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Death of Dillon's Rule: Local Autonomy to Control Land Use

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I. THE DILLON DEFENSE AND THE RISE OF LOCAL LAND USE POWER

A. The Dillon Defense Defeated

In order for municipal governments to promote sustainable and green development, create safe densities and open spaces in response to the pandemic, protect lives and property in areas vulnerable to natural disasters, and to manage climate change, they must be able to influence the development and preservation of privately owned land. For them to control the negative impacts of oil and gas facilities, they must find power to regulate matters that are typically the prerogative of state agencies. To legalize emerging renewable energy technologies, they must have authority to make them permitted uses in their zoning ordinances, and to innovate by creating solar-ready homes in subdivisions and provide for solar easements.

To all of these, Dillon's Rule is an obstacle. It holds that municipalities are not sovereign entities, but merely instrumentalities of states and that the legal powers delegated to them by state legislatures are to be narrowly construed.[1] This article documents the serious erosion of that principle since 1868 when it was articulated. It discusses how amendments to state constitutions, home rule provisions, state enabling statutes, and case law have diminished the effect of Dillon's Rule as it pertains to the authority of local governments to adopt and enforce land use regulations. It then argues that the resultant broad interpretation of local land use laws should give rise to a presumption that state laws regulating oil and gas production do not preempt local land use

1. *See infra* Part II(B).

laws unless they do so expressly. Finally, it suggests that state and local governments should collaborate to achieve state interests in energy production while preserving traditional local land use control over high-impact land uses such as energy production facilities. Unless Judge Dillon's demise is clearly understood, his ghost may frighten local officials and their attorneys and prevent them from solving the truly scary problems they will confront in the 21st century.

Dillon's Rule provides a defense for property owners who challenge local land use regulations. Using the rule, they claim that the challenged regulation is *ultra vires*, that is, beyond the power of the locality to act.[2] The *ultra vires* claim is defeated when the local government can show that it has either express or implied powers to act under state legislation such as zoning and other land use enabling acts, home rule provisions, or under provisions of their state-approved charters. In the century and a half since Judge Dillon handed down his decision from the Iowa bench, the advent of home rule and land use enabling statutes have significantly diluted the *ultra vires* defense of Dillon's Rule in the overwhelming majority of states.

B. The Delegation of Authority to Control Land Use

Of particular importance in the dilution of Dillon's Rule are the state enabling acts adopted in the first quarter of the twentieth century that delegate power to municipalities to control the use of the land. In 1916, roughly fifty years after Judge Dillon's decree, New York City adopted the nation's first comprehensive zoning law. A 1913 act of the state legislature amended the city's charter to authorize it to control land use.[3] Following New York City's action, zoning spread quickly. Forty-eight cities and towns followed suit by

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2. *See* Marble Technologies v. City of Hampton, 690 S.E.2d 84, 87 (Va. 2010); *See also* Kole v. Faultless, 963 N.E.2d 493, 496 (Ind. 2012) (explaining the ultra vires defense to illustrate the disadvantages of Dillon's Rule and why it was abrogated in the state: "Under the Dillon Rule, a person who simply found himself on the wrong side of some local action could easily challenge that action by essentially arguing that it was ultra vires. *See, e.g.*, City of S. Bend v. Chicago, S.B. & N.I. Ry. Co., 101 N.E. 628, 629 (Ind.1913) ("[T]he charter of South Bend delegated no power for the enforcement of the ordinance in controversy . . . ."). The resulting legal landscape handcuffed municipal corporations, preventing them from taking a wide range of governmental actions we might find commonplace today. *See, e.g.*, Pittsburgh, C., C. & St. L. Ry. Co. v. Town of Crown Point, 45 N.E. 587 (1896) (town could not enforce ordinance requiring railroad to post watchmen and maintain gates at crossings at railroad's expense because statute authorizing ordinances to prevent nuisances did not provide so specifically.)").

3. N.Y. GEN. CITY LAW §§ 19–20 (McKinney 1913).

adopting some form of zoning enabling act by September 1921.[4] The need for enabling acts in all states and for a uniform and effective method of delegating control of land use to municipalities led to the promulgation of a model zoning enabling act by a national commission in 1921.[5] By 1925, nineteen states had incorporated this standard enabling act either "wholly or in part in their laws."[6] By July 1, 1927, 553 cities, towns, and villages had adopted comprehensive zoning laws.[7]

As Secretary of Commerce under presidents Harding and Coolidge in the 1920s, Herbert Hoover paved the way for the rapid adoption of zoning. Perhaps because of the clutch of Dillon's Rule, Hoover noted, "Our cities do not produce their full contribution to the sinews of American life and national character," and these "moral and social issues can only be solved by a new conception of city building."[8] His response was to appoint two advisory committees: one to write a standard building code and another to draft model zoning and planning statutes to be adopted by the states, in their discretion.

The latter committee was called the Advisory Committee on City Planning and Zoning; it appointed a subcommittee on laws and ordinances that produced a final draft of a 12-page enabling statute called A Standard State Zoning Enabling Act Under Which Municipalities Can Adopt Zoning Regulations.[9] The act was issued by the Commerce Department in August 1922.[10] It contained nine sections, including the grant of zoning power to local governments; a provision that the local legislature could divide the city into districts or zones; a statement of zoning's purposes; the creation of a zoning board of appeals, and procedures for establishing, waiving, and amending those regulations.[11] All fifty states have adopted some form of the Standard Zoning Enabling Act.

With respect to this delegated local land use control, many state courts have abandoned Dillon's Rule in favor of a broad interpretation of local power. In Idaho, a court noted that, "in

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4. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT iv (photo. reprint 1924) (1922).

5. *See id.*

6. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT iii (revised ed. 1926).

7. John M. Gries, *Report on Zoning Laws and Ordinances, in* U.S. DEP'T OF COMMERCE, ZONING PROGRESS IN THE UNITED STATES 13, 13 (1927).

8. Regional Plan of New York and its Environs, *Plan of New York and its Environs; the Meeting of May 10, 1922* 15 (1922), https://babel.hathitrust.org/cgi/pt?id=hvd.li5jlc;view=1up;seq=3.

9. *See* U.S. DEP'T OF COMMERCE, *supra* note 4.

10. *Id.* at ii.

11. *Id.* at 4–12.

enacting the Local Planning Act of 1975, the legislature obviously intended to give local governing boards . . . broad powers in the area of planning and zoning."[12] In Texas, "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities."[13]

Some state legislatures have adopted statutes that explicitly repeal Dillon's Rule. The State of Arkansas repealed Dillon's Rule in this way in 2011.[14] "The rule of decision known as 'Dillon's Rule' is inapplicable to the municipal affairs of municipalities."[15] The statute defines "municipal affairs" as "all matters and affairs of government germane to, affecting, or concerning the municipality or its government except" certain state affairs "subject to the general laws of the State of Arkansas . . . ."[16] States have incorporated self-executing provisions related to home rule authority in their state constitutions; such amendments can greatly diminish the scope of Dillon's Rule or eliminate it altogether.[17]

C. Home Rule and the Demise of Dillon

The National League of Cities recently published Principles of Home Rule for the Twenty-First Century, a detailed analysis of the 130-year history and evolution of local home rule authority that also contains a Model Home Rule Law.[18] This publication notes that "[t]he basic theory of this first wave of home rule was that state

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12. Worley Highway Dist. v. Kootenai County, 663 P.2d 1135, 1137 (Idaho Ct. App. 1983).

13. Barr v. City of Sinton, 295 S.W.3d 287, 297 (Tex. 2009) (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981)).

14. 2011 Ark. Laws Act 1187, ARK. CODE ANN. § 14-43-602(b) (2011).

15. *Id.*

16. ARK. CODE ANN. § 14-43-601(a)(1) (2011).

17. Hon. John D. Russell & Aaron Bostrom, *White Paper: Federalism, Dillon Rule, and Home Rule*, AMERICAN CITY COUNTY EXCHANGE, Jan. 2016, at 6, 10.

18. Nat'l League of Cities, PRINCIPLES OF HOME RULE FOR THE 21st CENTURY 5 (2020), https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20Principles%20ReportWEB-2.pdf. The report "represents the culmination of a year-long process of research, drafting, outreach, and refinement. The principles are a hopeful vision for the future of state-local relations, grounded in the lessons of more than 130 years of experience with home rule. They make clear that cities, towns and villages are fully capable of governing, and that states must have a healthy respect for the institutions of local democracy." For a critical assessment of the NLC's publication, *see* David Schleicher, *Constitutional Law for NIMBYs: A Review of "Principles of Home Rule for the 21st Century" by the National League of Cities*, 81 OHIO ST. L.J. 883 (2020). ("Unfortunately, the Model Article is severely flawed. Rather than systematically addressing and responding to the various contemporary problems of local governance, it is laser-focused on . . . the spate of preemptive laws passed by politically-conservative state legislatures . . . .").

constitutions would empower cities to adopt charters and that cities that did so—St. Louis being the first—would be given the power to act with respect to what were considered 'local' or 'municipal' affairs." It describes a second wave of home-rule reform that provided a fuller range of legislative authority.[19] Lynn A. Baker and Daniel B. Rodriguez classify forty-six states as adopting some form of home rule.[20]

The importance of the adoption of home rule provisions is evident in Tennessee. The Tennessee Constitution was amended in 1953 to permit municipal governments to operate under home rule authority.[21]

[A]n exception to Dillon's Rule necessarily arises when the issue concerns the authority of home rule municipalities . . . The effect of the home rule amendments was to fundamentally change the relationship between the General Assembly and these types of municipalities, because such entities now derive their power from sources other than the prerogative of the legislature. Consequently, because the critical assumption underlying application of Dillon's Rule is no longer valid as to home rule municipalities, Dillon's Rule simply cannot be applied to limit any authority exercised by them.[22]

As stated by the Supreme Court of Tennessee, "the whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments . . . ."[23]

"Home rule, in effect, reverses Dillon's Rule because a local unit of government may exercise wide-ranging powers despite a lack of specific statutory authority."[24] In 1972, South Carolina amended its constitution, adding a home rule provision that repeals Dillon's Rule altogether.[25] The legislature subsequently passed the Home Rule Act,[26] and in doing so "intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government."[27] Some states have given home rule authority to

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19. *Id* at. 11–12. *See also* City of St. Louis v. Western Union Tel. Co., 149 U.S. 465, 468 (1893).

20. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1338–39, notes 11–12 (2009).

21. TENN. CONST. art. XI, § 9 (1953).

22. S. Constructors, Inc. v. Loudon Cty. Bd. of Educ., 58 S.W.3d 706, 713–714 (Tenn. 2001).

23. Farris v. Blanton, 528 S.W.2d 549, 551 (Tenn. 1975).

24. Louis V. Csoka, *The Dream of Greater Municipal Autonomy: Should the Legislature or the Courts Modify Dillon's Rule, a Common Law Restraint on Municipal Power?*, 29 N.C. CENT. L.J. 194, 201 (2007).

