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Golden v. Planning Bd. of Ramapo Revisited: Old Lessons for New Problems

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Notes and Comments

Golden v. Planning Bd. of Ramapo **Revisited: Old Lessons for New Problems**

I. Introduction

The importance of protecting the rights which attach to the ownership of land has been recognized since the inception of this country. The framers of the United States Constitution protected these interests through the Fifth Amendment.¹ Today, as the debate over land use and the government's proper role in land use decisions continues,² it may be time to re-examine the history of state and local governmental control over land use decisions in New York, and learn some new lessons from old teachings.

The drawback of allowing land use decisions to be made solely at the local level is most clearly stated as follows:

Local officials have a difficult time defining, let alone implementing, "the public interest." . . . [T]he public interest of each community is most often the self-interest of the residents who got there first. Thus, suburban communities may see their economic and social interest served through exclusionary zoning that attracts high taxpaying clean industry while excluding low-income service-consuming residents.³

1. The Fifth Amendment provides that: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

2. See, e.g., Terry Rice, *Zoning and Land Use*, 40 SYRACUSE L. REV. 641 (1989); Edward J. Sullivan, *The State of the Comprehensive Land-Use Plan in 1987: So Close, Yet So Far Away*, 20 THE URB. LAW. 971 (1988); ROBERT D. YARO & CHRISINE REID, *STATE AND REGIONAL GROWTH MANAGEMENT INITIATIVES: LESSONS FOR MASSACHUSETTS* (January 1988).

3. Arthur P. Solomon, *Five Land-Reforms*, 1977 J. HOUSING 276, 277.

However, a balance must be struck between the local interest in maintaining authority over land use decisions and the state interest in regulating these decisions to minimize the impact on the region or the state.

In a 1972 decision, the New York Court of Appeals addressed the proper scope of local governmental authority over the development of its land. In *Golden v. Planning Bd. of Ramapo*,⁴ the court upheld the municipality's right to regulate development. The municipality could effectively prevent subdivision on a given plat⁵ for as long as eighteen years through special permits for subdivision approval.⁶ Ramapo's effort to control the growth of its town is not unique.⁷ Through a variety of techniques,⁸ many towns attempt to maintain their character or status quo⁹ and to avoid the problems related to increased development and urbanization.¹⁰

This Comment will examine whether the ability to regulate land use decisions¹¹ is properly vested in local government, or whether it should be shifted to regional — or even state — government to consider broader issues and impacts not currently examined by municipalities. Part II of this Comment will examine *Golden v. Planning Bd. of Ramapo*¹² and the court's reasoning in upholding the local measure. Part II will also examine the current trends in New York Court of Appeals' decisions to illustrate the dichotomy among these decisions. Fur-

4. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). See *infra* notes 14-48 and accompanying text.

5. A "plat" is an individual plot of land subdivided into smaller lots or parcels. BLACK'S LAW DICTIONARY 1036 (5th ed. 1979).

6. *Golden*, 30 N.Y.2d at 367, 285 N.E.2d at 294-95, 334 N.Y.S.2d at 142-43.

7. Other regulation techniques include zoning, bulk and density restrictions, variances, subdivision control and site plan review. ROGER A. CUNNINGHAM ET. AL., THE LAW OF PROPERTY §§ 9.3, 9.5, 9.7 & 9.15 (1984).

8. See, e.g., *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) (exclusionary zoning); *Golden*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (timed growth ordinance).

9. See, e.g., *Berenson*, 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 681 (1975).

10. *Golden*, 30 N.Y.2d at 366, 285 N.E.2d at 294, 334 N.Y.S.2d at 142.

11. See, e.g., N.Y. TOWN LAW §§ 261-77 (McKinney 1987); N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1990).

12. *Golden*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). See *infra* notes 14-48 and accompanying text.

ther, this section will explore the issues involved in delegating power to local governments to regulate land uses, including a brief discussion of the home rule tradition in New York.¹³ Part II will also examine some representative state-wide land use schemes. Part III will analyze these state regulations of local land use decisions and determine what lessons New York can learn from the experiences of other states. Part IV will conclude that the time has come for land use reform in New York.

II. Background

A. *The Early Cases*

In the early 1970s, the town of Ramapo was faced with increasing development.¹⁴ To inhibit development and prevent the problems that accompany urbanization,¹⁵ the town adopted a master plan,¹⁶ a comprehensive zoning ordinance and a capital budget.¹⁷ In addition, the town enacted zoning amendments designed to synchronize private land development with the development of essential governmental services.¹⁸ These subject amendments created a new class of land use, the "Residential Development Use,"¹⁹ which required a special permit.²⁰ Any person engaged in residential development was required to obtain

13. See generally N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1990).

14. The court cited statistics on the growth and development of Ramapo. From 1940-1968, population in the unincorporated areas of the town increased by approximately 286%. This percentage was broken down, with a 130.8% increase in the period between 1950 and 1960, a 78.5% increase in the period between 1960 and 1966 and a 20.4% increase between 1966 and 1969. Actual population numbers increased from 58,626 people in 1966 to a projected 120,000 in 1985 (according to then current land use and zoning trends). *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 366 n.1, 285 N.E.2d 291, 294 n.1, 334 N.Y.S.2d 138, 142 n.1, *appeal dismissed*, 409 U.S. 1003 (1972).

15. *Id.* at 366, 285 N.E.2d at 294, 334 N.Y.S.2d at 142.

16. A master plan is "the omnibus plan of a [municipality] for housing, industry and recreational facilities and their impacts. . . ." BLACK'S LAW DICTIONARY 880 (5th ed. 1979).

17. *Golden*, 30 N.Y.2d at 366, 285 N.E.2d at 294, 334 N.Y.S.2d at 142.

18. *Id.* at 367, 285 N.E.2d at 295, 334 N.Y.S.2d at 143. These services were limited to five essentials: public sanitary sewers, drainage facilities, improved public parks or recreation facilities including public schools, roads (either public or private) and fire-houses. *Id.* at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143-44.

19. Residential Development Use was defined "as the erection or construction of dwellings on any vacant plot or parcel." *Id.*

20. *Id.* at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.

such a permit from the town.²¹

Each plat of land was assigned points based on the availability of municipal services and improvements,²² with the special permit issuing only after the accumulation of fifteen development points.²³ While accumulation of points for an unimproved parcel could take a number of years,²⁴ the town attempted to mitigate unreasonable burdens on developers through a variety of remedial provisions.²⁵ One provision gave developers a reduction in their tax assessments. Another provision allowed the board to issue special permits vesting in the developers a present right to develop subject only to point accumulations,²⁶ or in special circumstances allowing development absent full point accumulations.²⁷ In addition, the developer was free to provide the improvements or services himself and, thus, advance the date of approval.²⁸ A developer challenged Ramapo's ordinance, claiming that it operated to destroy the value of, and constituted an invasion of, the property rights of landowners.²⁹

The court first examined the state legislature's delegation of regulatory power to the local governments.³⁰ Because local governments do not have any independent power to regulate, they

21. *Id.*

22. *Golden*, at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143-44.

23. *Id.*

24. Ramapo's capital program provided a six year capital budget for improvements specified in the master plan. In addition, a supplement was adopted for the timing and sequence of municipal improvements for twelve years following the life of the capital budget. *Id.* at 366-67, 285 N.E.2d at 294-95, 334 N.Y.S.2d at 142-43. Therefore, an owner/developer of an unimproved plat could wait as long as eighteen years for the requisite improvements and fifteen accumulated development points. *Id.* at 367, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.

25. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

26. *Golden*, at 368, 285 N.E.2d at 296, 334 N.Y.S.2d at 144. By vesting in the developer a present right to proceed with the development (even though actual development cannot begin until all fifteen points have been accumulated), the developer had a right that was fully assignable. *Id.* Based on this plan, a plat with a present right to develop could be rendered more valuable than another plat without a present right to develop.

27. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144. The special circumstances existed where the planning board determined that, by granting a permit, the development was still consistent with the on-going plan. *Id.*

28. *Id.* at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

29. *Id.* at 365-66, 285 N.E.2d at 294, 334 N.Y.S.2d at 142. For a discussion of the constitutional property issues attendant to this claim, see *infra* notes 122-32 and accompanying text.

