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John R. Nolon

*Elisabeth Haub School of Law at Pace University*

Jessica A. Bacher

*Elisabeth Haub School of Law at Pace University*

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## 'Saddle Rock': Preemption of Local Land Use Prerogatives

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John R. Nolon and Jessica A. Bacher

[John Nolon is a Professor at Pace University School of Law, the Director of its Joint Center for Land Use Studies, and Visiting Professor at Yale's School of Forestry and Environmental Studies. Jessica Bacher is a Graduate Fellow at the Land Use Law Center at Pace Law School. She graduated first in her class from Pace Law School in 2003.]

**Abstract:** Local municipalities have broad authority to regulate land use as provided in state legislation. Like all higher forms of legislation, state law occasionally preempts local legislatures from enacting laws. Generally preemption is appropriate when the area to be regulated by the local laws is comprehensively regulated by state law, the uniformity of the state law will benefit the localities, and inconsistencies in local law are harmful to land owners and municipalities. This article discusses the pros and cons of state preemption on various types of land use regulation.

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The signature approach to land use control in New York has been to delegate extensive discretionary authority to local governments but not to direct or prescribe local action. The recent passage of a law permitting localities to add provisions to their zoning laws allowing planned unit developments is an example. In the last 15 years, the legislature has adopted several measures making it clear that local governments can require clustered developments, provide incentive zoning, induce the construction of affordable housing, provide for the transfer of development rights, among a number of other innovative land use techniques. This echoes the position of the courts which have held that local governments may invent means of achieving the appropriate use of the land as part of their implied power to zone. Both the courts and the legislature have encouraged and guided local action, rather than provide formulas that must be followed.

Consistently, the legislature has seldom preempted local land use power. Outside the field of utility regulation, there are very few examples of express legislative preemption. The courts similarly have found few examples of implied preemption: finding that the legislature has regulated in such a pervasive way so as to implicitly preempt local action. A rare example occurred in *Albany Area Builders Assoc. v. Town of Guilderland*, 74 N.Y.2d 372 (1989); the Court of Appeals held that a local traffic impact fee law was preempted by state

legislation. The local law provided that developments that generate additional traffic must pay a transportation impact fee. The court held that “the State Legislature has enacted a comprehensive and detailed regulatory scheme in the field of highway funding, preempting local legislation on that subject.” *Id.* at 377. The court noted that “[s]uch local laws, ‘were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State’s general law and thereby thwart the operation of the State’s overriding policy concerns.’” *Id.*

In *Ardizzone v. Elliott*, 75 N.Y.2d 150 (1989), the Court of Appeals invalidated a wetlands protection law adopted by the Town of Yorktown that did not conform to the requirements of the Freshwater Wetlands Act. The court held that the DEC had “exclusive authority to regulate state-mapped wetlands under the Freshwater Wetlands Act unless a local government has expressly assumed jurisdiction over such wetlands,” as provided in the state statute. *Id.* at 152. The court concluded that the language of the section did not give “any indication that the Legislature intended to provide for concurrent [s]tate and local jurisdiction over all freshwater wetlands.” *Id.* at 156. The court voided all local freshwater wetlands laws or laws that had not been adopted in compliance with the procedures outlined in Article 24. However, this holding has been reversed by state legislative action. In 1990, § 24-0509 was amended to allow concurrent jurisdiction over wetlands between the DEC and local governments. Obviously, in retrospect, the legislature had not intended to preempt local wetlands control.

The Court of Appeals recently found another instance of implied preemption, in the field of awarding area and use variances. In the case of *Matter of Cohen v. Board of Appeals of the Village of Saddle Rock*, 100 N.Y.2d 395 (2003), the Court of Appeals held that the “balancing” test for review of a variance application found in N.Y. Village Law § 7-712-b(3)(b) preempts local standards. Landowners had sought an area variance which was denied by both the local inspector and board of appeals based on local variance standards that differed from those prescribed in state law. The landowners appealed the denials, claiming that the factors contained in the Village Law, and no others, should be used to review their applications.

N.Y. Village Law § 7-712-b(3)(b) contains no express language of preemption. However, the Court of Appeals in Saddle Rock implied the Legislature’s intent to preempt by reference to the history, scope, and purpose of the particular legislative scheme. Localities involved in the Saddle Rock case argued that the state area variance standards represent a legislative effort to clarify and codify various common law requirements that existed at the time of its enactment, but was never intended to preempt the power of localities to enact their own standards. According to the Court of Appeals, the legislative history does not lead to such a conclusion, but rather supports the landowner’s position that the intent of the Legislature was to occupy the field and bring some measure of statewide consistency to variance application and review process.

Based on the particular legislative history of Village Law § 7-712-b(3) the Court concluded that the “Legislature intended to replace the confusing ‘practical difficulty’ standard with a consistent test that weighed the benefit to the applicant against detriment to the community, in addition to other enumerated factors.” *Id.* at 402. “As stated in the Sponsor’s Memorandum, ‘[t]his legislation is provided to recodify the laws which guide the function of zoning boards of appeal to encourage improved local understanding and facility in implementing the statute. Further, this legislation seeks to incorporate and standardize the universally acknowledged concepts of “use” and “area” variances in state.’” *Id.* The Bill Jacket also noted that the current state of local variance law leaves localities open to a “high degree of potential exposure to litigation.” In fact, challenges to variance denials and awards constitute a significant percentage of all land use litigation in the state. According to the legislative history, the statute was enacted to clarify standards of review and set forth understandable guidelines for the area variance application process, benefiting both zoning boards of appeals and applicants. A consistent standard would eliminate the “turmoil and uncertainty” that faced landowners and zoning practitioners with a consistent review process before zoning boards of appeals and the courts. Based on this legislative intent, the court concluded that the fairly detailed state established variance standards were preemptive. *Id.*

The factors that seem to have led to the court’s conclusion in Saddle Rock that the legislature intended to preempt are:

1. The state law was extensive in scope, like the highway finance law found preemptive in Guilderland.
2. The record showed that irregularities in local practice were harmful to both municipalities and property owners.
3. There were demonstrated benefits to uniformity of practice throughout the state.
4. The diversity of local conditions from place-to-place does not seem to justify allowing varying local practice.

