

## HOME RULE: Constitutionally Granted Planning and Zoning Powers vs. State Concern for Preservation of the Adirondacks

The trend toward regional and statewide land use controls<sup>1</sup> has raised a cry of protest from municipalities and landowners that such controls deprive local governments of planning and zoning powers.<sup>2</sup> Fearing parochialism,<sup>3</sup> proponents of regional legislation argue that local governments are no longer capable of dealing with increased urbanization or environmental concerns that transcend municipal borders.<sup>4</sup> By contrast, supporters of local autonomy consider plan-

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1. A model form of regional and statewide legislation developed by the American Law Institute with explanations of intent and effect is contained in AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE (1975) [hereinafter cited as MODEL CODE]. See Dunham, *Regional and State Land Policy in a Home Rule Setting*, 1975 INST. ON PLAN., ZONING AND EMINENT DOMAIN 89; Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976); Rose, *From the Legislatures: State Government Role in Land Use Planning and Control is Growing*, 2 REAL EST. L.J. 809 (1974); Schnidman, *The Courts Enter the Zoning Game: Will Local Government Win or Lose?*, 43 GEO. WASH. L. REV. 590 (1975); Sussna, *Recent Developments in Land Use Control*, 1977 INST. ON PLAN., ZONING AND EMINENT DOMAIN 29; Note, *State Land Use Regulation—A Survey of Recent Legislative Approaches*, 56 MINN. L. REV. 869 (1972).

2. See, e.g., CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974) (state coastal zone act did not preempt a local ordinance because permit required by the state act was in addition to locally required permits); Carlson v. Village of Worth, 25 Ill. App. 3d 315, 322 N.E.2d 852 (1974), *aff'd*, 62 Ill. 2d 406, 343 N.E.2d 493 (1976) (local environmental protection ordinance preempted by state EPA); New Carrollton v. Belsinger Signs, 266 Md. 229, 292 A.2d 648 (1972) (zoning power vested exclusively in park commission precludes municipalities from exercising zoning power contained in statewide grant). See generally Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737 (1959).

3. See MODEL CODE, *supra* note 1, at 248.

4. *Id.*

[I]n Florida one of the major sources of opposition to the proposed Everglades Airport was fear that local governments would encourage the development of commercial and industrial facilities in the area around the airport. In California the willingness of each local government around San Francisco Bay to see its

ning and zoning a uniquely local affair affecting population density, municipal growth, and city values.<sup>5</sup> The New York Court of Appeals resolved such a conflict in favor of regional controls in *Wambat Realty Corp. v. State*,<sup>6</sup> holding that constitutionally required procedures for encroachments on local planning and zoning powers do not bar the state from enacting a comprehensive zoning plan for the Adirondack Park.

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share of the Bay filled to encourage new development raised the prospect that the Bay would be turned into a river.

In New Jersey the failure of the local communities to agree upon a plan for the Hackensack Meadows stymied the development of this important area for many years. In Massachusetts the failure of the Boston suburbs to accept lower-cost housing caused concern that people of lower income would be denied access to rapidly-increasing suburban job opportunities. In Colorado the inability of rural counties to control second home subdivisions created great popular dissatisfaction.

*Id.* at 249.

See *Golden v. Planning Bd.*, 30 N.Y.2d 359, 374, 285 N.E.2d 291, 299, 334 N.Y.S.2d 138, 148, *appeal dismissed*, 409 U.S. 1003 (1972) (court decried notion that local governments have exclusive control over land use functions, indicating that such diffusion of function often creates planning which ignores the broader public interest); Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 705 (1964) [hereinafter cited as Sandalow] (“[A]t the present time there is an increasing awareness that municipal land use policies, particularly in metropolitan areas, do have a substantial impact upon surrounding communities.”). See also F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1972); Schoenbaum & Silliman, *Coastal Planning: The Designation and Management of Areas of Critical Environmental Concern*, 13 URBAN L. ANN. 15 (1977).

Florida enacted a statute based upon MODEL CODE, *supra* note 1, art. 7, to protect critical areas of state concern. FLA. STAT. ANN. § 380 (West 1974 & Supp. 1979). The Administration Commission, which is given power to supersede regulations not complying with the principles of the Act, designates “critical areas.” *Id.* § 380.05. Additionally, local governments may not change regulations for land development without consent. *Id.* § 380.05(6). This Act has not been challenged as interfering with local planning and zoning powers, perhaps because—unlike New York—Florida’s delegation of such powers is not protected by the state constitution. However, the Florida Supreme Court invalidated this Act on the grounds that the delegation of power to the Administration Commission lacks adequate standards. *Cross Key Waterways v. Askew*, — So. 2d — (Fla. 1978).

5. See R. ANDERSON, *AMERICAN LAW OF ZONING* § 3.03 (1968):

Land-use restriction is assumed to be a problem which can be solved more efficiently on the local level. The rationale of this policy was articulated by Chief Judge Cardozo of the New York Court of Appeals: “A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of the population, the growth of city life, and the course of city values.”

6. 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977).

The Adirondack Park is a unique combination of state-owned forest preserve and privately-owned land comprising a total of six million acres. New York has protected the forest preserve from spoliation by constitutional provisions, statutes, and strict judicial decisions, for over eighty-five years.<sup>7</sup> The first regulation of the Park's privately-owned lands<sup>8</sup> was the Adirondack Park Agency Act (APAA),<sup>9</sup> which adopted a comprehensive land use plan for the en-

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7. The forest preserve was first created by statute in 1885. 1885 N.Y. LAWS ch. 283. The statute directed that all lands owned or later acquired by the state of New York within certain counties be forever kept as wild forest lands and provided that they should not be sold, leased, or taken by any corporation, public or private.