30. *Golden*, 30 N.Y.2d at 369-70, 285 N.E.2d at 296, 334 N.Y.S.2d at 145.

must look to state enabling legislation.³¹ The appropriate enabling enactments are found in New York's Town Law.³² While this delegation of power to local governments is couched in terms of police power,³³ the authority is not broad and general, but is necessarily limited to problems attendant to a land use scheme.³⁴ The court found that the town was legislating to avoid

31. *Id.* at 370, 285 N.E.2d at 296, 334 N.Y.S.2d at 145.

32. *See generally* N.Y. TOWN LAW §§ 261-84 (McKinney 1987) (zoning and planning powers given to towns).

33. *See, e.g.,* N.Y. TOWN LAW § 261 (McKinney 1987) which provides, in part, that a town can regulate certain land uses "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community . . ." *Id.*

34. *Golden*, 30 N.Y.2d at 371 n.5, 285 N.E.2d at 297 n.5, 334 N.Y.S.2d at 146 n.5. Town Law § 263 lists the purposes for which a town can regulate, thus qualifying or limiting the general police power. Section 263 provides:

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to make provision for, so far as conditions may permit, the accommodation of solar energy systems and equipment and access to sunlight necessary therefor; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

N.Y. TOWN LAW § 263 (McKinney 1987).

In addition, Town Law section 261 lists the permissible *areas* of regulation, thus further restricting the general police power of the municipality. Section 261 provides:

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city; provided further, that all charges and expenses incurred under this article for zoning and planning shall be a charge upon the taxable property of that part of the town outside of any incorporated village or city. The town board is hereby authorized and empowered to make such appropriations as it may see fit for such charges and expenses, provided however, that such appropriation shall be the estimated charges and expenses less fees, if any, collected, and provided, that the amount so appropriated shall be assessed, levied and collected from the property outside of any incorporated village or city. Such regulations may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained.

undue concentration of population by limiting development to parallel the government's ability to support it with essential services.³⁵ By restricting development, the town was able to maintain existing population densities,³⁶ as permitted by state law.³⁷ Thus, the court found that because Ramapo's regulations fell within the parameters of the Town Law provisions, the measures were exercised for a legitimate purpose.³⁸

The court engaged in a lengthy discussion of the power of a municipality to regulate its land development. While acknowledging the validity of local regulation,³⁹ the court noted that "current 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"⁴⁰ The court here was indicating an impatience with the then current law in New York, and further indicated that it was time for the law to change:⁴¹ "Recognition of communal and regional interdependence, in turn, has resulted in proposals for schemes of regional and State-wide planning, in the hope that decisions would then correspond roughly to their level of impact."⁴² The court was concerned that, because decisions are made purely at the local level, regional or even state-wide impact may be ignored.

After expressing concerns over the delegation of power to local governments, the court went further and, as though addressing the legislature directly, said:

Of course, [undirected growth] problems 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, State-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies.⁴³

N.Y. TOWN LAW § 261 (McKinney 1987).

35. *Golden*, 30 N.Y.2d at 370 n.3, 285 N.E.2d at 296-97 n.3, 334 N.Y.S.2d at 145 n.3.

36. *Id.*

37. N.Y. TOWN LAW § 263 (McKinney 1987).

38. *Golden*, 30 N.Y.2d at 371, 285 N.E.2d at 297, 334 N.Y.S.2d at 146.

39. *Id.* at 383, 285 N.E.2d at 304-05, 334 N.Y.S.2d at 156.

40. *Id.* at 374, 285 N.E.2d at 299, 334 N.Y.S.2d at 148.

41. *Id.* at 375-76, 285 N.E.2d at 300, 334 N.Y.S.2d at 149-50.

42. *Id.* at 375, 285 N.E.2d at 300, 334 N.Y.S.2d at 149.

43. *Golden*, 30 N.Y.2d at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150. The court

Thus the court, addressing its concerns over the state's complete delegation of power to the local government, through the above language, expressed its belief that the law should be changed.

Even the dissent, although finding Ramapo's measures beyond the scope of state enabling legislation,⁴⁴ still noted the importance of state-wide regulation:⁴⁵ "Generally, there is the view that the conflict [between urban sprawl and local efforts to exclude urban population] requires solution at a regional or State level, usually with local administration, and not by compounding the conflict with idiosyncratic municipal action."⁴⁶ Thus, the dissent and the majority, while disagreeing on the validity of Ramapo's measures under enabling legislation,⁴⁷ both agreed that the ability to regulate was more appropriate at a regional or even state level and, therefore, the law should be changed.⁴⁸

In another important land use and zoning decision, *Berenson v. Town of New Castle*,⁴⁹ the court created a standard for determining whether a zoning ordinance was exclusionary.⁵⁰ To meet state constitutional requirements, the court required that a municipality's zoning ordinance provide for a balanced and well-ordered community and consider regional as well as town needs.⁵¹ Whether a zoning ordinance has considered regional needs would be determined by the court, which must "take into consideration not only the general welfare of the residents of the

had previously noted that there was currently (1972) a proposal in the state legislature to create an integrated state-wide planning process, with emphasis on regional and state planning powers. *Id.* at 371-72 n.6, 285 N.E.2d at 297-98 n.6, 334 N.Y.S.2d at 146 n.6.

44. *Id.* at 383, 285 N.E.2d at 305, 334 N.Y.S.2d at 156 (Breitel, J., dissenting).

45. *Id.* at 385, 285 N.E.2d at 306, 334 N.Y.S.2d at 158 (Breitel, J., dissenting).

46. *Id.* Judge Breitel characterized what he believed was the essential conflict involved and gave his view as to the proper solution:

The evils of uncontrolled urban sprawl on the one hand, and the suburban and exurban pressure to exclude urban population on the other hand, have created a massive conflict, with social and economic implications of the gravest character. . . . The conflict has surfaced in other States in efforts by municipalities to cut their own swaths in solving their difficulties, and, in every instance uncovered, the courts have struck down the efforts as unconstitutional or as invalid under enabling acts much like those in this state.

Golden, at 385, 285 N.E.2d at 306, 334 N.Y.S.2d at 158 (Breitel, J., dissenting).

47. *Id.* at 383, 285 N.E.2d at 305, 334 N.Y.S.2d at 156 (Breitel, J., dissenting).

48. *Id.* at 385, 285 N.E.2d at 306, 334 N.Y.S.2d at 158 (Breitel, J., dissenting).

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

50. *Id.* at 110-11, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 680-81.

51. *Id.*

zoning township, but should also consider the effect of the ordinance on the neighboring communities."⁵² However, if regional needs were adequately met in neighboring communities, the town itself need not provide for the region.⁵³

While *Berenson* was seemingly aimed only at exclusionary zoning techniques,⁵⁴ the principles stated could have far broader implications. The court took into its own hands the conflict between state or regional versus local control over land use decisions. The requirement that a statute consider regional needs was not based on any specific precedent and, in reality, was found nowhere in state enabling legislation.⁵⁵ The problem of regional control identified in *Golden*,⁵⁶ while not explicitly addressed, was partially solved in that case by the court's statement that exclusionary techniques would not be tolerated.⁵⁷ The court took this warning one step further in *Berenson*,⁵⁸ by injecting a regional requirement into the determination of a zoning ordinance's validity.⁵⁹

B. The Recent Cases

The 1980s brought three important land use cases⁶⁰ which marked a shift on the Court of Appeals. In the 1970s the emphasis was on regional planning and what the municipalities could not do.⁶¹ In the 1980s, the emphasis shifted to the ability of municipalities to legislate for their own needs, even if directly con-

52. *Id.* at 111, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

53. *Id.*

54. *Berenson*, 38 N.Y.2d at 109, 341 N.E.2d at 241, 378 N.Y.S.2d at 680.

55. See generally N.Y. TOWN LAW § 261-84 (McKinney 1987) (zoning and planning enabling legislation).

56. *Golden*, 30 N.Y.2d 359, 285 N.E.2d 291, 384 N.Y.S.2d 138.

57. *Id.* at 378, 285 N.E.2d at 302, 384 N.Y.S.2d at 152.

58. *Berenson*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672.