25. S.C. CONST. art. VIII, §§ 7,17 (1895).

26. S.C. CODE ANN. § § 5-7-10–310 (1976).

27. 19 S.C. JUR. CONST. LAW § 12.1.

municipalities either directly through self-executing constitutional provisions or by authorizing the state legislature to adopt home rule legislation.[28]

A self-executing provision directly grants local governments power.[29] The Arizona Constitution states, for example, that "The provisions of §§5 through 8 of this [home rule] article are self-executing, and no further legislation is required to make them effective."[30] "Any city containing, now or hereafter, a population of more than three thousand five hundred may frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state . . . ."[31]

Home rule authority in some states is derived from constitutional provisions that are implemented by statute.[32] The Connecticut Constitution, for example, specifies that "The general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities and boroughs relative to the powers, organization, and form of government of such political subdivisions."[33]

II. DILLION'S RULE AND MUNICIPAL LAND USE POWER

A. The Relevance of the Rule to Land Use Regulation

Under the Standard Zoning Enabling Act, municipalities are delegated the power to adopt zoning provisions that regulate the use of the land and the structure, location, and configuration of buildings. The Act stated that, "Such regulations shall be made with reasonable consideration, among other things, 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."[34] The relevance of Dillon's Rule of narrow construction of municipal powers is that it might prevent localities from including green building requirements in zoning, adopting provisions that mitigate climate change, regulating the location of oil and gas facilities,

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28. *See* Russell & Bostrom, *supra* note 17, at 6.
29. *See* John Martinez, 1 Local Government Law § 4:6 (2020).
30. ARIZ. CONST. art. XII, § 9 (2018).
31. *Id.* art. XIII § 2.
32. *See* Russell & Bostrom, *supra* note 17, at 6.
33. CONN. CONST. art. X § 1 (2017).
34. U.S. DEP'T OF COMMERCE, *supra* note 4, at 7.

or adopting standards that protect ecosystem services or promote renewable energy facilities. In Virginia, a Dillon's Rule state, a local government's attempt to enlarge a Resource Protection Area within its geographical boundaries under the Chesapeake Bay Preservation Act, for example, was declared void.[35]

In contrast, broadly construed, the "suitability for particular uses" and "most appropriate use of the land" language of the Standard Zoning Enabling Act allows local governments to incorporate provisions that apply to emerging technologies such as renewable energy or emerging exigencies such as climate change or pandemics. If narrowly construed, then these local laws could be enacted only if the state legislatures provide them with specific enabling legislation. The impracticality of such a system given the unique challenges and opportunities and the highly diverse conditions among their many municipalities is obvious.

B. Dillon's Rule in Context

There are two Dillon Rules; both written by Judge Dillon in separate cases decided a month apart in 1868.[36]

In *Clinton v. Cedar Rapids*, he wrote the opinion of the Supreme Court of Iowa that upheld the right of a state-charted railroad company to use dedicated city streets for its railroad track over the objection of the state-created municipality.[37] Both the railroad and the city were delegated their respective authorities by the Iowa state legislature. The state legislature, by special act, had recently conferred on the railroad the right to use the streets. The city claimed that the railroad company did not have the power to appropriate the streets and that, if it did, it should pay just compensation. The railroad countered it was so empowered by

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35. Marble Technologies v. City of Hampton, 279 VA. 409, 412 (2010). (The issue in the Circuit Court was "whether the City acted ultra vires in passing this amendment to the zoning ordinance.").

36. For a modern and respected view of Judge Dillon's view of local governmental power, *see* Richard Briffault, *Our Localism, Part 1—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7–8 (1990): "The formal legal status of a local government in relation to its state is summarized by the three concepts of 'creature,' 'delegate' and 'agent.' The local government is a creature of the state. It exists only by an act of the state, and the state, as creator, has plenary power to alter, expand, contract or abolish at will any or all local units. The local government is a delegate of the state, possessing only those powers the state has chosen to confer upon it. Absent any specific limitation in the state constitution, the state can amend, abridge or retract any power it has delegated, much as it can impose new duties or take away old privileges. The local government is an agent of the state, exercising limited powers at the local level on behalf of the state. A local government is like a state administrative agency, serving the state in its narrow area of expertise, but instead of being functional specialists, localities are given jurisdictions primarily by territory, although certain local units are specialized by function as well as territory."

37. City of Clinton v. Cedar Rapids & Mo. River Railroad Co., 24 Iowa 455 (Iowa 1868).

the act of the state legislature and that, there being no provision in the special act requiring such compensation, none should be awarded.

The court ruled in favor of the railroad noting "[T]he streets of the city are not its 'private property' in such a sense as to entitle it as of right, despite legislative declaration to the contrary, to compensation for this additional public use."[38]

> "The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy . . . . [T]he legislature might, by a single act . . . sweep from existence all of the municipal corporations in the State, and the *corporation* could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature."[39]

With respect to the rights of the railroad to lay its tracks on public streets under the special act of the state legislature "[i]t is competent for the legislature, under the right of eminent domain, to grant such an authority. Such intention must be shown by express words or necessary implication."[40] Judge Dillon stated:

> "Every grant of power is intended to be efficacious and beneficial, and to accomplish its declared object; and carries with it such incidental powers as are requisite to its exercise. If, then, the exercise of the powers granted draws after it a necessary consequence, the law contemplates and sanctions that consequence."[41]

Using this formulation, the court found that the railroad had incidental powers to lay track in the city's streets. On its face, this is not a particularly narrow rule of construction of legislative intent. What is "requisite to its exercise" is a highly subjective and circumstantial matter. Is it really requisite to the success of the railroad that it be able to condemn rights of way in city streets

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38. *Id.* at 477–78.

39. *Id.* at 475. This servient view of local governments was affirmed by the U.S. Supreme Court in Hunter v. City of Pittsburgh. The opinion confirmed these 'settled principles:' "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." "The . . . nature . . . of the powers conferred upon these corporations . . . rests in the absolute discretion of the state." "The state, therefore, at its pleasure, may modify or withdraw all such powers . . . ." 207 U.S. 161, 178–79, (1907).

40. *Id.* at 480.

41. *Id.*

without paying compensation? It surely is "efficacious and beneficial." Is this then a narrow or broad interpretation? Did Clinton, often cited as the source of Dillon's Rule, even contain a rule of interpretation of municipal power?

Waiting for clarification on these questions did not take long. A month later, the Iowa Supreme Court handed down its decision in *Merriam v. Moody's Executors*.[42] The question addressed was the power of a municipality to pass an ordinance providing that "in the case of the non-payment of [local] taxes or assessments, the [tax delinquent] lots . . . may be sold and conveyed by the city."[43] In *Merriam*, Judge Dillon elaborated on the "incidental powers as are requisite to its exercise" formulation in the *Clinton* case.

> [I]t must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.[44]

Clinton and *Merriam* establish two rules crafted by Judge Dillon in 1868. First, *the servient entity rule* under Clinton regards municipalities as mere "tenants at will," entities that state legislatures can simply sweep away.[45] The case does not contain a rule of legislative construction. Second, *the strict construction rule* under *Merriam* clarifies the issue of construction left open in *Clinton*. *Merriam* holds that delegating statutes are subject to a multifactor strict interpretation formulation, including a presumption against the validity of any contested municipal power. Dividing the rule into two parts helps to determine whether states are Dillon's Rule states for different purposes. They can be classified as Dillon's Rule states under *Clinton* if the focus is on the servient status of municipalities, which does not require strict construction. Alternatively, states can be classified as Dillon's Rule states under *Merriam* if the issue is whether state law embodies that case's rule of strict construction.

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42. Merriam v. Moody's Executors, 25 Iowa 163 (Iowa 1868).

43. *Id.* at 171.

44. *Id.* at 170 (citations omitted).

45. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOV'T LAW 289–290 (8th ed. 2016).

This article demonstrates that the vast majority of states have rejected Dillon's Rule of strict construction with respect to delegated land use authority. In that context, they are not Dillon's Rule states. Some, if not most, of these same states, however, remain Dillon's Rule states under the servient entity rule. Thus, scholars and municipal attorneys can denominate a state as a Dillon's Rule state and then erroneously conclude that the rule of strict construction applies to delegated land use powers. The binary formulation above clarifies the confusion caused by the unitary construction of the rule penned by Dillon himself. The opinions of the Supreme Court of Iowa are not precedential in other states, but Dillon's Rule was incorporated into Judge Dillon's influential treatise on the Law of Municipal Corporations, which abbreviates his rule of servient status and combines it with his formulaic rule of strict construction.[46]

If context matters, at issue in these two ancient Iowa cases were the ability of the state legislature to empower railroads to create necessary infrastructure for economic development and the municipal power to create a novel method of recovering delinquent taxes, both subjects that were and still are subject to strict control of state legislatures. The context changes dramatically, 150 years hence when the issues are whether municipalities have the power to permit renewable energy facilities, to protect the public health by requiring buildings to be safe from pandemics, or to mitigate climate change. As we will see in Part III and the article's appendix, the vast majority of states have rejected the rule of strict construction for interpreting local land use authority in the contemporary context.

C. Conducting an Autopsy on Dillon's Rule

The question posed by this article is whether the law in each of the fifty states broadly or narrowly interprets the power of municipalities to control private land uses: to protect the environment, to preserve natural resources, to promote renewable energy resources or, generally, to act with discretion with respect to local property and affairs. This article concerns only land use

46. "It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . All acts beyond the scope of the powers granted are void." *John F. Dillon*, 1 *Commentaries on the Law of Municipal Corporations* § 237(89), at 248–50 (5th ed. 1911) (footnotes omitted).

control, conceding that municipalities are not sovereign entities, that there is no impenetrable shield protecting them from legislative meddling, and that they depend on the delegation of powers to them through zoning enabling acts, home rule provisions, or by charters.

About this concession, there is a different view.

> Even in this pre–home rule era, state supremacy was hardly plenary, and legal protection for local democracy found expression in a variety of nineteenth-century state constitutional constraints. For example, advocates of local autonomy moved many states to amend their constitutions to bar or impose procedural constraints on "special" legislation, with some states giving cities power to exempt themselves from special acts.[47]

As the court explained, "[i]f a state law conflicts with the provisions of a city charter and the relevant interest is local, the city's charter supersedes the statute."[48]

An appendix at the end of this article contains a state-by-state analysis of the law showing that forty states have repealed Dillon's Rule. It does so by quoting provisions of state constitutions, acts of their legislatures, and the decisions of their courts. States such as Alabama, for example, are clearly in the repeal category based on case law.

> Zoning is a legislative matter, and, as a general proposition, the exercise of the zoning power should not be subjected to judicial interference unless clearly necessary. In enacting or amending zoning legislation, the local authorities are vested with broad discretion, and, in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority.[49]

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47. Nat'l League of Cities, *supra* note 18, at 10. *See also* Csoka, *supra* note 24, at 199 ("[A]cademics . . . debate the best approach to city governance. In particular, three academic viewpoints existed on municipal governance: Dillon's Rule, the Cooley Doctrine, and the Fordham Rule. Dillon's Rule . . . mandated a strict construction of municipal powers, given that municipalities are deemed creatures of the state. The Cooley Doctrine, on the other hand, held that localities are not creatures of the state but have inherent powers. Lastly, the Fordham Rule, while mandating a more liberal construction of municipal powers, still held that such powers should be devolved from the state. From the early twentieth century, the Cooley Doctrine was discredited. The Fordham Rule also faded from name-specific use. Dillon's Rule, on the other hand (notwithstanding its straightjacket approach to municipal power), gained wide popularity and acceptance throughout the state courts.").

48. City of Tucson v. State of Ariz., 333 P.3d 761, 763 (Ariz. Ct. App. 2014); *see also* *supra* note 45, at 289–90 (for the more traditional vies).

49. Ryan v. City of Bay Minette, 667 So. 2d 41, 43 (Ala. 1995) (quoting 82 AM. JURISPRUDENCE 2D *Zoning and Planning* § 338 (1976)).

