating land use. The State Environmental Quality Review Act (SEQRA) requires that local agencies, including the local legislative body, the planning board, and the zoning board of appeals, must review the impact of their regulatory activities on the environment.<sup>256</sup> The list of activities subject to this requirement is so long<sup>257</sup> and the definition of the environment is so general,<sup>258</sup> that the scope of SEQRA is nearly coextensive

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253. 145 A.D.2d 775, 535 N.Y.S.2d 501 (3d Dep't. 1988).

254. *Id.* at 776.

255. Compare *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), where the U.S. Supreme Court upheld a New York locality's regulation of mining operations below the water level. This case was decided before local authority in this field was limited by the Mined Land Reclamation Act in 1964.

256. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117. The State Environmental Quality Review Act (SEQRA) is largely modeled after the National Environmental Policy Act (NEPA). Neil Orloff, *SEQRA: New York's Reformation of NEPA*, 46 ALBANY L. REV. 1128, 1130 (1982). Similar to NEPA, 42 U.S.C. § 4331 (1988), the purpose of SEQRA is to promote harmony between man and the environment, enhance resources and enrich understanding of ecological systems that are essential to the people in the State of New York. N.Y. ENVTL. CONSERV. LAW § 8-0101. NEPA is essentially a procedural statute. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). However, SEQRA is a substantive statute that requires the implementation of policies and alternatives that minimize or avoid adverse effects revealed in the environmental impact statement process. § 8-0109(1). Courts have been quite deferential in reviewing agency decisions regarding environmental impacts of agency actions yet firm in requiring compliance with procedural mandates of SEQRA. See, e.g., *Akpan v. Koch*, 75 N.Y.2d 561, 555 N.Y.S.2d 16, 554 N.E. 2d 54 (1990). See generally MICHAEL B. GERRARD ET AL., *ENVIRONMENTAL IMPACT REVIEW IN NEW YORK* § 6.02 (1992).

257. § 8-0105(4).

258. § 8-0105(6).

with the authority of local government in the land use field.<sup>259</sup> For example, the enactment of a local law changing leaf collection and disposal procedures in a village constitutes an action requiring compliance with SEQRA.<sup>260</sup> The decisions of local authorities are reversed by the courts when those decisions are not made in full compliance with SEQRA.<sup>261</sup>

SEQRA affects growth and development since residential, commercial, and industrial development projects have multiple impacts on the environment. Under the statute, local land use authorities must review the "growth-inducing aspects of the proposed action"<sup>262</sup> and must set forth "mitigation measures proposed to minimize the environmental impact" of such projects.<sup>263</sup>

An additional requirement of SEQRA is that cumulative impact analysis is required in any instance when there are related actions that are included, likely to be undertaken, or are

259. See, e.g., *Pius v. Bletsch*, 70 N.Y.2d 920, 519 N.E.2d 306, 524 N.Y.S.2d 395 (1987), where the Court of Appeals found that even the issuance of a building permit, in certain cases, is subject to environmental review under SEQRA. But see *GERRARD*, *supra* note 256 (noting that the effect of a proposed action on economic factors such as business competition cannot be considered under SEQRA).

260. *Norgate at Roslyn Ass'n Inc. v. Incorporated Village of East Hills*, 104 A.D.2d 974, 480 N.Y.S.2d 898 (2d Dep't 1984).

261. See, e.g., *Holmes v. Brookhaven Town Planning Bd.*, 137 A.D.2d 601, 524 N.Y.S.2d 492 (2d Dep't), *appeal denied*, 72 N.Y.2d 807 (1988) (municipal division must take a 'hard look' at shopping mall proposal and file an EIS in compliance with SEQRA before approving construction plans); *Iorio v. Town of Mount Pleasant*, 131 Misc. 2d 395, 500 N.Y.S.2d 935 (Sup.Ct. Westchester County 1986) (condemnation of land to widen road required an EIS under SEQRA and the town's finding of no significant impact was arbitrary and capricious); *Inland Valve Farm Co. v. Stergi-anopoulos*, 104 A.D.2d 395, 478 N.Y.S.2d 926 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 718 (1985) (town planning board's approval of commercial and office center was arbitrary and capricious, an EIS is required). See also *Abrams v. Love Canal Area Revitalization Agency*, 134 A.D.2d 885, 522 N.Y.S.2d 53 (4th Dept. 1987) (local agency violated SEQRA when it failed to file an EIS before placing homes near Love Canal on the market); *Purchase Envtl. Protective Ass'n, Inc. v. Strati*, 163 A.D.2d 596, 559 N.Y.S.2d 356 (2d Dep't. 1990) (town board violated SEQRA when it allowed a developer to build even though the town's consultants decided the wetlands could be disregarded). But see *Week Broadcasting Corp. v. Planning Bd. of Lloyd*, 79 N.Y.2d 373, 583 N.Y.S.2d 170, 592 N.E.2d 778 (1992).

