Do North Carolina Local Governments Need Home Rule?

Frayda S. Bluestein

North Carolina local governments do not have home rule. North Carolina often is described as a Dillon's rule state, but recent court decisions have made clear that this designation is not accurate.[1] So if North Carolina is neither a home rule state nor a Dillon's rule state, what kind of state is it, and how does it compare with other states? Would North Carolina local governments be better off with home rule authority?

North Carolina local governments are created by the state and derive all their powers by delegation from it. In this respect they are just like local governments in other states. Nationally, however, the scope and structure of local government powers varies. States often are characterized as being either home rule or Dillon's rule states.[2] "Home rule" refers to a state delegation of broad authority to local governments over matters of local concern. Dillon's rule, developed in the late 1800s by Judge John F. Dillon, is a rule governing judicial review of local government actions. The rule requires that the scope of authority delegated to local governments be narrowly construed. Unlike home rule, Dillon's rule does not actually describe the structure of local government powers in a state. Rather, when used to describe a state, it usually means that local powers are interpreted narrowly in the absence of a legislative directive for a broad interpretation.

This article describes how local government authority in North Carolina compares with local government authority in home rule states. North Carolina local governments have been delegated powers that probably are equivalent to those enjoyed by local governments in home rule states. But North Carolina's system of specific enabling legislation, together with inconsistent standards of judicial interpretation, contributes to a lack of clarity in local government administration. This article recommends legislative changes that, if implemented, would promote flexibility, efficiency, and predictability for local governments in carrying out the authority and responsibility the legislature has delegated to them under current law.

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Home Rule

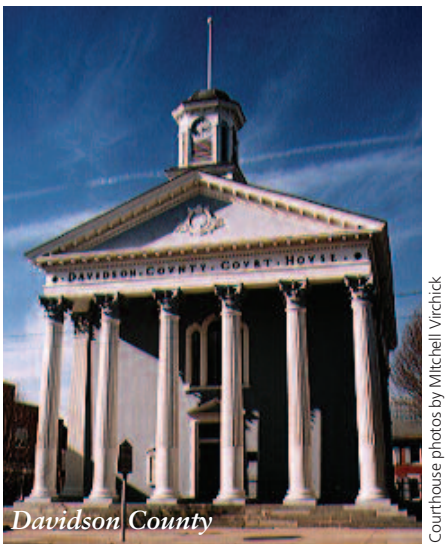
The U.S. Constitution allocates power between the federal government and the states. It does not mention local governments. Local governments are created by states and have no inherent rights either to their existence or to any particular grant of authority. As described by the U.S. Supreme Court in the landmark case *Hunter v. City of Pittsburgh*,

> *Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be [e]ntrusted to them . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent*


Person County


New Hanover County


Randolph County



Davidson County

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of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.[3]

Local government powers are established in state constitutions, state statutes, or some combination of the two. In home rule states, local government authority over local matters is delegated in broad terms, and local governments are not generally required to obtain specific authority for particular activities.[4]

All but a few states have some form of home rule authority.[5] The difference between states with and without home rule may be stated simply: in a state with home rule, local governments may act on matters of local concern unless a statute preempts local action; in a state without home rule, local governments may act on a matter only if a statute authorizes local action.

In addition to its eliminating the need for specific enabling authority, home rule often is understood to create a limitation on interference by the state legislature in matters of local concern.[6] A review of the constitutional and statutory provisions, judicial interpretations, and commentary about home rule suggests that home rule does not in fact create significant limitations on state legislative control over local government authority. As described later, both the legal structure in most home rule states and the judicial interpretations of home rule provisions preserve significant authority for statewide legislation preempting local authority.

Examination of the specific language of home rule delegations reveals that many of them actually reserve to the state substantial authority to legislate through general laws. A typical home rule grant authorizes a local government to "make and enforce local police, sanitary and other regulations *as are not in conflict with its charter or with the general laws*."[7] Similar formulations grant authority to local governments to determine their local affairs and government "not inconsistent with the laws of the General Assembly," and to authorize local charters "subject to and controlled by the general laws."[8] Other expressions of home rule provide authority over all local matters "not expressly denied by general law or charter" or "subject to such limitations as may be prescribed by the legislature."[9]

In some states, home rule is not provided for in the constitution but is purely a matter of legislative creation.[10] In these states the legislature has complete discretion in developing and modifying the scope of home rule authority that it has granted. Indeed, whether the home rule power originates in the constitution or in legislation, home rule powers often are shaped by lists of specific delegations, to which the local charters must conform.[11]

Clearly, then, the home rule authority granted is not absolute. Judicial interpretations about what issues are statewide and what issues are local, and about which local provisions are in conflict with general laws, sometimes have a narrowing impact on the scope of the home rule delegation. Litigation involving the scope of home rule authority also is affected by whether courts use Dillon's rule or a more generous standard of judicial review when analyzing the scope of local authority.

Most of the litigation in home rule states involves the issue of what constitutes a matter of statewide versus local concern. According to an authoritative treatise on local government law, "[t]here is no clear or workable test separating local from general concerns. Courts have acknowledged that there is considerable overlap in these two categories."[12] Matters of local concern sometimes are defined as those whose results affect "only the municipality itself, with no extraterritorial effects."[13] Although courts have generally concluded that structural and administrative functions internal to the local government are matters of local concern, a wide range of local government activities may be viewed as involving matters of statewide concern.[14] These may include police power regulations as well as local employment compensation and employment policies.[15]

As noted earlier, home rule delegations that require consistency with general laws reserve to the state substantial preemptive authority. Courts use the following analysis to determine whether local provisions conflict with general laws: a conflict exists if the local provision allows what state law prohibits, or prohibits what state law allows.[16] In some states the analysis tracks implied preemption, under which the local action is invalid if the court concludes that general laws indicate a legislative intent to foreclose local regulations on particular subjects.[17] Courts determining whether particular local actions conflict with general laws have reached different conclusions about whether a home rule provision authorizes local governments to go beyond a general law, or whether such action constitutes a conflict.[18]

