Fordham Urban Law Journal

Volume 1 | Number 2 Article 3

1972

Comment: The Constitutionality of Local Anti-Pollution Ordinances

Comments

THE CONSTITUTIONALITY OF LOCAL ANTI-POLLUTION ORDINANCES

Introduction

Local governments have recently expanded their efforts to abate pollution problems. New York City, for example, has enacted a law that severely restricts the sale and use of gasolines with pollutants and bans all leaded gasoline after January 1, 1974.[1] The constitutionality of such local ordinances under both federal and state law, however, has not yet been adequately determined. There have been so few cases on this subject in New York, or in any other state, that local governments may be in doubt as to their power to legislate in this field.

In order to clarify the constitutional limits of local environmental laws, it is necessary to examine the relevant questions raised by both the United States Constitution and the various state constitutions. Part I of this comment will deal with the federal-local conflicts and Part II will discuss the state-local conflicts. In each of the two sections, relevant legislation in the environmental field will be discussed. Finally, a model statute will be offered as an example of the wide range of powers a locality can constitutionally exercise.[2]

PART I

FEDERAL-LOCAL CONFLICTS

The Commerce Clause and Federal Pre-Emption

Local governments are not political entities recognized by the United States Constitution and have no legislative powers other than those expressly granted by the state.[3] In exercising such powers the major prob-

1. New York City, N.Y. Ad. Code ch. 57, § 1403.2-13.11 (Williams Supp. 1971).

2. This comment is limited to direct regulation of existing pollution. There are, of course, methods which can be used to prevent the construction of polluting facilities in a locality. Zoning is a prime example of one of these methods and is unquestionably a powerful protection device. For a general discussion of the constitutional issues involved in zoning, see Comment, The Constitutionality of Local Zoning, 79 Yale L.J. 896 (1970).

3. This principle is well established in American law. The existence of the municipal corporation as a creature of the state was recognized by the Supreme Court in Bissell v. City of Jeffersonville, 65 U.S. (24 How.) 287 (1861). In New York, the principle was articulated in Brown v. Trustees, Hamptonburg School Dist., 303

lem that local ordinances must overcome is presented by the commerce clause.[4] In our complex society, expansion of the commerce clause by Supreme Court interpretation has reached the point where almost any state or local statute can be challenged as interfering with interstate commerce and therefore in conflict with the commerce clause.[5] The extent to which a political subdivision can regulate businesses or other activities engaged in interstate commerce is a crucial question.

If Congress has not legislated in the area in question, then the state or locality may do so as long as its legislation does not unduly burden interstate commerce.[6] But what constitutes an undue burden? The test that has been espoused by the Supreme Court is a rather vague one; the interest of the locality in regulating its own health and safety is balanced against the effect that the legislation will have on interstate commerce.[7]

N.Y. 484, 104 N.E.2d 866 (1952): "It is a familiar principle of our law that a municipal corporation is a body politic. It is created by statute and, as an instrumentality of the general government of the State, it exercises powers of government which are delegated to it by the Legislature. . . . it is a creature of the Legislature . . . ." Id. at 488, 104 N.E.2d at 868.

4. U.S. Const. art. I, § 8.

5. The commerce clause has noticeably been "stretched" by the Supreme Court in a series of cases arising out of the public accommodations section of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6 (1970). See Daniel v. Paul, 395 U.S. 298 (1969). In this case the question was whether a private recreation area at Lake Nixon, Arkansas, was a public accommodation affecting commerce within the meaning of the Civil Rights Act. The Court found that the club's snack bar, a small part of the recreation complex, was a facility in interstate commerce because a major part of the ingredients in the hot dog and hamburger rolls came from out of state, as did most of the ingredients in the soft drinks. Therefore, the "snack bar's status as a covered establishment automatically brings the Lake Nixon facility within the ambit of [the Act]." Id. at 305; see also United States v. Johnson Lake, Inc., 312 F. Supp. 1376 (S.D. Ala. 1970); Scott v. Young, 307 F. Supp. 1005 (E.D. Va. 1969) (mem.), aff'd, 421 F.2d 143 (4th Cir.), cert. denied, 398 U.S. 929 (1970); United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969). In Perez v. United States, 402 U.S. 146 (1971), the federal anti-loansharking provisions of the Consumer Credit Protection Act, 18 U.S.C. §§ 891-96 (1970), were held to be within the power of Congress under the commerce clause even though the individual loanshark operated purely in an intrastate manner. It was sufficient that his activities fell within a "class of activities" which, in total, affected interstate commerce.

6. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

7. Southern Pac. Co. v. Arizona, 325 U.S. 761, 768-69 (1945); Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen, 318 U.S. 1, 8 (1943); Parker v. Brown, 317 U.S. 341, 362 (1943); Illinois Natural Gas Co. v. Central Ill. Pub. Ser. Co.,

In *Soap & Detergent Association v. Clark*,[8] for example, a district court in Florida upheld a county ordinance barring all phosphates from detergents. The court found that the law did not impose an undue burden on interstate commerce because, in balancing the benefit of the ordinance in improving the quality of water in the county against the financial harm to the detergent industry from complying with such a ban, the court felt that "the scales are strongly tipped" in favor of the ordinance.[9]

When Congress has in fact legislated in a particular area, however, this weighing process is inapplicable if Congress, through such legislation, has pre-empted the area. Pre-emption occurs when it is the intention of Congress, express or implied, to prohibit state and local governments from legislating in the area.[10] If Congress has indeed pre-empted all of the powers in a given area, the locality is prevented from legislating in that area by the supremacy clause of the United States Constitution.[11]

The mere fact, however, that Congress has legislated in an area does not raise the presumption that the area has been pre-empted; the intention of Congress to do so must be clearly manifested.[12] In *Huron-Portland Cement Co. v. City of Detroit*,[13] for example, shipowners sought an injunction to prevent the city from prosecuting complaints under a municipal smoke abatement ordinance. The shipowners argued that since the ships were inspected and licensed by the federal government, the area had been pre-empted. The Court disagreed, stating that the intention of Congress to pre-empt "is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."[14] The Court found no such conflict. In the exercise of their power to preserve

314 U.S. 498, 504-05 (1942); Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (dissenting opinion).

8. 330 F. Supp. 1218 (S.D. Fla. 1971).

9. Id. at 1222. Similarly, a county court in Maryland held that a city ordinance requiring deposits on all beverage containers was not discriminatory nor an unreasonable burden on interstate commerce. 2 BNA Envir. Rep.–Curr. Devs. 1049 (1971). A recent New York case, however, declared unconstitutional a New York City tax on plastic containers as violative of the equal protection clause of the fourteenth amendment. Society of Plastics Indus. v. City of New York, 68 Misc. 2d 366, 326 N.Y.S.2d 788 (Sup. Ct. 1971).

10. See Southern Pac. Co. v. Arizona, 325 U.S. 761, 766 (1945).

11. U.S. Const. art. VI. See Garner v. Teamsters Local 776, AFL, 346 U.S. 485 (1953); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

12. Allen-Bradley Local 1111 v. Employment Relations Bd., 315 U.S. 740 (1942); Reid v. Colorado, 187 U.S. 137 (1902).

13. 362 U.S. 440 (1960).

14. Id. at 443, citing Savage v. Jones, 225 U.S. 501, 533 (1912).

health and welfare, therefore, "the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government."[15] In the area of air pollution and aircraft noise control, however, there has been partial, but not complete, pre-emption.

The Clear Air Act

The Clean Air Act of 1967, as amended by the Clean Air Amendments of 1970,[16] is presently the major piece of federal legislation in the air pollution field.[17] Local governments planning to enact their own pollution regulations must consider the provisions of this Act. Generally speaking, if the Act had pre-empted the field, or any part thereof, any local law attempting to encroach upon the pre-empted area would be unconstitutional.

Rather than pre-empting the field, however, the Act generally seeks to encourage local pollution control by enunciating the principle "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments."[18] Each state assumes this responsibility by "submitting an implementation plan for such State which shall specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."[19] The administrator of the federal program will approve the state plan if it meets certain requirements.[20]

There is, however, express pre-emption in the field of motor vehicle emission control:

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.[21]

15. Id. at 442. A Maryland circuit court recently upheld the constitutionality of a Maryland statute prohibiting dredging and filling "sand, gravel or other aggregates or minerals, in any of the tidal waters or marshland" of Charles County, Maryland, as a reasonable exercise of state police powers since it is necessary to protect the county wetlands. 2 BNA Envir. Rep.–Curr. Devs. 1332 (1972).

16. 42 U.S.C. §§ 1857-1857*l* (1970).

17. For other examples of federal legislation in the environmental area, see Water Pollution Control Act, 33 U.S.C. §§ 1151-75 (1970); Oil Pollution Act, 33 U.S.C. §§ 1001-15 (1970).

18. 42 U.S.C. § 1857(a)(3) (1970).

19. Id. § 1857c-2(a).

20. Id. § 1857c-5(a)(2).

21. Id. § 1857f-6a(a).

Federal pre-emption in this area is subject to two exceptions. First, by limiting the scope of the section to "new motor vehicles," the Act apparently leaves the regulation of used motor vehicles to the state and local governments.[22] Secondly, any state that adopted standards prior to March 30, 1966, may apply to the Secretary of Health, Education and Welfare for a waiver of this section's application.[23] California is the only state that qualifies for this exception.[24] In short, state and local governments have little legislative flexibility in the area of motor vehicle emission control.

