New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

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Report by the Committee on the New York State Constitution Proposing Revisions to Article IX of the State Constitution (Home Rule) Regarding Implied Preemption

In its 2016 report on Article IX of the New York State Constitution, the Local Governments (Home Rule) Article, the NYSBA Committee on the State Constitution ("Committee") concluded that "[c]onstitutional Home Rule is a subject ripe for consideration and debate by all concerned. There is a need to weigh the benefits and costs of amendments to Article IX that would restore local autonomy through greater certainty and clarity."[1]

At that time, the Committee believed that, had a constitutional convention been approved by voters in 2017, it would address home rule. However, after that ballot question was defeated, the Committee decided to address directly possible revisions to the State Constitution that could be routed through the legislative amendment process. The Committee created a subcommittee on home rule and charged it with proposing language to improve Article IX. The subcommittee is seeking to propose revisions that would both clarify the authority of the state government vis-à-vis local governments and rebalance Article IX so as to grant localities the autonomy that article, at least as drafted, seemed to provide. The subcommittee's first effort addresses the preemption doctrine, specifically "implied preemption."

In its 2016 report, the Committee identified the preemption doctrine as "a fundamental limitation on the power of local governments to adopt local laws."[2] The Committee examined the various aspects of the preemption doctrine. Conflict preemption occurs when "there is an outright conflict or 'head-on collision' between a local law and State statute."[3] Express field preemption occurs when "a State statute explicitly provides that it preempts all local laws on the subject."[4] In both of these situations, local legislatures generally have clear guidance in considering a local law as to whether it may run afoul of a state statute.

Implied field preemption, on the other hand, presents a situation in which "either the purpose and scope of the regulatory scheme will be so detailed or the nature of the subject of regulation will be such that the court may infer a legislative intent to preempt, even in the absence of an express statement of preemption."[5] The concept of implied

[1] NYSBA Committee on the New York State Constitution, *Report and Recommendations Concerning Constitutional Home Rule* (2016).
[2] Id. at 3.
[3] Id. at 17.
[4] Id.
[5] Id. at 17-18 (citing Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level,* 65 BROOKLYN L. REV. 321, 349 (1999) (citations omitted).

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

field preemption is a court-created doctrine, and its contours are fashioned entirely by case law.

Implied field preemption has been the source of much uncertainty and litigation, and although courts have occasionally ruled in favor of localities, most often this doctrine has been used to invalidate local laws passed by local legislatures that had no notice that they were treading on prerogatives of the state. As Professor Richard Briffault has said (quoted in the Committee's report):

> The Legislature rarely makes a clear declaration of policy. The courts therefore have no clear standard for determining whether the extent and nature of state regulation of an area is "comprehensive," and therefore preemptive, or "piecemeal," and therefore not preemptive. The result is ad hoc judicial decision making and considerable uncertainty as to when state legislation will be considered preemptive of local action.[6]

The Committee's report cited a litany of cases where courts have found such implied preemption. The concerns localities have with this type of preemption are two-fold. First, localities are prevented from legislating within their home rule authority on matters which they arguably should be able to address. Second, localities operate in an atmosphere of uncertainty, not knowing whether a particular action they want to take will survive a preemption challenge.

Proposed Amendment

The proposed language below is intended to eliminate the implied preemption doctrine, and thereby allow localities to determine with reasonable certainty whether or not potential local laws are in fact preempted by state law. In addition, requiring the state legislature to state explicitly a determination to preempt local laws would provide more predictability and reduced litigation and expenditure of resources by the state and local governments.