Many home rule charters are limited by statewide general laws, so another important issue is whether these laws may preempt matters of purely local concern. A few constitutions specify the areas in which the state may regulate by general law, to which local charters must conform. In other states, courts have assumed that the state's authority is limited to matters of statewide concern.[19] In still other states, however, the law provides that the state legislature may enact laws on local matters as long as it does so by general laws, rather than by local or special laws.[20]

The Colorado Constitution is one of only a few specifically providing that local ordinances on matters of local concern override conflicting state laws.[21] In interpreting this provision, courts have acknowledged that some issues involve matters of mixed state and local concern, and a complex judicial standard has evolved. When the matter is of mixed concern, the local government may act as long as there is no conflict with state law. In the event of a conflict, state law supersedes.[22]

The Colorado Supreme Court applied this analysis in a case brought by two home rule cities challenging state uniform laws governing the use of red-light cameras.[23] Although prior case law held that traffic enforcement on local streets was a matter of local concern, the court found that the interest in uniformity justified state preemption. Strong dissents in this and another recent Colorado case suggest that, despite the court's attempt to set a definitive standard, clear delineations of appropriate spheres of authority in home rule states remain elusive.[24]

In addition to these structural limitations, judicial interpretation of home rule authority sometimes has had a limiting effect. Although the prevailing notion is that states have either home rule or Dillon's rule, courts in home rule states sometimes use Dillon's rule to interpret the scope of local government authority.[25] Some courts have held that the grant of home rule itself constitutes a rejection of Dillon's rule.[26] The presence of home rule authority, however, has not consistently guaranteed deferential review of local authority by the courts. Some states have enacted constitutional or statutory provisions that specify the appropriate standard for reviewing the scope of authority granted, in some cases explicitly rejecting the Dillon's rule formula in favor of a more liberal construction.[27]

In home rule states, local governments may act on matters of local concern unless state law prevents their doing so.

Despite structural and judicially created limitations, local governments in home rule states have successfully relied on their broad authority to support even controversial local initiatives. The Pennsylvania Supreme Court recently upheld a local policy extending employee benefits to employees' life partners against a challenge that the policy conflicted with state law defining marriage.[28] Home rule authority has supported city regulation and litigation regarding firearms use and manufacturing.[29] On the other hand, restrictions on lawsuits against gun manufacturers are among the general laws that limit local authority, even in home rule states.[30]

Home rule also has been interpreted to include the authority to use eminent domain for economic development purposes and to impose special assessments and fees to offset the cost of development.[31] Recent reaction to the U.S. Supreme Court decision in *Kelo v. City of New London,* however, has included proposed legislation that would limit use of eminent domain for economic development and would expressly preempt local authority even in home rule jurisdictions.[32]

Contemporary assessments of home rule in some states indicate that it provides much flexibility within the scope of powers that are not preempted.[33] However, *Home Rule in America: A Fifty-State Handbook,* based on a recent comprehensive national survey of local government home rule, suggests that expectations of autonomy through home rule have been largely disappointed. Numerous entries in this publication begin or end by noting such disappointment, referring to home rule as "more myth than reality" and observing that it has not resulted in freedom from "state interference."[34] The publication also notes that citizens in some home rule states have chosen not to pursue local government charters even when they have the option to do so by local initiative, and that the usefulness of home rule may be more influenced by the political, economic, historical, and other social factors present in a particular state than by the governing legal structures.[35]

Local Government Authority in North Carolina

Despite their lack of broad home rule delegation, North Carolina local governments have been delegated powers substantially equivalent to and in some cases greater than those enjoyed by local governments in states with home rule. As noted earlier, North Carolina local government authority exists by statutory delegation. Some provisions in the state constitution relate to local governments, but most of them either authorize the legislature to enact provisions relating to local governments or limit local government actions.[36] As the North Carolina Supreme Court has stated, "It is a well-established principle that municipalities, as creatures of statute, can exercise only that power which the legislature has conferred upon them."[37] Nothing in the constitution or other law limits the extent to which the state can withdraw or preempt authority previously delegated to local governments. Also, the scope of authority delegated and the possibility of implicit preemption are subject to interpretation by the courts.

In comparison with the broad delegations typical of home rule states, the requirement for specific statutory authority


Anson County


Alexander County


Cabarrus County

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Edgecombe County

in North Carolina local governments may seem restrictive. However, the statutory delegations in North Carolina—enabling laws in Chapters 160A (governing cities) and 153A (governing counties) of the North Carolina General Statutes (hereinafter G.S.)—actually encompass quite a broad range of powers and authority.

Most significant is a broad grant of regulatory authority. Under this delegation a city or a county may, by ordinance, "define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the [city or county]; and may define and abate nuisances."[38] For cities the statute requires that ordinances be consistent with the laws and the constitutions of North Carolina and the United States.[39] State courts have held that the same limitation applies to counties.[40] Beyond this limitation the broad grant of regulatory authority does not contain specific procedural or other limitations.

More specific statutes authorizing regulation also exist, such as those related to begging, sexually oriented businesses, noise, possession or harboring of dangerous animals, and removal and disposal of abandoned and junked motor vehicles.[41] Further, both cities and counties have extensive authority to regulate land use and development.[42] A separate statute provides that the enumeration of specific regulatory powers is not intended to limit the general authority granted in the broad-delegation statute.[43]

State statutes also authorize local governments to operate listed public enterprises and to operate other facilities, including libraries, public recreation facilities, hospitals, and animal shelters.[44]

Although the activities authorized for cities and counties have increasingly become overlapping, some activities only cities are authorized to conduct, and some activities, only counties.[45] Most notably, road construction and maintenance are limited to cities and the state, and counties have exclusive local responsibility for schools and a number of state-mandated functions, such as public health, mental health, and social services. Counties also have primary local responsibility for courts.

Local governments in North Carolina have authority to generate revenue through the property tax (subject to specific limitations regarding uses and amounts), local option sales taxes, special assessments (for listed purposes), user fees, and miscellaneous other local taxes and charges.[46] Cities and counties have specific authority to engage in a wide range of activities to promote local economic development.[47] North Carolina cities have authority to annex property, by petition from affected property owners and on their own initiative without approval of the property owners, subject to certain conditions relating to degree of development and ability to deliver services.[48]

North Carolina city and county governments have powers substantially equivalent to those enjoyed by their counterparts in home rule states.

