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*Buffalo Law Review*

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## **Green Energy v. The Constitution: New York State's Battle with Home Rule Provisions in the Age of Environmentalism**

ALEXA L. ARCHAMBAULT<sup>†</sup>

In the era of metal straws, reusable grocery bags, and glass water bottles, there is no doubt society is becoming more and more environmentally conscious. This ecological ethos has manifested itself in huge policy shifts away from traditional fossil fuel energy and toward renewable energy, such as wind and solar power. Lawmakers throughout the world are making agreements and commitments aimed at decreasing reliance on fossil fuels. In the United States, New York State has taken a leading role in the quest toward renewable energy. With New York State's ambitious climate goals, though, have come serious encroachments on powers traditionally held by local governments.

To keep up with its robust environmental policy goals, New York has seized power away from municipalities regarding the siting of large-scale energy projects, such as wind and solar plants. The State has, slowly but surely, bestowed upon the executive branch the power to control energy siting. As a result, municipalities largely affected by these projects grapple for a voice, only to be silenced by unelected officials in Albany. Lawmakers have quelled local dissent through the use of “unreasonably

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burdensome” clauses nestled within the two controlling energy siting statutes. These clauses effectively allow State officials to ignore local laws or ordinances which conflict with a proposed energy siting project if they find the local legislation to be “unreasonably burdensome”—a term without a definition.

Many view the energy siting process embraced by New York as a violation of the “home rule” provisions found within the New York State Constitution. In short, the home rule provisions grant local governments a broad range of powers.<sup>1</sup> Despite these home rule powers, however, the jurisprudence of the New York State Court of Appeals suggests the broad and overreaching energy siting process implemented by the Legislature would preempt any local rules to the contrary.

This Comment provides an analysis of New York’s environmental policy, the statutory processes in place to approve large-scale energy siting projects, and proposed changes to the home rule jurisprudence embraced by New York courts to protect local interests and faithfully adhere to the Constitution’s home rule provisions. Part I details the evolution and current state of New York’s environmental policy. Part II discusses energy siting generally and the regime adopted in New York to approve large-scale energy siting projects. Part III discusses the home rule provisions found within the New York State Constitution, along with doctrines adopted by the courts which have limited their practical reach. Finally, Part IV argues New York courts should reconsider their jurisprudence surrounding home rule and, accordingly, invalidate the sections of the governing energy siting statutes which encroach upon local governments’ powers.

## I. NEW YORK’S EVOLVING ENVIRONMENTAL POLICY

While New York’s environmental conscience can be traced back to the 1800s,<sup>2</sup> it seems appropriate to include a more contemporary analysis of New York’s environmental policies. In April 1970, then-Governor Nelson Rockefeller signed a law which created the New York State

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1. See N.Y. CONST. art. IX, § 2(a) (“The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.”).

2. See generally Brad Edmondson, *Environmental Affairs in New York State: An Historical Overview*, NEW YORK STATE ARCHIVES (2001), [http://www.archives.nysed.gov/common/archives/files/mr\\_pub72.pdf](http://www.archives.nysed.gov/common/archives/files/mr_pub72.pdf).

Department of Environmental Conservation (“NYSDEC”).<sup>3</sup> Since its inception, NYSDEC has taken large steps toward improving the quality of New York’s air, land, and water. Some of its most notable measures have included creating comprehensive pesticide controls, forming a solid waste management plan, establishing a Pollution Prevention Unit to encourage businesses to reduce pollution, and reviewing the impacts of high-volume hydraulic fracturing, also known as “fracking”.<sup>4</sup>

New York governors have consistently placed emphasis on environmental protection policies. Governor Mario Cuomo, who served as governor from 1983 to 1994, boasted his dedication to environmental efforts by citing his role in ensuring high water quality standards, strictly enforcing water pollution laws, and increasing the budget of NYSDEC.<sup>5</sup> Mario Cuomo also signed an executive order, referred to as “community right to know,” which required 12,000 businesses to identify sites where they dumped toxic waste since 1952.<sup>6</sup> While activists appreciated Mario Cuomo’s environmental talking points, some believed he failed to follow through on them. “Cuomo articulates a very good environmental agenda . . . [b]ut . . . his performance hasn’t measured up,” said the executive director of a New York environmental lobbying organization.<sup>7</sup>

Governor George Pataki, who served as New York’s governor from 1995 to 2006, earned an impressive environmental rapport throughout his tenure. Pataki even obtained the endorsement from the New York League of Conservation Voters, a major environmental group, when he ran for reelection in 2002.<sup>8</sup> The group’s executive director said Pataki “has been an excellent environmentalist” and “is clearly the best environmental candidate for governor.”<sup>9</sup> Some of Pataki’s achievements included signing a \$1.75 billion bond act “to preserve open spaces, clean up waterways, close landfills and pay for other environmental projects”<sup>10</sup>

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3. *History of DEC: Highlights & Environmental Milestones*, N.Y. STATE DEP’T OF ENV’T CONSERVATION 2, [https://www.dec.ny.gov/docs/administration\\_pdf/dectimeline.pdf](https://www.dec.ny.gov/docs/administration_pdf/dectimeline.pdf) (last visited May 11, 2021).

4. *Id.* at 15.

5. See Elizabeth Kolbert, *Environmentalists Feel Cuomo Pulls His Punches*, N.Y. TIMES, July 13, 1986 (§ 4), at 6.

6. *Id.*

7. *Id.*

8. *Environmental Group Is Backing Pataki*, N.Y. TIMES, June 7, 2002 (§ B), at 8.

9. *Id.*

10. Raymond Hernandez, *Pataki Signs Bill for Environmental Bond Act Referendum*,

and preserving over one million acres of New York State land.<sup>11</sup> At the end of his final term, the *New York Times* wrote an opinion piece lauding Pataki's work to protect New York's endowed natural resources. The article stated, "[m]ost politicians are fortunate if they're remembered for one good thing. In the case of Gov. George Pataki, that will almost surely be his work for the environment."<sup>12</sup>

Governor Andrew Cuomo, elected in 2010 and son of former Governor Mario Cuomo, has zealously pursued an environmentally-conscious agenda throughout his tenure. In 2015, Andrew Cuomo famously banned fracking due to health and environmental concerns.<sup>13</sup> Cuomo also, to the pleasure of many environmental activists, banned single-use plastic bags.<sup>14</sup>

In July 2019, Andrew Cuomo's environmental efforts came to a peak when he signed the Climate Leadership and Community Protection Act ("CLCPA") into law.<sup>15</sup> This legislation, referred to by Cuomo as a "Green New Deal," implemented economy-wide renewable energy goals, including carbon-free electricity by 2040.<sup>16</sup> CLCPA has been called the "most aggressive climate change legislation in the nation."<sup>17</sup>

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N.Y. TIMES, Aug. 2, 1996 (§ B), at 4.