Aircraft Noise Control

Aircraft noise has become a major problem for localities situated near airports. When these localities have attempted to reduce the noise by regulating the flow of the aircraft flying above them they have been hindered by substantial federal pre-emption in this area. A prime example is the case of *American Airlines, Inc. v. City of Audubon Park*.[25]

Audubon Park passed a city ordinance which made it unlawful to fly over the city limits under a height of 750 feet. The United States District Court for the Western District of Kentucky considered the power of the Federal Aviation Administration to adopt rules and regulations to control the use of navigable airspace.[26] Deciding that the federal regulations were legitimately adopted, the court ruled that the city ordinance was in direct conflict with the FAA regulations and that the ordinance was void because it was an "intolerable and undue burden upon interstate and foreign commerce."[27] More importantly, the court found an intent by

22. The difference between a "new" or "used" motor vehicle, within the meaning of the Act, may well become academic in a few years. A "new motor vehicle" is defined as one which has not reached the ultimate purchaser. 42 U.S.C.A. § 1857f-7(3) (Supp. 1972). Once it is determined that the vehicle is a "new" vehicle, the federal regulation, and hence the federal pre-emption, will apply to the "useful life" of the vehicle. Id. § 1857f-1(a)(1). The "useful life" of a vehicle is a period of five years or 50,000 miles, whichever comes first. Id. § 1857f-1(d)(1), (2). Thus all vehicles classified as "used" at the time of passage of the 1970 amendments will not be subject to federal regulation but vehicles defined as "new" at that time and all subsequent new vehicles will be subject to federal regulation for the five year or 50,000 mile period.

23. 42 U.S.C. § 1857f-6a(b) (1970).

24. See H.R. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967). See also C. Havinghurst, Air Pollution Control (1969).

25. 297 F. Supp. 207 (W.D. Ky. 1968), cert. denied, 396 U.S. 845 (1969).

26. 49 U.S.C. §§ 1303, 1348(a), 1348(c) (1970).

27. 297 F. Supp. at 211.

Congress to pre-empt the entire field of law with respect to the regulation of interstate and foreign air traffic.[28] The reasoning of this case reinforced an earlier decision which had held that a village ordinance setting a 1,000 foot minimum altitude for overflying aircraft was unconstitutional because the federal law pre-empted the field.[29]

Besides setting minimum altitude limits, another approach of municipalities has been to ban all overflights or to limit the use of certain runways which have flight patterns over the aggrieved area. In one of these cases, a town's "unnecessary" noise ordinance, insofar as it applied to aircraft using nearby airports, was found to be invalid since it was in direct conflict with applicable regulations of the FAA.[30] This conflict arose because the patterns necessary to comply with the local ordinance would require an alteration in the flight pattern established by FAA regulations.[31]

Aircraft Owners & Pilots Association v. Port of New York Authority[32] clearly shows that not all attempts to lessen aircraft noise are doomed to failure. In this case the Port Authority, as owner and operator of John F. Kennedy International Airport, imposed a fee of $25.00 for taking off and landing at peak traffic hours. Imposition of the fee had the intent, and indeed the effect, of limiting the use of the runways by general aviation. While the fee was in effect, the FAA adopted its "High Density Traffic Airports" regulation providing for a priority system of take-off and landing during peak traffic hours.[33] The court decided that the FAA contemplated the continuance of the Port Authority's regulation because the purpose of the FAA regulation was to correct delays at certain major airports and not to correct safety problems.[34] It appeared to the court that the FAA had decided that additional measures were needed and acted under its power to provide for the efficient utilization of airspace.[35] The court said that the fee does not run counter to FAA regulations but, "simply has the tendency further to restrict the traffic restricted by the

28. Id. at 212.

29. All Am. Airways v. Village of Cedarhurst, 106 F. Supp. 521 (E.D.N.Y. 1952), aff'd, 201 F.2d 273 (2d Cir. 1953).

30. American Airlines, Inc. v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969).

31. Id.; 49 U.S.C. §§ 1301, 1304, 1348 (1970).

32. 305 F. Supp. 93 (E.D.N.Y. 1969).

33. 14 C.F.R. §§ 93.121-93.133 (subpart K) (1972).

34. 305 F. Supp. at 99, 100.

35. 49 U.S.C. §§ 1348(a), 1348(c) (1970).

federal regulation . . . for an aim common to both sets of regulations."[36]

Thus local provisions are not prohibited if they regulate interstate activities not pre-empted by Congress, and if the regulations do not constitute an undue burden.[37]

PART II
STATE-LOCAL CONFLICTS

Local anti-pollution ordinances generally face the same obstacles in relation to state law as they do with respect to federal law. The problems with state constitutions, however, are theoretically more extensive because, unlike the federal-state relationship where the states retain all powers not expressly granted to the federal government,[38] local political subdivisions have only those powers which are granted by the state.[39] If the power to legislate is not granted by the state constitution or by a state statute, then the local government's legislation is void.[40]

When dealing with the problems presented by the state-local relationship, it is necessary to determine the exact extent of powers granted to local governments. Even if the locality is free to legislate in an area, the proposed statute should be examined to see if the power is used reasonably. An inquiry must also be made as to whether there are any conflicts between the local law and existing state laws that would invalidate the local legisation. A consideration of these questions as they apply to New York law will clarify the state-local government relationship.