Local governments, including cities and counties, have broad authority for interlocal cooperation, including the authority to exercise powers and engage in undertakings jointly, through joint agencies or through contracts.[49]

Cities and counties have authority for some purposes to establish separate entities, such as service districts or authorities, governed by the city council or the county board of commissioners, or its appointees, but with separate authority to tax, borrow, or regulate.[50] They also have authority to establish regional authorities to address issues as provided by specific statutes.[51]

With regard to certain structural aspects of local government, the legislature has delegated what might be considered home rule–type authority. City and county governing boards have authority to change, without legislative approval, specified aspects of the local government organization and structure, including the number, terms, and method of election of governing board members.[52] Cities have authority to change their name and "style"—that is, whether they are called city, town, or village.[53] These changes may be made by the governing board by ordinance, or on citizen initiative subject to a referendum.[54]

State laws are restrictive, however, regarding local government administrative functions, including public records, open meetings, finance (including budget preparation and adoption, and accounting and disbursement of funds), procurement, property disposal, conflicts of interest, and voting by the local governing board.[55] These laws generally apply to local governments (and in some cases, to state agencies) uniformly, without regard to the size of the jurisdiction, and they contain specific minimum requirements.

This summary of delegated authority in North Carolina illustrates the wide range of subjects that are both specifically and generally addressed in state law. For each process or activity to be undertaken by a local government, local attorneys and other officials must understand both the scope of authority granted and any procedural requirements that apply.

Thus, although the state legislature has delegated significant authority to address local and even extraterritorial matters, the form in which these delegations are made includes, in many cases, specific substantive and procedural limitations. The dual nature of these statutes, being both enabling and limiting, is of particular significance given the default presumption against inherent authority. Situations inevitably arise in which it is not clear whether a specific statute encompasses authority for a desired program or activity, and whether specific substantive or procedural limitations exclude similar options that are not enumerated.

When the authority for a particular activity is not clear, local governments may seek special legislation—a "local act"—to provide clear authority. Local governments also regularly seek special legislation to make local modifications to specific procedural limitations contained in the general law. Although the constitution prohibits local acts on certain subjects, local modifications affecting a wide range of subjects are easy to obtain.[56] As long as the legislators who represent the local government support the proposed change, the rest of the legislature will rarely oppose it. Indeed, legislators often view their support of

local legislation as a tangible constituent service. Also, the local act system, when used to authorize new or innovative programs or activities, arguably provides a kind of pilot system, allowing a few jurisdictions to try out new ideas before they are authorized statewide.

On the other hand, the legislative landscape that shapes local authority is made somewhat more complicated by the presence of local acts that modify authority for one or more units through provisions that are not incorporated into the codified general statutes. Local attorneys sometimes fear that the presence of a local bill specifically authorizing a particular power for a particular jurisdiction implies that the power does not otherwise exist in the general law.

Judicial Interpretation

Judicial review of local government authority also complicates matters for North Carolina local governments. Inconsistency in state court decisions on whether a challenged activity is authorized by state law has added to the complexity of the specific delegation system in North Carolina.

In a case involving an allegation that a local government action is invalid for lack of statutory authority, the role of the court often is to determine whether the challenged action is within the scope of authority granted, even though it may not be expressly enumerated in a statute. Also, a case may require an analysis of whether the action is preempted, either explicitly or implicitly, by other state legislation.

The basic job of the court, then, is to determine whether the legislature intended to authorize the challenged local action. Courts have created various rules for construing statutes, through which they determine how narrowly or broadly they should interpret specific delegations. In the absence of legislative statements expressing the legislature's intent regarding the standard of review, courts have historically applied a narrow standard.

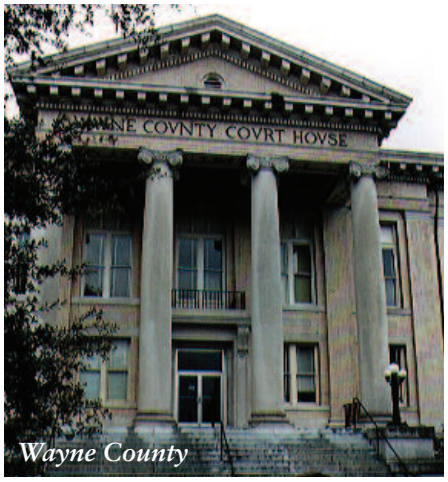
As noted earlier, Dillon's rule was specifically developed to address questions about the scope of local government authority. It states that local governments have and may exercise only those powers that are "granted in express words; . . . those necessarily or fairly implied in, or incident to the powers expressly granted; . . . and those essential to the declared objects and purposes of the corporation —not simply convenient, but indispensable."[57] The rule further provides that "any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."[58]

Although North Carolina courts have historically applied Dillon's rule in cases involving the scope of local government authority, since the early 1970s, state law has contained a provision expressing the legislature's intention that local government authority be broadly construed. The city provision reads as follows:

> *It is the policy of the General Assembly that the cities of this State should have adequate authority to exercise the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably expedient to carry them into execution and effect . . .*[59]

The statute contains the proviso that "exercise of such additional or supplemental powers shall not be contrary to the State or federal law or to the public policy of this State."[60] As noted earlier, statutes for both cities and counties also explicitly indicate that specific enumerations of regulatory powers are not exclusive and do not limit authority under the broader delegation of general ordinance-making authority.[61]

Despite this directive, North Carolina courts have continued intermittently to apply Dillon's rule (and other limiting constructions), even though the rule appears to be entirely inconsistent with the more generous standard in the statute.[62] As shown in a recent comprehensive analysis of Dillon's rule in North Carolina, the record of cases is quite mixed, both in terms of outcomes (that is, which activities have been held to be within the local government's authority and which have not) and,



Wayne County


Union County


Washington County

Polk County

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more importantly, in terms of the legal standards applied by the court.[63]