262. N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(g).

263. § 8-0109(2)(f).

dependent on a long-range plan of action.<sup>264</sup> In *Save the Pine Bush, Inc. v. Albany*,<sup>265</sup> the Court of Appeals held that an Albany plan to preserve the ecological integrity of the Pine Bush area was a long-term plan and that SEQRA mandated a cumulative impact review of projects related to it. The court reasoned that “where a governmental body announces a policy to reach a balance between conflicting environmental goals — here, commercial development and maintenance of ecological integrity — in such a significant area, assessment of the cumulative impact of other proposed or pending developments is necessarily implicated in the achievement of the desired result.”<sup>266</sup>

## 2. Mandated Planning to Protect Critical Areawide Resource

The state legislature has mandated that regional land use plans be prepared for the specific purpose of protecting groundwater resources. The Sole Source Aquifer Protection Law<sup>267</sup> sets forth the procedure to nominate<sup>268</sup> and designate<sup>269</sup> land areas over and around sole source aquifers as special groundwater protection areas.<sup>270</sup> Any action that is found to have a significant impact on an area designated as a special groundwater protection zone triggers the SEQRA requirement for preparation of an environmental impact statement, as discussed above. Under the aquifer protection statute, the Long Island Regional Planning Board is authorized to prepare a comprehensive management plan<sup>271</sup> for the aquifer located under the Long Island Pine Barrens.<sup>272</sup>

This Pine Barrens “region” contains some 100,000 acres

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264. N.Y. COMP. R. & REGS. tit. 6, § 671.11(b).

265. 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).

266. 70 N.Y.2d at 206.

267. N.Y. ENVTL. CONSERV. LAW §§ 55-0101 to 55-0117.

268. § 55-0109.

269. § 55-0111.

270. §§ 55-0109, 55-0111. Act applies only to federally-designated sole source aquifers within counties with populations of at least one million.

271. § 55-0115.

272. §§ 55-0113(5), 55-0115.

underlying three large towns on eastern Long Island: Brookhaven, Southhampton and Riverhead. In addition to the existing and proposed development projects it supports, it shelters "over 300 species of vertebrate animals, 1,000 species of plants and 10,000 species of insects and other invertebrate animals, many of them rare and restricted to Pine Barrens or other similar areas."<sup>273</sup> It is an area of critical ecological significance, an indispensable component of the aquifer system that is the sole natural source of drinking water for 2.5 million people.<sup>274</sup>

Within this region, over 200 development projects, valued at over \$11 billion and containing more than 12,000 housing units, were put on hold as a result of litigation initiated because no cumulative impact analysis of their environmental impact had been conducted.<sup>275</sup> Many of the projects had been approved by three towns,<sup>276</sup> portions of which are located over the area protected by the statute.<sup>277</sup> It was this failure that was attacked as deficient by the plaintiff, the Long Island Pine Barrens Society.<sup>278</sup>

In interpreting the aquifer protection statute's requirements, the appellate division in *Long Island Pine Barrens Society, Inc. v. Planning Board of Brookhaven*<sup>279</sup> confronted an awkward situation. A comprehensive plan that was mandated by the statute had not yet been completed by the Long Island Regional Planning Board or approved by the New York State Department of Environmental Conservation, as required. The appellate division held that the three towns in which these projects were located must review the cumulative effect of these projects on the drinking water aquifer under SEQRA.<sup>280</sup>

273. *Long Island Pine Barrens Soc'y v. Planning Bd. of Brookhaven*, 80 N.Y.2d 500, 509, 606 N.E.2d 1373, 1376, 591 N.Y.S.2d 982, 985 (1992).

274. *Long Island Pine Barrens*, 80 N.Y.2d at 508.

275. *Long Island Pine Barrens Soc'y v. Planning Bd. of Brookhaven*, 178 A.D.2d 18, 581 N.Y.S.2d 803 (N.Y. App. Div., 2d Dep't 1992), *rev'd*, 80 N.Y.2d 500, 606 N.E.2d 1373, 591 N.Y.S.2d 982 (1992).

276. *Long Island Pine Barrens*, 178 A.D.2d at 25.

277. N.Y. ENVTL. CONSERV. LAW § 55-0113.

278. *Long Island Pine Barrens*, 178 A.D.2d at 25.

279. 178 A.D.2d 18, 581 N.Y.S.2d 803 (2d Dep't), *rev'd*, 80 N.Y.2d 500 (1992).

280. *Long Island Pine Barrens Soc'y Inc. v. Planning Bd. of Brookhaven*, 178

The court's holding could be seen as placing a regional planning requirement on the dozens of separate local and state agencies involved with development approvals in the affected area.<sup>281</sup> The court's decision placed the three towns in the difficult situation of having to assess the impact that development would have on the aquifer without the assistance of a comprehensive management plan.