The Constitutional Grant of Power

The basic provision of New York law dealing with the powers of local governments is article IX of the state constitution.[41] Section 1 of article

36. 305 F. Supp. at 105.

37. The Supreme Court has held that a municipal ordinance charging a one dollar per passenger emplaning fee was not an undue burden on interstate commerce. Evansville-Vanderburgh Airport Auth. Dis. v. Delta Airlines, 405 U.S. 707 (1972). It is interesting to note that 18 airlines recently signed a court-approved agreement whereby the airlines promised to install anti-pollution devices by December 31, 1972, on their jets which use New York airports and are equipped with Pratt & Whitney JT8D engines. It is believed that this action will eliminate 70 per cent of the total smoke emissions from jets using Kennedy and La Guardia Airports. The agreement was reached in settlement of a state court suit initiated by the New York Attorney General. 2 BNA Envir. Rep.–Curr. Devs. 1180 (1972). See also L. Lefkowitz, Jamaica Bay: An Urban Marshland in Transition, 1 Fordham Urban L.J. 1, 9-13 (1972).

38. U.S. Const. amend. X.

39. See note 2 supra.

40. Williams v. Eggleston, 170 U.S. 304, 310 (1898).

41. N.Y. Const. art. IX.

IX is known as the "[b]ill of rights for local governments" and basically gives such localities the general powers normally associated with a governmental body, such as the power to take private property by eminent domain,[42] to have an elected legislative body[43] and to make agreements with other localities, states or the federal government.[44]

It is section 2, however, giving specific powers to the local governments and limiting the power of the state legislature to interfere with the exercise of these powers, that raises the major legal questions. Local governments are given the power to pass local laws relating to its "property, affairs or government."[45] Although this clause is part of the constitutional amendment that became effective in 1964, the phrase "property, affairs or government" has been in the New York Constitution at least since the turn of the century as an affirmative grant of powers to local governments.[46] This power, unlike the powers conferred by section 1, however, is not immune from limitations placed upon it by the state legislature. The state may act in relation to the "property, affairs or government" of a locality, but may only do so by "general law" passed by a simple majority or by a "special law" requiring a two-thirds vote of the legislature.[47] Thus the scope of "property, affairs or government" must be determined for two reasons: first, to define the limits of local powers and second, to decide which powers the legislature cannot abridge without a general law or a two-thirds vote of the legislature.

Cases interpreting the phrase "property, affairs or government" have generally given it a restrictive meaning. In the leading case on the subject, *Adler v. Deegan*,[48] Judge Cardozo, in a concurring opinion, articulated the doctrine that any matter of substantial state concern, even if intermingled with local concern, does not fall under the "property, affairs or government" of the locality. This "Doctrine of State Concern" has grown to the point where the local government is prohibited from legislating so long as there remains some degree of state concern, even

42. Id. § 1(e).
43. Id. § 1(a).
44. Id. § 1(c).
45. Id. § 2(c)(i).
46. This section can be traced back to the Constitution of 1846, as art. III, § 22, as added in 1874; as added in the Constitution of 1894, art. III, § 26; as amended in 1899, 1921, 1929, 1935 and then as added in the Constitution of 1938, art. IX, § 3. "Historical Note," art. IX, § 3, p. 549 (McKinney 1969).
47. N.Y. Const. art. IX, § 2(b)(2). A "general law" is one applying to all counties, cities, towns or villages. Id. § 3(d)(1). Its antithesis, the "special law" is one applying to "one or more, but not all, counties, . . . cities, towns or villages." Id. § 3(d)(4).
48. 251 N.Y. 467, 484, 167 N.E. 705, 711 (1929).

if the subject matter of a law is primarily of local interest. In *Ainslie v. Lounsbery*,[49] for example, the court struck down a local law establishing qualifications for the city examining board for plumbers. The court found that the regulation of plumbing and drainage fell within the area of public health which is a matter of state concern and therefore was not within the confines of the "property, affairs or government" of a city. Fortunately, however, local governments no longer need search for legislative powers within the restrictive meaning of "property, affairs or government" because they have additional powers as an affirmative constitutional grant:

> [E]very local government shall have power to adopt and amend local laws . . . relating to the following subjects, *whether or not they relate to the property, affairs or government of such local governments*. . . .[50]
> (6) The acquisition, care, management and use of its highways, roads, streets, avenues and property. . . .[51]
> (8) The levy, collection and administration of local taxes authorized by the legislature . . . for local improvements. . . .[52]
> (10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.[53]