Most generally applicable land use laws adopted by the state are neither as extensive in scope as the variance provisions, nor does their legislative history evidence an intention to solve a statewide problem by establishing mandatory standards. Further, most such laws respect the great diversity of circumstance among the 1600 local governments in the state and recognize the need for differences in local approaches. The recent adoption of Planned Unit Development legislation provides a current example. Until this year there was no separate authorization under Town, Village, and General City Law for including planned unit development provisions (“PUD”) in local zoning laws. The authority to do so was implied in the delegation to local governments of the power to enact

zoning restrictions and create zoning districts. One purpose of zoning is to insure that its provisions consider the character of areas and their suitability for particular uses with a view toward conserving the value of buildings and encouraging the most appropriate use of the land throughout the municipality. PUD zoning accomplishes these purposes. Several court decisions had considered various applications of previously adopted PUD ordinances, implicitly upholding their legality.

Notwithstanding this judicial evidence of implied power to adopt PUD provisions, on July 29, 2003, the governor signed a bill adding General City Law § 81-F, Town Law § 261-C, and Village Law § 7-703-A to expressly authorize the local legislative body to enact, “as part of its zoning law or ordinance, procedures and requirements for the establishment and mapping of planned unit development zoning districts.” The enabling statute’s stated purpose for “Planned Unit Development District Regulations are to provide for residential, commercial, industrial or other land uses, or mix thereof, in which economies of scale, creative architectural or planning concepts and open space preservation may be achieved by a developer in furtherance of the town comprehensive plan and zoning local law or ordinance.”

The New York statute grants express authority to communities to enact PUD regulations, but does not contain requirements for its enactment. The limited scope of the statute preserves the diversity of its application in the state by communities that have enacted PUD regulations and encourages more communities to do the same. Planned unit development zoning provisions give municipalities an alternative to the typical Euclidean method of zoning. They permit large lots to be developed in a more flexible manner than is allowed by the underlying zoning. PUD ordinances may allow developers to mix land uses, such as residential and commercial, on a large parcel and to develop the parcel at greater densities, and with more design flexibility, than is otherwise allowed by the underlying zoning district.

The PUD statute is not extensive in scope. Its purpose is simply to clarify local authority to enact such provisions and encourage localities to do so. There is no evidence that lack of uniformity in PUD practice is harmful or that there are demonstrated benefits to standardization of approach. The presumption in New York, because of extreme diversity of circumstance among localities, seems to be that flexibility is assumed and preemption is not intended in land use law making. There being no contrary showings, as existed in the Saddle Rock case with respect to variance practice, local authority to enact PUD laws of their own invention is clear.

The state statutory provisions allowing localities to adopt incentive zoning provide a closer case, simply because the state law provisions are extensive in scope. General City Law § 81-d, Town Law § 261-b, and Village Law § 7-703. These incentive zoning provisions authorize localities to pass laws waiving the

restrictions of local zoning laws to create incentives for developers to provide public benefits, such as affordable housing, parks, or infrastructure. The best example of this incentive at work is when the local law allows a residential developer to build 10 additional housing units – waiving zoning standards to that extent - in exchange for making five of them affordable to households of moderate means. This legislative scheme requires the local government to make several findings, and directs local legislatures with respect to the means of adopting incentive zoning laws. Can we assume, because the scope of the law is extensive, that the legislature intended to preempt varying local approaches to incentive zoning?

Municipal Home Rule § 10(1)(ii) permits local legislative bodies to amend or supersede provisions of the generally applicable state standards contained in the town, village, and general city law, unless the matter is preempted. In other words, the state legislature has said specifically that differences in local practice are permitted through supersession where the locality exhibits its intent to supersede general state law. Since a variety of general laws are extensive in scope and supersession of their provisions is permitted, the extensive scope of state laws alone is not enough to justify a finding of preemption. So, in the absence of any findings in the state legislation of the harms stemming from the diversity in practice or benefits of standardization, there should be no implication that the state legislature intended to preempt.

In light of this background, it is doubtful that the Saddle Rock case foreshadows a more aggressive judicial attitude toward the preemption of local land use prerogatives. There was some concern when the legislature began to codify and expand New York land use law in the early 1990s that it was directing or overtly guiding local control. These fears were consistently met with representations that the legislature was simply encouraging local governments to use their implied land use powers by clarifying and demonstrating that authority, not by creating prescriptive methods of behaving. Local governments, using their supersession authority under Municipal Home Rule Law, remain free to invent other ways of using land use methods authorized by state legislation whether extensive or limited in scope. These laws, including the new PUD provision, fall into that category of state zoning enabling legislation designed to encourage local action.

A very different thought process, one concerned with the results of uncontrolled local discretion, attended the enactment of the variance prescriptions. The evidence showed clearly that localities were beset by litigation, losing much of it, and that landowners and neighbors were prejudiced by the lack of consistent definition in the award of use and area variances. The adoption of few other state land use laws has been attended by evidence of such legislative intent. The Saddle Rock case will most likely be confined to its unique context in subsequent decisions of the courts.