Arkansas fits comfortably in the repeal category based on an act of its state legislature. "The rule of decision known as 'Dillon's Rule' is inapplicable to the municipal affairs of municipalities."[50] The state legislature defines 'municipal affairs' to mean "all matters and affairs of government germane to, affecting, or concerning the municipality or its government except" certain state affairs "subject to the general laws of the State of Arkansas."[51]

The home rule provisions of the state constitution place Illinois in the Dillon-is-dead category: "Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare . . . ."[52] "To restrict the concurrent exercise of home rule power, the General Assembly must enact a law *specifically* stating home rule authority is limited."[53] In 1972, South Carolina amended its constitution, adding a home rule provision that repeals Dillon's Rule, altogether.[54] The legislature subsequently passed the Home Rule Act,[55] and in doing so "intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government."[56]

III. STATE BY STATE APPROACHES

A. Proving the Negative: Outlier States

This part and the article's appendix demonstrate that, in all but a handful of states, Dillon's Rule of strict construction does not apply to municipal regulation of matters related to land use. Regarding the few outlier states, there is not sufficient evidence to take them out of the Dillon's Rule category with respect to land use authority. Looking at their constitutions, legislation, and case law, it is not clear that all of the outlier states, particularly ones like Kentucky and Vermont, are not in the Dillon-is-dead grouping; there was

50. ARK. CODE ANN. § 14-43-602(b) (2011).

51. ARK. CODE ANN. § 14-43-601(a)(1) (2011).

52. ILL. CONST. art. VII, § 6 (a) (1970).

53. Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 81 (Ill. 2013) (citing Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1163–64 (Ill. 1992)).

54. S.C. CONST. art. VIII, §§ 7, 17 (1895).

55. S.C. CODE ANN. §§ 5-7-10 to - 310 (1976).

56. 19 S.C. JURISPRUDENCE *Constitutional Law* § 12.1.

simply not enough evidence in these sources to be sure. The task of proving the negative is particularly difficult. Our analysis errs on the side of caution.

Some of the outlier states, however, are unambiguously Dillon's Rule states regarding municipal affairs in general and land use power specifically. "Virginia is a 'Dillon's Rule' state, not a 'Home Rule' state. Local governments have limited authorities."[57] They do not have the power to "impos[e] a moratorium on the filing of site plans and preliminary subdivision plats"[58] or extend the county's health insurance coverage "to unmarried 'domestic partners' of its employees."[59]

Hawaii is placed in the Dillon' Rule category; its courts' holdings demonstrate the diversity of state home rule provisions. At first blush, the home rule provisions of the Hawaii constitution seem to grant broad powers to localities. It provides that "Each political subdivision shall have the power to frame and adopt a charter for its own self-government . . . ."[60] It provides this local authority with respect to matters of "executive, legislative and administrative structure and organization."[61] Such local laws "shall be superior to statutory provisions, [but] subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions."[62]

Case law demonstrates how broadly the courts view general laws, or laws of state concern, and how narrowly it views local provisions regarding zoning and land development. For example, in *Kaiser Hawaii Kai Development Co. v. City and County of Honolulu*, the plaintiff argued successfully that a local initiative process that downzoned its property was a violation of the Hawaii standard Zoning Enabling Act's state-wide emphasis on comprehensive planning.[63] The court found that a local initiative process was inconsistent with the legislature's long-range goal of comprehensive planning. It held that zoning by initiative is inconsistent with this goal.[64] At a minimum, this severely narrows the land use regulatory matters that are local in nature.

The City and County of Honolulu enacted an ordinance requiring local electricians to obtain a certificate by the city's

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57. *Local Government Autonomy and the Dillon Rule in Virginia*, http://virginiaplaces.org/government/dillon.html (last visited July 10, 2020).

58. Bd. of Supervisors v. Horne, 215 S.E.2d 453, 459 (Va. 1975).

59. Arlington Cty. v. White, 528 S.E.2d 706, 707, 709 (Va. 2000).

60. HAW. CONST. art. 8, § 2 (1978).

61. *Id.*

62. *Id.*

63. Kaiser Haw. Kai Dev. Co. v. City & Cty. of Honolulu, 777 P.2d 244 (Haw. 1989).

64. *Id.* at 247.

building superintendent. Some of the electricians who had prior valid certificates were unable to obtain new valid certificates because of their part-time status. The trial court determined it was not within the city's municipal powers to require such a permit. The Supreme Court of Hawaii affirmed. "Municipal corporations are solely the creation of the State. As such they may exercise only those powers which have been delegated to them by the State Legislature."[65]

Kentucky is arguably, but not clearly, a Dillon's Rule adherent. "[I]n order to construe KRS 67.380 as a zoning statute, we would be compelled to believe that the legislature intended, by a simply worded, short grant of power, to give to counties a broad, unlimited authority to zone whereas the authority of cities in the field of zoning is restricted by detailed limitations and qualifications."[66] The Kentucky League of Cities, however, notes that

> [I]n 1980, the General Assembly . . . grant[ed] broad home rule authority to all classes of cities through the adoption of KRS 82.082 . . . . under KRS 82.082, a city may exercise any power or perform any function that is: 1) Within the boundaries of the city; 2) In furtherance of a public purpose of the city; and 3) Not in conflict with a constitutional provision or statute.[67]

This is ambiguous enough to prove the negative: that Kentucky is not a Dillon state.

Vermont, too, is difficult to classify for the purposes of this article and demonstrates the binary nature of Dillon's Rule. One case defines it as a Dillon's Rule state based on the subservient status of municipalities.[68]

> "[T]he power of the municipality is limited to what has been granted by the state. John Forrest Dillon, for whom that principle is named, famously described this idea while Chief Justice of the Iowa Supreme Court: 'Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the

65. Application of Anamizu v. City & Cty. of Honolulu, 481 P.2d 116, 118 (Haw. 1971).

66. Am. Sign Corp. v. Fowler, 276 S.W.2d 651, 654 (Ky. 1955).

67. *What is Home Rule?,* KY. LEAGUE OF CITIES (Feb. 20, 2019), https://www.klc.org/news/475/FAQ.

68. City of Montpelier v. Barnett, 49 A.3d 120, 129 (Vt. 2012).

> breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control."[69]

However, in *Daims v. Town of Brattleboro*, a more ambiguous interpretation of the rule focuses on the proper approach to interpreting the rule. In this case, the Supreme Court of Vermont states:

> Plaintiffs argue, however, that because municipalities have only those powers explicitly granted by the Legislature, the select board is authorized to do only what the statute obligates it to do and thus cannot comment on voter-initiated petitions absent explicit authorization to do so in § 2645 or the town charter. In so arguing, plaintiffs cite the longstanding legal principle, known as Dillon's Rule . . . . Fleshed out, however, the principle stands for the broader proposition that municipalities' powers 'include both those powers granted in express words by statute and those powers necessarily or fairly implied in the powers expressly granted.'[70]

The "fairly implied" language in *Daims* resonates with the flexible rule of interpretation in *Clinton* and is divorced from the language of strict interpretation in *Merriam*.[71]

So, is Vermont a Dillon's state or not? The case law seems to take a slightly more expansive view of incidental powers, but there is no direct renunciation of the rule in the law of Vermont. Perhaps the case law simply takes a more expansive view of the language of Dillon's Rule in the *Clinton* case. It might fit in some hybrid category, but we conclude that it, as well as Kentucky, remain Dillon's Rule states for all purposes including land use power and leave them out of this state-by-state analysis.

B. Proving the Positive-Dillon is Dead States

There is persuasive evidence that Dillon's Rule has been rejected with respect to municipal power to regulate the use of land in forty

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69. *Id.* (citing City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (Iowa 1868)). "[W]henever Vermont statutes set out the specific process that a municipality must follow in order to act, as when it adopts, amends or repeals its zoning and subdivision bylaws, there must be 'substantial compliance' with these procedures or the action may later be challenged for legal insufficiency." VT. SEC'Y OF STATE, MUNICIPAL LAW BASICS 2 (2014) (citing Town of Charlotte v. Richter, 128 Vt. 270, 271 (1970)).

70. Daims v. Town of Brattleboro, 148 A.3d 185, 188 (Vt. 2016) (citations omitted).

71. *See id.*

states.[72] These states, as a few relevant examples here show, can be placed into one of five categories:

1. Broad Construction of the Zoning Enabling Act

   a. Alabama

   "Zoning is a legislative matter, and, as a general proposition, the exercise of the zoning power should not be subjected to judicial interference unless clearly necessary. In enacting or amending zoning legislation, the local authorities are vested with broad discretion, and, in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority."[73]

   b. New Jersey

   "The State Constitution specifically authorizes the Legislature to give municipalities zoning power. The Legislature exercised this power in 1975 when it enacted the Municipal Land Use Law ("MLUL"), the MLUL confers upon municipalities broad planning and zoning powers while simultaneously limiting and guiding the exercise of that power."[74]

   c. Texas

   "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities."[75]

2. Legislative Renunciation of Dillon's Rule of Strict Construction

   a. Arkansas

   ACA §14-43-602 states that "the rule of decision known as 'Dillon's Rule' is inapplicable to the municipal affairs of municipalities."[76]

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72. *See infra* Appendix notes 140–231 and accompanying text.

73. Ryan v. City of Bay Minette, 667 So. 2d 41, 43 (Ala. 1995) (quoting Homewood Citizens Ass'n v. City of Homewood 548 So. 2d 142, 143 (1989)).

74. Elga A. Goodman et al., *Land Use Regulation*, *in* 50A N.J. PRAC., § 27:13 (2019-2020 ed.).

75. Barr v. City of Sinton, 295 S.W.3d 287, 297 (Tex. 2009) (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981)).

76. ARK. CODE ANN. § 14-43-602(b) (2011).

b. Utah

"If there were once valid policy reasons supporting [Dillon's] rule, we think they have largely lost their force and that effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal." This statement was a comment on a statute from Utah's legislature that granted powers to Utah's local governments to enact all ordinances and regulations "necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city." [77]

3. Broadly Construed Self Executing Constitutional Home Rule (contrast narrowly construed)

a. Illinois

"Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare . . . ." "To restrict the concurrent exercise of home rule power, the General Assembly must enact a law specifically stating home rule authority is limited."[78]

b. Louisiana

The state constitution says "Subject to and not inconsistent with this constitution, any local government subdivision may draft, adopt, or amend a home rule charter in accordance with this Section." Louisiana's highest court interpreted the state constitution to mean that "local governments are provided broad powers to adopt regulations for land use, zoning and historic preservation."[79]

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77. State v. Hutchinson, 624 P.2d 1116, 1120 (1980); UTAH CODE ANN. § 10-8-84(1) (2018).

78. ILL. CONST. art. VII, § 6(a) (1970); Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 81 (Ill. 2013) (citing Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1163–64 (Ill. 1992)).