The particularly broad grant of power in subdivision (10) above is the primary source of additional local powers. The impact of this provision has almost revolutionary potential because matters of health, previously held to be matters of state concern,[54] are now expressly made a legitimate area of local concern. The "Doctrine of State Concern" is only a limitation upon the powers of localities that derive from the general grant of powers; it is not a limitation on express constitutional grants of powers. Moreover, article IX provides that "[r]ights, powers, privileges and immunities granted to local governments shall be liberally construed."[55] It seems likely, therefore, that local governments in New York share

49. 275 App. Div. 729, 86 N.Y.S.2d 857 (3d Dep't 1949) (mem.). See also City of Poughkeepsie v. Vassar College, 35 Misc. 2d 604, 232 N.Y.S.2d 13 (Sup. Ct. 1961).

50. N.Y. Const. art. IX, § 2(c)(ii) (emphasis added).

51. Id. § 2(c)(6).

52. Id. § 2(c)(8).

53. Id. § 2(c)(10).

54. See note 49 supra and accompanying text.

55. N.Y. Const. art. IX, § 3(c); Krolick v. Lowery, 32 App. Div. 2d 317, 322, 302 N.Y.S.2d 109, 114 (1st Dep't 1969), aff'd mem., 26 N.Y.2d 723, 257 N.E.2d 56, 308 N.Y.S.2d 879, cert. denied, 397 U.S. 1075 (1970). The effect of this phrase upon the "property, affairs or government" provision must be substantial, since both phrases appear in the same article.

concurrent powers with the state on matters of health and the environment.

The Statutory Grant of Power

In addition to the constitutional grant of power, municipalities may obtain added powers from the state legislature. The legislature has enacted several statutes[56] granting localities additional powers. Villages, for example, have been given the power to regulate the emission of smoke and gases, the sources thereof, and the use of bituminous coal.[57] In addition, power is given to regulate and prohibit "whistling, ringing of bells and other noises."[58] A city may expend funds for any "public or municipal purpose,"[59] including "the promotion of . . . beauty . . . health . . . comfort and convenience. . . ."[60] In addition, a city may order the repair or removal of a building that endangers health.[61] A county has been given the power to expend and appropriate funds to provide for the disposition of solid wastes.[62] Thus, when determining if a locality has the power to legislate in an area, the statutes relating to that type of municipality should be examined for possible explicit grants of power.

The Reasonableness Requirement

Localities must also be aware of the requirement that a government cannot impose unnecessary or unreasonable requirements on local businesses under the guise of promoting the general welfare.[63] These regulations must have a real and substantial relationship to the objective of promoting the local welfare.[64] A local environmental law, such as one regulating the removal of top soil, must meet this requirement.[65]

56. N.Y. County Law (McKinney 1972); N.Y. Gen. City Law (McKinney 1968); N.Y. Town Law (McKinney 1965); N.Y. Village Law (McKinney 1966).

57. N.Y. Village Law § 89(54) (McKinney 1966).

58. Id. § 89(48)(a). The Village of Tuckahoe, for example, has enacted a noise ordinance pursuant to the powers given it under the Village Law. Tuckahoe, N.Y. Ordinance 34, § 2. For a discussion of this ordinance see Stoffel Seals Corp. v. Village of Tuckahoe, 206 Misc. 597, 134 N.Y.S.2d 114 (Sup. Ct. 1954).

59. N.Y. Gen. City Law § 20(5) (McKinney 1968).

60. Id. § 21.

61. Id. § 20(35).

62. N.Y. County Law § 226-b(1) (McKinney 1972).

63. Trio Distrib. Corp. v. City of Albany, 2 N.Y.2d 690, 143 N.E.2d 329, 163 N.Y.S.2d 585 (1957).

64. Bon-Air Estates, Inc. v. Building Inspector, 31 App. Div. 2d 502, 298 N.Y.S.2d 763 (2d Dep't 1969); People v. Chimino, 39 Misc. 2d 555, 241 N.Y.S.2d 759 (Tonawanda City Ct. 1963).

65. Burroughs Landscape Constr. Co. v. Town of Oyster Bay, 186 Misc. 930, 61 N.Y.S.2d 123 (Sup. Ct. 1946).

The Consistency Requirement and Relevant State Laws

A major impediment to local environmental legislation is the requirement that it not be inconsistent with any state law. The constitutional grant of power to local governments provides that "every local government shall have power to adopt and amend local laws *not inconsistent with* the provisions of . . . *any general law*. . . ."[66]

This consistency requirement has generally been construed as invalidating any ordinance that has stricter requirements than a state law on the same subject. In *Wholesale Laundry Board of Trade, Inc. v. City of New York*,[67] for example, the New York City Minimum Wage Law was invalidated because it forbade hiring at a wage which state law permitted.