11. See Michael Cooper, *Land Deal to Push Pataki Over the Million-Acre Mark in Preservation of Open Space*, N.Y. TIMES (Dec. 21, 2006), <https://www.nytimes.com/2006/12/21/nyregion/21land.html>.

12. Opinion, *The George Pataki Era*, N.Y. TIMES (Dec. 31, 2006), <https://www.nytimes.com/2006/12/31/opinion/nyregionopinions/CIpataki.html>.

13. See Thomas Kaplan, *Citing Health Risks, Cuomo Bans Fracking in New York State*, N.Y. TIMES (Dec. 17, 2014), <https://www.nytimes.com/2014/12/18/nyregion/cuomo-to-ban-fracking-in-new-york-state-citing-health-risks.html>.

14. See Anne Barnard, *Get Ready, New York: The Plastic Bag Ban Is Starting*, N.Y. TIMES (Mar. 1, 2020), <https://www.nytimes.com/2020/02/28/nyregion/new-york-state-ban-plastic-bags.html>; see also *Bag Waste Reduction Law*, N.Y. STATE DEP'T OF ENV'T CONSERVATION, <https://www.dec.ny.gov/chemical/50034.html> (last visited Apr. 23, 2021) ("Plastic bag usage affects both our communities and environment. Plastic bags can be seen stuck in trees, as litter in our neighborhoods, and floating in our waterways. From the significant recycling and disposal issues they pose to the harm they can do to wildlife, the negative impacts of plastic bags are easily seen.").

15. David Roberts, *New York just passed the most ambitious climate target in the country*, VOX (July 22, 2019, 8:56 AM), <https://www.vox.com/energy-and-environment/2019/6/20/18691058/new-york-green-new-deal-climate-change-cuomo>.

16. *Id.*

17. James Gormley, *Cuomo signs most aggressive climate change legislation in the nation*, N.Y. STATE SENATE (July 18, 2019), <https://www.nysenate.gov/newsroom/in-the-news/todd-kaminsky/cuomo-signs-most-aggressive-climate-change-legislation-nation/>.

CLCPA contains ambitious climate goals. Specifically, it requires NYSDEC to commit to forty percent fewer greenhouse gas emissions in 2030 than in 1990.<sup>18</sup> It further requires NYSDEC to commit to eighty-five percent fewer greenhouse gas emissions in 2050 than in 1990.<sup>19</sup> Additionally, CLCPA established a climate action council, which is comprised of various experts and department heads.<sup>20</sup> The climate action council is responsible for creating a “scoping plan” to make recommendations on regulatory measures and other State actions to ensure the State’s greenhouse gas emissions limits are attained.<sup>21</sup>

Shortly after signing CLCPA into law, Andrew Cuomo also executed what he called “the nation’s largest offshore wind agreement” consisting of two offshore wind projects.<sup>22</sup> Cuomo stated this would provide enough energy to power over one million homes.<sup>23</sup>

It is against this backdrop—decades of environmentally friendly policies in New York State which have culminated in the creation of the Green New Deal—that the modern-day energy siting regime enters the scene. The energy siting regime and its focus on renewable energy is highly influenced by environmental concerns and directly impacted by CLCPA, as will be explained below.

## II. ENERGY SITING AND THE APPROVAL PROCESS: THE SHIFT TOWARD STATE CONTROL

### A. *What is Energy Siting and Why Does it Matter?*

According to the United States Environmental Protection Agency, the largest source of greenhouse gas emissions in the United States comes from burning fossil fuels.<sup>24</sup> Implementing more sources of renewable

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18. See N.Y. ENV’T CONSERV. LAW § 75-0107(1)(a) (McKinney 2020).

19. See *id.* § 75-0107(1)(b).

20. See *id.* § 75-0103(1).

21. *Id.* § 75-0103(13).

22. *Governor Cuomo Executes the Nation’s Largest Offshore Wind Agreement and Signs Historic Climate Leadership and Community Protection Act*, N.Y. STATE GOVERNOR (July 18, 2019), <https://www.governor.ny.gov/news/governor-cuomo-executes-nations-largest-offshore-wind-agreement-and-signs-historic-climate>.

23. See *id.*

24. See *Sources of Greenhouse Gas Emissions*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Apr. 23, 2021).

energy throughout New York State will, therefore, be crucial to achieving CLCPA's ambitious greenhouse gas reduction targets. Renewable energy, sometimes referred to as "clean energy" or "green energy," comes in many forms. Common examples of renewable energy are wind power, solar power, and hydropower.<sup>25</sup>

To achieve its CLCPA goals, New York has encouraged the siting of large-scale renewable energy facilities. The renewable energy facilities across New York vary in type and scale. One wind project that applied for approval in 2016, for example, sought to install over 140 industrial wind turbines 500 feet or taller in two rural upstate New York counties.<sup>26</sup> The project predicted it would produce up to 105,800 kilowatts of energy.<sup>27</sup> Another wind project that applied for approval in 2015 sought to install up to sixty-two wind turbines and would produce up to 126,000 kilowatts of energy.<sup>28</sup> A solar project that applied for approval in 2020, the "North Side Energy Center" proposal, sought to install a solar farm that would involve approximately 2,200 acres of land and produce an estimated 180,000 kilowatts of energy.<sup>29</sup>

The sheer size and scope of these projects necessitates some degree of governmental oversight. There are, therefore, state regulations at play to monitor and attempt to streamline the siting process for developers. In New York State, the process to approve large-scale energy projects used to be governed by Article 10 of the Public Service Law. The New York State Legislature, however, overhauled Article 10 in 2020, and the

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25. *Renewable Energy at EPA*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/greeningepa/renewable-energy-epa> (last visited Apr. 23, 2021).

26. See Invenergy, *Article 10 Preliminary Scoping Statement: Number Three Wind Farm 1, 3* (2016), <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-F-0328> ("Revised Preliminary Scoping Statement").

27. See *id.* at 3.

28. Environmental Design & Research, *Preliminary Scoping Statement: Cassadaga Wind Project 1* (2015), <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-F-0490&submit=Search+by+Case+Number> ("2015-09-03\_PSS\_Final") (Similar to other wind and solar projects, the project proposed not only the industrial wind turbines, but also "approximately 34 miles of associated collection lines (mainly below grade unless there are physical or environmental constraints, which will be described in the Application), approximately 19 miles of access roads, up to two permanent meteorological towers, one operation and maintenance (O&M) building, and up to four temporary construction staging/laydown areas.").

29. TRC, *Preliminary Scoping Statement: North Side Energy Center 14* (2020), <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=17-F-0598&submit=Search> ("Preliminary Scoping Statement").

process is now governed by Section 94-c of the Executive Law. Because some projects continue to proceed pursuant to Article 10 regulations, each regime will be explained in turn.