The proposal would first amend subsection 2(c) of Article IX to read as follows (new language is underlined):

> (c) In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature <u>expressly</u> shall restrict the adoption of such a

[6] Id. at 19-20 (citing Richard Briffault, *Intergovernmental Relations*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 156-57 (Gerald Benjamin & Hendrik N. Dullea eds., 1997, at 173)

local law relating to other than the property, affairs or government of such local government:

Second, the proposal would add new subsections 2(d) and (e) (with other subsections to be renumbered accordingly) to read as follows:

> (d) A local law shall only be deemed inconsistent with a general law, or with a special law that may not be superseded by a local government, if: (i) this constitution or a state law expressly prohibits the adoption of such local law; or (ii) this constitution or a state law expressly declares the state's authority to be exclusive over the subject of the local law; or (iii) a conflict exists between the local law and the general law, or the special law that may not be superseded by a local government, such that the local law permits what would be prohibited by the general or special law or directly impedes such law by imposing prerequisite additional restrictions upon a right specifically conferred by such law, and neither this constitution nor a state law expressly permits or authorizes such conflict.
>
> (e) The amendments to this section that include this subdivision shall apply only to local laws adopted after the effective date of such amendments, provided that such amendments shall not apply to local laws adopted after such effective date to the extent that such local laws concern a subject matter that was found by controlling appellate judicial authority before such date to be within a preempted field unless such authority has been modified by subsequent authority or state law.

The revision to subsection 2(c) makes clear that if the legislature chooses to restrict the adoption of a local law under this subsection, it must do so expressly.

New subsection 2(d) in effect interprets the word "inconsistent" in Article IX, section 2, creating three instances in which a local law could not stand because it is inconsistent with a state statute: (i) the state prohibits the adoption of such law, (ii) the state expresses its intent to preempt such law or (iii) there is a conflict with such law in that the local law permits what the state law prohibits, or that the local law impedes a state law by imposing prerequisite additional restrictions upon a right specifically conferred by the state law, and neither the constitution or a state or local law allows such conflict. Clause (iii) recognizes that there are situations where, regardless of whether the state legislature expresses its intent, there is an irreconcilable conflict with a local law. We have attempted to define that conflict with some precision relying on the existing case law in this area, to provide more clarity both for localities seeking to enact laws and for the courts in determining whether a local statute should be invalidated as being preempted.

We note that even where there is what appears to be an irreconcilable conflict between a state and local law, the local law should be allowed to stand if the constitution or a state law expressly permits or authorizes such a local law. This provision is meant to address the situation posed in cases such as *Cohen v. Board of Appeals of the Village of Saddle*

Rock,[7] where the state Court of Appeals applied the doctrine of implied preemption to overturn a local law which appeared to be expressly authorized by the Municipal Home Rule Law. The Court invalidated the Village of Saddle Rock's effort to change the standard to be applied in granting a variance. Municipal Home Rule Law section 10(1)(ii)(e)(3) stated a village had the power to amend or supersede "any provision of the village law relating to the property, affairs or government of a village … unless the legislature expressly shall have prohibited the adoption of such law." The legislature had not expressly prohibited the adoption of the contested law. Nevertheless, the Court held the preemption doctrine to be an "overriding limitation" to the enactment authority of the village and invalidated the law using the implied preemption doctrine. We believe the new subsection 2(d) would overcome the problem posed for localities by the *Saddle Rock* decision, providing a positive grant of authority to a locality to act where a state law explicitly permits such action.

We believe these changes strike the correct balance, provide greater fidelity to the intent of Article IX and afford clearer guidance to municipalities seeking to attain the autonomy promised by that article. The State would still be free to preempt local laws whenever it believes it important to do so, while local governments would be able to discern more clearly their authority to act with regard to their own property, affairs and government.

Retroactivity

We recognize there may be concern regarding the retroactivity of this provision. Making the provision fully retroactive would create a chaotic situation. On the other hand, local governments should have some flexibility going forward to operate in a new regime where the implied preemption doctrine would not apply. Accordingly, the new subsection 2(e) makes clear that the proposed amendments would apply only to local laws adopted after the effective date of the amendment, but would not apply to a local law enacted after such date where controlling appellate authority existed *before such date* holding the subject matter of that law to have been a preempted field (unless that authority thereafter had been modified by a subsequent state law or court decision). .

This proposal gives municipalities the flexibility and predictability they desire, avoids the possibility of divergence among the courts, protects areas of state law that were found – prior to the amendment's effective date – to preempt local law and prevents the upheaval that would be caused by undoing years of precedent at one time.

We urge adoption of these amendment by the Executive Committee so they would become the policy of this Association.

[7] 100 N.Y.2d 395 (2003).