A watershed decision was rendered in 1994 when, in *Homebuilders Association of Charlotte v. City of Charlotte*, the North Carolina Supreme Court upheld Charlotte's imposition of fees for regulatory permits, specifically relying on the broad-construction statute and refusing to apply Dillon's rule.[64] This case did not end the judiciary's pattern of variable approaches, however. Later that year, in *Bowers v. City of High Point,* the supreme court used Dillon's rule to invalidate a local government employment benefit policy that went beyond the provisions of the statute governing benefits.[65] More recently, in *Smith Chapel Baptist Church v. City of Durham*, the supreme court ruled that imposition of fees for stormwater *programs* exceeded the authority granted to local governments to charge fees for utility *systems*.[66]

The most significant recent case in this area, *Bellsouth Telecommunications v. City of Laurinburg,* exhibits a valiant effort by the state's appellate court finally to bury Dillon's rule and to reconcile prior seemingly inconsistent rulings under a unifying standard for judicial review.[67] Followers of local government law may be cautiously optimistic about some strong statements in this case but hesitant to see them as a major step toward predictability.

The broad-construction statute has replaced Dillon's rule and should be applied in cases in which there is an ambiguity in the authorizing language.

In *Bellsouth Telecommunications* the North Carolina Court of Appeals held that the use of a municipal cable system for a fiber optic network was within the scope of authority granted to operate a "cable television system." Placing its rationale clearly within the *Homebuilders Association* precedent, the court relied on the broad-construction statute, holding that its language has replaced Dillon's rule and should be applied in cases in which there is an ambiguity in the authorizing language, or the powers clearly authorized reasonably necessitate "'*additional and supplementary powers' to carry them into execution and effect.*"[68] In reconciling the prior rulings in the *Bowers* and *Smith Chapel* cases, the court explained that Dillon's rule is appropriate "where the plain meaning of the statute is without ambiguity."[69]

Although the court's opinion provides a refreshingly honest look at the variable records of prior cases, how much predictability the newly enunciated standard will provide is uncertain. The focus will be on whether a particular statute is ambiguous or whether, instead, it has a plain meaning on which the court can rely to determine whether the authority in question has clearly been delegated.

Also, courts will be responsible for deciding when powers authorized "necessitate additional and supplementary power to carry them into execution and effect." What evidence the court will rely on in making this determination is difficult to discern. In the *Bellsouth Telecommunications* case, the court applied the new standard to determine whether a fiber optic network fell within the plain meaning of "cable television system" as defined in the enabling statute. Concluding that the language of the statute was ambiguous, the court applied the broad-construction rule. Although it recognized that the legislature could not have anticipated the technological developments that led to the issue presented, the court upheld the city's authority, concluding that "the legislature's intent in 1971 was to enable the municipality's public enterprise to grow in reasonable stride with technological advancements, as it is this advancement which marks the ever-approaching horizon of necessity."[70] A less sympathetic court might have concluded that the legislature could not possibly have intended to authorize technology that did not exist when the enabling law was enacted.

In cases analyzed under the new standard, the determination of whether a contested provision is ambiguous or clear may have a significant effect on the outcome. When statutes are clear, local governments are likely to argue (as they most certainly would have, had the *Smith Chapel* case been reviewed under this standard) that the challenged action is an "additional or supplemental power" necessary to carry the delegated authority into execution and effect. As noted earlier, the basis on which courts will determine the necessity of such power is not clear. The particular choice of wording in enabling legislation will acquire a new significance, and the legislature will not find it any easier to anticipate future local activities or innovations when developing that wording. Nor is the legislative process likely to provide more information that a court can use in determining whether additional or supplemental authority is necessary or whether the authority granted should be limited to its plain meaning using Dillon's rule.[71]

Recommendations

There are many subjective considerations involved in answering the question of whether North Carolina local governments need home rule. Some of these considerations are discussed in an expanded report of this research.[72] North Carolina local governments do not appear to *need* home rule, at least in the form that it exists in most states, in order to secure broader or more comprehensive authority over key local government issues. As stated earlier, the authority that local governments in North Carolina have is probably as broad as, and in some cases broader than, that in many home rule states. To the extent that home rule is seen as an avenue to freedom from state involvement in issues perceived to be local in nature, the sense of a need for home rule is probably misplaced. Home rule as it exists in most states simply does not place significant limitations on state preemption of local authority.

From a practical standpoint, any major change in the basic structure of state-local relations in North Carolina is unlikely. Local governments have been delegated substantial and broad powers, and the state relies on local governments to deliver essential services to the citizens of the state. North Carolina is known for having politically strong local governments that have historically enjoyed a good working relationship with the legislature. There is no political call for a constitutional amendment, and the legislature is unlikely to support any significant diminution in its ability to make statewide law in its discretion.

The specific delegation system in North Carolina, however, is complicated and may create more uncertainty in implementation than is necessary. The following recommendations are intended to improve flexibility, efficiency, and predictability for local governments in carrying out the powers delegated to them. These recommendations do not argue in favor of more substantive authority. Instead, they suggest ways of improving the system under which local governments carry out currently authorized activities.

1. Reduce unnecessary statutory detail. The legislature should impose on itself a practice of wording enabling legislation as broadly as possible, specifically avoiding substantive or procedural detail that does not promote important statewide policies. This practice would be consistent with the already stated policy that the legislature intends to delegate sufficient authority to "carry into execution and effect" the authorized activity.[73]

Particularly with respect to internal administrative functions, leaving procedural details to the local units seems appropriate. For issues such as when to require governing board approval of certain transactions and what methods to use for soliciting bids or disposing of property, local units should have flexibility to establish procedures appropriate to their size, staffing, and management philosophy. Even the author of the restrictive Dillon's rule believed that a more deferential standard of judicial review should apply to the mode adopted for carrying out authorized powers and that there should be no presumption against such decisions as long as they are reasonable.[74]

This recommendation could be implemented prospectively. Also, a process could be undertaken to review and recommend changes in existing law in order to establish a consistent degree of specificity. Implementation of this practice in drafting and amending enabling legislation could provide flexibility in local administration and might reduce the need for local bills modifying mandated procedures. The purpose of this recommendation is to draw attention at the state level to the trade-off between specificity in enabling statutes and flexibility in local administration.