B. *Article 10: The Old, But Still Alive, Regime*

To spur the increase of renewable energy throughout New York, the Legislature passed Article 10 of New York's Public Service Law into law in 2011. According to the sponsor's memo, Article 10 "reinvigorates and streamlines the licensing process for the siting of [large] energy sources . . . in a manner that will meet the energy and reliability needs of the state's energy consumers."<sup>30</sup> Article 10, in large part, takes the power of energy project approval out of the hands of local municipalities and places them into the hands of the State.

Despite its overhaul in April 2020, Article 10 still governs projects which filed for approval before that date.<sup>31</sup> These projects may, however, choose to abandon Article 10 and opt-in to the new process, known as Section 94-c.<sup>32</sup> Many pending projects will likely jump ship to the new regime because, as will be explained below, it is even more streamlined and friendly to large developers than Article 10.

Article 10 vests the authority to approve energy projects, typically wind and solar plants, with a generating capacity of 25,000 kilowatts of energy or more into a body known as the "Siting Board."<sup>33</sup> The Siting Board is comprised of seven members: five appointed officials in Albany and two local representatives, known as "ad hoc" members.<sup>34</sup>

The five State officials on the Siting Board are: the Chairman of the New York State Department of Public Service, the Commissioner of the New York State Department of Environmental Conservation, the Commissioner of the New York State Department of Health, the Chairperson of the New York State Energy Research and Development Authority, and the New York State Commissioner of Economic Development.<sup>35</sup>

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30. *Senate Bill S5844*, THE N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2011/S5844> (last visited Apr. 23, 2021).

31. See N.Y. EXEC. LAW § 94-c (4)(e)(iii) (McKinney 2020).

32. See *id.* § 94-c(4)(f).

33. See N.Y. PUB. SERV. LAW § 161(2) (McKinney 2011).

34. *Id.* § 160(4).

35. *Id.*

The two ad hoc members of the Siting Board are residents of the municipality in which the energy project is proposed to be located.<sup>36</sup> Thus, the two ad hoc members change project-to-project, depending on the project's proposed location. Ad hoc members may not hold State or local office.<sup>37</sup> One ad hoc member is appointed by the president pro tempore of the New York State Senate and the other is appointed by the speaker of the New York State Assembly.<sup>38</sup> Both the president pro tempore of the Senate and the speaker of the Assembly are given a list of candidates to choose from for ad hoc member selection.<sup>39</sup> The list is comprised of four individuals nominated by the chief executive officer representing the municipality where an energy project is proposed and four individuals nominated by the chief executive officer representing the county.<sup>40</sup>

If the president pro tempore of the Senate or the speaker of the Assembly fail to make their respective appointments within thirty days of nominations, the governor is tasked with the responsibility of appointing one or both ad hoc members from the list of candidates.<sup>41</sup> Finally, if the governor fails to appoint one or both of the ad hoc members within forty-five days of nominations, the Siting Board will proceed without one or both ad hoc members, forgoing any local representation on the Siting Board.<sup>42</sup>

The entire regulatory scheme surrounding Article 10 can be broken down into a four-step process.<sup>43</sup> First is the public involvement program, in which “[d]evelopers are required to implement public involvement programs in their respective host communities at least 150 days before submitting their preliminary scoping statement and official applications

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36. *Id.*

37. *Id.* § 161(3).

38. *Id.* § 160(4).

39. *Siting Board - Frequently Asked Questions*, N.Y. STATE DEP'T OF PUB. SERV., <http://www3.dps.ny.gov/W/PSCWeb.nsf/all/BCE89BD8C61D9D4B85257E200054A99A?OpenDocument> (last visited Apr. 23, 2021).

40. *Id.*

41. PUB. SERV. § 161(2).

42. *Id.*

43. *Article 10*, N.Y. STATE ENERGY RES. & DEV. AUTHORITY, <https://www.nysersda.ny.gov/All-Programs/Programs/Clean-Energy-Siting/Siting-for-Large-Scale-Renewables/Article-10> (last visited Apr. 23, 2021).

to the Siting Board.”<sup>44</sup> Second is the preliminary scoping statement, which is “a written document informing the Siting Board, other public agencies, and the community about the project.”<sup>45</sup> Third is the formal application, in which developers “submit a formal Article 10 application to the Siting Board, which includes the same information as the preliminary scoping statement but in greater detail.”<sup>46</sup> Finally comes the Siting Board decision.<sup>47</sup> The Siting Board is required to make a final decision within twelve months of the date that a developer’s application is deemed complete.<sup>48</sup>

Most of the controversy surrounding Article 10 is based upon its “unreasonably burdensome” clause. This clause effectively grants the Siting Board authority to circumvent local ordinances that it finds “unreasonably burdensome” to the approval of large energy projects.<sup>49</sup> The clause specifically states “the [Siting] board may elect not to apply, in whole or in part, any local ordinance, law, [or] resolution . . . if it finds that, as applied to the proposed facility, such is unreasonably burdensome.”<sup>50</sup> The term “unreasonably burdensome” is not defined within Article 10, giving the Siting Board broad authority to ignore local ordinances.<sup>51</sup>

### C. Section 94-c: The New Regime

The New York legislature eventually overhauled Article 10.<sup>52</sup> In April 2020, the Accelerated Renewable Energy Growth and Community Benefit Act passed into law through the State’s yearly budget. The Act is codified in Section 94-c of New York’s Executive Law and is often referred to as “Section 94-c”.<sup>53</sup> Section 94-c was a “major step toward achieving the goals set forth in the . . . [CLCPA]”<sup>54</sup> and streamlined the

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. N.Y. PUB. SERV. LAW § 168(3)(e) (McKinney 2011).

50. *Id.*

51. *Id.*

52. *See* N.Y. EXEC. LAW § 94-c (McKinney 2020).

53. *Id.*

54. *Major Overhaul of Large-Scale Renewable Energy Project Permitting Included in*

approval process of large-scale energy siting projects even more than Article 10.<sup>55</sup>

Most notably, Section 94-c abandoned the Siting Board, which was at the heart of the Article 10 legislation, and transferred energy siting approval entirely to the executive branch. Section 94-c established a new office within New York's Department of State called the Office of Renewable Energy Siting ("ORES").<sup>56</sup> The executive director of ORES, instead of the Siting Board, is now responsible for "evaluating, issuing, amending, approving the assignment and/or transfer of siting permits" for large-scale energy projects with a generating capacity of 25,000 kilowatts or more.<sup>57</sup> Section 94-c placed the permitting process into the hands of an individual executive director, thereby saving the time and energy that was previously required to identify and prepare the Siting Board.<sup>58</sup> Section 94-c provided ORES one year to establish uniform standards for the siting of major renewable energy facilities.<sup>59</sup>

Section 94-c established a mandatory public comment period which lasts for sixty days after an application is submitted to ORES.<sup>60</sup> The municipality must submit a statement asserting whether the project conflicts with one or more local ordinances.<sup>61</sup> If the project does, in fact, conflict with one or more local ordinances, ORES must hold an adjudicatory hearing "to hear arguments and consider evidence with respect thereto."<sup>62</sup> Unfortunately for local municipalities, though, Section 94-c preserves the broad and ambiguous "unreasonably burdensome" clause from Article 10. Specifically, Section 94-c states:

A final siting permit may only be issued if the office makes a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions would comply with applicable laws and regulations. In making this determination, the office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it

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*New York State Budget Bill*, HODGSON RUSS (Apr. 2, 2020), <https://www.hodgsonruss.com/newsroom-publications-11826.html> [hereinafter *Major Overhaul*].