The Adirondack Park was established and placed under the control of the forest commission in 1892. 1892 N.Y. LAWS ch. 707. The constitutional protection provided two years later, N.Y. CONST. art. VII, § 7 (1895), extended the statutory protection by providing that timber on state forest preserve lands could not be sold, removed, or destroyed. The purchase of 80,000 acres of land for the Adirondack Park was authorized the same year (1895 N.Y. LAWS ch. 561).

The courts have consistently upheld protection of the state-owned Adirondack Park lands. *See* Black River Regulating Dist. v. Adirondack League Club, 307 N.Y. 475, 121 N.E.2d 428, 92 N.Y.S.2d 265 (1954) (upholding validity of a statute prohibiting construction of a reservoir); Association for Protection of Adirondacks v. MacDonald, 253 N.Y. 234, 170 N.E. 902, 239 N.Y.S. 31 (1930) (invalidating a statute authorizing the Conservation Commissioner to build a bobsled run for the 3rd Olympic Games in 1932 at the expense of four acres of timber [Park's acreage at that time: 1,941,403 acres] and noting that constitutional amendments had been required in 1918 and 1927 to cut timber to build roads through the park); *People v. Adirondack Ry. Co.*, 39 A.D. 34, 56 N.Y.S. 869 (1899) (upholding the right of the state to condemn lands for the park and forbidding railroads through the Park); *Helms v. Diamond*, 76 Misc. 2d 253, 349 N.Y.S.2d 917 (1973) (upholding validity of the portion of the APAA prohibiting landing of seaplanes on bodies of water wholly bounded by state land in the Park and ruling that the pre-existing nonconforming use exception of the APAA applied only to privately-owned Park lands).

8. The opening of Interstate Highway I-87 linking Montreal and New York City put the Park within a day's drive of 55 million people. The resulting tourist business and great surge in demand for second homes transformed the private lands scattered throughout the park from service areas for the protected wilderness into areas threatening the "scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the . . . Park." N.Y. EXEC. LAW § 801 (McKinney 1972) *as amended* (McKinney Supp. 1972-1978).

The purchase of huge tracts of land by nonresident development corporations (24,300 acres by the Horizon Corp. of Tucson, Arizona and 18,500 by Luis Paparazzo, a Connecticut developer) brought fears of large second home developments, strip development along travel corridors, and water pollution, all of which have caused great problems in the Catskill area to the south of the Park. NATURAL RESOURCES DEFENSE COUNCIL, INC., LAND USE CONTROLS IN NEW YORK STATE 108, 109, 118-19, 134-35 (1975) [hereinafter cited as NRDC].

9. Adirondack Park Agency Act, N.Y. EXEC. LAW art. 27, §§ 801-819 (McKinney 1972) *as amended*, (McKinney Supp. 1972-1978). For an extensive discussion of the

tire Park area. The APAA required plaintiff, a private developer, to seek approval of a proposed subdivision from the Adirondack Park Agency (Agency). Although the development was permissible under local resolutions,<sup>10</sup> the Agency refused to approve the application.

Plaintiff challenged the validity of the APAA, charging that it completely suspended planning and zoning powers expressly delegated to local governments by constitutional and statutory home rule provisions.<sup>11</sup> Plaintiff argued further that in New York the legislature may repeal, impair, diminish, or suspend powers delegated to local governments only by a "double enactment procedure" consisting of enactment and approval in two successive calendar years.<sup>12</sup> Despite the fact that the APAA was enacted only once, the court upheld its validity on summary judgment by determining that preservation of the

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APAA by the Senior Attorney of the Adirondack Park Agency, see Booth, *The Adirondack Park Agency Act: A Challenge in Regional Land Use Planning*, 43 GEO. WASH. L. REV. 612 (1975) [hereinafter cited as Booth]. See Davis, *Land Use Control and Environmental Protection in the Adirondacks*, 47 N.Y. ST. B.J. 189 (1975).

10. 41 N.Y.2d at 492, 362 N.E.2d at 583, 393 N.Y.S.2d at 951. In addition to this lawsuit by the developer, the Town of Black Brook also challenged the validity of the Adirondack Park Agency Act, N.Y. EXEC. LAW art. 27, §§ 800-819 (McKinney 1972) *as amended*, (McKinney Supp. 1972-1978) in *Town of Black Brook v. State*, 41 N.Y.2d 486, 362 N.E.2d 579, 393 N.Y.S.2d 946 (1977). The court acknowledged the town's standing to question the constitutionality of an act of the legislature but considered the issue foredoomed by the decision in *Wambat*.

11. N.Y. CONST. art IX, § 2(b)(1) "[The legislature] shall enact . . . a statute of local governments granting to local government powers . . . in addition to the powers vested in them by this article." Pursuant to this constitutional authority, the New York Legislature adopted the Statute of Local Governments. N.Y. STAT. LOCAL GOV'TS LAW (McKinney 1969). The statute granted local governments "[T]he power to adopt, amend, and repeal zoning regulations" *Id.* § 10(6); and "the power to perform comprehensive or other planning work relating to its jurisdiction" *Id.* at § 10(7).

12. N.Y. CONST. art IX § 2(b)(1): "A power granted . . . may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year." N.Y. STAT. LOCAL GOV'TS LAW § 2 (McKinney 1969) contains substantially the same language. See note 21 and accompanying text *infra*.