79. LA. CONST. art. VI § 5 (1974); King v. Caddo Par. Comm'n, 719 So. 2d 410, 416 (La. 1998).

c. Tennessee

The Tennessee Constitution was amended in 1953 to permit municipal governments to adopt and operate under home rule authority. "[T]he whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments." "[A]n exception to Dillon's Rule necessarily arises when the issue concerns the authority of home rule municipalities . . . . The effect of the home rule amendments was to fundamentally change the relationship between the General Assembly and these types of municipalities, because such entities now derive their power from sources other than the prerogative of the legislature. Consequently, because the critical assumption underlying application of Dillon's Rule is no longer valid as to home rule municipalities, Dillon's Rule simply cannot be applied to limit any authority exercised by them."[80]

4. Constitutional Provisions Implemented by Broadly Construed State Home Rule Legislation

a. North Dakota

North Dakota's Constitution enables its legislature to enact home rule statutes and provides that home rule charters and ordinances are to be "liberally construed." The Supreme Court of North Dakota held that a city has "broad authority to enact land-use regulations without compensating the landowner for the restrictions . . . ."[81]

5. Two of the Above

a. South Carolina

In 1972, South Carolina amended its constitution to allow for home rule. The legislature subsequently passed the Home Rule Act, and in doing so "intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government." South Carolina's Constitution states that "[t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor." The

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80. S. Constructors, Inc. v. Loudon Cty. Bd. of Educ., 58 S.W.3d 706, 714 (Tenn. 2001) (quoting Civil Serv. Merit Bd. of Knoxville v. Burson, 816 S.W.2d 725, 729 (Tenn. 1991)); *Id.* at 713–14.

81. N.D. CENT. CODE ANN. § 40-05.1-05 (2001); Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 856 (N.D. 2005) (quoting Braunagel v. City of Devils Lake, 629 N.W.2d 567, 572 (N.D. 2001) (citations omitted)).

South Carolina Code also specifically states, "[t]he powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities." In the land use context, the Supreme Court of South Carolina explicitly stated that a planning commission was given "broad discretion."[82]

b. South Dakota

South Dakota's Constitution states that the "[p]owers and functions of home rule units shall be construed liberally." "[T]he specific language of an enabling statute can make a difference." The Supreme Court of South Dakota suggested that the court affords local power a broader interpretation in the land use context. There, the court stated that city "action will be sustained unless in its proceedings it did some act forbidden by law or neglected to do some act required by law," and that "municipal zoning ordinances are afforded a presumption of validity."[83]

IV. PRESUMPTION AGAINST PREEMPTION: ENERGY LAW

A. Preemption vs. Broad Land Use Authority

Under the subservient entity branch of Dillon's Rule, it is clear that even broadly construed land use authority can be preempted by the state legislature to achieve a colorable state interest.[84] "Although Wisconsin cities and villages enjoy extensive home rule powers, those powers have been significantly eroded in recent years by court decisions interpreting the scope of municipal home rule powers and by the legislature which has, with increasing frequency, enacted legislation preempting municipalities from acting in a given area."[85]

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82. 19 S.C. JURISPRUDENCE *Constitutional Law* § 12.1; S.C. CONST. art. VIII, § 17 (1972); S.C. CODE ANN. § 5-7-10 (1976); Kurschner v. City of Camden Planning Comm'n, 656 S.E.2d 346, 351 (S.C. 2008).

83. S.D. CONST. art. IX, § 2 (1972); Olesen v. Town of Hurley, 691 N.W.2d 324, 329 (S.D. 2004); Parris v. City of Rapid City, 834 N.W.2d 850, 854–855 (S.D. 2013) (citations omitted).

84. *See infra* Part IVB.

85. Claire Silverman, *Municipal Home Rule in Wisconsin*, THE MUNICIPALITY, 16 (June 2016), http://www.lwm-info.org/DocumentCenter/View/949/Home-Rule-Article-from-June-2016?bidId=.

Preemption of local prerogatives by state legislation can be express or implied or based on operational conflict or on the occupation of an entire field of activity by a state statute.[86] Some states require that the state legislature preempt local authority expressly.[87] In the remainder of states, courts vary in their approach to finding preemption by implication. In the unique area of land use control, the judiciary seems reluctant to imply preemption, given the presumption of validity afforded land use law. This reluctance is deepened by the close relationship between zoning, property values, local property taxation, and the responsibilities of local governments to provide infrastructure and municipal services. Realizing that state legislatures have empowered municipalities to tax and directed them to provide municipal services and infrastructure, courts seem reluctant to imply that state legislation preempts local land use control, which directly affects property valuations and the cost of municipal services. They are unwilling to shorten one leg of a three-legged stool. This moves in the direction of a presumption against preemption.[88]

B. Presumption of Validity of Land Use Laws

Local zoning and land use laws are routinely presumed by courts to be constitutional when challenged by an aggrieved landowner. Although this is a different question from whether a local law has

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86. *See generally* Uma Outka, *Intrastate Preemption in the Shifting Energy Sector*, 86 U. COLO L. REV. 927 (2015); Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENVTL. L. REV. 293 (2016).

87. *See* City of New Orleans v. Bd. of Comm'rs, 640 So. 2d 237, 243 (La. 1994).

88. This presumption against preemption "can also be understood and defended as a constitutionalized and more specific version of the more familiar canon against implied repeal. Especially to the extent that state law purports to preempt well-established forms of local legislation, preemption does not merely eliminate local law but also implicitly repeals state statutes that delegate regulatory power to local governments . . . . It is, however, a well-established canon of statutory construction that '[r]epeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect.'" Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 654 (2014) (quoting N.Y. STAT. LAW § 391 (McKinney 2013)) (citing 97 N.Y. JURISPRUDENCE 2D *Statutes* § 78 (2013)). Under such canon, "the implied repeal of a state statutory delegation of zoning power should be disfavored unless plainly required by the text or unwritten purpose of the allegedly preemptive state law." *Id.* (citing Emerson College v. City of Boston, 471 N.E.2d 336, 338 (Mass. 1984); Fammler v Bd. of Zoning Appeals, 4 N.Y.S.2d 760, 761–62 (App. Div. 2d Dep't 1938; PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 41:13 (5th ed. 2013)). "New York courts have invoked the idea that repeals by implication are presumptively disfavored to protect local governments' power from implied preemption." *Id.* at 654–55 (citing Town of Brookhaven v. N.Y. State Bd. of Equalization & Assessment, 668 N.E.3d 407, 411–12 (N.Y. 1996); Hunter v. Warren County Bd. of Supervisors, 800 N.Y.S.2d 231, 234 (App. Div. 3d Dep't 2005)).

been preempted by the state legislature, such cases add credence to the presumptive validity of land use ordinances and their importance in the scheme of things. "A significant function of local government is to provide for orderly development by enacting and enforcing zoning ordinances."[89] Those municipal zoning ordinances are afforded a presumption of validity.[90]

The power of the state legislature to delegate land use authority to municipalities is derived from the police power to protect the public interest generally. The power to control land use, then, is a police power specifically given to local governments and it is concededly broad in its scope.

"Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . . . The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[91]

In *Brown v. City of Cleveland,* the Supreme Court of Ohio affirmed the strong presumption of validity afforded zoning ordinances, stating "it would almost seem unnecessary to state that zoning ordinances which are enacted pursuant to a municipality's police powers are presumed valid until the contrary is clearly shown."[92] The Supreme Court of Ohio applies this presumption widely: "In general, a validly enacted local law is not preempted by a state statute unless it conflicts with that statute."[93]

In *Parris v. City of Rapid City,* the municipality denied the plaintiff's petition to rezone its property located within the Flood Hazard Zoning district. Plaintiff argued that the city's Flood Hazard Zoning District ordinance violated two statutes adopted by the South Dakota legislature. The Supreme Court of South Dakota ruled in favor of the city. It emphasized that the presumption of

89. Schafer v. Deuel Cty. Bd. of Comm'rs, 725 N.W.2d 241, 245 (S.D. 2006).

90. City of Brookings v. Winker, 554 N.W.2d 827, 829 (S.D. 1996) (citing City of Colton v. Corbly, 323 N.W.2d 138, 139 (S.D. 1982)).

91. Berman v. Parker, 348 U.S. 26, 32-33 (1954) (citations omitted).

92. Brown v. City of Cleveland, 420 N.E.2d 103, 105 (Ohio 1981).

93. Atwater Twp. Trustees v. B.F.I. Willowcreek Landfill, 617 N.E.2d 1089, 1092 (Ohio 1993) (citations omitted).

validity afforded municipal zoning ordinances because enacting and enforcing municipal zoning ordinances constitutes a "significant function of local government."[94]

A similar presumption of validity is found in challenges to the exercise of home rule authority. When states argue against federal preemption of their power, they can point to the Tenth Amendment of the Constitution, reserving the general power to protect the public health, safety, welfare, and morals to the states. Localities, however, are instrumentalities of the states; they enjoy no, or very limited, inherent authority. Under state home rule regimes, municipalities can argue that their power over local affairs should give rise to a presumption that state legislation should not preempt such authority unless it is done so expressly.[95]

In 2015, the Nevada legislature passed Senate Bill 29, which grants counties limited functional home rule authority, which the legislature characterizes as "a limited form of the authority to pass ordinances and act upon matters of local concern that are not otherwise governed by state or federal laws."[96] "[I]f there is any fair or reasonable doubt concerning the existence of a power of the board to address a matter of local concern, it must be presumed that the board has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature."[97] As suggested by the Supreme Court of Arizona, a finding that an ordinance does violate state law "is only appropriate 'when existing law clearly and unambiguously compels that conclusion.' The court held that such a standard is not met when 'the issue is not settled by existing case law.'"[98]

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94. Parris v. City of Rapid City, 834 N.W.2d 850, 855 (S.D. 2013) (citing Schafer, 725 N.W.2d at 245).

95. *See* Wiseman, *supra* note 86, at note 46 ("The clearest difference in tests is the presumption again preemption, which purportedly applies in the federal-state context. This presumption applies because states retain authority over police powers (the power to regulate to protect the public health, safety, and welfare) reserved to them in the Tenth Amendment of the Constitution, whereas local governments are mere arms of state governments. Local governments only exercise authority that state governments have delegated to them. However, because many state constitutions give local governments home rule authority, this creates something close to (although not equal to) reserved powers exercised by the states.").

96. SB29 was incorporated into Chapter 244 of Nevada Revised Statutes. NEV. ASS'N OF CTYS., REP. ON THE IMPLIMENTATION OF SB29, FUNCTIONAL HOME RULE FOR CTYS. (2015).

97. NEV. REV. STAT. ANN. § 244.137(6)(b) (2015).

98. Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1515 (2018) (quoting Brnovich v. City of Tucson, 399 P.3d 663, 670 (Ariz. 2017)).

C. Is there a Presumption Against Preemption?

When a state legislature grants broad powers to its local governments to control land use, it provides some evidence that the legislature might not intend to preempt local powers. Under the servient status branch of the binary Dillon's Rule, it is clear that the state legislature may expressly preempt local power regarding any topic, with the possible exception of a matter that can be proved to be solely a local affair. The question is this: why would a state legislature grant broad powers to municipalities, on the one hand, and, on the other, preempt that power by implication? There should be a presumption that implied preemption does not lie in such a case. Given the broad powers delegated, the legislature should state that intention expressly. This is accented by the understanding that the power to control land use is inextricably intertwined with the responsibility of municipalities to provide infrastructure and municipal services and to tax property, whose value is dependent on sound land use regulation. Absent express language, there should be a presumption against preemption.[99]

Article IX, section 3(c) of the New York Constitution requires that the home rule powers of municipalities be "liberally construed."[100] This provision raises a "qualified presumption of preemption."[101] It also implies that power to control land use is not subject to narrow construction under Dillon's Rule.[102]

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99. Nat'l League of Cities, *supra* note 18, at 26.