55. *See id.*

56. *See* EXEC. § 94-c(1).

57. *Id.* § 94-c(3).

58. *See Major Overhaul*, *supra* note 54.

59. EXEC. § 94-c(3)(b).

60. *Id.* § 94-c(5)(c)(i).

61. *Id.* § 94-c(5)(c)(ii).

62. *Id.* § 94-c(5)(d) (emphasis added).

makes a finding that, as applied to the proposed major renewable energy facility, it is *unreasonably burdensome* in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.<sup>63</sup>

In other words, even if ORES determines a project completely violates a local law or ordinance, the project still may be approved if ORES finds the law or ordinance “unreasonably burdensome”—a term which, like in Article 10, remains undefined by the statute. This clause effectively strips away any local control over whether large energy projects, which often alter the character of an entire community, will be installed. The “unreasonably burdensome” clause is even more troubling in the context of Section 94-c than in Article 10 because the decision to invoke this clause rests solely in the hands of the ORES executive director. The Article 10 process, at least, allowed for local voices to be a part of the approval process through the ad hoc membership of the Siting Board.

Section 94-c does somewhat acknowledge local governments in that it provides for an intervenor fund, which is a fund designed to help local governments study the potential impact of a proposed project.<sup>64</sup> In the same breath, though, Section 94-c again limits the power of local governments through its “scope of section” provision.<sup>65</sup> This provision states, in pertinent part:

Notwithstanding any other provision of law . . . no other . . . municipality or political subdivision or any agency thereof may, except as expressly authorized under this section or the rules and regulations promulgated under this section, require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility with respect to which an application for a siting permit has been filed, provided in the case of a municipality, political subdivision or an agency thereof, such entity has received notice of the filing of the application therefor.<sup>66</sup>

Section 94-c, even more so than Article 10, vests power almost exclusively in Albany regarding the approval of large-scale energy projects. This is despite the fact that most of these projects occur in small, rural communities throughout the state.<sup>67</sup>

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63. *Id.* § 94-c(5)(e).

64. *See id.* § 94-c(7).

65. *See id.* § 94-c(6)(a).

66. *Id.*

67. *See Applications Approved*, N.Y. STATE DEP'T OF PUB. SERV., <https://www3.dps.ny>

## III. THE HOME RULE DOCTRINE IN NEW YORK STATE

A. *Home Rule Within the New York State Constitution*

The New York State Constitution contains what are known as home rule provisions. Embodied in Article IX, Section 2, the provisions grant seemingly broad authority to local municipalities.<sup>68</sup>

The doctrine of home rule has been a constitutional principle in New York State since the nineteenth century.<sup>69</sup> The doctrine “grant[s] local governments affirmative lawmaking powers, while carving out a sphere of local autonomy free from State interference.”<sup>70</sup> Support for municipal self-government emerged in the late nineteenth century.<sup>71</sup> The movement for municipal self-government “sought to vest control of local affairs in the hands of municipal authorities, free from extensive interference by State officials.”<sup>72</sup>

Specifically, the New York State Constitution states that “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government.”<sup>73</sup> A general law is defined as “[a] law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages.”<sup>74</sup>

Further, the home rule provisions state that a local government has the power to adopt local laws in ten specific areas, regardless of whether they relate to its property, affairs, or government, including: the powers and duties of its officers and employees;<sup>75</sup> the membership and

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.gov/W/PSCWeb.nsf/All/ED227D547EF2B1B985258221006A32EB?OpenDocument (last visited Apr. 23, 2021).

68. N.Y. CONST. art. IX, § 2.

69. *Report and Recommendations Concerning Constitutional Home Rule*, N.Y. STATE BAR ASS'N 1–2 (2016), <https://nysba.org/app/uploads/2020/02/COSC-Report-on-Home-Rule-final-approved-by-the-House-1.pdf>.

70. *Id.* at 2.

71. Note, *Home Rule and the New York State Constitution*, 66 COLUM. L. REV. 1145, 1145 (1966).

72. *Id.*

73. N.Y. CONST. art. IX, § 2, cl. (c).

74. N.Y. CONST. art. IX, § 3, cl. (d)(1).

75. N.Y. CONST. art. IX, § 2, cl. (c)(1).

composition of its legislative body;<sup>76</sup> the transaction of its business;<sup>77</sup> the incurring of its obligations;<sup>78</sup> the presentation, ascertainment, and discharge of claims against it;<sup>79</sup> the acquisition, care, management, and use of its highways, roads, streets, avenues, and property;<sup>80</sup> the acquisition of its transit facilities and the ownership and operation thereof;<sup>81</sup> the levy, collection and administration of local taxes authorized by the legislature;<sup>82</sup> the wages or salaries of persons employed by any contractor or sub-contractor performing work, labor, or services for it,<sup>83</sup> and the government, protection, order, conduct, safety, health and well-being of persons or property therein.<sup>84</sup>

The home rule doctrine, despite its seemingly broad scope, has been limited over the years by New York State courts.<sup>85</sup> Two court-developed doctrines—“preemption” and “State concern”—have limited the autonomy the New York Constitution appears to grant to local governments.<sup>86</sup>

#### B. *Preemption: Express and Implied*

The first doctrine that has impacted the home rule doctrine is preemption.<sup>87</sup> The preemption doctrine “represents a fundamental limitation on home rule powers.”<sup>88</sup> The preemption doctrine essentially states that where New York State and local law conflict, State law will

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76. N.Y. CONST. art. IX, § 2, cl. (c)(2).

77. N.Y. CONST. art. IX, § 2, cl. (c)(3).

78. N.Y. CONST. art. IX, § 2, cl. (c)(4).

79. N.Y. CONST. art. IX, § 2, cl. (c)(5).

80. N.Y. CONST. art. IX, § 2, cl. (c)(6).

81. N.Y. CONST. art. IX, § 2, cl. (c)(7).

82. N.Y. CONST. art. IX, § 2, cl. (c)(8).

83. N.Y. CONST. art. IX, § 2, cl. (c)(9).

84. N.Y. CONST. art. IX, § 2, cl. (c)(10).

85. *Report and Recommendations Concerning Constitutional Home Rule*, *supra* note 69, at 3.