New York utilizes the double enactment procedure to require many of the legislators to face the voting public before a second vote on the subject and to "afford localities protection from hasty and ill-considered legislative judgments." *Wambat Realty Corp. v. State*, 41 N.Y.2d at 492, 362 N.E.2d at 583, 393 N.Y.S.2d at 950. The double enactment procedure also applies in areas other than home rule. For example, "No law diminishing the area of the Adirondack [Park] . . . shall be effective unless enacted by the legislature at two successive regular sessions." N.Y. ENVIR. CONSERV. LAW § 9.0301(2) (McKinney 1973).

Adirondack Park qualified as a substantial state concern and was therefore immune from the double enactment procedure.<sup>13</sup>

In the absence of statutory or constitutional delegations of power, states possess plenary authority over local governmental affairs.<sup>14</sup> Virtually all states, however, have statutory or constitutional "home rule" provisions which grant cities, counties, or other local government units the authority to regulate local affairs. An important distinction between constitutional and statutory home rule manifests itself in the procedure required to change the theory or effect of home rule. Generally, the legislature may revoke powers granted by statute while powers granted by constitution fix the authority of the state with respect to local self-government.<sup>15</sup> Otherwise, constitu-

13. "The short of the matter is that neither Constitution nor statute was designed to disable the State from responding to problems of significant State concern." *Wambat Realty Corp. v. State*, 41 N.Y.2d at 497, 362 N.E.2d at 586, 393 N.Y.S.2d at 954.

14. See R. ANDERSON, *AMERICAN LAW OF ZONING* § 3.02 (1968); F. SMITH, *JUDICIAL REVIEW OF LEGISLATION IN NEW YORK 1906-1938*, at 115-35 (1952); Sandalow *supra* note 4, at 645; Note, *Municipal Home Rule in New York*, 20 *BROOKLYN L. REV.* 201, 202 (1954); Note, *Home Rule and the New York Constitution*, 66 *COLUM. L. REV.* 1145 (1966); Note, *Home Rule: A Solution for Municipal Problems?*, 16 *WYO. L.J.* 47, 49 (1961).

The forerunners of municipal home rule grants were statutes restricting the states' power to legislate regarding the internal municipal affairs of individual cities. Such restrictions permitted "special laws" relating to the affairs of a particular city with the city's consent only, but allowed "general laws" relating to the affairs of all cities within a class. This "special law/general law" distinction still exists in many home rule jurisdictions. See N.Y. CONST. art. IX § 2(b)(2); Sandalow, *supra* note 4, at 648. For a thorough discussion of the special legislation background to home rule amendments, see H. MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE*, 64-108 (1916).

15. N. LITTLEFIELD, *METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE* 14 (1962); Sandalow, *supra* note 4, at 669.

As conflicts arise between state land use statutes and local zoning ordinances, courts generally place some degree of reliance on the source of local legislative power. In Colorado, for example, state legislation may preempt zoning ordinances of statutory cities but not of cities deriving their home rule power from constitutional provisions. See, e.g., *Service Oil Co. v. Rhodus*, 179 Colo. 335, 500 P.2d 807 (1972) (constitutional home rule city has power to terminate a non-conforming use that has been destroyed without the fault of the owner regardless of contrary statutes); *Moore v. Boulder*, 29 Colo. App. 248, 484, P.2d 134 (1971) (constitutional home rule cities exempt from restrictions of zoning enabling act). The reasoning is that constitutional grants of power to local governments are binding on the legislature. "[T]he city derives its power from the constitutional home rule provisions and not from state statute, any conflict between the ordinance and state statute [must be] resolved in favor of the local ordinance." *Id.* at 253-54, 484 P.2d at 136-37 (1971). See generally *Birmingham, 1974 Land Use Legislation in Colorado*, 51 *DEN. L.J.* 467 (1974).

tional and statutory home rule provisions are similar. Both fall into two main categories: those granting *specific*, enumerated powers,<sup>16</sup> and those granting a general police power under which local governments may exercise *all* power within the scope of their local affairs unless expressly limited by constitution, statute, or charter.<sup>17</sup>

New York is unusual in that it has both constitutional<sup>18</sup> and statutory<sup>19</sup> home rule provisions, combining enumerated powers<sup>20</sup> with limitations on the legislature's authority to act in relation to local

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By contrast, Illinois courts have construed similar grants of power against local governments. For an excellent discussion of the Illinois Supreme Court's ability to ignore constitutional amendments increasing home rule powers, see Minetz, *Recent Illinois Supreme Court Decisions Concerning the Authority of Home Rule Units to Control Local Environmental Problems*, 26 DEPAUL L. REV. 306 (1977).

16. Courts in [states granting specific powers] may take a narrow view of the delegated authority. . . . In *Canavan v. Messina*, 31 Conn. Super. 447, 334, A.2d 237 (1973), the court found that the home rule municipality did not have the power to establish a minimum age for its mayor in its charter. The home rule statute listed 56 powers specifically to be enjoyed by home rule municipalities, and then authorized these municipalities to "make all lawful regulations and orders in furtherance of any of said powers." CONN. GEN. STAT. § 7-194 (1977). The court noted that all powers possessed by home rule municipalities are "specifically derived" from the state, found no express power to establish a minimum age requirement, and refused to imply one from the general grant of power just quoted, especially as the state by statute had established its own minimum age requirement for local

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D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 187 (1977).

17. The Texas constitutional home rule provision . . . simply provides that 'Cities . . . may . . . adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature . . .' TEXAS CONST. art. XI, § 5. This provision has been interpreted as a full grant of power to home rule municipalities to do anything the legislature could have authorized them to do, so that legislative acts need be looked to only for limitations on and not grants of power.

D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 187-188 (1977). See also Sandalow, *supra* note 4, at 644.