100. N.Y. CONST. art. IX, § 3(c) (2002).

101. *See* Hills, *supra* note 88, at 648. ("Such liberal construction, this article suggests, requires a qualified presumption against preemption: Unless statutory text manifestly and unambiguously supersedes local law, courts should presume that state law does not preempt local laws . . . This constitutional requirement has also been codified by section 51 of the Municipal Home Rule Law, which provides that home rule powers 'shall be liberally construed.'" (citing N.Y MUN. HOME RULE LAW § 51 (1963)).

102. "These requirements of liberal construction apply to towns' powers to enact zoning laws, which are derived not only from specific delegations of power contained in the Town Law but also the Municipal Home Rule Law. Article IX, section 3(e) can be understood as a repeal of the New York courts' adherence to 'Dillon's Rule . . . .'" *Id.* at 653. (citations omitted). "This presumption is not irrebuttable: it can be overcome where local laws encroach on some substantial state interest that local residents are likely to ignore. The controversy over hydraulic fracturing provides a good example of a dispute that this presumption can help resolve. The state legislature has never given any serious thought to whether and what extent local governments should be permitted to zone out hydraulic fracturing operations. Given this inattention, which is reflected in the murky language of the preemption clause of the Oil, Gas, and Solution Mining Law (OGSML), state law should be deemed to be ambiguous on the question of preemption, and state courts should construe this ambiguity to preserve local power." *Id.* at 648 (citations omitted).

The National League of Cities' Model Home Rule Law expressly endorses the presumption against preemption. Section C of the Model Law "creates a presumption against preemption, requiring that any state intervention in a home rule government be express, not implied, and only by general law."[103]

Much has been made in recent years over the tendency of some state legislatures to preempt local power. With the exception of the regulation of oil and gas, historically a state agency function, these modern intrastate preemptive acts seldom dealt with land use or natural resources. Some of the common regulations that states have preempted include: soda taxes, plastic bag bans, Styrofoam restrictions, limitations on pesticide use, regulation of transportation networks, minimum wage laws, family leave policies, employer-mandated benefits, LGBTQ anti-discrimination laws, firearms laws, removal of confederate monuments, sanctuary cities, and gender identity bathroom. With the exception of local control over fracking in a few states, these areas do not include those related to land use and natural resource protection.[104]

D. The Unique Case of Energy Law

States in energy rich states have traditionally regulated the field of oil and gas law. They delegate the power to permit oil and gas facilities to state agencies. On its face, such a law might constitute field preemption. This notion has been overcome in many states either through case law or state legislation. Several states noted for preempting oil and gas regulation have left significant room for local regulation of the land use impacts of energy generation.

New York's oil and gas statute contains language that at first blush seems to preclude the regulation of fracking under local land use authority. The New York Oil, Gas and Solution Mining Law (OGSML)[105] provides that:

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103. The relevant provisions are "1. The state shall not be held to have denied a home rule government any power or function unless it does so expressly," and "2. The state may expressly deny a home rule government a power or function encompassed by Section B of this Article only if necessary to serve a substantial state interest, only if narrowly tailored to that interest . . . " Nat'l League of Cities, *supra* note 18, at 30, 35.

104. *See* Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1566–71 (2019); Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 964–68 (2019). For a review of the efforts to preempt local single-family housing as exclusionary, *see* Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 THE URBAN LAWYER 179 (2020).

105. N.Y. ENVT'L. CONSERV. LAW § 23-0303(2) (McKinney 2012).

> The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.[106]

In 2012, a total ban on hydrofracking by the Town of Dryden was sustained in *Anschutz v. Town of Dryden*.[107] The court found that the OGSML did not expressly preempt local zoning and that the town's zoning amendment did not regulate gas production; rather, it regulated land use and not the operation of gas mining. The court noted that "[n]one of the provisions of the OGSML address traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood."[108] It cited other preemptive statutes with provisions requiring the relevant state agency to consider the traditional concerns of zoning in deciding whether a permit is to be issued. "Under this construction, local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while DEC regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by local law."[109] The provision of the local law that invalidated any other permits permitting drilling was found invalid as preempted by the OGSML and was severed from the law leaving the other provisions in place. [110]

In Texas, after the City of Denton banned fracking from its jurisdiction in 2014, the state legislature adopted a law preempting municipalities from prohibiting fracking.[111] The new law, however, conceded some power to local governments. Included are the control of "aboveground activity related to an oil and gas operation that occurs at or above the surface of the ground, including a regulation governing fire and emergency response,

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106. *Id.*

107. Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 474 (N.Y. Sup. Ct. 2012).

108. *Id.* at 470 (citations omitted).

109. *Id.* at 471.

110. The court found that the provision could be severed without impairing the underlying purpose of the zoning amendment. *Id.* at 474. The Court of Appeals of New York subsequently held that municipalities "may ban oil and gas production activities, including hydrofracking, within municipal boundaries through the adoption of local zoning laws." Matter of Wallach v. Town of Dryden, 16 N.E.3d 1188, 1191 (N.Y. 2014). The court further held that the OGSML "does not preempt the home rule authority vested in municipalities to regulate land use." *Id.*

111. TEX. NAT. RES. CODE ANN. § 81.0523 (2015).

traffic, lights, or noise, or imposing notice or reasonable setback requirements."[112] This is a recognition of the fact that state agencies focus mostly on permitting production, while ensuring that the operation of facilities is sufficiently controlled so as to be efficient and safe for workers and the public. Allowing these above ground matters to municipal control recognizes the historically important role of local governments, which focus on the land use impacts of industrial operations.

The state legislature of Oklahoma provides local governments the right to enforce many traditional land use standards regulating oil and gas facilities.

"A municipality, county or other political subdivision may enact reasonable ordinances, rules and regulations concerning road use, traffic, noise and odors incidental to oil and gas operations within its boundaries, provided such ordinances, rules and regulations are not inconsistent with any regulation established by Title 52 of the Oklahoma Statutes or the Corporation Commission. A municipality, county or other political subdivision may also establish reasonable setbacks and fencing requirements for oil and gas well site locations as are reasonably necessary to protect the health, safety and welfare of its citizens but may not effectively prohibit or ban any oil and gas operations, including oil and gas exploration, drilling, fracture stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure."[113]

An Amendment to Pennsylvania's Oil and Gas Act, commonly known as Act 13, contained a provision preempting local bans. Specifically, it limited "the extent to which [energy] companies are permitted to engage in fracking activities, ostensibly in part to protect the environment, while simultaneously preempting local ordinances seeking to prohibit or limit fracking within municipalities."[114] In December 2013, Supreme Court of Pennsylvania held that Act 13 was unconstitutional because it violated the state constitution.[115] Pennsylvania's constitution includes an Environmental Rights Amendment that was invoked for purposes of this case: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and

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112. *Id.* § 0523(c)(1).

113. OKLA. STAT. ANN. tit. 52 § 137.1 (2020).

114. Benjamin L. McCready, *Like It or Not, You're Fracked: Why State Preemption of Municipal Bans are Unjustified in the Fracking Context,* 9 DREXEL L. REV. 61, 79 (2016) (citing 58 PA. CONS. STAT. § 3202 (2012)).

115. Robinson Twp. v. Commonwealth of Pa., 83 A.3d 901, 913 (2013).

esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."[116] Based on this provision, the Court determined that statewide preemption of local bans violated the Pennsylvania Constitution.[117]

In *Morrison v. Beck Energy* (2015), the Ohio Supreme Court held that local land use authority "does not allow a municipality to discriminate against . . . [fracking facilities] that the state has permitted . . . ."[118] A concurring judge noted that "the traditional concerns of zoning laws" were not at issue and the court did not decide whether state law "conflicts with local land use ordinances that address only the traditional concerns of zoning."[119] That remains to be decided.

In Colorado, state legislation recognizes the role of local governments in regulating fracking.[120] It requires that all an application for a new drilling site include proof that "the applicant has filed an application with the local government having jurisdiction to approve the siting of the proposed oil and gas location and the local government's disposition of the application; or, [that] [t]he local government having jurisdiction does not regulate the siting of oil and gas locations."[121] Further the statute provides that "Local governments and state agencies, including the commission and agencies listed in section 34-60-105(1)(b), have regulatory authority over oil and gas development, including as specified in section 34-60-105(1)(b). A local government's regulations may be more protective or stricter than state requirements."[122]

V. RECONCILING STATE AND LOCAL INTERESTS

This article is not an attempt to exalt local over state control of energy production or other matters of importance that transcend local boundaries. It is, rather, to give professionals who advise municipalities a clear understanding of local government authority and prerogatives, to remove the taint of Dillon's Rule. It speaks, as

116. PA. CONST. art. I § 27 (1981).

117. McCready, *supra* note 114, at 80.

118. Morrison v. Beck Energy Corp., 37 N.E.3d 128, 138 (Ohio 2015).

119. *Id.*

120. COLO. REV. STAT. ANN. § 34-60-131 (2019).

121. COLO. REV. STAT. ANN. § 34-60-116(1)(b) (2019).

122. COLO. REV. STAT. ANN. § 34-60-131 (2019).

well, to those serving state agencies who need to know the breadth of local power in order to grasp its importance and seize the opportunity to negotiate effective partnerships with municipalities. The intention is to demonstrate that local governments have an important role to play in critical decision-making regarding the built and natural environment.

Preemption implies the opposite. It elevates decision-making to the state level without benefit of the finely grained knowledge of conditions on the ground that local officials and residents have. Preemption bypasses the public engagement process that is required in local land use decision-making and, thus, fails to give affected shareholders an opportunity to be heard: to express their concerns, and to suggest solutions that officials from the remove of state capitols cannot fathom.

The better approach is to establish a collaborative strategy that reconciles state and local interests. Colorado got it right in 2019.[123] In amending the Oil and Gas Conservation Act, the state legislature recognized the importance of local land use interests by giving municipalities a meaningful role in the state permitting process. By requiring state agency permit seekers to certify that they have submitted an application to the local government and to disclose the municipality's disposition of the matter, it establishes a collaborative process that furthers both state and local policies. This approach embraces the role of the state in setting uniform operational standards and of the localities in determining the location of high-intensity production facilities in the context of their comprehensive plans and zoning ordinances.

Another rapidly emerging example of state and local collaboration is evidenced in hazard mitigation planning where state agencies work closely with local government partners, using their broad authority to control land use to mitigate damage from natural disasters. This avoids the irony of delegating land use control to local governments and then failing to incorporate that power in identifying and protecting vulnerable ecosystems and neighborhoods.

One example of state and local government collaboration is Massachusetts's Integrated Climate Adaptation and Hazard Mitigation Plan.[124] Not only was this statewide plan developed based on "strategies and actions identified in local hazard

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123. *See* COLO. REV. STAT. ANN. § 34-60 (2019). See *supra* note 120–121, and accompanying text.