In the environmental area, however, the term "inconsistent" has a different interpretation. The air pollution control article of the Environmental Conservation Law [hereinafter the ECL] is a recently enacted statute combining many environmental provisions of various state statutes. It provides:

> Any local laws, ordinances or regulations of a county, city, town or village which comply with at least the *minimum applicable requirements* set forth in any code, rule or regulation promulgated pursuant to this article shall be deemed consistent with this article or with any such code, rule or regulation.[68]

This statement implies that a local air pollution ordinance can have stricter requirements than the state law on the subject.[69] In regard to water pollution, however, the ECL does not specifically refer to the consistency problem, but rather states:

> It is the purpose of this . . . article to provide additional . . . remedies . . . and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any . . . provisions . . . be construed as estopping the state, persons or municipalities . . . in the exercise of their rights . . . to abate any pollution now or hereafter existing.[70]

Since the statute recognizes the right of localities to abate pollution, it

66. N.Y. Const. art. IX, § 2(c)(i) (emphasis added).

67. 17 App. Div. 2d 327, 234 N.Y.S.2d 862 (1st Dep't 1962), aff'd 12 N.Y.2d 998, 189 N.E.2d 623, 239 N.Y.S.2d 128 (1963). See also Robin v. Inc. Vil. of Hempstead, 30 N.Y.2d 347, 285 N.E.2d 285, 334 N.Y.S.2d 129 (1972) and Kim v. Town of Orangetown, 66 Misc. 2d 364, 321 N.Y.S.2d 724 (Sup. Ct. 1971), holding that a village and town ordinance, respectively, forbidding abortion acts except in hospitals were invalid as inconsistent with state law and as legislation in an area pre-empted by the state.

68. N.Y. Environ. Conserv. Law § 19-0709 (McKinney 1972) (emphasis added).

69. Id.; 24 Op. St. Compt. 780 (1968).

70. N.Y. Environ. Conserv. Law § 17-1101 (McKinney 1972).

follows that any local water pollution regulation should be favorably regarded by the courts.

The "Declaration of Policy"[71] of the ECL gives further indication that the state legislature looks favorably upon local legisation intended to abate air and water pollution:

> It shall further be the policy of the state to improve and coordinate the environmental plans, functions, powers and programs of the state, in *cooperation with the* federal government, regions, *local governments*, other public and private organizations and the concerned individual . . . .[72]

The ECL also states that:

> [T]he commissioner shall have power to:
> a. Coordinate and develop policies, planning and programs related to the environment of the state and regions thereof;
> b. Promote and coordinate management of water, land, and air resources . . . .[73]

In *Oriental Boulevard Company v. Heller*,[74] the New York Court of Appeals cited these sections in finding that the ECL did not pre-empt the area of air pollution control so as to invalidate a New York City ordinance regulating fuel burners and refuse incinerators.[75]

The recently enacted New York City Noise Control Code[76] [hereinafter referred to as the Code] is a practical example of a local environmental law that must be judged in light of the consistency requirement.

Excessive noise, as the Code points out,[77] has been proven to be harmful to health and thus falls under the health provision of the state constitution.[78] Certain provisions of the Code, dealing with noises generated by motor vehicles, must contend with the state's Vehicle and Traffic Law [hereinafter referred to as the VTL].[79]

The VTL states that the "provisions of this chapter shall be applicable and uniform throughout this state. . . ."[80] and that local authorities are barred from passing any ordinance in conflict with the VTL or even from

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71. N.Y. Environ. Conserv. Law § 1-0101 (McKinney 1972).
72. Id. § 1-0101(2) (emphasis added).
73. Id. § 3-0301(1)(a), (b).
74. 27 N.Y.2d 212, 265 N.E.2d 72, 316 N.Y.S.2d 226 (1970), appeal dismissed, 401 U.S. 986 (1971).
75. New York City, N.Y. Ad. Code ch. 41, §§ 892-4.2, 892-4.3 (Williams 1971). The chapter was repealed by L.L. 1971, No. 49, Aug. 20, 1971.
76. New York City, N.Y., Noise Control Code, Oct. 4, 1972.
77. Id. § 1.03.
78. N.Y. Const. art. IX, § 2(c)(10).
79. N.Y. Veh. & Traf. Law (McKinney 1971).
80. Id. § 1600.

duplicating any provisions of the VTL as a local ordinance.[81] The result is that only state agencies may regulate the operation and inspection of motor vehicles. But throughout the VTL certain powers are given to the localities, and any local government that passes an ordinance which in fact regulates motor vehicles, even one which has as its main purpose the abating of noise, must be exercising one of the enumerated powers left to the localities by the VTL, if the regulation is to be upheld.[82]

Conclusion

Despite the absence of litigation on the subject of local anti-pollution legislation, an analysis of relevant federal and New York law leads to the conclusion that local governments have a wide scope of powers in the environmental field. The pre-emption and consistency doctrines will present grounds for restraints on local anti-pollution laws, but local governments have ample constitutional and statutory powers with which to counter these doctrines in most cases.