2. Clarify the standard of judicial review. The legislature should clarify the scope and applicability of the broad-construction approach that courts must use in reviewing cases challenging local government authority. As noted earlier, the courts continue to struggle with the meaning of the broad-construction statute. Even the most recent interpretation, though perhaps more consistent with the statute's intent, requires use of Dillon's rule in cases in which the statute in question is not ambiguous. The use of ambiguity as a standard for determining when broad construction applies is unlikely to improve predictability and does not appear to be consistent with the legislative directive to include *additional powers* necessary to carry into effect the activity authorized.[75]

First, the legislature should clarify whether the broad-construction provision applies to authority granted outside the scope of G.S. Chapters 160A and 153A. As currently written, the directive for broad construction relates only to powers granted in those chapters and in local acts, including local charters. In reality, local government authority can be found in many important provisions outside the basic city and county statutes.[76] Although the legislature may not intend to extend the broad-construction language to some delegations, such as the authority to levy taxes, there is no logical basis for concluding that the standard should not apply to police power regulations that are authorized in other chapters. The legislature should revise the broad-construction directive so that it applies to all delegated powers except those exempted. Through this approach the legislature could specifically list any subjects, chapters, or specific grants of authority to which the directive would not apply, rather than letting the courts determine the statute's application beyond the basic city and county chapters.

Second, the legislature should revise the broad-construction statute to correct the ongoing variability in judicial review of local government authority. As noted earlier, even the most recent judicial interpretation of the statute falls short of fully implementing its language. Without diminishing the state's role in creating local government authority, or its power of explicit and implicit preemption, the legislature could clarify that courts must interpret broadly the powers that are delegated. This would mean explicitly stating that the plain meaning of the statute is not restrictive and that powers beyond those plainly delegated are included if they are necessary to carry out the authority delegated or if they are reasonably and appropriately related and not in conflict with other laws.[77]

Another approach would be to amend the broad-construction statute to create a presumption in favor of local authority. A statement that additional and supplemental powers shall be considered to be included unless specifically or implicitly preempted would, in effect, reverse the provision in Dillon's rule requiring any fair, reasonable doubt about whether authority exists, to be resolved against the local government. As noted earlier, this approach has been taken in several home rule states. The formulation seems more consistent with the legislative directive of broad construction than the approach most recently enunciated by the court. The effect of the presumption would be to place on a challenger the burden of demonstrating that the action is not reasonably related to delegated authority or is in conflict with other law.

This recommendation gives meaning and effect to the decades-old legislative statement of intention for broad construction. It suggests that, given a legislative directive for broad construction, it is more efficient for the legislature to preempt the areas in which authority is not intended, than for local governments to seek to delineate the scope of authority already granted.

3. Authorize local ordinances to conform city charters and county local acts to the general law. This final recommendation is for a minor procedural improvement that could be made with an amendment to the current statutes that allow local governments to make structural changes without legislative approval (discussed on page 18).[78] The legislature regularly approves local acts to align city charters and other local acts with the general law, but the need for legislative involvement is purely technical.[79] Charters are local acts of the legislature and can be amended only by

another local act. There should be no need for legislative approval, however, when the purpose of the amendment is to allow the local unit to follow the existing general laws.

Conclusion

Despite their lack of official recognition in the nation's federalist structure, local governments across the country, in states with and without home rule, clearly carry out important functions that affect the daily lives of citizens and are essential in the administration of state and federal programs. Authority granted to local governments is quite broad in both kinds of states. If the notion that local governments in North Carolina *need* home rule is based on an assumption that home rule would provide greater freedom from state preemption of local authority, the assumption is false. However, incorporation of some aspects of home rule authority into the North Carolina statutory structure could better effectuate the existing legislative directive for broad construction of local authority. The changes suggested in this article are designed to bring the law of local government authority in North Carolina, as it exists in statutes and cases, more in line with expressed legislative intent and to improve the ability of local governments to carry into effect the many functions and responsibilities that they have been delegated.

Notes

This is an abridged version of Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?* 84 North Carolina Law Review 1983 (2006).

1. *See* Bellsouth Telecomms. v. City of Laurinburg, 168 N.C. App. 75, 606 S.E.2d 721 (2005); Land Owners Ass'n v. Durham County, 630 S.E.2d 200, ___ N.C. App. ___ (2006).

2. *See* Jesse J. Richardson Jr. et al., Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management 1 (Washington, D.C.: Brookings Inst., 2003), available at www.brookings.edu/es/urban/publications/dillonsrule.pdf (hereinafter Brookings Report)("[M]ost writers, government officials and laypersons classify a state as either a Dillon [sic] Rule state or a home rule state").

3. Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907). This case involved a constitutional challenge by citizens of a town that was consolidated with Pittsburgh pursuant to the provisions of a state statute authorizing consolidation.

4. "Home rule" has been defined as "[t]he power of local self-government, or the power of local governments to deal with matters of local concern without having to turn to the state legislature for approval, as long as their actions do not contravene already defined state policies." Dale Krane et al., Home Rule in America: A Fifty-State Handbook 495 (Washington, D.C.: CQPress, 2000).

5. Only North Carolina and Virginia have no home rule provisions in either their constitutions or their statutes. Home Rule in America, a comprehensive analysis of local government authority in each state, identifies six of the fifty states as having no effective home rule. *Id.* at 476–77.

6. *See* Antieau on Local Government Law § 21.02 (Sandra M. Stevenson ed., 2d ed., New York: Matthew Bender, 1997).

7. Idaho Const. art. XII, § 2 (emphasis added).

8. Iowa Const. art. II, § 38A ("not inconsistent with . . ."); *see also* Ky. Const. § 156(b); Ohio Const. art XVIII, § 3; R.I. Const. art. XIII, § 2; Utah Const. art. XI, § 5. Wash. Const. art. XI, § 10 ("subject to and controlled by . . .").