18. N.Y. CONST. art. IX, § § 1-3.

19. N.Y. STAT. LOCAL GOV'TS LAW § § 1-21 (McKinney 1969).

20. The constitution enumerates 18 specific grants of power concerning local legislation and administration of local governmental functions plus a general grant of police power. N.Y. Const. art. IX, § § 1-2. Enumerated by statute are seven specific powers: local legislation, acquisition of real and personal property, acquisition of parks, disposition of real and personal property, rent control, zoning, and planning. N.Y. STAT. LOCAL GOV'TS LAW § § 10(1)-10(7) (McKinney 1969).

For an excellent analysis of the powers granted and restrictions retained in the New York Constitution, Municipal Home Rule Law, and Statute of Local Governments, see Note, *Home Rule: A Fresh Start*, 14 BUFFALO L. REV. 484 (1965).

governments.<sup>21</sup> While the delegation of authority seems broad, judicial interpretation has consistently construed grants of local authority against the locality.<sup>22</sup> Likewise, the judiciary has diluted the constitutional prohibition of legislation dealing with local property, affairs, or government.<sup>23</sup>

21. N.Y. CONST. art. IX, § 2(b)(1) quoted at note 12 *supra*; N.Y. STAT. LOCAL GOV'TS LAW § 2(b) (McKinney 1969): "Powers may be repealed, diminished, impaired or suspended only by the enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year."

The constitutional reservation reads: "Except as expressly provided, nothing in this article shall restrict or impair any power of the legislature in relation to: . . . (3) [m]atters *other than the property, affairs or government of a local government.*" N.Y. CONST. art. IX, § 3(a)(3) (emphasis added). Similarly, the Statute of Local Governments provides:

The legislature hereby excludes from the scope of the grants of powers to local governments in this statute and reserves to itself the right and power to enact any law described in this section notwithstanding the fact that it repeals, diminishes, impairs or suspends a power granted to one or more local governments in this statute: . . . 4. [a]ny law relating to a matter *other than the property, affairs or government of a local government.*

N.Y. STAT. LOCAL GOV'TS LAW § 11.4 (McKinney 1969) (emphasis added).

22. "The New York courts have almost uniformly applied a maxim of construction known as 'Dillon's Rule' under which all grants of local authority are narrowly construed against the locality." Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1149 (1966). See, e.g., *Town of Brookhaven v. Parr Co. of Suffolk*, 76 Misc. 2d 378, 350 N.Y.S.2d 529 (1973), *modified on other grounds*, 47 A.D. 2d 554, 363 N.Y.S.2d 640 (1975) (town had no right to require building and occupancy permit from defendant who had obtained a license from the state Racing and Wagering Board); *Holland v. Bankson*, 178 Misc. 810, 35 N.Y.S.2d 250, *aff'd*, 264 A.D. 896, 36 N.Y.S.2d 431, *appeal granted*, 264 A.D. 955, 37 N.Y.S.2d 442 (1942), *rev'd*, 290 N.Y. 267, 49 N.E.2d 16, 42 N.Y.S.2d (1943) (city right to regulate hours, tours of duty and hours off duty of its firemen subject to statewide legislation).

23. See, e.g., *Toia v. Regan*, 54 A.D.2d 46, 387 N.Y.S.2d 309, *aff'd*, 40 N.Y.2d 837, 356 N.E.2d 276, 387 N.Y.S.2d 832 (1976), *appeal dismissed*, 429 U.S. 1082 (1977) (court denied county's objection to state law which imposed 50% of non-federal cost of public assistance on local government despite the county's argument that resulting restrictions on tax revenues severely reduced its ability to manage its own affairs); *Robertson v. Zimmerman*, 268 N.Y. 52, 196 N.E. 740 (1935) (court upheld establishment of a sewage authority for the City of Buffalo through an act which imposed restrictions and obligations on one particular municipality as a means of protecting water in Lake Erie, the Niagara River, and Lake Ontario); *Smith v. Jansen*, 85 Misc. 2d 81, 379 N.Y.S.2d 254 (1975) (court validated an act abolishing the Board of Trustees of Suffolk Cooperative Library System and providing for the election of a new Board because of the state's interest in public education); *Whalen v. Wagner*, 2 Misc. 2d 89, 152 N.Y.S.2d 386 (1957), *aff'd*, 4 N.Y.2d 575, 152 N.E.2d 54, 176 N.Y.S.2d 616 (1958) (despite findings that city streets and highways are property relating to the affairs of the city, court upheld legislation concerning New York City bridges and roads as part of the state highway system for all state citizens traveling to and from

*Adler v. Deegan*,<sup>24</sup> the landmark decision on home rule in New York, upheld the Multiple-Dwelling Law. That law applied only to New York City but failed to receive the two-thirds legislative approval required for such "special legislation."<sup>25</sup> The *Adler* court found that laws dealing with matters of concern to the public at large, though immediately affecting particular localities, constitute valid exercises of state legislative power.<sup>26</sup> *Adler* established three standards for determining when the state has authority to enact legislation affecting and touching upon local matters. The majority opinion adopted a standard that requires a narrow interpretation of local powers.<sup>27</sup> Cardozo's concurrence advocated a standard allowing intrusion into local affairs if the legislation covers a matter of "state concern."<sup>28</sup> Finally, the third standard sought to uphold general laws

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New York City). See Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1151 (1966).

24. 251 N.Y. 467, 167 N.E. 705 (1929). *Adler's* narrow construction of local powers occurred just five years after New York adopted the 1924 constitutional amendments in an effort to strengthen local powers. One commentator criticized the *Adler* decision as "sounding the virtual death knell for home rule as its sponsors envisaged it." Diamond, *Some Observations on Local Government in New York State*, 8 BUFFALO L. REV. 27, 35 (1958).