86. *See id.*

87. *See Adopting Local Laws In New York State: James A. Coon Local Government Technical Series*, N.Y. STATE DIV. OF LOC. GOV'T SERVS. 1, 6–7 (2015), [https://www.dos.ny.gov/lg/publications/Adopting\\_Local\\_Laws\\_in\\_New\\_York\\_State.pdf](https://www.dos.ny.gov/lg/publications/Adopting_Local_Laws_in_New_York_State.pdf).

88. *Albany Area Builders Ass'n v. Town of Guilderland*, 546 N.E.2d 920, 922 (N.Y. 1989).

prevail if the State has manifested either explicit or implied intent to occupy the field.<sup>89</sup>

The “preemption” doctrine is illustrated well by *Albany Area Builders Ass’n v. Town of Guilderland*.<sup>90</sup> In *Albany Area Builders*, a town board passed the Transportation Impact Fee Law (“TIFL”).<sup>91</sup> TIFL required applicants for building permits to pay a transportation “impact fee” if they sought to make a change in land use that would generate additional traffic.<sup>92</sup> The New York State Court of Appeals held that State law preempted the local law, and thus rendered the local law invalid.<sup>93</sup> The court stated that “[w]hile localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies ‘the untrammelled primacy of the Legislature to act with respect to matters of State concern.’”<sup>94</sup>

The preemption doctrine, according to the *Albany Area Builders* court, applies where there is an express conflict between New York State and local law and in cases where New York State law has impliedly intended to occupy the field.<sup>95</sup> Here, the court held the New York State legislature impliedly intended to occupy the field when it enacted a “comprehensive and detailed regulatory scheme” regarding highway funding.<sup>96</sup> Therefore, because the two laws conflicted, the New York State legislation preempted the local legislation.<sup>97</sup>

In another case involving the preemption doctrine, *Vatore v. Commissioner of Consumer Affairs*,<sup>98</sup> the New York State Court of Appeals upheld a local law after it was challenged on preemption grounds. The local law at issue in *Vatore* prohibited tobacco product vending machines in public places other than taverns.<sup>99</sup> A tobacco

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89. *See id.*

90. 546 N.E.2d at 922.

91. *Id.* at 921.

92. *Id.*

93. *Id.* at 923.

94. *Id.* at 922 (quoting *Wambat Realty Corp. v. State*, 362 N.E.2d 581, 586 (N.Y. 1977)).

95. *Id.*

96. *Id.*

97. *Id.*

98. 634 N.E.2d 958, 959 (N.Y. 1994).

99. *Id.* at 958.

vending machine operator, among others, sued a New York City official, arguing the local law was “inconsistent with, and therefore . . . preempted by, then-existing State statutes which regulated the sale and use of tobacco products.”<sup>100</sup> The relevant New York State legislation, the Adolescent Tobacco-Use Prevention Act, had the express purpose to restrict the availability of tobacco products, with the particular objective of discouraging tobacco use by adolescents.<sup>101</sup>

The Court of Appeals in *Vatore* thus analyzed whether the New York State law occupied the field of regulation of tobacco product distribution through vending machines, thus preempting local law.<sup>102</sup> Again, this preemption could be either explicit or implied.<sup>103</sup> The Court held that the New York State legislation neither explicitly nor impliedly preempted the local law at issue.<sup>104</sup>

Beginning with implied preemption, the *Vatore* court noted that in *Albany Area Builders*, local law was preempted where New York State law contained broad and detailed provisions explicitly limiting the amount of taxation for highway purposes.<sup>105</sup> In *Vatore*, by contrast, the New York State statutory scheme was neither broad nor detailed enough to determine the Legislature engaged in implied preemption, where the law merely stated its purpose was “to restrict the distribution of tobacco products for purposes of encouraging the use or sale of such products, to restrict the dispensing of tobacco products in vending machines, and to take other related actions in order to protect the health, welfare and safety of the people, especially adolescents.”<sup>106</sup>

Turning to explicit preemption, the New York State law in *Vatore*

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100. *Id.* at 959.

101. *Id.*

102. *Id.*

103. *See* *Albany Area Builders Ass’n v. Town of Guilderland*, 546 N.E.2d 920, 922 (N.Y. 1989).

104. *Vatore*, 634 N.E.2d at 961 (stating that “[the New York State law] has not preempted the entire field of regulation of vending machine distribution of tobacco products. The argument that Local Law No. 67 is invalid because it prohibits that which the State statute would allow is therefore without merit, as this general principle applies only where the Legislature has shown its intent to preempt the field”).

105. *Id.* at 960 (stating that “in *Albany Area Bldrs.*, the detailed provisions of State law explicitly limiting the amount of taxation for highway purposes and the manner of expenditure of such funds constituted a preemptive legislative scheme grounded in the need to safeguard the public fisc without distinction between localities”).

106. *Id.* at 960, 960 n.3.

did, in fact, contain a narrow express preemption provision giving preclusive effect to New York State law.<sup>107</sup> The Court noted, however, that “[u]nder generally applicable principles of statutory construction, the inference to be drawn from the Legislature’s having given preclusive effect to one section of [the New York State law] is a concomitant intention *not* to give preclusive effect to any other section of [the New York State law].”<sup>108</sup> Therefore, the court concluded that the New York State legislature’s inclusion of a limited express preemption provision, only applicable to one specific section of the legislation not at issue in this case, did not intend to preempt local regulation of the other areas covered by the legislation.<sup>109</sup>

In conclusion, the court in *Vatore* held that the New York State law did not preempt the entire field of regulation of vending machine distribution of tobacco products.<sup>110</sup> Therefore, the Court of Appeals upheld the local law.<sup>111</sup>

Finally, the New York Court of Appeals held in *Consolidated Edison Co. of New York v. Town of Red Hook*<sup>112</sup> that Article VIII,<sup>113</sup> which regulated the siting of major steam power plants, impliedly preempted a local law which imposed fees on proposed power plant facilities.<sup>114</sup> This case is especially relevant to energy siting, providing insight into how New York courts would analyze an Article 10 or Section 94-c claim.

In *Consolidated Edison*, a corporation recommended two sites for new major power plant facilities.<sup>115</sup> One of the proposed sites was partly within the Town of Red Hook and, in response, the town board enacted Local Law No. 2, which required a license from the town board to begin a site study.<sup>116</sup> This license required a fee and extensive data and faced the possibility of rejection if the town believed the project would be

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107. *Id.* at 960.

108. *Id.* (emphasis added) (relying on N.Y. STAT. LAW § 240 (McKinney 2018)).

109. *Id.*

110. *Id.* at 961.

111. *Id.*

112. 456 N.E.2d 487 (N.Y. 1983).

113. N.Y. PUB. SERV. LAW § 140 (McKinney 2011) (Article VII, enacted in 1972, was a predecessor to Article 10 and Section 94-c. Article VII expired on Jan. 1, 1989).