9. N.M. Const. art X, § 6D ("not expressly denied by . . ."); *see also* Mo. Const. art. VI, § 19(a) (conferring all powers that legislature can confer if they are consistent with constitution and not limited or denied by statute); Mont. Const. art. XI, § 6 (conferring any power not prohibited by constitution, law, or charter); Neb. Const. art. XI, § 2 (conferring powers consistent with and subject to laws of state); Pa. Const. art. IX, § 2 (conferring on charter city "any power not denied by the charter, the General Assembly, or the constitution"). Tex. Const. art. II, § 5 ("subject to such limitations as . . .").

10. For examples of legislative home rule provisions, *see* Del. Code Ann. tit. 22, ch. 8; Ind. Code ch. 36.

11. *See, e.g.,* Ga. Const. art. IX, § III (listing specific powers granted); La. Const. art. VI, § 5(E) (conferring on home rule cities powers and functions necessary for management of local affairs "not denied by general law or inconsistent with the constitution" and listing specific powers granted); Mich. Const. art. VII, § 22 (listing specific powers granted, including procedural requirements, but with statement that enumeration is not limit on general grant of authority).

12. Antieau § 21.05.

13. Am. Fin. Servs. Ass'n v. Toledo, 830 N.E.2d 1233, 1242 (Ohio Ct. App. 2005).

14. Eugene McQuillin, Law of Municipal Corporations § 4.113 (Clark A. Nichols et al., rev., Wilmette, Ill.: Callaghan, 1949–).

15. Regarding police power regulations, under the standard in Ohio, "[a] state statute takes precedence over a local ordinance when 1) the ordinance is in conflict with the statute, 2) the ordinance is an exercise of the police power, rather than of local self-government, and 3) the statute is a general law." Canton v. State, 766 N.E.2d 963, 966 (Ohio 2002). Louisiana's constitutional home rule provision states, "Notwithstanding any provision of this Article, the police power of the state shall never be abridged." La. Const. art. VI, § 9(B). In New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002), the Louisiana Supreme Court relied on this provision to uphold a state statute that prohibited local governments from establishing minimum wage requirements for private employers. Regarding local employment compensation and employment policies, *see* City of Enid v. Public Empl. Relations Bd., 133 P.3d 281 (Okla. 2006) (holding that collective bargaining is matter of statewide concern); City of Buffalo v. N.Y. Public Empl. Relations Bd., 576 N.Y.S.2d 896, 898 (N.Y. 1975) (holding that compensation of public safety employees is matter of statewide concern).

16. City of New York v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006) (invalidating local provision prohibiting city from doing business with vendors that discriminated between spouses and domestic partners in providing benefits, as inconsistent with general law requiring award of contracts on basis of price or quality).

17. *See, e.g.,* Nordmarken v. City of Richfield, 641 N.W.2d 343, 348 (Minn. Ct. App. 2002); Sherwin-Williams Co. v. City of L.A., 844 P.2d 534, 536 (Cal. 1993).

18. *Compare* City of Portland v. Dollarhide, 714 P.2d 220, 228 (Or. 1986) (holding that higher penalty under local ordinance was invalid), *with* Savage v. Prator, 921 So. 2d 51, 54–56 (La. 2006) (summarizing cases under home rule upholding local regulations that created higher penalties or prohibitions), *and* Coastal Recycling v. Connors, 854 A.2d 711, 715 (R.I. 2004) (holding that argument that state has preempted by occupying field with statewide legislation was at odds with home rule provision in constitution).

19. *See* S.C. State Ports Auth. v. Jasper County, 629 S.E.2d 624 (2006) (2005 WL3941459 at 4) (concluding that permissive language indicates no legislative intent to occupy field to exclusion of local action).

20. *See* R.I. Const. art. XIII, § 3 (allowing legislation on local matters as long as it is done by general law); S.C. Const. art. VIII, § 14 (limiting general law to matters of statewide concern).

21. Colo. Const. art. XX, § 6.

22. Courts first determine whether the challenged law (state or local) involves a matter

of local, state, or mixed state and local concern. In cases involving a conflict between a state and a local provision on a matter of local control, the local provision supersedes, as provided in the constitution. If the matter is determined to be of statewide concern, the local provision is preempted unless the constitution or state statutes provide specific authorization to the locality to legislate in this area.

23. City of Commerce v. State, 40 P.3d 1273 (Colo. 2002).

24. *See id.* (Mullarky, J., dissenting). In Northglenn v. Ibarra, 62 P.3d 151 (Colo. 2003), the court determined that a local ordinance prohibiting unrelated or unmarried sex offenders from living together in a single family residence conflicted with and was preempted by state law (because it affected a statewide rather than a mixed state and local matter) regarding adjudicated children living in state-created foster homes. A dissenting judge wrote, "In my view, the majority analysis subtly misapplies our precedent in this area in a way that radically alters the relationship between home rule cities and the state, by virtually eliminating the area of mixed concern, in which both city and state had previously been permitted to legislate. Because I believe our well-established precedent requires not only that Northglenn's ordinance be considered the regulation of a matter of mixed state and local concern, but also that it be found to be consistent with state law, I would uphold the validity of the ordinance and reverse the district court." *Id.* (Coats, J., dissenting).

25. *See* Brookings Report at 17–18, finding that thirty-nine states employ Dillon's rule.

26. *See* Williams v. Town of Hilton Head, 429 S.E.2d 802, 805 (S.C. 1993).

27. *See* ALASKA CONST. art. X, § 1 (stating intention to provide for maximum local self-government and requiring that power granted be given liberal construction). Indiana's statutory home rule provisions and Iowa's constitution explicitly abrogate Dillon's rule. *See* IND. CODE ch. 36, § 1-3-4; IOWA CONST. art. II, § 38A.

28. Devlin v. City of Phila., 862 A.2d 1234 (Pa. 2004).

29. *See* City of New York v. Berretta, 315 F. Supp. 2d 256 (E.D. N.Y. 2004) (upholding city's authority to sue gun manufacturers); *see generally* Richard Briffault, *Home Rule for the Twenty-First Century,* 36 URBAN LAWYER 253, 254 (2004) n. 7 (summarizing cases upholding local gun regulations).