25. See Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145 (1966). At the time of the *Adler* decision the legislature could act within the "property, affairs or government" of a municipality pursuant to an emergency message of the governor only if it obtained the approval by two-thirds of the members of each house. See N.Y. CONST. art XII, § 2 (1923). This condition remains in the present constitution. N.Y. CONST. art IX, § 2(b)(2).

26. 251 N.Y. at 474, 167 N.E. at 707. The *Adler* court relied on *City of New York v. Village of Lawrence*, 250 N.Y. 429, 165 N.E. 836 (1929) which held that a legislative boundary change was not a law within the home rule provision although nothing so clearly affects the property or government of a city as its jurisdiction.

27. Judge Crane propounded the first standard, narrow interpretation of local powers. See *Manes v. Golden*, 400 F. Supp. 23 (1975), *aff'd*, 423 U.S. 1068 (1976) (upholding a local law setting filing fee in the Superior Court); *Burke v. Krug*, 161 Misc. 687, 292 N.Y.S. 851 (1936) (denying a challenge to an act authorizing a new form of county government on the basis that it did not affect local government).

28. The second test is called the "state concern" doctrine, *i.e.*, the legislature may act on matters of state concern *even if* such actions affect the property, affairs or government of a local government. See, *e.g.*, *Robertson v. Zimmerman*, 268 N.Y. 52, 196 N.E. 740 (1935) (state concern for the life and health of communities taking water supply from Lake Erie, the Niagara River, and Lake Ontario sufficient to impose obligation of a sewage authority on the City of Buffalo); *Matter of Freedman v. Suffolk County Bd. of Supervisors*, 29 App. Div. 2d 661, 286 N.Y.S.2d 377 (1968), *aff'd*, 25 N.Y.2d 873, 250 N.E.2d 877, 303 N.Y.S.2d 886 (1969) (state concern for quality of social service personnel sufficient to uphold act allowing extra compensation to local social service personnel having approved graduate education); *Bugeja v. City of New*

designed to protect the health and welfare of citizens, though applicable to only one locality.<sup>29</sup> Although the state concern doctrine arising from *Adler* received the greatest judicial acceptance, later courts have used all three standards to almost routinely deny home rule challenges to legislation.<sup>30</sup>

In an attempt to stop judicial erosion of home rule powers, New York adopted a constitutional amendment in 1963.<sup>31</sup> The amendment directed the legislature to enact a Statute of Local Governments<sup>32</sup> granting specific powers and protecting those powers from state encroachment by the double enactment procedure.<sup>33</sup> This innovative provision was expressly aimed at providing "a reservoir of selected significant powers" for local governments<sup>34</sup> and protecting those powers from hasty and ill-considered legislative judgments.<sup>35</sup> Additionally, the constitutional amendment called for liberal construction of delegated powers<sup>36</sup> while the resulting Statute of Local

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York, 24 App. Div. 2d 151, 266 N.Y.S.2d 80 (1965), *aff'd*, 17 N.Y.2d 606, 215 N.E. 2d 684, 268 N.Y.S.2d 564 (1966) (state concern for continuity of services for education, health, housing, and transportation sufficient to uphold act authorizing mayor of New York City to issue bonds for payment of city's pension liabilities); *Modjeska Sign Studios, Inc. v. Berle*, 87 Misc. 2d 600, 386 N.Y.S.2d 765 (1976), *aff'd*, 55 App. Div. 2d 340, 390 N.Y.S.2d 945 (1977) (state concern for aesthetics sufficient to regulate advertising signs in the Catskill and Adirondack Parks).

29. The third test, found in Judge Pound's concurrence, is based on the "special/general law" theory previously discussed at note 14 *supra*. This test extends the state concern doctrine by labeling laws aimed at the health and welfare of city residents as "general." It also supports laws which are general in their terms but applicable to only one locality. *See, e.g., County of Orange v. Metropolitan Transp. Auth.*, 71 Misc. 2d 691, 337 N.Y.S.2d 178 (1970), *aff'd*, 39 App. Div. 2d 839, 332 N.Y.S.2d 420 (1971) (validating act authorizing acquisition for an airport expansion as a matter of general state concern); *Burke v. Krug*, 161 Misc. 687, 292 N.Y.S. 851 (1936) (act applicable to one county by description of population distribution held "general").

30. *See Diamond, Some Observations on Local Government in New York State*, 8 BUFFALO L. REV. 27, 35 (1958); Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV., 1145, 1149-51 (1966).

31. The constitutional amendments were adopted November 5, 1963, to be effective January 1, 1964. N.Y. CONST. art. IX. The Statute of Local Governments enacted pursuant to the constitution became law March 29, 1964 (effective July 1, 1965).

32. N.Y. STAT. LOCAL GOV'TS LAW (McKinney 1969).

33. N.Y. CONST. art. IX, § 1.

34. *Wambat Realty Corp. v. State*, 41 N.Y.2d at 496, 362 N.E.2d at 586, 393 N.Y.S.2d at 953-54 (1977).

35. *Wambat Realty Corp. v. State*, 41 N.Y.2d at 492, 362 N.E.2d at 583, 393 N.Y.S.2d at 950.

36. N.Y. CONST. art. IX, § 3(c) "Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." *Id.*

Governments contained rules of construction affording even broader protection.<sup>37</sup> Planning and zoning were among the selected powers specifically granted.<sup>38</sup>

37. N.Y. STAT. LOCAL GOV'TS LAW § 20 (McKinney 1969).

Where a power granted by this statute [planning and zoning] relates to the property, affairs or government of a local government, its inclusion herein shall not be deemed to imply that the legislature has construed such power as not relating to the property, affairs or government of such local government or as restricting the powers of such local government.