59. *Id.* at 111, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

60. See *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989), *infra* notes 80-111 and accompanying text; *Kamhi v. Planning Bd. of Yorktown*, 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.S.2d 865 (1983), *infra* notes 75-79 and accompanying text; *Riebert Apartments Corp. v. Planning Bd. of Clarkstown*, 57 N.Y.2d 206, 441 N.E.2d 1076, 455 N.Y.S.2d 558 (1982), *infra* notes 63-72 and accompanying text.

61. See, e.g., *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975), *supra* notes 49-59 and accompanying text; *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972), *supra* notes 14-59 and accompanying text.

flicting with a state statute.⁶²

In 1982, the Court of Appeals decided *Riegert Apartments Corp. v. Planning Bd. of Clarkstown*,⁶³ in which a developer challenged a provision requiring either land, or money in lieu of land, for park facilities as a prerequisite for site plan approval.⁶⁴ In holding the measure invalid,⁶⁵ the court differentiated between permissible regulations on subdivision approval and site plan approval based on the Town Law provisions.⁶⁶

The court stated that the town could validly require land, or money in lieu of land, for developing parks as a prerequisite for subdivision approval, but that no such measure was permissible for site plan approval.⁶⁷ Otherwise, the court continued, a town

62. See, e.g., *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989). See also N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1990).

63. 57 N.Y.2d 206, 441 N.E.2d 1076, 455 N.Y.S.2d 558 (1982).

64. *Id.* at 213, 441 N.E.2d at 1077, 455 N.Y.S.2d at 559.

65. *Id.*

66. *Id.* at 209-12, 441 N.E.2d at 1078-79, 455 N.Y.S.2d at 559-61. A subdivision is a division of a lot, tract or parcel of land into two or more lots, tracts or parcels for sale or development. BLACK'S LAW DICTIONARY 1277 (5th ed. 1979). In contrast, a site plan usually relates to the development of a single lot intended to have one owner. *Riegert*, 57 N.Y.2d at 211, 441 N.E.2d at 1079, 455 N.Y.S.2d at 560-61. When submitting a site plan, a builder must show the proposed location on the land of buildings, parking facilities or other installments. *Id.*

67. *Riegert*, 57 N.Y.2d at 208, 441 N.E.2d at 1077, 455 N.Y.S.2d at 559. Town Law sections 276 and 277 provide the ways in which a town can regulate subdivision plats. While section 276 delineates the procedural requirements, section 277 allows for substantive measures. N.Y. TOWN LAW §§ 276, 277 (McKinney 1987).

[S]uch plat shall also show . . . a park or parks suitably located for playground or other recreational purposes. . . . [T]he board may require as a condition to approval of any such plat a payment to the town of a sum to be determined by the town board, which sum shall constitute a trust fund to be used by the town exclusively for neighborhood park, playground or recreation purposes including the acquisition of property.

Id. at § 277(1).

Section 274-a, in contrast, refers to site plans rather than plats and suggests that certain elements be included in site plan approvals. For example, parking, means of access, screening, signs, location and dimension of buildings and impact on adjacent land uses are all suggested elements of a site plan. Although the above comports with the general usage of the terms site plan and subdivision plat, section 274-a goes further:

Plats showing lots, blocks or sites which are subject to review pursuant to authority adopted under section two hundred seventy-six of this chapter shall continue to be subject to such review and shall not be subject to review under this paragraph.

Id. at § 274-a.

could burden the development twice, once for subdivision from the developer and once from individual lot owners seeking approval for site plans.⁶⁸ By placing references to parks in section 277 and omitting these references in section 274-a, the intent, as the court understood it, was to place the burden of community concerns on the developer rather than on the individual owner.⁶⁹ Thus, the court invalidated the town's regulation⁷⁰ because it was imposed at the wrong phase of the development,⁷¹ and, thus, directly conflicted with the Town Law.⁷²

The Court of Appeals addressed the concern over adequate parks and recreational facilities twice more in *Kamhi v. Planning Bd. of Yorktown*⁷³ (*Kamhi I*) and *Kamhi v. Town of Yorktown*⁷⁴ (*Kamhi II*). In *Kamhi I*, the court considered a provision requiring conveyance of a percentage of the developer's land for park purposes as a condition of subdivision approval.⁷⁵ In addition to section 277,⁷⁶ the court considered section 281, which authorizes conditions for changes in plat approval.⁷⁷ The court was unwilling to extend the general provision of section 281(d),⁷⁸ relating to park facilities, to allow a town to compel conveyance of land without cost to itself.⁷⁹

In *Kamhi II*,⁸⁰ like in *Riegert*,⁸¹ the court considered a town

68. *Riegert*, 57 N.Y.2d at 212, 441 N.E.2d at 1079, 455 N.Y.S.2d at 561.

69. *Id.*

70. *Id.* at 213, 441 N.E.2d at 1077, 455 N.Y.S.2d at 562.

71. *Id.* at 208, 441 N.E.2d at 1077, 455 N.Y.S.2d at 559.

72. *Id.* at 212, 441 N.E.2d at 1079, 455 N.Y.S.2d at 561. See also N.Y. TOWN LAW §§ 274-a, 276 & 277 (McKinney 1987).

73. 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.S.2d 865 (1983).

74. 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989).

75. *Kamhi I*, 59 N.Y.2d at 388, 452 N.E.2d at 1194, 465 N.Y.S.2d at 866.

76. N.Y. TOWN LAW § 277 (McKinney 1987).

77. *Kamhi I*, 59 N.Y.2d at 388, 452 N.E.2d at 1194, 465 N.Y.S.2d at 866. See N.Y. TOWN LAW § 281 (McKinney 1987).

78. Section 281(d) provides that if the plat shows:

lands available for park, recreation, open space, or other municipal purposes directly related to the plat, then the planning board as a condition of plat approval may establish such conditions on the ownership, use, and maintenance of such lands as it deems necessary to assure the preservation of such lands for their intended purposes.

Id. § 281(d).

79. *Kamhi I*, 59 N.Y.2d at 391, 452 N.E.2d at 1196, 465 N.Y.S.2d at 867. The court viewed "the power to condition ownership . . . as a delegation of power only to limit the transfer, development or subdivision of park property. . . ." *Id.*

80. *Kamhi II*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144.

requirement of land, or money in lieu of land, as a condition for site plan approval.⁸² This time, however, the court engaged in an informative discussion of the ability of a town to regulate land.⁸³ The court initially examined Town Law section 274-a⁸⁴ and found no explicit authority to require land, or money in lieu of land, for site plan approval.⁸⁵ However, the court went on to examine the powers of a municipality to regulate under its home rule powers.⁸⁶

Provisions of the Municipal Home Rule Law⁸⁷ authorize municipalities to adopt local laws relating to property, affairs or government, as long as such laws are consistent with the state constitution and other statutory enactments.⁸⁸ In *Kamhi II*, because the town measure was inconsistent with section 274-a,⁸⁹ no authority for the measure was found in the Municipal Home Rule Law provisions relating to the affirmative grants of power.⁹⁰

81. *Riegert Apartments Corp. v. Planning Bd. of Clarkstown*, 57 N.Y.2d 206, 441 N.E.2d 1076, 455 N.Y.S.2d 558 (1982). See *supra* notes 63-72 and accompanying text.

82. *Kamhi II*, 74 N.Y.2d at 426, 547 N.E.2d at 347, 548 N.Y.S.2d at 145.

83. *Id.* at 428-33, 547 N.E.2d at 348-49, 548 N.Y.S.2d at 146-49.

84. N.Y. TOWN LAW § 274-a (McKinney 1987).

85. *Kamhi II*, 74 N.Y.2d at 428, 547 N.E.2d at 348, 548 N.Y.S.2d at 146. See also *Riegert Apartments Corp. v. Planning Bd. of Clarkstown*, 57 N.Y.2d 206, 441 N.E.2d 1076, 455 N.Y.S.2d 558 (1982). See *supra* notes 63-72 and accompanying text.

86. *Kamhi II*, 74 N.Y.2d at 428, 547 N.E.2d at 348, 548 N.Y.S.2d at 146. Municipal Home Rule Law section 10 gives municipalities general powers to adopt and amend local laws. N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1990).

87. N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1990).

88. *Kamhi II*, 74 N.Y.2d at 429, 547 N.E.2d at 348, 548 N.Y.S.2d at 146. Municipal Home Rule Law provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government." N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 1969 & Supp. 1990).