30. *See* IOWA CODE tit. IX; KY. REV. STAT. ANN. § 65.045; MONT. CODE ANN. § 7-1-115.

31. Gen. Bldg. v. Shawnee County, 66 P.3d 873 (Kans. 2003) (use of eminent domain); Boca Raton v. State, 595 So. 2d 25 (1992) (imposition of special assessments); Hospitality v. County of Charleston, 464 S.E.2d 113 (S.C. 1995) (imposition of special fees).

32. Kelo v. City of New London, 125 S. Ct. 2655 (2005). Examples of proposed legislation include S. 2683, 94th G.A., Reg. Sess. (Ill. 2006), available at www.ilga.gov/legislation/billstatus.asp?DocNum=2683&GAID=8&GA=94&DocTypeID=SB&LegID=23628&SessionID=50 (last visited July 14, 2006) (proposing preemption of home rule powers relating to use of eminent domain for economic development, and creation of statewide prohibition on use of eminent domain for economic development); and LEGISLATIVE TASK FORCE TO STUDY EMINENT DOMAIN AND ITS USE AND APPLICATION IN THE STATE, OHIO GENERAL ASSEMBLY, INITIAL FINDINGS (Columbus, Ohio: the Task Force, 2006), available at www.greaterohio.org/documents/ohio-ed-tf-inital-findings.pdf (last visited July 14, 2006) (proposing statewide definition of blight for use of eminent domain).

33. *See* Briffault, *Home Rule,* at 254 (summarizing cases upholding exercise of local authority under home rule in matters involving controversial issues such as local tobacco and firearm regulation, gay and lesbian rights, domestic partnership ordinances, campaign finance reform, and living-wage provisions).

34. From KRANE ET AL., HOME RULE IN AMERICA: Connecticut: "In many respects, local autonomy is a popular myth in Connecticut" (at 84); Florida: "[T]he meaning of home rule is dubious . . . [H]ome rule powers . . . are less than what they appear to be on paper" (at 94); Idaho: "Home rule in Idaho is more myth than reality" (at 120); Iowa: "For cities, the promise of home rule has been disappointing because it has not resulted in any significant independence from state interference" (at 148); Minnesota: "[I]n practice, the powers and form of governing in most home rule cities are similar to those found in statutory cities" (at 226); Mississippi: "[I]t is difficult to ascertain the implications of [home rule] provisions, since the constitution and statutes micromanage or mandate so many policies" (at 239); Nebraska: "[M]any observers believe that 'for all practical purposes, home rule in Nebraska does not really exist'" (citing Arthur B. Winter, *Nebraska Home Rule: The Record and Some Recommendations*, 59 Nebraska Law Review 626 (1980) (at 258); Nevada: "Home rule exists in name only" (at 269); New Mexico: "The notion that broad functional home rule exists is an exaggeration" (at 301); Tennessee: "[H]ome rule is just a concept, and one of limited importance in the realm of state-local relations . . . [I]t is difficult to argue that home rule municipalities have fared better fiscally or politically than their general law or private act counterparts" (at 397); Wyoming: "[M]any local officials believe that home rule has not turned out to be the gift originally intended" (at 462).

35. *See* HOME RULE IN AMERICA at 259, 383, 392 (Nebraska, South Dakota, and Tennessee) as examples of the trend of not pursuing charters.

36. *See, e.g.,* N.C. CONST. art. VII, § 1 ("The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable"); art. VII, § 3 (delineating authority of merged or consolidated local governments); art. V, § 2 (delineating scope of local authority to levy taxes and authorizing legislature to enact laws allowing local governments to contract with private parties for public purpose); art. V, § 4 (establishing limitations on local debt); art. II, § 24 (establishing limitations on local legislation).

37. Bowers v. City of High Point, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994).

38. G.S. 160A-174(a); G.S. 153A-121(a).

39. G.S. 160A-174(b). The statute enumerates conditions that would constitute inconsistency, essentially codifying the tests for explicit and implicit preemption that a court would apply.

40. *See* Craig v. County of Chatham, 356 N.C. 40, 45, 565 S.E.2d at 176 (2002); State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972).

41. G.S. 160A-179 (begging); G.S. 160A-181.1 (sexually oriented businesses); G.S. 160A-184 (noise); G.S. 153A-131 (dangerous animals); G.S. 160A-303 (cities), 153A-132 (counties) (abandoned or junked motor vehicles).

42. G.S. 160A art. 19 (cities); G.S. 153A art. 18 (counties). For an analysis of the statutory authority of North Carolina local governments in the area of smart growth initiatives, *see* David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina,* 35 WAKE FOREST LAW REVIEW 671 (2000).

43. G.S. 160A-177 (cities); G.S. 153A-124 (counties).

44. G.S. 160A-311 (cities), 153A-274 (counties) (public enterprises). Authorized public enterprises for both cities and counties are wastewater, water, public transportation, solid waste collection and disposal, off-street parking, airports, and stormwater management programs; and for cities only, electricity, cable television, and gas. G.S. 160A art. 18 (cities), 153A-444 (counties) (parks and recreation); G.S. 160A-493 (cities), 153A-442 (counties) (animal shelters);

G.S. 131E-7 (cities and counties, hospitals); G.S. 153A-263 (cities and counties, libraries).

45. *See* David M. Lawrence & Warren Jake Wicker, Municipal Government in North Carolina tab. 1-4 (2d ed., Inst. of Gov't, Univ. of N.C. at Chapel Hill, 1995), listing 44 services authorized for both cities and counties, 15 for counties only, and 8 for cities only.

46. G.S. 160A-209 (cities), 153A-149 (counties) (property tax); G.S. 105-465, -483 (cities and counties, local option sales taxes); G.S. 160A-216 (cities), 153A-185 (counties) (special assessments). Specific statutes authorize some user fees, as in the case of public enterprises (G.S. 160A-314, cities; G.S. 153A-277, counties). In Homebuilders Ass'n of Charlotte v. City of Charlotte, 336 N.C. 37, 442 S.E.2d 45 (1994), the North Carolina Supreme Court held that local governments have implicit authority to charge fees for regulatory programs.