*Id.* at § 20(1).

Nothing in this statute shall operate to restrict the meaning of or diminish or impair any power granted to a local government.

*Id.* at § 20(2).

No power granted in this statute [planning and zoning] shall be deemed repealed, diminished, impaired or suspended by the enactment of any subsequent act of the legislature, *unless such act shall be enacted and re-enacted as prescribed . . . and unless such act shall contain a specific reference to this statute.*

*Id.* at § 20(3) (emphasis added).

Powers granted to local governments by this statute shall liberally construed.

*Id.* at § 20(5).

These detailed rules of construction were added in an effort to overcome the restrictive judicial interpretation of local powers. See Diamond, *Some Observations on Local Government in New York State*, 8 BUFFALO L. REV. 27 (1958): "The Court of Appeals has often reiterated that the constitution must be given 'the meaning which the words convey to an intelligent, careful voter. . . .' But the home rule amendments . . . are construed in quite a different manner by that court, at least as far as 'property, affairs and government' are concerned." *Id.* at 35. But see R. ANDERSON, *NEW YORK ZONING LAW AND PRACTICE* § 3.02 (1963) (Supp. 1968):

These measures [1963 and 1964 revisions] have made little, if any, impact upon the power of a city to adopt and enforce zoning ordinances . . . [T]he statute itself provides . . . that the powers granted therein "shall at all times be subject to such purposes, standards and procedures as the legislature may have heretofore prescribed or may hereafter prescribe." This language appears to preserve the existing statutory limitations on the zoning power and to constitute it subject to subsequent limitations enacted in the usual single-shot manner.

*Id.*

38. N.Y. STAT. LOCAL GOV'TS LAW §§ 10(6), 10(7) (McKinney 1969). This statute provided additional protection for powers which New York had traditionally considered local affairs. New York City enacted the first comprehensive zoning ordinance in the country. Building Zone Ordinance of the City of New York (1916). It was passed under a state enabling act, N.Y. LAWS 1914, ch. 470, and was upheld in *Lincoln Trust Co. v. Williams Building Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920). The New York enabling act and New York City zoning ordinance became the patterns for essentially all early zoning and enabling acts. R. ANDERSON, *AMERICAN LAW OF ZONING* § 2.07 (1968). The Supreme Court upheld the constitutionality of a zoning ordinance based on the New York pattern in *Village of Euclid v. Ambler Realty Corp.*, 272 U.S. 365 (1926). That landmark decision validated use of the police power, asserted for the public welfare, to impose height and use restrictions to protect

*Wambat* was the first home rule case alleging suspension of an enumerated power.<sup>39</sup> Affirming the trial court's summary judgment,<sup>40</sup> the Court of Appeals construed the reservations of power to act on "matters other than the property, affairs or government of local governments"<sup>41</sup> as allowing the state to enact any legislation purporting to deal with matters of state concern.<sup>42</sup> By phrasing the issue in terms of the state's power to "override local interests"<sup>43</sup> and deciding the case on the basis of the state concern doctrine,<sup>44</sup> the court

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residential areas from expanding commercial and industrial uses. Protection of the economic value of residential districts and economy in municipal administration of street maintenance, police and fire protection were the primary concerns of the Court.

39. Since the enactment of the Statute of Local Governments, three cases have dealt with the state's interest in rent control, a power granted to local governments with zoning and planning. In each of these cases the local government challenge was by traditional objections on the "special law/general law" theory or on the "property, affairs or government" theory. See *Kerr v. Urstadt*, 33 N.Y.2d 134, 305 N.E.2d 760, 350 N.Y.S.2d 631 (1973); 241 East 22nd St. Corp. v. City Rent Agency, 33 N.Y.2d 134, 305 N.E. 2d 760, 350 N.Y.S.2d 631 (1973); *City of New York v. State of New York*, 31 N.Y.2d 804, 291 N.E. 2d 583, 339 N.Y.S.2d 459 (1972).

40. *Wambat Realty Corp. v. State*, 85 Misc. 2d 489, 378 N.Y.S.2d 912 (1976).

41. N.Y. CONST. art IX, § 3(a)(3) and N.Y. STAT. LOCAL GOV'TS LAW § 11.4 (McKinney 1969), quoted at note 21 *supra*.

42. While decreeing that preservation and development of the vast "Adirondack spaces" related to "life, health, and the quality of life," the court failed to cite a single authority supporting the state's interest in resources on privately-owned forest lands. *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 495, 362 N.E.2d 581, 585, 393 N.Y.S.2d 949, 953. See discussion of state concern doctrine at note 28 *supra*.

43. "The issue is . . . whether the State may override local or parochial interests when State concerns are involved. That issue is and has been resolved in favor of State primacy. The price of strong local government may not be the destruction or even the serious impairment of strong State interests." *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 497, 362 N.E.2d 581, 586-87, 393 N.Y.S.2d 949, 954-55 (1977).