89. *Kamhi II*, 74 N.Y.2d at 428, 547 N.E.2d at 348, 548 N.Y.S.2d at 146. The court stated that section 274-a "significantly [did] not authorize a demand of parkland or its money equivalent." *Id.*

90. *Id.* at 429, 547 N.E.2d at 348-49, 548 N.Y.S.2d at 147. Section 10 specifically lists the areas, whether or not related to property, affairs or government, of permissible municipal regulation. These are: (1) Powers, duties, qualifications, number, selection and removal, term of office, compensation, etc. of officers and employees; (2) membership and composition of the legislative body; (3) transaction of business; (4) incurring of obligations; (5) presentation, ascertainment, disposition and discharge of claims against the government; (6) acquisition, care, management and use of highways, roads, streets, avenues and property; (7) acquisition, ownership and operation of transit facilities; (8) levy and administration of local taxes (consistent with state law); (9) collection of local taxes (consistent with state law); (9-a) fixing, levy, collection and administration of local gov-

However, the supersession authority found in the home rule provisions allows a town to regulate, notwithstanding the fact that the regulation conflicts with a state law.⁹¹ These supersession provisions allow towns to address their unique concerns even when these regulations are inconsistent with state-wide enactments.⁹² The court applied a standard requiring "a sufficient nexus between the property and the problem being redressed."⁹³ Thus, the town's measure under this standard was appropriate because, even though it directly conflicted with section 274-a, it directly promoted the purpose of the state law.⁹⁴

The court justified a result different from *Riegert*⁹⁵ by distinguishing the actual developments involved.⁹⁶ *Kamhi II*, unlike *Riegert*,⁹⁷ involved condominium developments which did not require subdivision approval in Yorktown.⁹⁸ Therefore, if the

ernmental rentals, charges, rates or fees; (10) matters relating to employees of contractors performing work for the municipality; (11) protection and enhancement of physical and visual environment; (12) government, protection, order, conduct, safety, health and well-being of persons or property; (13) apportionment of its legislative body; (14) the powers granted in statute of local government. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a) (McKinney 1969 & Supp. 1990).

Nowhere do these enumerated powers include the authority to compel land or money in lieu of land as a prerequisite to site plan approval. *Kamhi v. Town of Yorktown*, 74 N.Y.2d at 429, 547 N.E.2d at 349, 548 N.Y.S.2d at 146-47.

^{91.} *Kamhi II*, 74 N.Y.2d at 429, 547 N.E.2d at 349, 548 N.Y.S.2d at 147. Supersession authority is found in section 10(1)(ii)(d)(3) which provides that:

The amendment or supersession in its application to it, of any provision of the [town] law relating to the property, affairs or government of the [town] or to other matters in relation 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.

N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1990). This means that a town can supersede a state law unless the state has expressly prohibited local regulation in that particular area.

^{92.} *Kamhi II*, 74 N.Y.2d at 430, 547 N.E.2d at 349, 548 N.Y.S.2d at 147.

^{93.} *Id.* at 430-31, 547 N.E.2d at 349, 548 N.Y.S.2d at 147.

^{94.} *Id.* at 432, 547 N.E.2d at 351, 548 N.Y.S.2d at 149. The court later invalidated the measure, as applied to this landowner, due to the town's failure to comply with the specific procedural requirements in the sections. *Id.* at 435, 547 N.E.2d at 352, 548 N.Y.S.2d at 150.

^{95.} *Riegert Apartments Corp. v. Planning Bd. of Clarkstown*, 57 N.Y.2d 206, 441 N.E.2d 1076, 455 N.Y.S.2d 558 (1982). See *supra* notes 63-72 and accompanying text.

^{96.} *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989).

^{97.} *Riegert*, 57 N.Y.2d at 213, 441 N.E.2d at 1077, 455 N.Y.S.2d at 559.

^{98.} *Kamhi II*, 74 N.Y.2d at 432, 547 N.E.2d at 348, 548 N.Y.S.2d at 148.

town was to achieve the purpose of section 274-a, namely to obtain parkland for the development, it had to do so in a way that directly conflicted with other town law provisions prohibiting, or, at the least, not explicitly authorizing, land or money in lieu of land, for site plan approval.⁹⁹ Because supersession authority is permissible for areas of uniquely local concern,¹⁰⁰ the court found "that permitting the Town to supersede Town Law [section] 274-a in its local application — so that the purpose of the statute will be promoted rather than defeated within this community — fits comfortably within section 10."¹⁰¹

While the majority in *Kamhi II*¹⁰² construed the home rule provisions to allow supersession of the Town Law,¹⁰³ the concurrence took exception with this construction.¹⁰⁴ According to the concurrence, the primary issue was whether there was an independent legislative delegation of power to regulate in a particular area.¹⁰⁵ Without this independent authority, the town had no power to amend or supersede existing enactments.¹⁰⁶

The concurrence was careful to note that municipalities have no power to adopt laws inconsistent with any general law of the state.¹⁰⁷ Thus, the provision prohibiting inconsistent local laws¹⁰⁸ and the provision permitting supersession, provided the state has not expressly prohibited the measure,¹⁰⁹ are inconsistent.¹¹⁰ This inconsistency is reconciled by invalidating local measures absent a delegation of authority to the town by either

99. *Id.* at 432, 547 N.E.2d at 348, 548 N.Y.S.2d at 148. The court stated that, when applied to this particular development, the purpose of section 274-a to burden the developer rather than the individual owner was wholly circumvented. *Id.*

100. *Id.* at 433, 547 N.E.2d at 349, 548 N.Y.S.2d at 149.

101. *Id.* at 432, 547 N.E.2d at 348-49, 548 N.Y.S.2d at 149.

102. *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989).

103. *Id.*; N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1990).

104. *Kamhi II*, 74 N.Y.2d at 435, 547 N.E.2d at 353, 548 N.Y.S.2d at 151 (Simons, J., concurring).

105. *Id.* at 436, 547 N.E.2d at 353, 548 N.Y.S.2d at 151 (Simons, J., concurring).

106. *Id.*

107. *Id.*

108. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1990).

109. *Id.*

110. *Kamhi II*, 74 N.Y.2d at 437, 547 N.E.2d at 354, 548 N.Y.S.2d at 152 (Simons, J., concurring).

the state constitution or any other general law.¹¹¹

The concurrence also examined the legislative history of home rule provisions and found that the purpose of the provisions was to implement powers already possessed by the town "by giving them the same authority to supersede or amend general laws enjoyed by other local governments."¹¹² Therefore, the real purpose of home rule provisions¹¹³ was to provide an effective means for municipalities to tailor previously delegated power to suit local conditions¹¹⁴ and not, as the majority had contended, to supplement towns' specifically delegated power.¹¹⁵

The dichotomy created by the court's earlier cases¹¹⁶ and the most recent cases¹¹⁷ leaves this area of the law in a state of unrest. It is possible that the court, based on its recognition of the advantages of regional control over land use regulation, became frustrated with the absence of any state advances in this area. Further, it can be questioned to what extent the decision in *Kamhi II*¹¹⁸ allows local governments to supersede state laws. If the majority decision is interpreted broadly,¹¹⁹ it can be argued that local governments now have almost plenary power to revise state laws to suit their own unique situation. However, the

111. *Id.*

112. *Id.* at 438, 547 N.E.2d at 354, 548 N.Y.S.2d at 152 (Simons, J., concurring).

113. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1990).

114. *Kamhi II*, 74 N.Y.2d at 439, 547 N.E.2d at 355, 548 N.Y.S.2d at 153 (Simons, J., concurring). Judge Simons cited several situations where local measures superseding state law had been upheld. These were: a local measure that transferred certain review powers to a board other than one authorized to perform the function under Town Law; a local measure changing certain voting requirements of a town board from a vote of three-fourths to a simple majority; an amendment of certain filing requirements established in general laws. *Id.*

115. *Id.*

116. See *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). See also *supra* notes 14-59 and accompanying text.

117. See *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989); *Kamhi v. Planning Bd. of Yorktown*, 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.S.2d 865 (1983); *Riegert Apartments Corp. v. Planning Bd. of Clarkstown*, 57 N.Y.2d 206, 441 N.E.2d 1076, 455 N.Y.S.2d 558 (1982). See also *supra* notes 60-115 and accompanying text.