The Court of Appeals reversed the decision of the appellate division that required the three towns to perform a cumulative impact analysis of their actions. The court noted simply that "[h]ere, . . . there is no plan . . . ." <sup>282</sup> It found that a general governmental policy, contained in a host of local, state and federal laws, designed to protect the drinking water aquifer was not the same thing as a land use plan. Such a plan is the predicate for requiring an analysis of the cumulative effects of otherwise unrelated projects.<sup>283</sup> The court echoed its earlier sentiments, stating that "the existing system of land-use planning in the region is plainly not equal to the massive undertaking that effective long-range planning would require, and some other system devised by a larger planning entity must be substituted."<sup>284</sup>

The Court of Appeals decision in *Long Island Pine Barrens* held that the local land use agencies were not required to review the cumulative impact of their actions on the aquifer in the absence of the specific plan called for in the statute. It found that the state legislature had established a direct, albeit ineffectual, method for creating a comprehensive management plan for the Pine Barrens.<sup>285</sup> Protection of the Pine Barrens aquifer was provided for under the Sole Source Aquifer Protection Act,<sup>286</sup> which required that the Long Island Regional Planning Board, a bi-county body, prepare a "comprehensive

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A.D.2d 18, 581 N.Y.S.2d 803 (2d Dep't 1992). See N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 1984 & Supp. 1993).

281. 178 A.D.2d at 27-33.

282. 80 N.Y. 2d at 514.

283. *Id.* at 512-15.

284. *Id.* at 516.

285. 80 N.Y.2d 500, 513-17.

286. N.Y. ENVTL. CONSERV. LAW § 55-0101 to 55-0117 (McKinney 1993).

management plan" designed to "ensure the non-degradation of the high quality of groundwater recharged within the special groundwater protection area."<sup>287</sup>

However, the court noted several problems with this mechanism. First, the legislation failed to provide the Regional Planning Board with any means for enforcing its plan.<sup>288</sup> Second, without legal authority to do so, the Planning Board was charged with "finding a mechanism to implement a regional plan."<sup>289</sup> Third, in the court's opinion, the required plan was not completed in a timely fashion. The Planning Board's pace in adopting a plan, "in view of the gravity of the risk of irreversible harm to the environment" was characterized by the Court as "leisurely" and "clearly counterproductive."<sup>290</sup>

The Court of Appeals commented on the ineffectiveness of the planning mechanism selected by the legislature, referencing the Planning Board's lack of authority to enforce its plan.<sup>291</sup> In this case, comprehensive regional planning is prescribed, affecting local control and private development projects.<sup>292</sup> As it did in earlier cases, the court recommended that the state legislature readdress this matter of "urgent public concern," because of its dissatisfaction with the final results.<sup>293</sup>

For the Long Island Pine Barrens, regional land use planning was delegated to a special purpose entity without enforcement powers and with no taxing authority or a reliable source of revenue to sustain its planning responsibilities. This scheme reflects the enigmatic nature of land use planning in New York generally. Master plans, for example, which are central to the land regulation process, are adopted by local planning boards.<sup>294</sup> They are prepared at public expense.

287. § 55-0115.

288. *Long Island Pine Barrens*, 80 N.Y.2d at 515-16.

289. *Id.* at 516.

290. *Id.* at 517.

291. 80 N.Y.2d at 514-15.

292. *Id.* at 516.

293. *Id.* at 517-18.

294. N.Y. TOWN LAW § 272-a (McKinney 1987 & Supp. 1993); N.Y. VILLAGE LAW

Land use planning under SEQRA, as indicated in the *Long Island Pine Barrens* case, is done by "lead agencies."<sup>295</sup> The cost of these studies is paid for by private applicants who must apply for the lead agency's approval to develop their land.<sup>296</sup> Built into this system is an economic disincentive that discourages comprehensive land use planning at the public's expense in favor of case-by-case environmental impact analysis paid for by the private sector under SEQRA.<sup>297</sup>

The Pine Barrens region is similar to other regions whose futures depend on the uncoordinated land use decisions of local governments. Some of these regions are defined by natural resources such as watersheds, rivers or forests. Others are characterized by economic considerations, such as housing markets or commuting patterns. The natural boundaries of these regions do not respect the territorial lines of the local political jurisdictions whose laws determine their fate.

New York City is trying to create order in the development occurring in its 2,000 square mile drinking water watershed where dozens of local governments control land use decisions.<sup>298</sup> The cost to the ratepayers if the city fails to do so may exceed five billion dollars for the construction of water filtration plants. The Court of Appeals in 1975 required local governments to consider regional housing needs in adopting and amending their zoning ordinances.<sup>299</sup> In the seminal case of *Golden v. Ramapo*, the court tentatively upheld a local growth control ordinance doubtful all the while that "these problems [of regional growth] can be solved by Ramapo or any single municipality . . . ."<sup>300</sup> These recent dramatic situations illustrate the importance of the Court of Appeals' recommendation that the legislature consider creating some

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§§ 7-704 & 7-722 (McKinney 1973 & Supp. 1993); and N.Y. GEN. CITY LAW §§ 20(25) & 28-a (McKinney 1989 & Supp. 1993).