In the crucial and burgeoning field of environmental law, local governments have an ideal opportunity to assert their potentially great, but feebly exercised, legislative powers. If local authorities depend exclusively upon the state legislature for environmental legislation, not only

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81. Id.

82. A comparison of the Code with the VTL illustrates some of the problem areas. Sections 4.05(i) and (ii) of the Code restrict the use of claxons and horns. The VTL specifically provides that localities with over one million population may regulate "the use of horns, lights and other required equipment of vehicles." N.Y. Veh. & Traf. Law § 1642(a)(14) (McKinney 1971). Thus, subsections (i) and (ii) are permissible. Subsection (iv) provides, inter alia, that an auto-burglar alarm must be of the type that terminates after 15 minutes. It may be argued that this subsection does not deal with the operation or use of the device as required by the VTL's grant of power to local governments, but the better reasoning is that this requirement falls within the intent of the VTL provision. Section 4.07 of the Code limits the use of emergency signal devices to emergency situations, and since it concerns only that use, there is no question as to its validity.

Section 4.15 of the Code prohibits the discharge of an exhaust which creates an unnecessary noise. Section 375(31) of the VTL prohibits the modification of a muffler system to amplify noise. The two sections are not in apparent conflict, but again the power of the City to regulate the equipment of a motor vehicle where it has not been granted specific power to do so is questionable. Section 4.15, however, does not specifically require any equipment, although it might be construed to require a muffling system. It could then be argued that it does not fall within the state's pre-emption since the purpose of the pre-emption is to create state-wide uniformity and 4.15 does not necessarily require something that is inconsistent with uniform state control.

will they lose control over anti-pollution laws primarily affecting their local areas, but they will once again be abnegating the principles of home rule.

A MODEL MUNICIPAL ENVIRONMENTAL CODE

Introduction

The purpose of including a model code is to give the reader some idea of the possible scope of local environmental legislation. The Code is not meant to be comprehensive but rather is merey set forth as an example. It is, therefore, general in scope and does not concern itself with issues not discussed in this comment and may apply to a city, town or village.

The Code

Article I. Statement of Purpose

It is the purpose of this Code to provide for the protection of the health, safety and welfare of the people of this municipality by conserving and enhancing the environment and controlling water, land, air and noise pollution.

Article II. Environmental Planning Commission

1. An Environmental Planning Commission, hereinafter referred to as the Commission, is hereby established. It shall be composed of three members appointed by the [City, Town or Village] Council for a term of two years.
2. The Commission shall promulgate standards consistent with the purpose and scope of this Code. It shall determine which type of facilities and devices are to be placed on an Operating Certificate List and issue certificates only to those facilities and devices on the List that meet the promulgated standards.[83]
3. No person shall cause or permit the use or operation of any type of facility or device placed on the Operating Certificate List without first obtaining a certificate from the Commission.
4. The Commission may make or cause to be made any investigation, study or inspection which in its opinion is desirable for the purpose of controlling or abating a violation of this Code.
5. (a) The Commission shall have the power to conduct hearings and, by the issuance of subpoena, compel the attendance of witnesses and the

83. The concept of a requirement of an operating certificate comes from the New York City, N.Y., Ad. Code ch. 41, §§ 892-4.0, 892-4.1 (Williams 1971). The chapter was repealed by L.L. 1971, No. 49, Aug. 20, 1971.

production of any books, papers or other items relating to the matter under investigation.

(b) The hearing shall be conducted in a fair and impartial manner and any Commissioner who, for any reason, cannot judge the merits of a case in an impartial manner, shall absent himself from any consideration thereof.

(c) The party under investigation shall have at least 15 days written notice of the charges against him, an opportunity to cross-examine witnesses, the power of subpoena equivalent to that of the Commission, as set forth in subsection (a), and an opportunity to otherwise present evidence in his own behalf.

6. If the Commission has reasonable cause to believe that any facility or device is in violation of this Code, the Commission may order the owner of such facility or device to conduct such tests as are necessary in the opinion of the Commission to determine whether the facility or device or its operation is in violation of this Code and to submit the test results to the Commission within 10 days after the completion of the tests. Such tests shall be conducted in a manner approved by the Commission.

7. If, in the opinion of the Commission, further tests are necessary, the Commission may order the owner to conduct such tests or to provide such access to the facility or device as the Commissioners may reasonably request for the purpose of conducting such tests. The owner shall be furnished with copies of the analytical results of the data collected.