118. *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989). See *supra* notes 81-115 and accompanying text.

119. *Kamhi II*, 74 N.Y.2d at 426, 547 N.E.2d at 347, 548 N.Y.S.2d at 145. See *supra* notes 80-101 and accompanying text.

concurrence casts doubt on this interpretation,¹²⁰ arguing instead that supersession authority is only as broad as previous delegations of specific power allow.¹²¹ At some point, this dichotomy must be resolved, either judicially or legislatively.

C. *Legal Issues Attendant to Land Regulation*

As with any proposed area of governmental regulation, simply stating a need to legislate and then doing so is not enough. Not only must the law be constitutional under both the state and federal constitutions, but it should not conflict with previously enacted laws. Any law purporting to change a previously enacted regulatory scheme must be tailored to fit with all the other existing laws.

1. *Constitutional Issues*

The United States Constitution protects property and its ownership.¹²² Consequently, any governmental intrusion upon this right must fall within these constitutional limitations. While compliance with these constitutional protections may seem simple enough, the government may deprive an individual of property without due process of law¹²³ or just compensation¹²⁴ and not even know it. This situation is known as confiscation¹²⁵ or takings.¹²⁶

If a government, whether it be state or local, appropriates land for its own use, it must compensate the owner.¹²⁷ Addition-

120. *Id.* at 435, 547 N.E.2d at 353, 548 N.Y.S.2d at 151 (Simons, J., concurring). *See supra* notes 102-15 and accompanying text.

121. *Kamhi II*, 74 N.Y.2d at 439, 547 N.E.2d at 355, 548 N.Y.S.2d at 153 (Simons, J., concurring).

122. U.S. CONST. amend. V. *See supra* note 1 for the text of this amendment.

123. *Id.* *See also* U.S. CONST. amend. XIV.

124. U.S. CONST. amend. V. *See supra* note 1 for the text of this amendment.

125. "Confiscation" as applied to property issues is the act of taking private property "by the government without compensation to the owner." BLACK'S LAW DICTIONARY 271 (5th ed. 1979).

126. "Taking", like confiscation, implies deprivation of property without compensation. However, taking is a broader concept and can result even when there is not a change of possession. "Property may be deemed taken . . . when there is interference with the use [and enjoyment] of property . . . and it results in a diminution of value. . . ." BLACK'S LAW DICTIONARY 1303 (5th ed. 1979).

127. The power of the government to appropriate property for a public purpose is

ally, a government may regulate the use of land to such an extent that it becomes essentially valueless to the owner, resulting in a form of taking.¹²⁸ The New York Court of Appeals has said that a zoning ordinance is confiscatory and, therefore, unconstitutional if it prevents a landowner from using his property for any purpose for which it is reasonably adapted.¹²⁹

Generally, the court will uphold a regulation if it is reasonably related to a legitimate governmental interest.¹³⁰ In addition, the landowner has a tremendous burden to prove that the land cannot be developed so as to yield a reasonable return.¹³¹ In some cases, the court has refused to find an application of the regulation unconstitutional where the land could not return as high a profit as it would have absent the regulation.¹³² Consequently, the task of challenging a regulation on the basis of confiscation or taking is rather difficult for the land owner where the only damage has been a diminution in the value of the land.

2. *Statutory Issues in New York*

In New York there are certain statutory barriers to any potential challenge to a local land use regulation. The state enabling legislation has given municipalities a great deal of authority to regulate the use of land within its boundaries.¹³³ Even if the local measure conflicts with other state enactments, it may still be valid under supersession authority.¹³⁴

Under state enabling legislation, a municipality has broad authority to regulate land use decisions.¹³⁵ The limitations on

called "eminent domain." An exercise of this power requires the owner to receive just compensation for his property. The right of eminent domain is the right of the state to reassert its dominion over any portion of the soil of the state for public good. BLACK'S LAW DICTIONARY 470 (5th ed. 1979).

128. See CUNNINGHAM ET. AL., *supra* note 7, § 9.2 at 517.

129. Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 81, 295 N.E.2d 788, 790, 343 N.Y.S.2d 118, 122 (1973).

130. *But see*, Town of Islip v. Caviglia, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989). The court here used a heightened level of scrutiny because First Amendment issues were involved. *Id.* at 552, 540 N.E.2d at 218, 542 N.Y.S.2d at 142.

131. See Rice, *supra* note 2, at 641, 652-54.

132. See Williams v. Town of Oyster Bay, 32 N.Y.2d 78, 81, 295 N.E.2d 788, 790, 343 N.Y.S.2d 118, 122 (1973).

133. See generally N.Y. TOWN LAW §§ 261-84 (McKinney 1987).

134. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1990).

135. See generally N.Y. TOWN LAW §§ 261-84 (McKinney 1987).

this power are few. Town Law section 261 appears to limit a town's regulatory power to certain physical concerns, such as a building's height, the percentage of a lot that may be occupied and the population density. However, these powers are expanded by the policies for which the town can regulate, namely, to promote the health, safety, morals or general welfare of the community.¹³⁶

In addition, while section 263 enumerates the proper purposes for such regulations, these purposes are described with very general terms. "Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."¹³⁷ This demonstrates the policies for which municipalities may regulate. Other sections also grant fairly general powers, some limited by specific enumerations.¹³⁸

In general, the Court of Appeals has liberally construed these statutes, invalidating local regulations only when clearly outside the scope of permissible regulations¹³⁹ or enacted with a clearly exclusionary purpose.¹⁴⁰ In other cases, the court has upheld the validity of regulatory measures even when clearly conflicting with state statutes under municipal home rule authority.¹⁴¹

While municipalities have broad authority to regulate under state enabling legislation, this authority may be further expanded by municipal home rule provisions.¹⁴² Municipal Home Rule Law provisions enable municipalities to adopt local laws and to amend or supersede the application of state laws.¹⁴³ Be-

136. *Id.* § 261.

137. *Id.* § 263.

138. *See, e.g., id.* §§ 276, 277 & 281.

139. *See, e.g., Kamhi v. Planning Bd. of Yorktown*, 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.2d 865 (1983). *See supra* notes 75-79 and accompanying text.

140. *See, e.g., Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975). *See supra* notes 49-59 and accompanying text.

141. *See Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989). *See supra* notes 80-115 and accompanying text.

142. *See supra* notes 87-115 and accompanying text for a discussion of Municipal Home Rule Law.

143. Rice, *supra* note 2, at 641. For example, Town Law or Village Law can be

cause of these provisions, municipalities can create "numerous imaginative local enactments which [seek] to tailor zoning laws to the particular needs of a locality and to avoid restrictive provisions of the enabling legislation."¹⁴⁴

This supersession authority was upheld by the court in *Kamhi v. Town of Yorktown*.¹⁴⁵ In *Kamhi II*, the court, while referring to the supersession authority as a limited exception,¹⁴⁶ found that "the Legislature has recognized that situations may arise where laws of state-wide application are appropriately tailored by municipalities to fit their own peculiarly local needs."¹⁴⁷ Thus, a municipality has almost plenary power to create its own measures for land use regulation. The only limitation under municipal home rule provisions, as construed by the *Kamhi II* majority, is when a state has expressly prohibited a local law¹⁴⁸ or when a local law is otherwise preempted by state law.¹⁴⁹ In reaching its conclusion that the local measure, at least substantively, was within the authority granted by the state,¹⁵⁰ the court took heed of the legislature's directive that Municipal Home Rule Law should be liberally construed.¹⁵¹ Although the concurrence agreed with the result, it specifically disagreed with the majority's construction of home rule authority.¹⁵²

While *Kamhi II* upheld substantive provisions of a local

amended or superseded.

144. *Id.* at 641-642.

145. 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1981). *See supra* notes 80-115 and accompanying text.

146. *Id.* at 429, 547 N.E.2d at 349, 548 N.Y.S.2d at 147.

147. *Id.* at 430, 547 N.E.2d at 349, 548 N.Y.S.2d at 147.

148. *Id.* *See also* N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1990).

149. *Kamhi II*, 74 N.Y.2d at 430, 547 N.E.2d at 349, 548 N.Y.S.2d at 147 (quoting Albany Area Bldrs. Assn. v. Town of Guilderland, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989)).