295. 80 N.Y.2d at 512.

296. N.Y. ENVTL. CONSERV. LAW § 8-0109.

297. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.17 (1992).

298. See *supra* text accompanying notes 189-213.

299. *Berenson v. New Castle*, 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975).

300. *Golden*, 30 N.Y.2d at 376.



state-wide or regional framework for guiding land use decisions.

### 3. Court Mandates Local Zoning May Not Be Exclusionary

Applying basic constitutional principles, the courts in New York have imposed an obligation on municipalities to consider regional housing needs in the adoption and amendment of their zoning ordinances. The courts have held that since the zoning power is a delegation of the state's police power, it cannot be used to exclude low and moderate income households, an important segment of the population of the state.

The landmark case of *Berenson v. Town of New Castle*<sup>301</sup> and an associated line of cases establish the legal rules that will be used by courts in New York to decide whether municipal zoning unconstitutionally excludes affordable housing. The New York courts have established standards that urge localities to adopt inclusionary zoning provisions, while maintaining that the task of providing for regional and state-wide planning in these matters belongs to the legislature.<sup>302</sup>

In *Berenson*, the plaintiff was a land developer aggrieved by the absence of any provision in the New Castle zoning ordinance that allowed the construction of multi-family housing.<sup>303</sup> The plaintiff claimed that the state derived its power to zone from the state constitution and that the authority to zone has to be exercised in the interest of all of the people of

301. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

302. "Zoning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the [l]egislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning." *Id.* at 111. *See also Golden v. Town of Ramapo*, 30 N.Y.2d 359, 376, 285 N.E.2d 291, 300, 334 N.Y.S.2d 138, 150 (1972): "Of course, these problems (of growth) cannot be solved by Ramapo or any single municipality, but depend upon the accommodation of widely disparate interests for their ultimate resolution. To that end, [s]tate-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies." 30 N.Y.2d at 376. *See supra* text accompanying notes 279-97 for a discussion of *Pine Barrens*.

303. *Berenson v. New Castle*, 38 N.Y.2d 102, 105 (1975).

the state.<sup>304</sup> The plaintiff further claimed that zoning prohibiting affordable housing unconstitutionally excludes a large portion of the state's population.<sup>305</sup>

In reviewing the trial court's denial of motions to dismiss, the Court of Appeals established a two-pronged test to be applied when determining the reasonableness of local zoning ordinances. The two factors are: (1) whether the town has provided a properly balanced and well ordered plan for the community — that is, whether the present and future housing needs of all the town's residents are met<sup>306</sup> and (2) whether regional needs were considered.<sup>307</sup> After issuing these guidelines, the state's highest court remanded the case for trial to the supreme court in Westchester County which invalidated the local zoning ordinance as unconstitutionally exclusionary.<sup>308</sup> *Robert E. Kurzius Inc. v. Incorporated Village of Upper Brookville* added a third prong to the *Berenson* test.<sup>309</sup> Here, the court held that an ordinance was enacted with intent to exclude a particular group of people would fail constitutional examination.<sup>310</sup>

In two other exclusionary zoning cases, the court held local zoning invalid. In *Allen v. Town of North Hempstead*,<sup>311</sup> a zoning provision that required residency in the town as a condition for occupancy of senior citizen housing was found to violate these standards. The court wrote that "[t]he durational residence requirement at bar has a more direct exclusionary effect on nonresidents like plaintiffs than the almost total exclusion of multi-family housing held to be unconstitutional by this court [in *Berenson*]."<sup>312</sup> In *Continental Build-*

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304. *Id.*

305. *Id.*

306. *Id.* at 110.

307. *Berenson v. New Castle*, 38 N.Y.2d 102, 110 (1975).

308. See John R. Nolon, *A Comparative Analysis of New Jersey's Mount Laurel Cases with the Berenson Cases in New York*, 4 PACE ENVTL. L. REV. 3 (1986).

309. 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980), *cert. denied*, 450 U.S. 1042 (1981).

310. 51 N.Y.2d at 343-344.

311. 103 A.D.2d 144, 478 N.Y.S.2d 919 (2d Dep't 1984).

312. *Id.* at 149.