124. COMMONWEALTH OF MASS., MASS. STATE HAZARD MITIGATION AND CLIMATE ADAPTATION PLAN (Sept. 2018), https://www.mass.gov/files/documents/2018/10/26/SHMCAP-September2018-Full-Plan-web.pdf.

mitigation plans,"[125] but it explicitly calls for state coordination with local government to "build resilience to extreme weather and sea level rise," among other actions.[126] The State Hazard Mitigation Team provides training as well as "technical assistance and funding" to municipalities.[127] Owing in part to its robust support for local planning, Massachusetts approved 229 local mitigation plans as of 2018.[128]

The state of Maryland developed a Hazard Mitigation Planning Guidebook for local governments to "facilitate cooperation between the State and local governments."[129] This guidebook was used in developing the City of Baltimore's Disaster Preparedness and Planning Project (DP3), a hazard-mitigation and climate adaptation plan.[130] This plan lists land-use strategies "to increase the City's adaptive capacity to withstand the impact of more frequent and intense extreme weather events and quickly bounce back from any disruptions."[131] These strategies include "increasing the Urban Tree Canopy to 40 percent by 2037," encouraging "development of Green Streets in floodprone areas . . . ," integrating natural buffer requirements into new development, and "increase[ing] green spaces in areas where there is available vacant land . . . ."[132]

The Colorado Oil and Gas permitting system and these hazard mitigation examples align with the opinion of scholars regarding localism, subsidiarity, and collaboration.[133] They agree that local governments must play meaningful roles in exercising their broad land use authority to achieve both state and local objectives. For this to happen, intergovernmental cooperation must be the default, not the exception.[134]

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125. *Id.* at 12.

126. *Id.* at 7–30

127. *Id.* at 7–40.

128. *Id.* at 10-9.

129. MD. EMERGENCY MGMT. AGENCY, STATE OF MD. LOCAL HAZARD MITIGATION PLAN GUIDANCE ii (May 2015), https://www.montgomerycountymd.gov/OEMHS/Resources/Files/MEMA-HazardMitigationLocalGuidanceBooklet.pdf.

130. CITY OF BALTIMORE, MD., CITY OF BALTIMORE DISASTER PREPAREDNESS AND PLANNING PROJECT (DP3): A COMBINED ALL-HAZARD AND CLIMATE ADAPTATION PLAN 129 (2018), https://www.baltimoresustainability.org/wp-content/uploads/2019/10/2018-DP3-For-Print.pdf.

131. *Id.* at 3.

132. *Id.* at 139, 152, 163.

133. John R. Nolon, *Calming Troubled Waters: Local Solutions*, 44 VT. L. REV. 1, 63–67 (2019).

134. *Id.* at 66 ("There is general consensus among the theorists discussed above that, with respect to land law localism: (1) local governments play an essential role in land use problem solving; (2) local governments must be meaningfully involved in strategic planning and implementation; (3) there are several limitations to local governments' ability to solve

The principle of subsidiarity "holds that responsibility for dealing with a problem should be delegated to the most decentralized institution capable of handling that problem."[135] There is a single actor implication in this phrasing and it begs a question regarding the capacity of the decentralized institution. Complex land use issues like the protection of neighborhoods and natural resources from the adverse impacts of energy production and natural disasters engage local people and their governments; they are the first affected and the first to respond. They live and are engaged exactly where these problems manifest themselves. They are motivated to act, they have broad land use authority to control private development, but they often need assistance to act effectively.

Nearly all local governments have been delegated significant legal authority from their state legislatures to adopt effective strategies within their borders. Despite this power to act independently, they regularly form partnerships with regional, state, and federal agencies to supplement their ability to deal with the problem.[136] Evidence of multilevel intergovernmental collaboration abounds, with localities working with partners up and down the vertical axis.[137] "In other words, they reject the single actor implication of the principle [of subsidiarity] and instinctively collaborate with other agencies to supplement and leverage their municipal capacity. In so doing, they embrace a principle of collaborative subsidiarity."[138]

The ubiquity of these state and local collaborations adds further evidence that Judge Dillon's Rule of narrow construction is no longer the barrier that it once was. One can sense the law evolving to meet the needs of a changing society as it has broadened

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problems; (4) to solve complex land use problems, they need assistance, guidance, and direction; (5) the assistance should be responsive to local needs; and that (6) for this to happen, higher levels of government at the regional, state, or federal level must collaborate with locals in solving larger-scale land use problems"); see also *Id.* nn. 568–73.

135. *Id.* at 57 (citing Graham R. Marshall, *Nesting, Subsidiarity, and Community-Based Environmental Governance Beyond the Local Level*, 2 INT'L J. COMMONS 75, 80 (2008).

136. "The capacity at a given level to perform a task satisfactorily can often be enhanced through strategies seeking to strengthen access to the requisite capacities. Subsidiarity obliges actors at higher levels to explore such opportunities before ruling out the possibility of decentralizing tasks to lower levels." *See* Marshall, *supra* note 135, at 93.

137. *See* Alice Kaswan, *Climate Adaptation and Land Use Governance: The Vertical Axis*, 39 COLUM. J. OF ENVT'L L. 390, 392 (2014); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 963–64 (2007) ("A pragmatic judicial approach to intergovernmental relations that does not give priority to any particular alignment of governmental collaboration allows the political branches at all levels of government to craft approaches most appropriate to modern exigencies.").

138. Nolon, *supra* note 133, at 67 (citing Marshall, *supra* note 135, at 80).

and sustained the plenary role of local governments in planning, building, and protecting human settlements. The King is dead, long live the King.[139]

139. "The King is dead, long live the King! This is a traditional proclamation made for a new monarch in various nations throughout world history." The seemingly contradictory phrase "simultaneously announces the death of the previous monarch and then salutes the new monarch in order to assure the public of political continuity." Kenneth Way, *A Prayer for the King (Psalm 72): Part 1,* BIOLA UNIVERSITY (Mar. 7, 2019), https://www.biola.edu/blogs/good-book-blog/2019/a-prayer-for-the-king-psalm-72-part-1.

VI. DILLON IS DEAD – APPENDIX OF 40 STATES

A. Where Dillon's Rule No Longer Applies to Land Use Regulations

Alabama:

"Zoning is a legislative matter, and, as a general proposition, the exercise of the zoning power should not be subjected to judicial interference unless clearly necessary. In enacting or amending zoning legislation, the local authorities are vested with broad discretion, and, in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority."[140]

Alaska:

Article X, section 11 of the Alaska Constitution grants home rule boroughs "all legislative powers not prohibited by law or by charter." In *Jefferson v. State* we noted that although "home rule powers are intended to be broadly applied," a municipal ordinance may be preempted or invalidated by state statute. But we held that the statutory "prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law."[141]

Arizona:

[B]y virtue of the broad zoning power conferred by the UEMA, Mesa is authorized to prohibit *off-premises signs*. It does not follow that a city or regulatory board may use the same or another grant of enabling power to obtain extreme results, such as a ban of on-premises identification signs or the prohibition of all new entrants into a business or profession.[142]

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140. Ryan v. City of Bay Minette, 667 So. 2d 41, 43 (Ala. 1995) (quoting 82 AM. JUR. 2d Zoning and Planning § 338 (1976) at 913–14.

141. Jacko v. State of Alaska, 353 P.3d 337, 342 (Alaska 2015) (citations omitted).

142. Outdoor Sys. v. City of Mesa, 819 P.2d 44, 48–49 (Ariz. 1991) (emphasis added).

Arkansas:

"ACA §14-43-602 states that the rule of decision known as Dillon's Rule is inapplicable to the municipal affairs of municipalities."[143]

Act 1187 of 2011 repealed Dillon's Rule in Arkansas. It was later codified into A.C.A. § 14-43-602(b), which states, "The rule of decision known as 'Dillon's Rule' is inapplicable to the municipal affairs of municipalities." ACA § 14-43-601 defines "municipal affairs" as "all matters and affairs of government germane to, affecting, or concerning the municipality or its government except" certain state affairs "subject to the general laws of the State of Arkansas."

The Supreme Court of Arkansas noted

> that, effective July 27, 2011, Arkansas Code Annotated section 14–43–602(b) (Repl. 2013) provided that the "rule of decision known as 'Dillon's Rule' is inapplicable to the municipal affairs of municipalities." Dillon's Rule is a restrictive view of municipal power that a municipal corporation possesses and can exercise only powers granted in express words, those necessarily or fairly implied in, or incident to, the powers expressly granted, and those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable.[144]

California:

A 1970 addition to the California Constitution provides that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[145] This provision is particularly relevant because land use regulation and planning is considered a matter of local concern. While "it has been asserted that [this provision] does not reach certain subjects . . . there is no tenable claim that the subject of groundwater is outside the purview of municipal legislation."[146]

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143. *Guidebook for Municipal Officials of Mayor/Council Cities*, ARK. MUN. LEAGUE, 5 ARK. MUN. LEAGUE (June 2015), https://static.ark.org/eeuploads/arml/MayorCouncil_Guidebook_2015_WEB.pdf.

144. Davis v. City of Blytheville, 478 S.W.3d 214, 217 (Ark. 2015) (citing Tompos v. City of Fayetteville, 658 S.W.2d 404, 406 (Ark. 1983)).

145. CAL. CONST. art. XI, § 7 (1970).

146. Baldwin v. Cty. of Tehama, 36 Cal. Rptr. 2d 886, 890 (Cal. Ct. App. 1994) (citations omitted).

Colorado:[147]

"The Land Use Enabling Act broadly empowers local governments to plan for and regulate land use within their jurisdictions: 'The general assembly . . . declares that in order to provide for planned and orderly development . . . and a balancing of basic human needs of a changing population with legitimate environmental concerns, *the policy of this state is to clarify and provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions*.'[148]

Connecticut:

"Such regulations may also encourage energy-efficient patterns of development, the use of solar and other renewable forms of energy, and energy conservation. The regulations may also provide for incentives for developers who use passive solar energy techniques, as defined in subsection (b) of section 8-25, in planning a residential subdivision development. The incentives may include, but not be limited to, cluster development, higher density development and performance standards for roads, sidewalks and underground facilities in the subdivision."[149]

The Supreme Court of Connecticut stated that

> [t]he purpose, however, of Connecticut's . . . Home Rule Act is clearly twofold: to relieve the General Assembly of the burdensome task of handling and enacting special legislation of local municipal concern and to enable a municipality to draft and adopt a home rule charter or ordinance which shall constitute the organic law of the city, superseding its existing charter and any inconsistent special acts.[150]

Consistent with this purpose, a state statute "cannot deprive cities of the right to legislate on purely local affairs germane to city purposes."[151]

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147. COLO. CONST. art. XX, § 6 (2018) ("This article shall be in all respects self-executing.").

148. Droste v. Bd. of Cty. Comm'rs of the Cty. of Pitkin, 159 P.3d 601, 605–06 (Colo. 2007) (quoting COLO. REV. STAT. ANN. § 29-20-102(1) (2020)).

149. CONN. GEN. STAT. ANN. § 8-2(a) (2018).

150. Caulfield v. Noble, 420 A.2d 1160, 1163 (Conn. 1979) (citations omitted).

151. *Id.* (citations omitted).

Delaware:[152]

Delaware's highest court held that "[t]he permissive nature of the statute makes it clear that the state statute sets a floor and not a ceiling . . . ."[153] This interpretation means that the Delaware Constitution allows local governments to legislate freely, unless explicitly told not to by the state.

Florida:

The North Port Road and Drainage District (NPRDD), a municipal dependent special district within the City of North Port levied a tax against parcels of property owned by West Villages Improvement District.[154] Under the definition of a special district in Florida, "[t]he membership of its governing body is identical to that of the governing body of a single county or a single municipality."[155] The Florida Supreme Court held that NPRDD could not levy the taxes "on the basis that NPRDD's home rule power under the Florida Constitution does not reach as far as it argues."[156] The court cited *City of Boca Raton* and explained that in 1885, municipal powers under Florida's Constitution were dependent upon delegation by the legislature. But that this approach overwhelmed the Florida legislature and "[t]herefore, a provision was added to the 1968 Florida Constitution to grant municipalities broad home rule powers."[157] It grants municipalities the "powers needed to perform the functions of municipal government so long as the power is exercised for a municipal purpose . . . ."[158] However, "municipalities may not legislate regarding subjects expressly prohibited by the constitution and subjects expressly preempted . . . ."