114. *Consolidated Edison*, 456 N.E.2d at 490.

115. *Id.* at 488.

116. *Id.*

“detrimental to town property, residents, wild life or ecology, or simply inconsistent with the town’s land use plan and zoning regulations.”<sup>117</sup> The issue was whether Local Law No. 2 was invalid because Article VIII of the public service law preempted the field of regulation concerning the siting of major steam power plants.<sup>118</sup> The court answered this question in the affirmative.<sup>119</sup>

The *Consolidated Edison* court began its analysis by noting that the intent of a state law to preempt local law need not be express, rather “[i]t is enough that the Legislature has impliedly evinced its desire to do so.”<sup>120</sup> The court therefore, without much explanation, conceded that Article VIII did not expressly preempt local law. The court came to this conclusion despite the existence of an “unreasonably restrictive” clause within the statute, which largely mirrors the “unreasonably burdensome” clauses of Article 10 and Section 94-c.<sup>121</sup>

A desire to preempt local law can be implied, the court stated, “from a declaration of State policy by the Legislature or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area.”<sup>122</sup> The court stated both applied here.

First, preemption may be implied from a declaration of State policy by the Legislature. Here, when the Legislature first enacted Article VIII in 1972, it declared that the regulation of major steam electric generating facilities was an uncoordinated process which resulted in delays, thus necessitating state control.<sup>123</sup> Further, the Legislature stated the purpose of Article VIII was “to provide for the expeditious resolution of all matters concerning the location of major steam electric generating facilities . . . in a single proceeding.”<sup>124</sup>

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117. *Id.*

118. *Id.*

119. *See id.* at 490.

120. *Id.*

121. *See* N.Y. PUB. SERV. LAW § 146(2)(d) (McKinney 2011) (“[T]he board may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standards or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is *unreasonably restrictive* in view of the existing technology or the needs of or costs to consumers whether located inside or outside of such municipality.” (emphasis added)).

122. *Consolidated Edison*, 456 N.E.2d at 490 (internal citations omitted).

123. *Id.*

124. *Id.*

Second, preemption may be implied from the comprehensive and detailed regulatory scheme. Here, the court concluded that Article VIII provided a comprehensive and detailed regulatory scheme without much explanation. In the court's defense, the statute was rather detailed and the court did outline the framework of the complex statute earlier in its opinion.<sup>125</sup>

Therefore, the *Consolidated Edison* court concluded, "the history and scope of [A]rticle VIII, as well as its comprehensive regulatory scheme, evidence the Legislature's desire to pre-empt further regulation in the field of major steam electric generating facility siting, a desire that would be frustrated by laws such as Local Law No. 2."<sup>126</sup>

The broad preemption jurisprudence embraced by New York State courts, in applying both implied and express preemption, is a major roadblock to the home rule powers enshrined in the New York State Constitution, even where the New York State legislature failed to make explicit its desire to preempt local laws and ordinances.

### C. *State Concern*

Another limitation on the home rule powers given to local governments in the New York State Constitution is the "State concern" doctrine.<sup>127</sup> This doctrine can be traced back to *Adler v. Deegan*,<sup>128</sup> a landmark case from the New York State Court of Appeals.<sup>129</sup>

In *Adler*, New York State passed a law, the Multiple Dwelling Act, to improve living conditions in tenements.<sup>130</sup> The Multiple Dwelling Act, however, only applied to cities with a population of 800,000 or more.<sup>131</sup> Because New York City was the only city in New York with a population of 800,000 or more at the time this case was decided, the legislation's regulations effectively only applied to New York City.<sup>132</sup> The Multiple

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125. *See id.* at 488–89.

126. *Id.* at 490.

127. *Report and Recommendations Concerning Constitutional Home Rule*, *supra* note 69, at 22.

128. 167 N.E. 705 (N.Y. 1929).

129. *Home Rule and the New York State Constitution*, *supra* note 71, at 1150.

130. *Id.*

131. *Adler*, 167 N.E. at 714 (Lehman, J. dissenting).

132. *Id.* (stating that "[t]he provisions 'hereinafter prescribed' apply in terms only to cities having a population of 800,000 inhabitants or more, except that the local legislative body of

Dwelling Act was “aimed at many evils, but most of all it [was] a measure to eradicate the slum[.]” said then-Chief Judge Benjamin Cardozo in a concurring opinion.<sup>133</sup> Cardozo continued, stating “[the Multiple Dwelling Act] seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwellings of the great metropolis.”<sup>134</sup>

In *Adler*, the Multiple Dwelling Act was challenged as an unconstitutional violation of the home rule provisions in the New York State Constitution.<sup>135</sup> Specifically, it was argued the Multiple Dwelling Act related to the “property, affairs, or government” of New York City and should therefore be deemed unconstitutional.<sup>136</sup>

Judge Crane, writing the majority opinion in *Adler*, upheld the constitutionality of the Multiple Dwelling Act.<sup>137</sup> Crane stated the health measures put into place by the Multiple Dwelling Act must be a matter of State concern because:

New York City, with its millions, is made up very largely of those who pass through it, or temporarily reside in it. It is a shifting population, scattering over all portions of the state and to the four corners of the earth. A pestilence, a disease, anything that affects the health and the welfare of the city of New York, touches almost directly the welfare of the state as a whole.<sup>138</sup>

The crux of the State concern doctrine comes not from *Adler*’s majority opinion, but rather from Cardozo’s concurring opinion. Cardozo stated, “[t]he test is rather this: That, if the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality.”<sup>139</sup> This test significantly undermined local governments’ ability to successfully rely on the home rule doctrine to preserve their powers.<sup>140</sup>

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any other city, town, or village may by local law adopt the provisions of the act, or may, at its will, ignore them. Since New York City is the only city in the state of New York with a population of 800,000 or more, at present the act in effect applies only to that city”).

133. *Id.* at 711 (Cardozo, J., concurring).

134. *Id.*

135. *Id.* at 706 (discussing a since-repealed version of the home rule doctrine in the New York State Constitution).

136. *Id.*

137. *Id.* at 708.

138. *Id.*

139. *Id.* at 714 (Cardozo, J., concurring).