*ing Co., Inc. v. Town of North Salem*,<sup>313</sup> the court defined the municipal duty to provide for regional housing needs by stating that, if a need is demonstrated by the plaintiff, the local zoning ordinance must accommodate that need.<sup>314</sup>

These cases caution localities against acting overtly to exclude persons of limited means and suggest that local officials periodically examine whether their zoning ordinances accommodate such persons. The obvious limitation affecting the courts in this field is the same one that faces a local government that wishes to adopt an inclusionary zoning ordinance. What is its share of the regional need? What is its "housing" region? How many households are in need of housing within that region? What incomes do they have? How many of them are there? What is the community's proportionate share of that need?

In several states these questions have been answered by statutes, most of which are state-wide comprehensive planning acts. In these states, local governments are encouraged or required to integrate housing objectives into their comprehensive planning efforts. These state statutes establish planning regions, define regional needs, including housing, and allocate planning and zoning responsibility to individual localities.<sup>315</sup>

313. 150 Misc. 2d 145, 567 N.Y.S.2d 328 (Sup. Ct. Westchester County 1991).

314. A related line of "exclusionary zoning" cases involve the invalidation of local zoning that restrictively defines a family for the purpose of regulating occupancy of dwelling units. In *Baer v Town of Brookhaven*, for example, five elderly women lived in a house located in an area zoned for one family houses. 73 N.Y.2d 942, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989). Under the town code the term "family" was defined so that any number of persons related by blood, adoption, or marriage could live in a dwelling unit, but that no more than four unrelated persons "shall be deemed to constitute a family." *Baer*, 73 N.Y.2d at 943. The New York Court of Appeals held the ordinance to be unconstitutional, as applied to this household of five, "because the ordinance here . . . restricts the size of a functionally equivalent family but not the size of a traditional family . . . ." *Baer*, 73 N.Y.2d at 943. The court could not find a defensible public purpose rationale for the distinction between the two types of families. 73 N.Y.2d at 943. See also *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544 (1986) (where the Court of Appeals in New York declared this form of exclusionary zoning unconstitutional).

315. See, e.g., CAL. GOV'T CODE §§ 65300-65590.1 (West 1983 & Supp. 1993); FLA. STAT. ANN. §§ 163.3161-3215, 186.001-187.201 (West 1987 & Supp. 1993); JOHN M. DEGROVE, PLANNING & GROWTH MANAGEMENT 9-15 (1992); GA. CODE ANN. §§ 36-70-1-70-5, 50-8-30-8-46 (Michie 1990); DEGROVE, at 106-09; ME. REV. STAT. ANN. tit. 30,

New York's neighbors have responded to this challenge aggressively. New Jersey has combined state-wide comprehensive planning with regional housing fair share requirements.<sup>316</sup> Connecticut's legislature recently adopted the Affordable Housing Appeals Act<sup>317</sup> which requires localities to justify their disapproval of an application for affordable housing within their jurisdiction.

The momentum of other states, including New York's tri-state partners, and of federal housing policy<sup>318</sup> urges New York to develop a policy framework within which local governments may make inclusionary housing decisions. These federal and state initiatives add both urgency and wisdom to the call by the state's highest court for New York's legislature to adopt regional land use policies<sup>319</sup> and regional housing

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§§ 4312-4349 (West 1978 & Supp. 1992); DEGROVE, at 53-64; OR. REV. STAT. §§ 197.005-.860 (1991); R.I. GEN. LAW §§ 45-22.2-1-22.2-14 (1991), VT. ST. ANN. tit. 24, §§ 4301-4387 (1992); DEGROVE, at 73-76, WASH. REV. CODE ANN. §§ 36.70.010-70.980, 36.70A.010-70A.902 (West 1991 & Supp. 1993).

316. N.J. STAT. ANN. §§ 52:18A-196 to 52:18A-206 (West Supp. 1992). *See also* The Fair Housing Act of 1985, N.J. STAT. ANN. §§ 52:27D-301 to 52:27D-329 (West 1986 & Supp. 1992).

317. Affordable Housing Land Use Appeals, CONN. GEN. STAT. ANN. § 8-30g (West 1989 & Supp. 1992). Normally, when a local agency turns down an application for a permit to build, that decision is presumed to be valid by the courts and the challenger has the burden of proving its illegality. That presumption is removed and the burden shifted to the municipality under this statute. The law applies to any community in which less than ten percent of the housing stock is affordable. It contains definitions of affordable housing that parallel recent definitions for state and federal housing subsidy programs.

318. The National Affordable Housing Act of 1990 requires all states that wish to receive federal housing assistance to prepare a Comprehensive Housing Affordability Strategy (CHAS). This state-wide affordable housing plan must include a five year housing needs assessment, implementation strategies, an evaluation of the effect of land use regulations on housing supply and affordability, intergovernmental housing strategies, and a geographic allocation of priorities. Pub.L. No. 101-625 [S.566], Nov. 28, 1990. *See* 56 Fed. Reg. 38,218 (Aug. 12, 1991). New York State has adopted a CHAS as required by federal law for states participating in federal housing assistance programs. *See* New York State Comprehensive Housing Assistance Strategy, submitted by the Division of Housing and Community Renewal to the U.S. Department of Housing and Urban Development (HUD) on 10/31/91, and subsequently approved by HUD.

319. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

policies.<sup>320</sup>

#### F. State Spending to Shape Local Development Patterns

Serious land use policy issues have been raised recently by the state legislature's requests to the public to approve bonds to raise funds for economic development and environmental conservation purposes. Bond acts allow the state government to borrow money, secured by the state's credit, for discrete public purposes. Before such bonds may be issued, the state must secure the voters' approval.<sup>321</sup> The proceeds from the sale of these bonds may then be spent to accomplish the purpose approved by the voters. Frequently, in the allocation of these funds, state agencies affect local land use in a variety of ways, some of which have proven controversial.<sup>322</sup>

Prior to 1990, New York voters passed nine environmental bond acts, all that were submitted to them for approval. In 1972, the Environmental Quality Bond Act was passed, authorizing the borrowing of 1.15 billion dollars.<sup>323</sup> Its funds

320. See *Berenson v. Town of North Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 676, 682 (1975).

321. See N.Y. CONST. art. VII, §11 and N.Y. STATE FINANCE LAW § 57(1) (McKinney 1989).

322. Using proceeds from the 1986 Environmental Bond Act, the state acquired a 120 acre parcel, known as Sloop Hill, located on the west shore of the Hudson River in the Town of New Windsor. "State Acquisition of Sloop Hill Said to Set Dangerous Precedent for Municipalities Along the Hudson River," PR Newswire, Mar. 1, 1988 available in LEXIS, Nexis library, Wires file. The owner of the parcel had planned to build a luxury condominium community on the site. However, when the owner applied for a building permit, a local environmental group sought an injunction, challenging the legality of the permit's approval. *Id.* Other legal actions followed and commencement of the project was delayed. Finally, the owner agreed to sell the property to the state for \$13.3 million, claiming that he was forced into the sale by the threat of bankruptcy. *Id.* The owner accused the state of using delaying tactics to force the sale of the property, characterizing the state's actions as "de facto condemnation." *Id.* As a result of the sale, which enhanced environmental interests in the area, the property was not developed for the use provided for in the local zoning ordinance. *Id.* See also *Town Furious at New York's Settlement with Developer*, N.Y. TIMES, Oct. 25, 1990, at p.42, for a related example involving other sources of funds.

323. N.Y. ENVTL. CONSERV. LAW §§ 51-0101 to 51-0109 (McKinney 1984 & Supp. 1993). Under the act, these funds were to be used for water quality protection (\$650 million), land protection (\$175 million), solid waste (\$175 million) and air quality protection (\$150 million).

went largely to the development and upgrading of sewage treatment plants and incinerators.<sup>324</sup> In 1986, another Environmental Quality Bond Act was passed.<sup>325</sup> A large portion of its 1.45 billion dollars was devoted to the cleanup of hazardous waste sites.<sup>326</sup> The two most recent bond acts submitted to the voters were both defeated: the Environmental Bond Act of 1990 and the Jobs Bond Act of 1992.

The Jobs Bond Act of 1992 proposed borrowing 800 million dollars to fund public works projects and to create as many as 35,000 construction jobs and up to 100,000 permanent, private sector positions.<sup>327</sup> The bonds would have provided funds for 390 projects statewide designed to attract new businesses and to help existing businesses expand.<sup>328</sup> The majority of the funds would be allocated to counties based on their population. These funds were to be spent on infrastructure construction, where there was evidence of local support.<sup>329</sup> The remainder of the funds were to be used for projects with regional impacts such as enhancing Stewart Airport's development, improving interstate highway interchanges, and furthering a Hudson River rail crossing. All of the projects to be funded by bond proceeds were to stimulate the economy by providing construction and permanent jobs. A clear consequence of the use of the proceeds would have been to stimulate land development. The list of projects selected for funding under the Jobs Bond Act appears to have resulted from extensive negotiations among legislators, the executive

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324. Stephen L. Kass & Michael B. Gerrard, *The 1990 Environmental Bond Act*, 204 N.Y. L.J. 51, Sept. 12, 1990, at 3.

325. N.Y. ENVTL. CONSERV. LAW §§ 52-0101 to 52-0113 (McKinney 1984 & Supp. 1993)

326. *Id.*

327. Jobs Development Bond Act of 1992, N.Y. ECONOMIC DEVELOPMENT LAW §§ 300-312 (McKinney 1988 & Supp. 1993) Kenneth J. Hicks, *Voters Approve \$7.29 billion of Ballot Bonds, Reversing Trend*, THE BOND BUYER, Nov. 5, 1992, at 1.