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152. DEL. CODE. ANN. tit. 22, § 802 (2018) ("Every municipal corporation in this State containing a population of at least 1,000 persons as shown by the last official federal decennial census may proceed as set forth in this chapter to amend its municipal charter and may, subject to the conditions and limitations imposed by this chapter, amend its charter so as to have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute.").

153. City of Lewes v. Nepa, 212 A.3d 270, 272 (Del. 2019).

154. N. Port Rd. Drainage Dist. v. W. Villages Improvement Dist., 82 So. 3d 69, 70 (Fla. 2012).

155. *Id.* at 70. (citation omitted)

156. *Id.*

157. *Id.* at 72.

158. *Id.*

Georgia:

> Under the Constitution of this State and the enabling act of the General Assembly, Ga.L.1929, pp. 818, 827, the City of Atlanta has a broad authority as to zoning, and in the establishment of districts and regulations, classification may be on any basis 'relevant to the promotion of the public health, safety, order, morals, conveniences, prosperity, or welfare.'[159]

The Georgia Constitution states: "The General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to municipalities may be dealt with without the necessity of action by the General Assembly."[160]

Idaho:

"The Local Land Use Planning Act (LLUPA), at Idaho Code Section 67-6501 *et seq.*, was enacted in 1975. The Idaho Supreme Court has found that under LLUPA, 'the legislature intended to give local governing boards broad powers in the area of planning and zoning.'"[161] "[I]n enacting the Local Planning Act of 1975, the legislature obviously intended to give local governing boards, such as the Kootenai County Commissioners, broad powers in the area of planning and zoning."[162]

Illinois:

"'Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare . . . .'"[163] "'To restrict the concurrent exercise of home rule power, the General Assembly must enact a law *specifically* stating home rule authority is limited.'"[164]

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159. Galfas v. Ailor, 57 S.E.2d 834, 836 (GA. CT. APP. 1950).

160. GA. CONST. art. IX, § II, para. II.

161. Mountain Ctr. Bd. of Realtors v. City of McCall, No. 2006-490-C, 2008 Idaho. Dist. LEXIS 35, at *10 (4th Jud. Dist. of Idaho, Valley Cty. Feb. 19, 2008) (quoting White v. Bannock Cty. Comm'rs, 80 P.3d 332, 336 (Idaho 2003)) (citing Worley Highway Dist. v. Kootenai Cty., 663 P.2d 1135 (Idaho Ct. App. 1983))).

162. Worley Highway Dist. v. Kootenai Cty., 663 P.2d 1135, 1137 (Idaho Ct. App. 1983).

163. Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 81 (Ill. 2013) (citing ILL. CONST. art. 7, § 6(a)).

164. *Id.* (citing Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1163–64 (Ill. 1992)).

Indiana:

There is "broad authority granted to local government units[;] . . . the state's policy is 'to grant units all the powers that they need for the effective operation of government as to local affairs.'"[165] The court cited an Indiana Statute regarding local government authority, which states: "(b) A unit has: (1) all powers granted it by statute; and (2) all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute."[166] The Indiana County had both express authority as well as powers not granted by statute; "[l]ocal government units are vested with a broad scope of authority in conducting their own local affairs."[167]

Iowa:

One hundred years after Dillon's Rule was promulgated, Iowa enacted a home rule amendment to its constitution that loosened the Rule's grip on municipalities to some extent.[168] Subsequently, the state legislature and judiciary have systematically provided broader land use decision-making and regulatory power to municipalities. "Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly."[169]

"The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state."[170]

"[A zoning] ordinance is valid if it has any real, substantial relation to the public health, comfort, safety, and welfare, including the maintenance of property values." Zoning ordinances carry with them a strong presumption of validity. The party asserting the invalidity of the zoning regulation has the burden of proving the zoning regulation is unreasonable, arbitrary, capricious or discriminatory.[171]

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165. Bd. of Comm'rs of Henry Cty. v. State Bd. Of Tax Comm'rs, 529 N.E.2d 1224, 1227 (Ind. 1988) (quoting IND. CODE ANN. § 36-1-3-2 (1980)).

166. IND. CODE ANN. § 36-1-3-4 (2020).

167. Bd. of Comm'rs, 529 N.E.2d at 1227.

168. IOWA CONST. art. III, § 38A (1968).

169. *Id.*

170. *Id.*

171. Molo Oil Co. v. City of Dubuque, 692 N.W.2d 686, 691 (Iowa 2005) (citations omitted).

Louisiana:

The state constitution says "Subject to and not inconsistent with this constitution, any local government subdivision may draft, adopt, or amend a home rule charter in accordance with this Section."[172] Louisiana's highest court interpreted the state constitution to mean that "local governments are provided broad powers to adopt regulations for land use, zoning and historic preservation."[173]

Massachusetts:

In regard to land use regulation, Massachusetts municipalities have broad power under the state's Zoning Act and the state's broad home rule legislation.

The Zoning Act provides the following definition of 'zoning': 'Zoning', shall mean ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants.[174]

Michigan:

Article II, § 201(1) of the Michigan Zoning Enabling Act states:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of one or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.[175]

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172. LA. CONST. art. VI, § 5 (2018).

173. King v. Caddo Parish Comm'n, 719 So. 2d 410, 416 (La. 1998).

174. MARTIN R. HEALY ET AL., *Zoning Power and Its Limitations*, *in* MASSACHUSETTS ZONING MANUAL (6th ed. 2017)

175. MICH. COMP. LAWS § 125.3201(1) (2020).

Minnesota:

"Given the broad discretion of local officials in land-use decision-making, we will reverse only when a decision lacks a rational basis or the city's actions are 'arbitrary, capricious, discriminatory, or illegal.'"[176]

Montana:

"We perceive therefore in the statutes a legislative intent for a broad general grant of power to municipalities in their zoning regulations, and that implied in the power to restrict the use of land, as an exercise of police power, is the authority to adopt reasonable moratoriums."[177]

Nebraska:

"[I]t is clear that the Legislature has given the city broad powers to regulate land uses within its jurisdiction as long as those regulations are within the police power."[178]

It is axiomatic that zoning is a local concern. In light of this, plus the fact that the Legislature has used the general term "regulations" without explicitly delineating what regulations the city is permitted to use, coupled with a grant of power to the city to implement, amend, supplement, change, modify, or repeal those regulations, it is clear that the Legislature has given the city broad powers to regulate land uses within its jurisdiction as long as those regulations are within the police power. Thus, we find in chapter 14 of the Nebraska Revised Statutes an implied grant of power to the city to enact all necessary zoning regulations, including conditional rezoning, as long as those regulations are within the proper exercise of the police power.[179]

Nevada:

In 2015, the Nevada legislature passed Senate Bill 29, which "grants counties limited *functional* home rule" authority, which the legislature characterizes as "a limited form of the authority to pass ordinances and act upon matters of local concern that are not

176. Concept Props., LLP v. City of Minnetrista, 694 N.W.2d 804, 815 (Minn. Ct. App. 2005) (quoting Sun Oil Co. v. Vill. of New Hope, 220 N.W.2d 256, 263 (Minn. 1974)).

177. State ex rel. Diehl Co. v. City of Helena, 593 P.2d 458, 462 (Mont. 1979).

178. Giger v. City of Omaha, 442 N.W.2d 182, 193 (Neb. 1989).

179. *Id.*

otherwise governed by state or federal laws."[180] SB29 was incorporated into Chapter 244 of Nevada Revised Statutes, which states that "if there is any fair or reasonable doubt concerning the existence of a power of the board to address a matter of local concern, it must be presumed that the board has the power unless the presumption is rebutted by evidence of a contrary intent by the Legislature."[181]

New Hampshire:

> The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable: it 'must be exercised within constitutional limits.'[182]

"Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property."[183]

New Jersey:

"The State Constitution specifically authorizes the Legislature to give municipalities zoning power. The Legislature exercised this power in 1975 when it enacted the Municipal Land Use Law ("MLUL"), the MLUL confers upon municipalities broad planning and zoning powers while simultaneously limiting and guiding the exercise of that power."[184]

New York:

The New York legislature adopted the Municipal Home Rule Law (MHRL), the provisions of which are to be "liberally construed."[185] Under the MHRL, localities are given the authority to

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180. NEV. ASS'N OF CTYS., *supra* note 96, at 1.

181. NEV. REV. STAT. ANN. § 244.137(6)(b) (2015).

182. Difeo v. Town of Plaistow, No. 00-E-0218, 2002 N.H. Super. LEXIS 20, *17 (N.H. Super. Ct. Mar. 7, 2002) (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981), quoting Moore v. E. Cleveland, 431 U.S. 494, 514 (1977)).

183. Schad, 452 U.S. at 68 (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974); Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

184. ELGA A. GOODMAN, KRISTINA K. PAPPA, & BRENT A. OLSON, 50A N.J. Prac., BUS. L. Deskbook § 27:13 (2019–2020 ed.) (citing N.J. CONST. art. IV, § 6 para. 2 (1947)).

185. N.Y. MUN. HOME RULE L. § 51 (1963).

adopt laws relating to "the protection and enhancement of [their] physical and visual environment"[186] and to the matters delegated to them under the Statute of Local Governments, which allows cities, towns, and villages to "perform comprehensive or other planning work relating to its jurisdiction."[187] The court recognizes that "[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities."[188]

North Carolina:

The state legislature adopted a legislative rule that delegates broad powers to local governments. Under this rule, "city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect . . . "[189]

"It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be *broadly construed* and grants of power shall be construed to include *any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect . . .* "[190]

North Dakota:

North Dakota's constitution enables its legislature to enact home rule statutes and provides that home rule charters and ordinances are to be "liberally construed."[191] The Supreme Court of North Dakota held that a city has "broad authority to enact land-use regulations without compensating the landowner for the restrictions . . . "[192]

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186. *Id.* §10(1)(ii)(a)(11) (2018).

187. N.Y. STAT. OF LOC. GOV'TS §§ 10(6), 10(7) (2018).

188. Barbulean v. City of Newburgh, 640 N.Y.S.2d 935, 944 (N.Y. Sup. Ct. 1995).

189. N.C. GEN. STAT. ANN. § 160A-4 (West 2020).

190. Homebuilders Ass'n of Charlotte v. City of Charlotte, 442 S.E.2d 45, 49–50 (N.C. 1994) (emphasis added) (citing N.C. GEN. STAT. § 160A-4 (1987)).

191. N.D. CENT. CODE § 40-05.1-05 (2001).

192. Wild Rice River Estates, Inc. v. City of Fargo, 705 N.W.2d 850, 856 (N.D. 2005) (quoting Braunagel v. City of Devils Lake, 629 N.W.2d 567, 572 (N.D. 2001) (citations omitted)).