150. *Kamhi II*, 74 N.Y.2d at 432, 547 N.E.2d at 350-51, 548 N.Y.S.2d at 149. The court later invalidated the measure as applied to this landowner for the town's failure to comply with the procedural requirements of Municipal Home Rule Law. *Id.* at 435, 547 N.E.2d at 352, 548 N.Y.S.2d at 150. *See also* N.Y. MUN. HOME RULE LAW § 22(1) (McKinney 1969 & Supp. 1990).

151. *Kamhi II*, 74 N.Y.2d at 428, 547 N.E.2d at 348, 548 N.Y.S.2d at 146. *See also* N.Y. MUN. HOME RULE LAW § 51 (McKinney 1969 & Supp. 1990).

152. *Kamhi II*, 74 N.Y.2d at 435-36, 547 N.E.2d at 353, 548 N.Y.S.2d at 151 (Simons, J., concurring).

regulation based on home rule provisions,¹⁵³ the concurrence and other commentators have cast doubt on the validity and scope of this construction.¹⁵⁴ The dichotomy created by these two views of home rule leaves the current state of the law uncertain.

D. *Types of State-Wide Land Use Schemes*

Other states, unlike New York, have state-wide land use regulations. These regulations, in many cases, require — rather than allow — a comprehensive plan.¹⁵⁵ What follows is a general survey of several types of state-wide land use regulations and the states that have implemented them.

1. *The Concurrence Statute*

The basic purpose of a concurrence statute is to synchronize development with the availability of essential governmental services. In this way, the ability of governments to support developments is not unnecessarily burdened. The government also has the ability to plan for the future by allocating resources to proposed developments. This type of scheme was used by Ramapo, giving the town the ability to prevent chaotic development and urban sprawl.¹⁵⁶ Like Ramapo, Florida determined a need for this type of regulation on a state-wide basis.¹⁵⁷

In the early 1980s, Florida enacted voluminous land use regulations to guide its municipalities when making these decisions. In the "Local Government Comprehensive Planning and Land Development Regulation Act,"¹⁵⁸ Florida's stated policy objective was "to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and

153. *Id.* at 432, 547 N.E.2d at 351, 548 N.Y.S.2d at 149.

154. *See Kamhi II*, 74 N.Y.2d at 435, 547 N.E.2d at 353, 548 N.Y.S.2d at 151 (Simons, J., concurring). *See also* James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule"*, 59 ST. JOHN'S L. REV. 713 (1985).

155. *See, e.g.*, FLA. STAT. ANN. §§ 163.3161-163.3194 (West 1990); ME. REV. STAT. ANN. tit. 30-A, §§ 4301-4344 (West Supp. 1990); OR. REV. STAT. §§ 197.175-197.283 (1989).

156. *See supra* notes 14-29 and accompanying text.

157. *See generally* FLA. STAT. ANN. §§ 163.3161-163.3194 (West 1990).

158. FLA. STAT. ANN. § 163.3161(1) (West 1990).

control future development.”¹⁵⁹

To this end, Florida requires each local government to prepare a comprehensive plan¹⁶⁰ containing certain elements.¹⁶¹ The required elements include: a capital improvements element designed to encourage the efficient use of government facilities;¹⁶² a future land use plan element;¹⁶³ a traffic circulation element;¹⁶⁴ a conservation element;¹⁶⁵ and a housing element.¹⁶⁶ The plan also requires coordination with adjacent municipalities, including a policy statement indicating the relationship between a proposed development and the comprehensive plan of an adjacent municipality.¹⁶⁷

In addition to the required elements, the comprehensive plan may contain a public buildings and related facilities element, a recommended community design element, an historic and scenic preservation element or an economic element.¹⁶⁸ An important provision in Florida's regulation is section 167.3167(3) which provides that where a local government is required to prepare a comprehensive plan and does not do so, the regional agency created by the statute will prepare one for the locality.¹⁶⁹ The plan created by the regional agency will have the same status under the law as would the plan created by the municipality.¹⁷⁰

Perhaps the most interesting aspect of Florida's statute is what is termed the “concurrency” requirement.¹⁷¹ Section

159. *Id.* § 163.3161(2).

160. *Id.* § 163.3167(2).

161. *Id.* § 163.3177.

162. *Id.* § 163.3177(3)(a). It should be noted that this scheme is very similar to that used by Ramapo in *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). See *supra* notes 14-29 and accompanying text.

163. *Id.* § 163.3177(6)(a).

164. *Id.* § 163.3177(6)(b).

165. *Id.* § 163.3177(6)(d).

166. *Id.* § 163.3177(6)(f).

167. *Id.* § 163.3177(4)(a).

168. FLA. STAT. ANN. § 163.3177(7) (West 1990). Other optional elements include a general area redevelopment element, a safety element and other elements that may be peculiar to the locality. *Id.*

169. *Id.* § 163.3167(3).

170. *Id.*

171. Lawrence A. Levy, *Living with Growth Management — Florida in the 1990s*, 1990 URB., ST. AND LOC. L. NEWSL. 13 at 1.

163.3177(10)(h) states:

It is the intent of the legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development [P]ublic facility and service availability shall be deemed sufficient if the public facilities and services for a development are phased . . . so that the public facilities and those related services which are deemed necessary by the local government to operate the facilities necessitated by that development are available concurrent with the impacts of the development.¹⁷²

This requirement of availability of governmental services is very similar to the local measure upheld by the court in *Golden v. Planning Bd. of Ramapo*.¹⁷³

2. The Mandatory Guideline Statute

The mandatory guideline statute puts the responsibility of goals and guidelines on the state while giving primary responsibility of implementation and regulation to smaller governmental entities. This type of statute encourages the involvement of the government and the citizenry in enacting these guidelines. All local land use regulations must comply with the guidelines to create uniform development throughout the state. Oregon has enacted this type of statute in an attempt to manage its growth on a state-wide scale.¹⁷⁴

Oregon's stated purpose in enacting a comprehensive land use statute was that "[u]ncoordinated use of lands within [the] state threaten the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of [Oregon]."¹⁷⁵ Oregon requires comprehensive plans from each city and county and requires them to exercise their zoning and planning responsibilities.¹⁷⁶

In addition to the above requirement, Oregon provides for the adoption of policy goals relating to wetland areas, wilder-

172. FLA. STAT. ANN. § 163.3177(10)(h) (West 1990).

173. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). See *supra* notes 14-48 and accompanying text.

174. See generally OR. REV. STAT. §§ 197.174-197.283 (1989).

175. OR. REV. STAT. § 197.005 (1989).

176. *Id.* § 197.175(1), (2)(a).

ness, recreational and outstanding scenic areas, unique wildlife habitats and agricultural land.¹⁷⁷ Further, all locally enacted comprehensive plans and land use regulations must be in compliance with the enacted goals.¹⁷⁸ Oregon also provides for the designation of critical concern areas for which regulations are more strictly enforced.¹⁷⁹

The unique features of this land use regulation scheme include the forced participation of local governments and the absence of state regulation regarding the comprehensive plans.¹⁸⁰ While state government or agencies provide guidance by enacting standards to which the plans must comply, the actual regulation is still left to the local governments.¹⁸¹ Thus, the power is decentralized. Another unique feature of this scheme is the requirement that governments allow citizen involvement when regulating land uses.¹⁸²

Oregon's scheme has several advantages. First, the land management system has helped to protect a large amount of farm land that otherwise would have been lost.¹⁸³ Second, the scheme has created a flood of public support.¹⁸⁴ Third, the structure of the program has ensured compliance with statewide goals.¹⁸⁵ Fourth, the plan has required all jurisdictions to establish boundaries beyond which development cannot go, establishing a more contiguous pattern of growth.¹⁸⁶

177. *Id.* § 197.230.

178. *Id.* § 197.250. The goals that have been enacted include: citizen involvement, land-use planning, agricultural land, forest lands, areas subject to natural disasters and hazards, recreational needs, economy, housing, public facilities, transportation, energy conservation, urbanization and ocean resources. See YARO & REID, *supra* note 2, at 26-27.