44. To support its state concern analysis, the court relied primarily on *Floyd v. New York State Urb. Dev. Corp.*, 33 N.Y.2d 1, 300 N.E.2d 704, 347 N.Y.S. 161 2d (1973), which allowed the state to plan and execute a housing project in disregard of local zoning ordinances. This reliance is unfortunate because the state concern at issue in *Floyd* was not a specifically delegated and protected power but housing—a matter long accepted as a legitimate area for exercise of the state police power. Since courts frequently exempt state agencies from local ordinances, the case is not analogous to the developer's claim that the APAA completely emasculates constitutionally protected planning and zoning powers. See D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM*, 194 (1977). See also *Town of Brookhaven v. Suffolk Meadows Quarter Horse Racing Ass'n*, 76 Misc. 2d 175, 350 N.Y.S.2d 525 (1973) (where State Quarter Horse Racing Commission approved location for defendant to conduct quarter horse races at which pari mutuel betting [state's concern] would be conducted, defendant was exempt from local zoning ordinances). *Levi, Gehring & Groethe, Application of Municipal Ordinances to Special Purpose Dis-*

failed to answer the question raised by the litigation. The real issue was whether the legislature must employ constitutionally mandated procedures when state action impairs or suspends specific home rule powers. The *Wambat* decision implies a negative answer.<sup>45</sup>

A cursory review of the APAA reveals strong support for the developer's claim that the APAA encroaches on local planning and zoning powers. By dividing the private land into categories with development intensity restrictions,<sup>46</sup> the APAA virtually prohibits all second home developments.<sup>47</sup> Sections of the APAA restrict development,<sup>48</sup>

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*tricts and Regulated Industries*, 12 URBAN L. ANN. 77 (1976); Note, *Immunity of State and State-Related Activities from Local Municipal Zoning Regulations: Florida Focus*, 28 U. FLA. L. REV. 800 (1976). *Contra*, *City of Pittsburg v. Commonwealth*, 468 Pa. 174, 176, 360 A.2d 607, 609 (1976) (Supreme Court of Pennsylvania reversed lower court approval of state action where state located a pre-release center in Pittsburgh without applying for an occupancy permit or zoning authorization, saying "we do not find that the Legislature intended the Bureau of Corrections to be immune from local zoning regulations.").

45. One week after the decision in *Wambat* the Court of Appeals relied on that case in *Board of Educ. v. City of New York*, 41 N.Y.2d 535, 362 N.E.2d 948, 394 N.Y.S.2d 148 (1977), to uphold the Stravisky-Goodman Law, N.Y. EDUC. LAW § 2576(5) (McKinney Supp. 1978-1979). That law required the City of New York to appropriate for public elementary and secondary education at least an amount equal to the average proportion of the total expense budget as awarded in the three fiscal years preceding. Not only is this a "special law" applicable to New York City alone, but it also infringes on the city's power to manage its fiscal obligations—both of which are prohibited by the constitution. N.Y. CONST. art IX, § 2(b)(2) ("[the legislature] shall have the power to act in relation to the property, affairs or government of any local government only by general law. . ."); *id.* § 2(c) (local governments have power to transact business and incur obligations). The court found that the state's interest in education made the law a matter of state concern. Relying on *Wambat* and over two strong dissents, the court reversed the two lower courts and held that home rule was no bar to legislation directed to matters of state concern. 41 N.Y.2d 535, 362 N.E.2d 948, 394 N.Y.S.2d 148 (1977). Thus the judiciary has completely defeated the purpose of the 1963 home rule amendments.

46. The method of selecting the categories has been described as:

A system of land use classifications based upon soils, topography, water, fragile ecosystems, vegetation, wildlife, park character, public facilities, existing land use patterns, and other public and social considerations was laid out graphically on a map of the region. By limiting the uses deemed compatible in each classification and by limiting the intensity of development in each classification, development is channeled into the areas of the Park most amenable to, and best able to withstand, that development.

David, *Land Use Control and Environmental Protection in the Adirondacks*, 47 N.Y.S. B.J. 189, 191 n.14 (1975).

47. While the development intensity restrictions are worded in terms of principal buildings per square mile to encourage clustering buildings in areas most able to support development, the average lot size of the classifications are as follows:

require Agency approval of local land use plans, require that local land use plans conform to the official state plan,<sup>49</sup> and subject certain developments to Agency review and approval irrespective of local approval.<sup>50</sup> These provisions appear to impair the planning and zoning powers of the one hundred nineteen local governments within the Park.<sup>51</sup> Indeed, the court admitted: "Of course the [APAA] prevents localities . . . from freely exercising their . . . powers. That indeed is its purpose and effect . . . the motive is to serve a supervening state concern transcending local interests."<sup>52</sup>

The problem with the court's analysis is that it renders meaningless the clear and unambiguous protection of specifically granted powers in the 1963 constitutional and statutory amendments,<sup>53</sup> and leaves the New York courts with a dangerously broad principle. It implies that any state interest in legislation constitutes adequate grounds for the legislature to ignore home rule delegations of power.

A thorough analysis of the APAA's impact on local planning and

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<u>Classification</u>	<u>Percent of Total Private Land</u>	<u>Average Lot Size</u>
Resource Management	53%	42.7
Rural	32%	8.5
Low intensity	10%	3.2
Moderate intensity	*	1.3
Hamlet	*	n/a
Industrial	*	n/a

\* These three areas together total 5% of the privately-owned Park land and include areas which are already highly developed. See Kalish, *Environmental Protection*, in GOVERNING NEW YORK STATE (Academy of Political Science ed. 1974) [hereinafter cited as Kalish]; Booth, *supra* note 9, at 624.

48. N.Y. EXEC. LAW art. 27, § § 805.3d-805.3g (McKinney 1972) *as amended* (McKinney Supp. 1972-1978).

49. *Id.* at § § 807-808.

50. *Id.* at § § 809-811.

51. The [Agency] has authority to . . . [review] . . . local land use legislation within the Park, an area about the size of the State of Vermont. Specifically, the Park boundaries enclose one entire county, parts of eleven other counties, and part of all of 87 towns. Agency review to determine compliance with the plan is mandatory and extends to amendments as well as original land use control legislation.

Anderson, *Land Use Control*, 25 SYRACUSE L. REV. 457, 458 (1974).

52. *Wambat Realty Corp. v. State*, 41 N.Y. 2d at 494-95, 362 N.E. 2d at 584, 393 N.Y.S.2d at 952 (1977).