47. G.S. 158-7.1 (authorizing construction of infrastructure, acquisition of property, and appropriation of funds to promote local industrial or commercial development). Current law does not authorize the use of eminent domain for economic development.

48. G.S. 160A art. 4A, pts. 1, 4 (noncontiguous areas, by petition of owners); G.S. 160A, art. 4A, pts. 2, 3 (on their own initiative).

49. G.S. 160A art. 20.

50. *See* G.S. 160A art. 23 (municipal service districts), art. 24 (parking authorities), art. 25 (public transportation authorities); G.S. 153A art. 16, pt. 1 (county service districts).

51. *See, e.g.,* G.S. 153A art. 22 (regional solid waste management authorities); G.S. 160A art. 27 (regional transportation authorities).

52. G.S. 160A art. 5, pt. 4 (cities); G.S. 153A art. 4, pt. 4 (counties).

53. G.S. 160A-101(1), (2). There are no classes of cities in North Carolina, so different styles do not indicate different levels of authority and do not have any other legal significance.

54. G.S. 160A-104 (cities); G.S. 153A-60 (counties). There are no other provisions for citizen initiative, recall, or referendum in the general laws governing North Carolina local governments, although a few local charters contain such provisions. *See* David M. Lawrence, *Initiative, Referendum, and Recall in North Carolina,* Popular Government, Fall 1997, at 8.

55. G.S. 132 (public records); G.S. 143 art. 33C (open meetings); G.S. 159 art. 3 (finance); G.S. 143 art. 8 (procurement); G.S. 160A art. 12 (property disposal); G.S. 14-234 (conflicts of interest); G.S. 160A-75 (cities), 153A-44, 45 (counties) (voting).

56. N.C. Const. art. II, § 24.

57. John F. Dillon, The Law of Municipal Corporations § 5, at 173 (2d ed., New York: James Cockcroft, 1873).

58. *Id.*

59. G.S. 160A-4; *see also* G.S. 153A-4 (counties).

60. G.S. 160A-4. The proviso is consistent with the preemption limitation contained in the general delegation of police power, as described earlier.

61. G.S. 160A-177 (cities); G.S. 153A-124 (counties).

62. *See, e.g.,* Porsh Builders v. City of Winston-Salem, 302 N.C. 550, 553–54, 276 S.E.2d 443, 445 (1981); Owens, *Local Government Authority,* at 694–96.

63. *See* Owens, *Local Government Authority,* at 679–700.

64. Homebuilders Ass'n of Charlotte v. City of Charlotte, 336 N.C. 37, 442 S.E.2d 45 (1994).

65. Bowers v. City of High Point, 451 S.E.2d 284 (1994). The reaction of local government attorneys to this apparent turnaround was well captured in the title of a review of the two decisions by A. Fleming Bell, II: *Dillon's Rule Is Dead: Long Live Dillon's Rule!* Local Government Law Bulletin no. 66 (1995). The directive to use a broad construction is in G.S. Chapters 160A (cities) and 153A (counties). Bowers involved a narrow interpretation of a statute in G.S. Chapter 143. A court may well determine that even if broad construction displaces Dillon's rule or another restrictive default standard of judicial interpretation, it does so only with respect to power explicitly contained in G.S. Chapters 160A and 153A.

66. Smith Chapel Baptist Church v. City of Durham, 350 N.C. 805, 517 S.E.2d 874 (1999). In this case the decision relied on application of the "plain meaning" rule of statutory interpretation.

67. Bellsouth Telecomms. v. City of Laurinburg, 168 N.C. App. 75, 606 S.E.2d 721 (2005).

68. *Id.* at 83, 606 S.E.2d at 726 (emphasis in original).

69. *Id.* ("[W]here the plain meaning of the statute is without ambiguity, it 'must be enforced as written'"), quoting *Bowers,* 339 N.C. at 419–20, 451 S.E.2d at 289.

70. *Bellsouth Telecomms.,* 168 N.C. App. at 86–87, 606 S.E.2d at 728.

71. The new standard was applied in Durham Land Owners Ass'n v. Durham County, 630 N.C. App. 200 (2006), which held that the county lacked statutory authority to collect school impact fees. Noting its responsibility to determine legislative intent of the enabling legislation, the court stated that "there is little case law or legislative action surrounding the statute." No. COA05-736 at 3 (June 6, 2006).

72. *See* Bluestein, *Do North Carolina Local Governments Need Home Rule?*

73. G.S. 160A-4 (cities); G.S. 153A-4 (counties).

74. John F. Dillon, Commentaries on the Law of Municipal Corporations 453 (5th ed., Boston: Little, Brown, 1911).

75. *See* G.S. 160A-4 (cities); G.S. 153A-4 (counties).

76. *See, e.g.,* G.S. 20 (motor vehicles); G.S. 108, social services; G.S. 113, 113A, 143 (environmental regulation and pollution control); G.S. 143 (competitive bidding); G.S. 143 (public safety officer employment benefits); G.S. 122C (mental health); G.S. 130A (public health); G.S. 157 (housing authorities); G.S. 158 (economic development); G.S. 159 (local government finance); G.S. 162 (water and sewer systems).

77. As noted earlier, this approach was used by North Carolina courts earlier in the state's history (*see* Owens, *Local Government Authority,* at n. 81, *citing* Smith v. City of New Bern, 70 N.C. 14, 19 (1874) ("[local governments] must have the choice of means adopted to ends and are not confined to any one mode of operation").

78. See G.S. 160A art. 5, pt. 4 (cities); G.S. 153A art. 4, pt. 4 (counties).

79. See, e.g., N.C. Sess. Laws 2005-143 (2005 Adv. Leg. Serv. no. 4) (repealing Beaufort County local act in order to conform law in that county to general laws); N.C. Sess. Laws 2005-145 (2005 Adv. Leg. Serv. no. 4) (conforming Town of Wrightsville Beach Charter to general law regarding appointment of board of adjustment).