8. If any facility, device or building is found to be in violation of the provisions of this Code, or of the regulations established as provided herein, the Commission shall notify the owner of the facility, device or building of such violation and set a reasonable period, not to exceed one year, within which the owner must abate the violation.

9. If a violation of this Code is not abated after reasonable notice has been given pursuant to section 8 of this article, and after a hearing pursuant to section 5 of this article, the Commission may:

(a) Revoke or suspend a certificate issued pursuant to section 2 of this article;

(b) Order the owner of any facility, device or building which causes or is maintained or operated so as to cause a violation of any provision of this Code to install any apparatus which can reasonably be expected to correct the violation, or to repair, properly maintain, replace or alter such facility, device or building in a manner which can reasonably be expected to correct the violation;

(c) Seal any facility, device or building which causes or is maintained or operated so as to cause a violation of any provision of this Code or regulations promulgated thereunder;

(d) Order any person to cease and desist from any activity which causes, or is conducted so as to cause, a violation of any provision of this Code, or any order or regulation promulgated thereunder;

(e) Impose a civil penalty not exceeding $1,000 for each day of the violation against any person who continues to violate this Code, or any order or regulation promulgated thereunder, after reasonable notice of said violations.

10. (a) Any person, other than a municipal employee authorized to serve summonses for a violation of this Code, may make a complaint to the Commission alleging that a person violated a provision of this Code, or order or regulation promulgated thereunder, together with evidence of such violation.

(b) Any person who submits a complaint pursuant to subsection (a) of this section shall be entitled to 25 per cent of any civil penalty collected from any proceeding arising from such complaint.

Article III. Water Pollution

It shall be unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into waters which are either wholly or in part within the boundaries of this municipality, any organic or inorganic material that shall cause or contribute to a condition in contravention of the standards adopted by the Commission.[84]

Article IV. Air Pollution

1. The purpose of this article is to eliminate all pollutants from the air which are found to be harmful to the health of the residents of this municipality.

2. No person shall cause or permit the emission into the open air from any source, whether fixed or mobile, and whether on land, air or water, of any harmful pollutant including, but not restricted to, smoke, soot, fly ash, dirt, fumes, gas vapors and odors,[85] unless certified by the Commission.

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84. The language of this section is essentially that of the N.Y. Pub. Health Law § 1220 (McKinney 1971).

85. The phrase "smoke, soot, fly ash, dirt, fumes, gas vapor and odors" is taken from New York City, N.Y. Ad. Code ch. 41, § 892-1.0 (Williams 1971).

3. The Commission shall promulgate ambient air standards consistent with the purpose of this article as set forth in section 1.

Article V. Noise Control

1. No person shall make, continue, cause or permit to be made or continued any unnecessary noise.[86]

2. Violations of this article shall include but not be limited to:

(a) Causing or permitting the use of sound reproduction devices such as to cause unnecessary noise;

(b) Causing or permitting the use of a claxon or air horn on a motor vehicle except as a sound signal of imminent danger;

(c) Causing or permitting the use of a burglar alarm incapable of automatically terminating its operation within 30 minutes of its being activated.

(d) Causing or permitting the use of a construction device in such a manner as to create a sound level exceeding the applicable level set by the Commission.

Article VI. Phosphates Banned

No detergent or other cleaning product containing a phosphorous compound shall be distributed or sold within the boundaries of this municipality.

Article VII. Waste Disposal

1. Every person being served by the municipal sanitation department must separate his disposable waste into four categories:[87]

(a) Paper;

(b) Glass;

(c) Metal containers; and

(d) Other.

2. If noncompliance with section 1 of this article is found pursuant to procedures set forth in article II, section 5, the Commission shall notify the municipal sanitation department to cease service to the violating person until the violator agrees to comply with the requirements of section 1 of this article.

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86. The regulation by a municipality of noise pollution was upheld by Fetch v. Police Justice Court, 7 App. Div. 2d 854, 181 N.Y.S.2d 904 (2d Dep't 1959).

87. A local ordinance requiring separation of different types of refuse was upheld in Silver v. City of Los Angeles, 217 Cal. App. 2d 134, 31 Cal. Rptr. 545 (2d Dist. 1963).

Article VIII. Aesthetic Environment

1. The purpose of this Article is to attain a harmonious and aesthetically pleasing environment for this municipality.[88]
2. No person shall install a billboard or illuminated sign larger than three feet by three feet without a certificate from the Commission.
3. The Commission shall set standards by which applications for a certificate pursuant to section 2 of this article shall be judged. In setting its standards, the Commission shall seek to fulfill the purpose of this article as stated in section 1 of this article.

Article IX. "Person" defined

Whenever used within this Code, the term "person" shall refer to any natural person, corporation or other legal entity.

88. The power of a locality to legislate with respect to the aesthetic environment was recognized in People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963), where an ordinance banning the hanging of laundry facing a street was found constitutional.