53. See notes 31-37 and accompanying text *supra*.

zoning, of the local governments' participation in the development of the APAA zoning plan,<sup>54</sup> and of prior home rule decisions may have allowed the court to uphold the APAA without such blatant denial of unambiguous constitutional guarantees. The case thus should have proceeded to a trial on the merits to determine if the APAA *actually* repeals, diminishes, impairs, or suspends local planning and zoning powers.

The home rule advocates in New York, who apparently receive greater cooperation from the legislature than from the courts,<sup>55</sup> succeeded in blocking passage of the APAA until a number of compromises were made which gave local governments a strong voice in setting the final guidelines of the APAA official plan.<sup>56</sup> In its final form, the APAA not only permits but encourages local planning and zoning by making financial and technical assistance available to local governments.<sup>57</sup> After obtaining local approval, many projects will not require Agency review.<sup>58</sup> Furthermore, Agency approval does

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54. The official Adirondack Park Land Use and Development Plan prepared by the Agency as a guide to land use planning and development throughout the entire area of the park was adopted by N.Y. EXEC. LAW art. 27, § 805 (McKinney 1972) *as amended*, (McKinney Supp. 1972-1978).

55. See Kalish, *supra* note 47, at 256, 259-60; Note, *New York State Planning Law Revision: The Lost Necessity?*, 22 BUFFALO L. REV. 1021, 1051 (1973) (planners cited the strength of the home rule lobby as the primary reason for defeat of the statewide planning law revision).

See also NRDC, *supra* note 8, at 111. "Both the assembly and the senate voted to postpone all action [on the APAA] for one year but this message was vetoed by the Governor. Passage of the bill instituting the law was possible only after a number of compromises were made." *Id. Accord* Kalish, *supra* note 47, at 259.

56. The following changes illustrate such compromises: 1) A Local Government Review Board was established consisting of one representative from each of the twelve counties within the Park to advise and assist the Agency; 2) The state agreed to continue payments to local governments in lieu of taxes on forest preserve lands; 3) The amount of state money available for local planning was increased; and 4) Another full-time resident of the Adirondacks was added to the Agency, increasing to five the number of local representatives on the eleven-member agency. NRDC, *supra* note 8, at 112. Additionally, the maximum population limit for the park was increased by 65%, from 1,200,000 to 2,000,000. This increase allowed substantial expansion from the current population of 125,000. Kalish, *supra* note 47, at 259.

57. NRDC, *supra* note 8, at 112. See Booth, *supra* note 9, at 619. See also the provision of the APAA directing the Agency to provide technical services to local governments. N.Y. EXEC. LAW § 807(6) (McKinney 1972) *as amended*, (McKinney Supp. 1972-1978).

58. Booth, *supra* note 9, at 620, 628. See also N.Y. EXEC. LAW § 810 (McKinney 1972) *as amended*, (McKinney Supp. 1972-1978).

not negate the requirement of local approval.<sup>59</sup>

Although a decision on the merits may have produced the same ultimate result, it would not have stripped local governments of the protection of local powers provided by the constitution.<sup>60</sup> While the decision is a victory for preservation of the natural resources of the Park, it is certainly a defeat for "the preservation of our constitutional system of government."<sup>61</sup> New York's interest in the one should be no more--but no less--than its interest in the other.

*Jane E. Leonard*

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59. See N.Y. EXEC. LAW § 818 (McKinney 1972) *as amended*, (McKinney Supp. 1972-1978); Booth, *supra* note 9, at 629. *Accord*, Davis, *Land Use Control and Environmental Protection in the Adirondacks*, 47 N.Y.S. B.J. 189 (1975). In this article, an attorney for the Adirondack Park Agency explained:

[U]nlike the scheme in Art. 7 of the ALI Model Land Dev. Code, which places local ordinances in abeyance until approved by the State Land Planning Agency, the Act [APAA] expressly allows for local regulation parallel to and independent of itself. . . . Moreover, any other course of action could be circumscribed in New York. N.Y. CONST. art. IX.

*Id.* at 223 n.40.

The California Court of Appeals relied in a similar analysis in *CEEED v. California Coastal Zone Conserv.* Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974). In *CEEED*, the court held that the act establishing the Commission did not intrude on the municipal affairs of chartered cities in violation of the California home rule statutes because the agency permit required for development was in addition to any permits required by local ordinance. *Id.* at 320, 118 Cal. Rptr. at 325. If the *Wambat* court had used the *CEEED* analysis, it would have avoided the constitutional question. The problem with this reasoning is that it views the power to regulate as the power to *limit* and totally ignores the fact that local governments may want to *encourage* increases in population density or industrial development. *Wambat* is an excellent example of a local government's desire for growth being daunted by a state environmental statute.

60. *Wambat* may be a forecast of the judicial response to a home rule challenge to the recently enacted Environmental Quality Review Act (EQRA). N.Y. ENVIR. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney Supp. 1978-1979). By its terms the EQRA could require detailed impact statements before local governments could issue building permits or enact zoning ordinances. *Id.* § 8-0105. EQRA requires all state and local agencies to prepare an environmental impact statement on any action they plan or approve which may have a significant effect on the environment. *Id.* § 8-0109(2). See Strainere, *Land Use in New York: An Evaluation of Policy and Performance*, 40 ALBANY L. REV. 643 at 723, 725-27 (1976); Comment, *The New York State Environmental Quality Review Act: An Overview and Analysis*, 41 ALBANY L. REV. 293 (1977).

61. See Brief for Amicus Curiae at 17, *Wambat Realty Corp. v. State*, 41 N.Y. 2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977).