Ohio:

Ohio's constitution establishes that all local authorities (those that derive their power from either Zoning Enabling Acts or Home Rule) have the power to regulate "police, sanitary and other similar regulations" but must not enact laws that conflict with general state law.[193] The Court of Appeals of Ohio held that "[m]atters of land use planning are primarily of local concern. Therefore, municipalities have broad discretion in classifying and regulating uses of land."[194] The Supreme Court of Ohio affirmed the strong presumption of validity afforded zoning ordinances stating "it would almost seem unnecessary to state that zoning ordinances which are enacted pursuant to a municipality's police powers are presumed valid until the contrary is clearly shown . . . "[195]

Oklahoma:

"We have stated 'A governmental entity may broadly use its power to regulate land use unless the regulation does not have a substantial relationship to the public health, safety, morals, or general welfare or is an unreasonable and arbitrary exercise of its police power.'"[196] Oklahoma's Constitution allows cities with more than 2,000 inhabitants to enact a home rule charter that is consistent with state laws and the state constitution.[197]

Oregon:

In *City of Corvallis v. State*, the Court of Appeals of Oregon referred to Dillon's Rule as the predecessor to home rule in Oregon, stating: "That principle, known as 'Dillon's Rule'—referring to an influential treatise on municipal law—dominated American legal scholarship in the nineteenth and early twentieth centuries."[198] Oregon is known for its strict regulation of land use, with literally hundreds of state statutes and rules on whether, how, and when a city may allow land to be developed. "Cities are required to comply with statewide land use and development goals . . . [s]tate law requires every city in Oregon to have a state-

193. OHIO CONST. art. XVIII, § 3 (2012).

194. Belich v. City of Olmsted Falls, No. 84537, 84807, 2005 WL 110926, at *4 (Ohio Ct. App. Jan. 20, 2005).

195. Brown v. City of Cleveland, 420 N.E.2d 103, 105 (Ohio 1981) (citations omitted).

196. Mustang Run Wind Project, LLC v. Osage Cty. Bd. of Adjustment, 387 P.3d 333, 345 (Okla. 2016) (quoting In re Initiative Petition No. 382, 142 P.3d 400, 406, (Okla. 2006) (citing Nucholls v. Bd. of Adjustment of the City of Tulsa, 560 P.2d 556 (Okla. 1976)).

197. OKLA. CONST. art. XVIII, § 3(a).

198. City of Corvallis v. State of Or., 464 P.3d 1127, 1131 (Or. Ct. App. 2020) (citing City of Corvallis v. Carlile, 10 Or. 139, 141 (1882)).

approved comprehensive plan to implement the Statewide Planning Goals and to serve as a high-level planning document for the city. Each city's comprehensive plan must include local policies and a land use diagram that are implemented through the city's zoning map and land use code."[199]

Pennsylvania:

> Municipalities shall have the right and power to frame and adopt home rule charters . . . A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.[200]

Local governments, additionally, are empowered under the Municipalities Planning Code (MPC) to enact zoning ordinances. The MPC specifies that the ordinances should reflect the community's policy goals as well as its particularized character and needs. The MPC grants this authority "except to the extent that those regulations of mineral extraction by local ordinances and enactments have heretofore been superseded and preempted by . . . "[201] specified state mining statutes (including the Noncoal Surface Mining Conservation and Reclamation Act) or to the extent that other activities have been preempted by state or federal law. Although local ordinances are preempted by conflicting state laws, the court in *Southdown, Inc. v. Jackson Township Zoning Hearing Board* notes that the Noncoal Surface Mining Act contains "an exception to its preemptive effect for local ordinances promulgated under the authority of the Pennsylvania Municipalities Planning Code."[202] Additionally, the Southdown court interpreted local land use authority over natural resources as "broad," stating, "[m]unicipalities have broad authority to regulate land use in general and mineral extraction in particular."[203]

Rhode Island:

> The powers of the state and of its municipalities to regulate and control the use of land and waters in

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199. *Local Government: The Basics*, LEAGUE OF OR. CITIES, 6, 22 (Mar. 2018), https://www.orcities.org/application/files/2515/7427/7942/LocalGovernmentBasics-Updated 11-20-19web.pdf.

200. PA. CONST. art. IX, § 2 (1968).

201. PA. STAT. 53 P.S. § 10603 (2008).

202. Southdown, Inc. v. Jackson Twp. Zoning Hearing Bd., 809 A.2d 1059, 1067 (Pa. Commw. Ct. 2002) (citing 52 PA. STAT. 52 P.S. § 3316 (1984).

203. *Id.* at 1065.

> the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed . . . [204]

The Zoning Enabling act

> empower[s] each city and town with the capability to establish and enforce standards and procedures for the proper management and protection of land, air, and water as natural resources, and to employ contemporary concepts, methods, and criteria in regulating the type, intensity, and arrangement of land uses, and provide authority to employ new concepts as they may become available and feasible.[205]

The Rhode Island Superior Court stated that "[t]he Rhode Island Zoning Enabling Act of 1991 grants to zoning boards of review throughout the State broad authority in the regulation of land use."[206]

South Carolina:

In 1972, South Carolina amended its Constitution to allow for home rule.[207] The legislature subsequently passed the Home Rule Act,[208] and in doing so "intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government."[209] South Carolina's Constitution states that "[t]he provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor."[210] The South Carolina Code[211] also specifically states, "[t]he powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such

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204. R.I. CONST. art. I, § 16.

205. R.I. GEN. LAWS 45 § 45-24-29 (2015).

206. Mill Realty Assocs. v. Crowe, No. CIV.A. 01-135, 2002 WL 1035426, at *4 (R.I. Super. May 10, 2002) (citing R.I. GEN. LAWS ANN. §§ 45-24-27 - 45-24-72.

207. S.C. CONST. art. VIII, §§ 7, 17 (1972).

208. S.C. CODE § 5-7-10 (1976).

209. 19 S.C. Jur. Constitutional Law § 12.1.

210. S.C. CONST. art. VIII, § 17 (1972).

211. S.C. CODE § 5-7-10 (1976).

municipalities." In the land use context, the Supreme Court of South Carolina explicitly stated that a Planning Commission was given "broad discretion."[212]

South Dakota:

South Dakota's Constitution states that the "[p]owers and functions of home rule units shall be construed liberally."[213] "[T]he specific language of an enabling statute can make a difference."[214] *In Parris v. City of Rapid City,* the Supreme Court of South Dakota suggested that their jurisprudence affords local power a broader interpretation in the land use context.[215] There, the court stated that city "'action will be sustained unless in its proceedings it did some act forbidden by law or neglected to do some act required by law,'" and that "municipal zoning ordinances are afforded a presumption of validity."[216]

Tennessee:

The Tennessee Constitution was amended in 1953 to permit municipal governments to adopt and operate under home rule authority.[217] "'[T]he whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments.'"[218]

"[A]n exception to Dillon's Rule necessarily arises when the issue concerns the authority of home rule municipalities . . . . The effect of the home rule amendments was to fundamentally change the relationship between the General Assembly and these types of municipalities, because such entities now derive their power from sources other than the prerogative of the legislature. Consequently, because the critical assumption underlying application of Dillon's Rule is no longer valid as to home rule municipalities, Dillon's Rule simply cannot be applied to limit any authority exercised by them."[219]

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212. Kurschner v. City of Camden Planning Comm'n, 656 S.E.2d 346, 351 (S.C. 2008).

213. S.D. CONST. art. IX, § 2 (1972).

214. Olesen v. Town of Hurley, 691 N.W.2d 324, 329 (S.D. 2004).

215. *See* Parris v. City of Rapid City, 834 N.W.2d 850, 854–855 (S.D. 2013).

216. *Id.* (citations omitted).

217. TENN. CONST. art. XI, § 9 (1953).

218. S. Constructors, Inc. v. Loudon Cty. Bd. of Educ., 58 S.W.3d 706, 714 (Tenn. 2001) (citing Civil Serv. Merit Bd. of City of Knoxville v. Burson, 816 S.W.2d 725, 729 (Tenn. 1991) (quoting Farris v. Blanton, 528 S.W.2d 549, 551 (Tenn. 1975)).

219. S. Constructors, Inc., 58 S.W.3d at 713–14 (citations omitted).

Texas:

"The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities."[220]

Utah:

"If there were once valid policy reasons supporting [Dillon's] rule, we think they have largely lost their force and that effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal." [221] This statement was a comment on a statute from Utah's legislature that granted powers to Utah's local governments to enact all ordinances and regulations "necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city." [222]

Washington:

"Local governments have broad discretion in developing CPs [comprehensive land use plans] and DRs [development regulations] tailored to local circumstances. But this discretion is limited by the requirement that the final CPs and DRs be 'consistent with the requirements and goals' of the GMA [Growth Management Act].",[223] "Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification in proportion to population, of cities and towns, which laws may be altered, amended or repealed."[224] The Optional Municipal Code (Title 35A RCW), was created in 1967. The code was enacted to allow cities to cope with complex urban problems that could not be properly addressed by the State legislature. The cities that have enacted the optional municipal code are called code cities. Under the optional municipal

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220. Barr v. City of Sinton, 295 S.W.3d 287, 297 (Tex. 2009) (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981)).

221. State v. Hutchinson, 624 P.2d 1116, 1120 (1980).

222. UTAH CODE ANN. § 10-8-84 (2018).

223. Diehl v. Mason Cty., 972 P.2d 543, 545 (WASH. CT. APP. 1999) (citing WASH. REV. CODE ANN. § 36.70A.3201) (2010). *See, e.g.*, Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 SEATTLE U. L. REV. 809, 858–59 (2015) (noting that, despite its constitutional home rule provision, Dillon's Rule in Washington "lives on in judicial discourse" and seeps into decisions involving municipalities to which it should not apply).

224. WASH. CONST. art. XI, § 10 (1964).

code, cities can address local concerns as they see fit as long as that action is not prohibited by the State Constitution nor general laws of the State. Most Washington cities are classified as code cities.[225]

Wisconsin:

> To be clear, after today, municipalities still have ample authority to regulate land use—and they should. Such regulation is an appropriate legislative function; it can serve to protect the health, safety and welfare of the public, and it encourages well reasoned growth. The issuance of conditional use permits also is an appropriate function for municipalities. Municipalities certainly have broad authority to restrict land use, but the district at issue today provides for no permitted use as of right, and the only use is garnered through the possibility of obtaining a conditional use permit. No reasonable justification exists for such excessive government control and restriction—especially when that government control is set against land use rights, and the control bears no substantial relation to the public health, safety, morals or general welfare.[226]

The statutory grants of home rule power are found in WIS. STAT. §§ 62.11(5)[227] (cities) and 61.34(1)[228] (villages). The legislature explains that these statutes should be liberally construed in favor of the villages and cities using their power "to promote the general welfare, peace, good order and prosperity" of the municipalities and their inhabitants.[229]

Wyoming:

The state's constitutional home rule provision provides, "[a]ll cities and towns are hereby empowered to determine their local affairs and government as established by ordinance passed by the governing body . . ."[230] "The powers and authority granted

225. The Municipal Research and Services Center, *City and Town Classification*, http://mrsc.org/getdoc/9ffdd05f-965a-4737-b421-ac4f8749b721/City-and-Town-Classification-Overview.aspx (last visited July 17, 2020.).

226. Town of Rhine v. Bizzell, 751 N.W.2d 780, 802 (Wis. 2008).

227. WIS. STAT. § 62.11(5) (2020).

228. WIS. STAT. § 61.34(1) (2017).

229. WIS. STAT. §§ 61.34(5) (2017), 62.04 (2020).

230. WYO. CONST. art. 13 § 1(b) (1972).

to cities and towns, pursuant to this section, shall be liberally construed for the purpose of giving the largest measure of self-government to cities and towns."[231]

231. *Id.* § 1(d) (1972).