179. OR. REV. STAT. § 197.405, 410 (1989).

180. YARO & REID, *supra* note 2, at 25.

181. *Id.*

182. *Id.* at 26.

183. *Id.* at 28.

184. *Id.*

185. YARO & REID, *supra* note 2, at 28.

186. *Id.*

3. *The Policy Statute*

While similar to the mandatory guideline statute,¹⁸⁷ the policy statute is different in that it attempts to coordinate planning among all governmental units, rather than mandating the type of regulation required. In this type of scheme, the state enacts policies and guidelines to be considered by regional and county entities when creating plans for development. This type of statute places the greatest emphasis on smaller governmental units and requires state consideration of these local plans. Hawaii has enacted this type of statute.¹⁸⁸

Hawaii created a state-wide planning scheme because it found a need to "improve the planning process . . . , to increase the effectiveness of public and private actions, to improve coordination among different agencies and levels of government, to provide for wise use of Hawaii's resources and to guide the future development of the State."¹⁸⁹ One significant aspect of Hawaii's plan is an identification and enumeration of goals and policies of the state and its people.¹⁹⁰ Not only are goals relating to the economy, the physical environment, and the well-being of citizens and the state identified,¹⁹¹ but also, objectives and policies relating to the population,¹⁹² the general economy,¹⁹³ the agricultural economy,¹⁹⁴ the tourism industry,¹⁹⁵ the physical environment,¹⁹⁶ housing issues,¹⁹⁷ and socio-cultural advancement in health¹⁹⁸ and education.¹⁹⁹

These identified policies are implemented through several mechanisms. First, the state plan provides for the creation of state functional plans which comply with all identified policies

187. See *supra* notes 174-86 and accompanying text.

188. See generally HAW. REV. STAT. §§ 226-1-226-105 (1985).

189. *Id.* § 226-1.

190. *Id.*

191. *Id.* § 226-4.

192. *Id.* § 226-5.

193. *Id.* § 226-6.

194. *Id.* § 226-7.

195. *Id.* § 226-8.

196. *Id.* § 226-11, 13.

197. *Id.* § 226-19.

198. *Id.* § 226-20.

199. *Id.* § 226-21.

and priorities.²⁰⁰ Next, the state functional plan requires²⁰¹ county general development plans indicating desired population and physical development patterns for the area.²⁰² County plans are also required to address problems and needs unique to that particular area.²⁰³ The policies are implemented through several councils, including the policy council,²⁰⁴ and the department of planning and economic development.²⁰⁵

In requiring a state functional plan, Hawaii explicitly requires local input. The plan is to be prepared by a state agency head responsible for the area who must "work in close cooperation with the advisory committee, respective officials, and people of each county. In the formulation of the functional plan, the preparing agency shall solicit public views and concerns."²⁰⁶ The plan must also take the county general plan into consideration.²⁰⁷

There are several unique features of Hawaii's approach to state-wide planning. By legislating policies, objectives and priorities, the state allows smaller governmental units greater latitude in determining the means to achieve these ends. They must take into account the state-wide concerns, but unique local concerns are not ignored. In addition, the state not only permits, but requires, consideration of concerns of the local populous. This enables every interested citizen to become involved and to have a say in the future direction of the state.

4. *The Inventory and Analysis Statute*

The inventory and analysis statute, while similar in goals and policies to other types of schemes,²⁰⁸ is unique in what it requires from local governments. The state enacts goals and guidelines to be followed by the localities in creating their com-

200. *Id.* § 226-52(a)(2)-(3).

201. *Id.* § 226-52(a)(3).

202. *Id.* § 226-52(a)(4).

203. *Id.*

204. *Id.* § 226-52(b)(1).

205. *Id.* § 226-55.

206. *Id.* § 226-57.

207. *Id.*

208. For a discussion of the other state mandatory plans, see *supra* notes 156-207 and accompanying text.

prehensive plans and implementation procedures, and requires an inventory and analysis section to be included in the comprehensive plan. This inventory and analysis requirement provides the greatest amount of future planning by an evaluation of the current situation. Maine has enacted this type of statute.²⁰⁹

Maine's purpose in enacting its state-wide growth management scheme, was to "[p]rovide municipalities with the tools and resources to effectively plan for and manage future development . . . with a maximum of local initiative and flexibility."²¹⁰ Maine also established a set of goals to "provide overall direction and consistency to the planning"²¹¹ of all local entities "in order to promote the general health, safety and welfare of [its] citizens."²¹²

In order to accomplish its purposes, Maine provides that every municipality must plan for its future growth and development by adopting growth management programs, including a comprehensive plan and the methods of its implementation.²¹³ The state further requires that every municipality create a local planning committee to implement the required growth management plan.²¹⁴ Local government must first encourage citizen involvement by "soliciting and considering a broad range of public review and comment"²¹⁵ before it can create or implement any comprehensive plan.²¹⁶

Maine requires every municipality to enact a comprehensive plan,²¹⁷ with various required elements. These elements include inventory and analysis,²¹⁸ policy development,²¹⁹ an implementa-

209. See generally ME. REV. STAT. ANN. tit. 30-A, §§ 4301-4344 (West Supp. 1990).

210. *Id.* § 4312(2)(B).

211. *Id.* § 4312(3).

212. *Id.*

213. *Id.* § 4323.

214. *Id.* § 4324(1)-(2).

215. ME. REV. STAT. ANN. tit. 30-A, § 4324(3) (West Supp. 1990).

216. *Id.*

217. *Id.* § 4323(2).

218. *Id.* § 4326(1). This element includes economic and demographic data, significant water resources, significant or critical natural resources, existing recreational areas, existing transportation systems and an assessment of capital facilities and public services necessary to support growth.

219. *Id.* § 4326(2). Policy development is intended to promote state goals and address conflict between regional and local issues.

tion strategy,²²⁰ and a regional coordination program.²²¹

Although Maine requires a great deal of local implementation, it provides assistance in the form of a review agency to provide not only the promotion of local programs, but also technical and financial assistance.²²² In addition, all localities must submit their plans to state authorities for review for consistency with the established goals and guidelines.²²³

This scheme has features similar to those of other states.²²⁴ However, Maine appears to be the most stringent in its requirements. Although providing a large amount of aid to municipalities, Maine expects the localities to take a large amount of responsibility for the planning process, including the planning mechanisms and implementation systems. Maine also retains the power of review over the local plans to determine compliance with state guidelines. Although its provisions are stringent, by enacting the goals and guidelines, rather than the actual regulation, Maine allows its localities a great deal of creative freedom in determining the best method of implementation for the area. In addition, the requirement of citizen involvement ensures input from all levels of government and the general population.

III. Analysis

While some commentators have suggested and some states have even implemented state-wide land use regulations,²²⁵ wholesale applicability of these schemes to New York would be ill advised. Obviously, any general reform would have to be tai-

220. ME. REV. STAT. ANN. tit. 30-A, § 4326(3) (West Supp. 1990). The implementation strategy must contain a timetable for the implementation program, to identify growth and rural areas, and develop a capital investment plan for financing public facilities.

221. *Id.* § 4326(4).

222. *Id.* § 4341. See also ME. REV. STAT. ANN. tit. 30-A, § 4344 (West Supp. 1990).

223. *Id.* § 4343.

224. For example, like Florida, *supra* notes 156-73 and accompanying text, and Oregon, *supra* notes 174-86 and accompanying text, Maine requires a comprehensive plan with certain mandatory elements. ME. REV. STAT. ANN. tit. 30-A, § 4326(3) (West Supp. 1990).

225. See, e.g., *infra* notes 228-41 and accompanying text; see also FLA. STAT. ANN. §§ 163.3161-163.3194 (West 1990), *supra* notes 156-73 and accompanying text; ME. REV. STAT. ANN. tit. 30-A, §§ 4301-4344 (West Supp. 1990), *supra* notes 208-24 and accompanying text; OR. REV. STAT. §§ 197.175-197.283 (1989), *supra* notes 174-86 and accompanying text.

lored specifically to fit with New York's own governmental systems and current enabling legislation.²²⁶ In addition, because other states enact their own land use schemes with their own particular problems and situations in mind, any wholesale adoption would not be sufficient to deal with either the problems facing New York, or the balance of power between the state and local governments. Therefore, the best possible solution is to tailor a unique scheme to fit New York by adopting selectively from other sources.