140. See David Diamond, *Some Observations on Local Government in New York State*, 8

Despite the fact that *Adler* was decided before the current Article IX home rule powers could be found in the New York State Constitution, the Court of Appeals continued to apply the State concern doctrine as outlined in *Adler* even after they were added.<sup>141</sup>

In *Wambat Realty Corp. v. State*,<sup>142</sup> the New York State Court of Appeals applied Cardozo's State concern test. In *Wambat*, a potential developer of more than 2,200 acres of land in the Adirondack Park region sought a declaratory judgment that the Adirondack Park Agency Act, a New York State law, was invalid because it violated the home rule protections afforded to local governments in the New York State Constitution.<sup>143</sup> The issue was whether the Adirondack Park Agency Act, which included comprehensive zoning and planning legislation to ensure preservation and development of the Adirondack Park region's resources, was invalid because it encroached upon the zoning and planning powers of local governments.<sup>144</sup>

The court upheld the Adirondack Park Agency Act, concluding the legislation touched upon matters of State concern and thus was not barred by the home rule provisions found in the State's constitution.<sup>145</sup> The court noted the constitutional terminology defining home rule powers, specifically "property, affairs or government," had been the subject of much controversy.<sup>146</sup> Citing *Adler*, though, the court stated, "[e]merging . . . from that controversy is one definitive principle: that a proper concern of the State may also touch upon local concerns does not mean that the State may not freely legislate with respect to such concerns."<sup>147</sup> The court concluded that "the [Adirondack Park] Agency Act prevents localities within the Adirondack Park from freely exercising their zoning and planning powers. That indeed is its purpose and effect, not because the motive is to impair home rule, but because the motive is to serve a

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BUFF. L. REV. 27, 35 (1958) ("Adler v. Deegan sounded the virtual death-knell of home rule as its sponsors envisaged it"); W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 330 ("The [*Adler*] court strove to find the law valid, but in its striving it shattered home rule.").

141. *Report and Recommendations Concerning Constitutional Home Rule*, *supra* note 69, at 23.

142. 362 N.E.2d 581 (N.Y. 1977).

143. *Id.* at 582.

144. *Id.*

145. *Id.* at 586–87.

146. *Id.* at 584.

147. *Id.*

supervening State concern transcending local interests.”<sup>148</sup> The court in *Wambat Realty Corp.* ended with strong and definitive language, stating:

The short of the matter is that neither Constitution nor statute was designed to disable the State from responding to problems of significant State concern. In this case the controversy is between the State and the would-be developer of land for profit . . . Such a controversy is not resolvable by the principles designed to encourage strong, decentralized, local government in matters exclusively of local concern and to restrain the State from paternalistic interference with local matters. The issue is much larger. It is whether the State may override local or parochial interests when State concerns are involved. That issue is, and has been, resolved in favor of State primacy. *The price of strong local government may not be the destruction or even the serious impairment of strong State interests.*<sup>149</sup>

New York’s highest court also followed *Adler’s* State concern doctrine in *Town of Islip v. Cuomo*.<sup>150</sup> *Town of Islip* concerned a special law, which is “a State statute that in terms and in effect applies to one or more, but not all, counties.”<sup>151</sup> Specifically, the legislation in this case limited disposal of solid waste by landfill in Nassau and Suffolk Counties.<sup>152</sup> The court concluded, however, that although this New York State legislation related to the local governments’ property and could thus potentially fall within the home rule provisions of the New York State Constitution, it was instead a matter of State concern.<sup>153</sup> The court, therefore, held that the New York State legislation was not a violation of the home rule provisions of the New York State Constitution.<sup>154</sup>

The *Town of Islip* court included some important analysis on the issue of State concern. The court first noted the difficulty of trying to divide functions between State and local governments in terms of “property, affairs or government,” as outlined in Article IX, § 2 of the New York State Constitution.<sup>155</sup> “The difficulty and uncertainty,” noted the *Town of Islip* court, “arises from the fact that laws not directly related

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148. *Id.*

149. *Id.* at 586–87 (emphasis added).

150. 473 N.E.2d 756 (N.Y. 1984).

151. *Adopting Local Laws In New York State: James A. Coon Local Government Technical Series*, *supra* note 87, at 4.

152. *Town of Islip*, 473 N.E.2d at 757.

153. *Id.*

154. *Id.* at 761.

155. *See id.* at 758.

to the 'property, affairs or government' of a local government may nonetheless affect such property, affairs or government."<sup>156</sup> The court discussed Cardozo's State concern test from *Adler v. Deegan*, but noted that the test had evolved in later cases to become: "if 'the subject matter of the statute is of sufficient importance to the State generally to render it a proper subject of State legislation the State may freely legislate, notwithstanding the fact that the concern of the State may also touch upon local matters.'"<sup>157</sup> Even State legislation that has "a direct effect on the most basic of local interests" does not violate home rule if the legislation is a matter of State concern.<sup>158</sup>

The New York State legislature passed the law at issue in *Town of Islip* in an effort "to phase out landfilling as a solid waste management practice."<sup>159</sup> Further, the legislature stated the law was "essential to protect the integrity of Long Island's sole source aquifer."<sup>160</sup>

In *Town of Islip*, the court found that the State concern "[was] the protection of the drinking water for a substantial portion of the State's population and in an area which encompasses a substantial portion of the State's commerce and industry."<sup>161</sup> The court noted the New York State Constitution encourages the Legislature to protect natural resources, including minimizing water pollution.<sup>162</sup> Precedent also indicated the Legislature could regulate water supply of a locality without violating the

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156. *Id.* at 759.

157. *Id.*

158. *Id.* at 760.

159. *Id.* at 757.

160. *Id.*

161. *Id.* at 760.

162. *Id.* (citing N.Y. CONST. art. XIV, § 4, which states, "The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and of excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources. The legislature shall further provide for the acquisition of lands and waters, including improvements thereon and any interest therein, outside the forest preserve counties, and the dedication of properties so acquired or now owned, which because of their natural beauty, wilderness character, or geological, ecological or historical significance, shall be preserved and administered for the use and enjoyment of the people. Properties so dedicated shall constitute the state nature and historical preserve and they shall not be taken or otherwise disposed of except by law enacted by two successive regular sessions of the legislature.").

New York State Constitution’s home rule provisions, where the water supply “affected ‘the health and safety not only of the residents of [the local government], but of persons temporarily there [and did] not deal solely with the ‘property, affairs or government’ of [the local government.]’”<sup>163</sup>

In conclusion, the court held in *Town of Islip* that New York State legislation was not a violation of the home rule provisions of the New York Constitution based on the State concern doctrine.<sup>164</sup>

The New York State Court of Appeals also relied on *Adler’s* State concern doctrine in the 2013 case *Empire State Chapter of Associated Builders & Contractors v. Smith*.<sup>165</sup> In *Smith*, the New York State law at issue required “public entities seeking bids on construction contracts to obtain ‘separate specifications’ for three ‘subdivisions of the work to be performed’—generally, plumbing, electrical and HVAC.”<sup>166</sup> This law impacted every public contract exceeding \$50,000.<sup>167</sup> This law, therefore, made contracting more “burdensome and expensive” for public entities.<sup>168</sup>

The Legislature, however, amended this New York State law in 2008.<sup>169</sup> The amendment raised the \$50,000 threshold, but the increase was not uniform throughout the state.<sup>170</sup> The amendment increased the threshold to \$3 million in the five counties located in New York City; \$1.5 million in Nassau, Suffolk and Westchester Counties; and \$500,000 in the other fifty-four counties.<sup>171</sup> The plaintiffs here sued the New York State Commissioner of Labor, arguing that “the 2008 [amendment] violate[d] article IX, § 2 of the [New York] State Constitution (the Home Rule section) by unjustifiably favoring the eight counties with higher thresholds—i.e., by loosening . . . restrictions to a greater extent for them

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163. *Id.* (citing *Bd. of Supervisors of Ontario Cnty. v. Water Power & Control Comm’n*, 175 N.E. 300, 345–48 (N.Y. 1930)).