328. Elsa Brenner, *County Would Get \$26.3 Million From Bond Act Approval*, N.Y. TIMES, Nov. 1, 1992, § 13 at 1.

329. Of the \$800 million proposed, \$600 million was to be allocated, based on population, to the county level. Eligible applicants for the financial assistance were to be local governments including counties, cities, villages and towns, and public benefit corporations such as industrial development agencies.

branch, and local interests.<sup>330</sup> The state's policy guiding project selection was a general one: economic stimulus. The land use policy behind this initiative was implicit. By requiring evidence of local support for that portion of the funds to be allocated for local projects, the projects selected would be in conformance with local land use policies.

The 1990 Environmental Bond Act proceeds would have been used for quite different purposes.<sup>331</sup> The largest share was targeted towards acquiring vacant land threatened by development pressures.<sup>332</sup> Sites for the land acquisition were to be selected pursuant to a State Land Acquisition Plan. This plan was created based on the input of regional advisory councils. The nine areas of the state that serve as the Department of Environmental Conservation's administrative territories were selected as the regions within which these regional councils were assembled. The members of these councils were selected, in part, to represent counties and local governments, as well as broader state interests.<sup>333</sup> Although the bonds themselves were not approved by the voters, the State Land Acquisition Plan was assembled as provided by the 1990 Environmental Bond Act. A state-level advisory council collaborated with these nine regional bodies in the preparation of a comprehensive inventory of lands that merit special protection. This list, which is now complete, will guide future state ac-

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330. See Sara Lyall, *Cuomo Lists Public Works Bond Act Would Finance*, N.Y. TIMES, Oct. 24, 1992, at p. 28.

331. L. 1990 ch. 146 (S. 8193, A.11576) and L. 1990 ch. 147 (S.8194, A. 11577). The 1990 Bond Act added a new Title II to Article 49 of the Environmental Conservation Law.

332. The allocation of the bond proceeds was determined based primarily on intense negotiations among members of the Assembly and Senate representing, and lobbied by, various geographical areas and interest groups.

333. The state agencies involved were the Department of Environmental Conservation and the Office of Parks and Recreation. These agencies were to be guided in the use of the proceeds by a new State Land Acquisition Advisory Council. The council's seven members represent the two state agencies, the governor, and the majority and minority leaders of each house of the legislature. N.Y. ENVTL. CONSERV. LAW § 49-0211(4). See §§ 49-0201 to 49-0215 (procedures for preparing a complete inventory of sites); see also DEPARTMENT OF ENVTL. CONSERVATION, CONSERVING OPEN SPACE IN NEW YORK - A SUMMARY OF THE PLAN 5-19 (1992) [hereinafter OPEN SPACE PLAN].

tions such as land acquisition.<sup>334</sup>

Are efforts to promote such bond acts hindered by the absence of a state-wide land use policy? Under the 1992 job stimulus proposal, what criteria other than economic stimulus, political equality and municipal support were used to select the projects? Under the 1990 environmental bond proposal, to what degree were economic development and tax base expansion considered? Where, in state government, were the state agencies charged with selecting projects to find overarching state land use policies competent to guide their decisions? In the absence of comprehensive policies that unite economic and environmental objectives, how can proponents of bond acts demonstrate that they truly advance the best interests of the state as a whole? What would be the long-term impacts of activities funded under these proposals? Are the funded projects consistent with local land use policies? Are those policies consistent with the best interests of regional land development? Although considerable energy was devoted to the selection of projects, how could the voters be assured that these decisions were made in the best interests of the state, without reference to a comprehensive state-wide land use policy?<sup>335</sup> Was the failure to answer these questions part of the reason that these bond proposals failed at the polls?

#### G. Federal Intrusions on Local Land Use Control

Federal statutes establish comprehensive pollution abatement standards to protect natural resources and to limit activities that degrade the environment. Because these federal standards affect the use of the land, they restrict local governmental authority to make land use decisions. This point has been demonstrated in the preceding material. For example,

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334. See OPEN SPACE PLAN, *supra* note 333, at 1.

335. The land acquisition advisory committees engaged in deliberations which considered tax base expansion, economic development, and local land use policy, as well as open space preservation. See, e.g., DEC News Release 91-282, regarding the extensive deliberations engaged in by the Region 5 Land Acquisition Advisory Committee. For a discussion of the extensive public participation that took place in the development of the Open Space Conservation Plan itself, see OPEN SPACE PLAN, *supra* note 333, at 3-4.



the effect on local land use authority was described in the discussion of the State Pollutant Discharge Elimination System. This system was established in response to the federal Clean Water Act (CWA)<sup>336</sup> which mandates that states restrict and monitor the flow of effluent from point sources, that is discrete conveyances, into protected water bodies.<sup>337</sup>

Under the CWA's National Estuary Program,<sup>338</sup> Long Island Sound was given priority consideration as a protected estuary.<sup>339</sup> Under this legislation, states are to develop comprehensive management plans to regulate pollution in order to protect threatened estuaries of national significance.<sup>340</sup>

This federal directive can greatly impact local land use patterns. For example, in 1991, federal and state agencies considered a moratorium on land development in many of the communities along the Sound. This was to be an interim measure to protect the estuary pending completion of the final studies required under the legislation.<sup>341</sup>

The standards that public drinking water supplies must meet are also established by federal environmental legislation. The obligations of the state and the City of New York to protect the city's drinking water supply are articulated and defined in the federal Safe Drinking Water Act, which protects

336. Clean Water Act, 33 U.S.C. §§ 1251-1387 (1986).

337. § 1342.