A. *General Reforms*

A number of reforms have been suggested that are designed to accomplish the shift from purely local control of land use decisions to greater state intervention and control.²²⁷ These suggested reforms may be reasonable for New York, given the strong local power over land use decisions and the current doubt as to the viability of municipal home rule.²²⁸

The first proposed reform concerns the nature of local planning and regulation. Rather than being reactionary, local planning must be more affirmative in its approach.²²⁹ Most local planning decisions are the result of emotional reactions to a proposed development. However, these decisions should be the result of a more positive exercise of power.²³⁰ This would include using a local plan to provide guidance when making decisions and to facilitate negotiations between local governments and private developers.²³¹ This could work in New York if the state were to require some kind of comprehensive, long-term plan from each locality. The plan would not necessarily be used by the state, but used by the locality to make decisions based on its documented long-range plans.

The second proposed reform encourages the states to assume more responsibility for controlling the regional impact of local development.²³² While regional impact is almost certain to

226. See *supra* notes 14-115 and accompanying text.

227. Solomon, *supra* note 3.

228. See *supra* notes 87-115, 142-54 and accompanying text.

229. Solomon, *supra* note 3, at 278.

230. *Id.* at 278-79.

231. *Id.* at 279.

232. *Id.*

occur, any regional control is largely impotent in its ability to minimize this impact. Regional mechanisms generally have the responsibility but lack the authority possessed by the sovereign state.²³³ In New York, giving affirmative power to regional governmental units may be a viable option. Because of the vastly different regions within the state, some regional control is possible as long as there are compatible interests within the region. For example, a region which contains both heavily populated urban areas and low density rural areas may not be effective given the competing interests within the region. However, any regional control mechanism must have authority from the state to carry out its function. Perhaps creating an intermediate level of government for land use decisions is not preferable for New York. This would just involve more bureaucratic red tape and probably would not accomplish anything.

The third reform suggested is a reduction in a locality's incentive to utilize exclusionary tactics such as maintenance of the status quo.²³⁴ This is accomplished through greater state assumption of financial responsibility for the drain on local resources attendant to increased development.²³⁵ Given the situation seen in Ramapo this reform is reasonable and possibly viable.²³⁶ If a municipality has a scheme to slow or even stop development because of the lack of resources to support the development, state assumption of some financial responsibility would not only allow the development, but may encourage municipalities to actually increase development to receive more funds. This could create great incentives for municipalities to construct affordable housing units, and abstain from exclusionary tactics.

The fourth reform suggests that the public have a more positive role in land development.²³⁷ This can be accomplished through public land holding designed to acquire available land and to sell it to private developers for uses consistent with a comprehensive plan. Public land holding can also preserve unde-

233. *Id.*

234. Solomon, *supra* note 3, at 280.

235. *Id.*

236. See *supra* notes 14-29 and accompanying text.

237. Solomon, *supra* note 3, at 280.

veloped land or promote a development project deemed to be in the public interest.²³⁸ However, the applicability of this reform to New York may be problematic, because while theoretically possible, there is a great potential for abuse. For example, this technique could easily be abused by localities that wish to hinder development and maintain the status quo. Further, it is also problematic in terms of the availability of funds with which to purchase the land. Obviously, the local government could not just take the land, and may lack the funds to purchase a sufficient amount of land to make the scheme work.

The fifth proposed reform is that the courts not only enforce the above reforms and controls, but also relax current legal standards.²³⁹ While the courts are important to any reform in land use regulation, it seems that in New York, the courts have already identified a problem for which there is no legislative solution. In New York, the reform should come from the legislature. Of course, the courts are an important aspect in making the scheme work, but the legislature must be the starting point.

These proposed reforms, taken together with other state models, can provide a workable solution for New York. Because the states discussed above have tailored state-wide schemes to their unique characteristics and needs,²⁴⁰ the wholesale adoption of any of them would not provide the proper solution for New York. It may be preferable for New York to pick and choose specific components to tailor its own state-wide scheme.

B. *Other States' Schemes*

Some aspects of Florida's land use model can be used in New York. For example, the concept of concurrency²⁴¹ could be fairly applicable due to the mix of rural and urban areas, allowing for development to progress at a rate commensurate with the government's ability to support that development. This would allow highly developed areas to avoid further develop-

238. *Id.*

239. *Id.* at 280-81. One standard that could be relaxed is the "diminution in property value test" to determine whether a private land owner must bear a restriction on the use of land without compensation from the government. *Id.* See also *supra* notes 127-132 and accompanying text.

240. See *supra* notes 155-224 and accompanying text.

241. See *supra* notes 157-72 and accompanying text.

ment and other less developed areas to develop at their own rate. A problem with the concurrency scheme for New York is the municipalities' ability to use the scheme to avoid continued development. As was seen with Ramapo, the municipality could conceivably slow or even stop development for a number of years while claiming inability to support developments with services.²⁴² If the state were to assume a greater financial responsibility for the drain increased development places on localities, then municipalities would no longer be able to claim a drain on governmental resources.

One aspect of Oregon's model²⁴³ that would be suitable for New York's home rule tradition²⁴⁴ is the ability of local governments to make substantive decisions as long as they are in compliance with state policy objectives. Having once given the local governments the strong power to regulate, taking it away would not be well received. The strong citizen support exhibited in Oregon is not likely to be seen in New York where local control over land use decisions is subject to greater influence by citizen landowners in the municipality.

Hawaii's scheme²⁴⁵ has certain desirable characteristics with respect to strong citizen involvement. Although strong citizen involvement may not be seen in New York with regard to a state land use regulation, state policy objectives may be better received. In addition, Hawaii requires citizen input from each affected locality.²⁴⁶ This is an attractive solution for localities in New York, where local citizens can have a say in the future law of the state. The policies and priorities of Hawaii have another attractive characteristic. By enacting a similar scheme New York would give greater power to the localities while still requiring some continuity among them. Through this, local government is satisfied because the actual decision about the use of land is still made at the local level. Additionally, the state is satisfied because the local decisions follow policy guidelines thereby creating some regularity in the state.

242. See *supra* notes 14-29 and accompanying text.

243. See *supra* notes 174-86 and accompanying text.

244. See *supra* notes 87-115, 133-54 and accompanying text.

245. See *supra* notes 188-207 and accompanying text.

246. See *supra* note 206 and accompanying text.

It may be that Maine's provisions²⁴⁷ require too much from local governments to be effective in New York. Further, because of the strong home rule tradition in New York,²⁴⁸ plenary state review of local comprehensive plans would not likely find favor with either local governments or their citizens. If modified, Maine's requirement of a comprehensive plan and implementation strategies²⁴⁹ may work in New York. This would give local governments the maximum input into the future of the area. In addition, through the inventory and analysis component of the comprehensive plan, local governments would be forced to evaluate the current situation and create a plan for future growth. This would at least create some awareness, at the local level, of the deficiencies in development in the area.

Considering all the possible reforms New York could use, the best possible solution is one that would maximize local input and decision-making, while requiring some continuity among decisions. To this end, New York should codify policy guidelines and goals to be considered by every local government in creating a mandatory comprehensive plan. Of course, included in this plan would be an analysis of every locality's current situation. The power of review by the state should extend only to the point of ensuring compliance with the state-wide policies and goals. Actual implementation should be left purely to the local governments. Any conflict arising from a challenged application of local implementation would be resolved by the courts which would determine whether the local enforcement falls within state goals. This specifically tailored scheme would generally maintain the current balance of power between the state and local governments, but would allow for uniform decision-making throughout the state.

IV. Conclusion

Any drastic change in the law is difficult. In New York, it may be time to examine the current distribution of power and make some changes. The New York Court of Appeals identified a problem almost twenty years ago, yet there has been no legis-

247. See *supra* notes 211-23 and accompanying text.

248. See *supra* notes 87-115, 133-54 and accompanying text.

249. See *supra* notes 208-24 and accompanying text.

lative change. In an era of environmental and housing concerns, it is time to redistribute power to accomplish changes for the public good. New York should heed the words of the Court of Appeals from 1972²⁵⁰ and realize that state control can indeed serve greater interests than purely local decisions.

*Jill Devine**

250. See *supra* notes 39-48 and accompanying text.

* Dedication

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