338. § 1330.

339. § 1330. The Long Island Sound Task Force recently completed development of a comprehensive conservation and management plan which documents the problems of the Sound and lists approaches to correct and prevent the problems. Telephone interview with David Miller, Northeast Regional Vice-President, National Audubon Society, March 11, 1993.

340. § 1330.

341. Tom Anderson, *O'Rourke Condemns Building Ban*, GANNETT SUBURBAN NEWSPAPERS, Aug 17, 1991.

The possibility of a moratorium was raised in February and again last month by county Environmental Facilities officials. They had said that for the county to abide by the nitrogen cap — which New York, Connecticut and the federal government agreed last November to impose — it would have to limit the amount of sewage that flows into three of the four county treatment plants on the Sound. That would mean a construction moratorium in most of the communities from Port Chester to Pelham and as far inland as White Plains and Scarsdale, they had said.

*Id.*

public drinking water supplies from pollution.<sup>342</sup>

Additionally, the Solid Waste Disposal Act establishes mandatory standards for transporting, disposing, and storing solid and hazardous wastes.<sup>343</sup> Under this federal law, states must comply with solid waste management plans established under federal guidelines.<sup>344</sup> States may also develop and implement their own plans in accordance with federal guidelines.<sup>345</sup> Strict enforcement of solid waste standards can indirectly influence a community's growth pattern. The discussion of New York's Solid Waste Management and Resource Recovery Facilities Act and its effect on local land use illustrates the potential impact of the federal solid waste standards.<sup>346</sup>

Another example involves the Clean Air Act<sup>347</sup> which requires sources of air pollution, including any new buildings that emit pollution into the air, to operate within the federally-set emissions limitations. Its provisions shape land development because they affect the construction and alteration of building on the land.<sup>348</sup> In addition, the Clean Air Act places certain restrictions on automobiles and traffic patterns.<sup>349</sup> Regulations promulgated under the Act contain detailed standards for limiting vehicle emissions.<sup>350</sup> These restrictions necessarily will influence community development and transportation planning because they depend on the existence of compact, orderly and efficient land use patterns, like so many of the other federal and state requirements discussed in this part.

## V. Conclusion

With the notable exception of the Adirondack Park Agency Act, New York's statutes delegate "comprehensive"

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342. 42 U.S.C. §§ 300f to 300j-26.

343. 42 U.S.C. §§ 6901-6992k (1989).

344. § 6942(a).

345. §§ 6942-6943.

346. *See supra* text accompanying notes 233-44.

347. 42 U.S.C. §§ 7401-7642 (1989).

348. *See* §§ 7412(g) & 7475.

349. §§ 7521-7554.

350. 40 C.F.R. pt. 86.

land use authority only to municipalities. At the same time, the state and federal legislatures, in response to particular constituencies alarmed about particular problems, have adopted a variety of statutes that usurp or diminish local prerogatives putting to rest the myth that local home rule authority is a barrier to state-wide control of land use. A major deficiency in these state and federal statutes is that they constitute narrowly focused and uncoordinated interferences with the plenary land use authority of local governments. Missing in this scheme, which emphasizes comprehensive planning at the local level and narrowly-focused protective statutes at the state and federal level, is any mechanism competent to shape regional development patterns in the best interests of the entire state.

A comprehensive review of these statutes<sup>351</sup> reveals that there are three overriding state-wide policy objectives in the land use field. The first is to maintain local control of land planning and development. The second is to promote economic growth, development and competitiveness. The third is to protect critical natural resources and the environment. The missing ingredient is some mechanism for considering these three diverse and often conflicting interests in unison, some process for making difficult choices among them and some method for integrating them as a single strategy. As the state's highest court has said, "[h]ere . . . there is no plan."<sup>352</sup>

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351. This article has not covered a variety of legislative initiatives that tend to ameliorate the consequences of existing land use patterns. Not mentioned are programs encouraging urban reinvestment, job development, senior citizen housing, slum elimination and the protection and productivity of agricultural land, among others.

352. *Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven*, 80 N.Y.2d 500, 514, 606 N.E.2d 1373, 1379, 591 N.Y.S.2d 982, 988 (1992).