164. *Id.* at 761.

165. 992 N.E.2d 1067 (N.Y. 2013).

166. *Id.* at 1069 (referring to the Wicks Law).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

than for the other counties.”<sup>172</sup>

The *Smith* court, in upholding the 2008 amendment to the New York State law, held that “where the legislature has enacted a law of statewide impact on a matter of substantial State concern but has not treated all areas of the State alike, the Home Rule section of the State Constitution does not require an examination into the reasonableness of the distinctions the legislature has made.”<sup>173</sup>

In reaching its conclusion, the *Smith* court directly quoted Cardozo’s test from *Adler*, stating, “[t]he test is . . . that if the subject be in a substantial degree a matter of State concern, the Legislature may act, though intermingled with it are concerns of the locality.”<sup>174</sup> The *Smith* court further stated the New York State Court of Appeals has followed *Adler*’s State concern test in a number of previous cases and was thus justified in following it in *Smith*.<sup>175</sup>

Overall, the doctrine of State concern, similar to the doctrine of preemption, has greatly limited any enforcement of the home rule provisions of the New York State Constitution.

#### IV. PUTTING THE PIECES TOGETHER: APPLICATION TO MODERN-DAY ENERGY SITING

##### A. *Local Dissent to Energy the Siting Process*

Article 10 wreaked havoc on the ability of local governments to regulate their property and affairs, and Section 94-c centralized power in Albany to an even larger extent. Local governments and their constituents have been pushing back for years against this perceived encroachment upon their rights.

Many local opposition groups have formed against Article 10 projects. One example is Save Ontario Shores, Inc. (“SOS”).<sup>176</sup> SOS, a

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172. *Id.*

173. *Id.* at 1069.

174. *Id.* at 1071 (quoting *Adler v. Deegan*, 167 N.E. 705 (N.Y. 1929)).

175. *Id.* (citing to *Wambat Realty Corp. v. State*, 362 N.E.2d 581, 584 (N.Y. 1977); *Town of Islip v. Cuomo*, 473 N.E.2d 756, 759–60 (N.Y. 1984); *City of New York v. Patrolmen’s Benevolent Ass’n of N.Y., Inc.*, 676 N.E.2d 847, 851 (N.Y. 1996); and *Greater N.Y. Taxi Ass’n v. New York*, 993 N.E.2d 393, 913–14 (N.Y. 2013)).

176. See SAVE ONTARIO SHORES, INC., <http://lakeontarioturbines.com/> (last visited Apr. 23, 2021).

grassroots citizens group, formed in response to the proposal of Apex Clean Energy, Inc. (“Apex”) to build forty-five to seventy industrial wind turbines in Somerset and Yates, both rural towns in upstate New York.<sup>177</sup> Apex’s project has long been in the Article 10 approval process.<sup>178</sup>

SOS’s website features an entire page dedicated to why the organization opposes the large-scale wind projects poised to be approved under Article 10—and that Section 94-c would approve at a much quicker rate.<sup>179</sup> The group addresses concerns such as public health, tourism, property values, environmental issues, and disregard for home rule.<sup>180</sup>

Another grassroots group, Broome County Concerned Residents,<sup>181</sup> formed in response to the Bluestone Wind Farm Project, which was approved under Article 10 in December 2019.<sup>182</sup>

Broome County Concerned Residents members actively participated in town board meetings, voicing their opposition to the Bluestone Wind Farm Project (“Bluestone”).<sup>183</sup> Unfortunately for Broome County Concerned Residents, however, the Siting Board ignored local legislation and went on to approve Bluestone. The Town of Sanford, a New York town in Broome County, passed a local law implementing a moratorium on the construction or development of wind turbines and related equipment on any real property within its town.<sup>184</sup> The Siting Board,

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177. *See About Us*, SAVE ONTARIO SHORES, INC., <http://lakeontarioturbines.com/about-us/> (last visited Apr. 23, 2021).

178. *See Active Article 10 Queue*, N.Y. STATE BD. ON ELEC. GENERATION SITING & THE ENV’T, <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/763B187DD5A792DE8525847400667D6B?OpenDocument> (last visited Apr. 23, 2021).

179. *See Why We Oppose*, SAVE ONTARIO SHORES, INC., <http://lakeontarioturbines.com/why-we-oppose/> (last visited Apr. 23, 2021).

180. *Id.*

181. *See Residents Oppose a Proposed Wind Farm in Eastern Broome County*, BINGHAMTON HOMEPAGE (Apr. 9, 2019, 9:24 PM), <https://www.binghamtonhomepage.com/news/local-news/residents-oppose-a-proposed-wind-farm-in-eastern-broome-county/1911940201/>.

182. *Applications Approved*, N.Y. STATE BD. ON ELEC. GENERATION SITING & THE ENV’T, <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/ED227D547EF2B1B985258221006A32EB?OpenDocument> (last visited Apr. 23, 2021).

183. *See Residents Oppose a Proposed Wind Farm in Eastern Broome County*, *supra* note 181.

184. *See Siting Board Approves Broome County Wind Farm*, N.Y. STATE BD. ON ELEC. GENERATION SITING & THE ENV’T, [http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/ArticlesByCategory/6EADABC DAC2E3A65852584D20068862D/\\$File/pr19112.pdf?OpenElement](http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/ArticlesByCategory/6EADABC DAC2E3A65852584D20068862D/$File/pr19112.pdf?OpenElement) (last visited Apr. 23, 2021).

however, used the “unreasonably burdensome” clause of Article 10 to overrule the local legislation and go forth with approval of Bluestone, despite local dissent.<sup>185</sup>

B. *How New York State Courts Can Reclaim Home Rule*

The New York State Constitution’s home rule doctrine has very little enforcement power as New York courts have interpreted it, and with Section 94-c has come further encroachment on local governments’ authority to govern their own property and affairs. It is, therefore, critical for courts to recognize the impacts of the significant deterioration of home rule. The Article 10 and Section 94-c legislation provide the perfect opportunity for New York State courts to reclaim and revive home rule. Courts can do this in three ways: (1) reassess their express preemption jurisprudence; (2) abandon the implied preemption doctrine; and (3) clarify the State concern doctrine.

First, New York courts should look at express preemption through a more critical lens. As *Albany Area Builders* explained, “[w]here the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State’s transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute,” thus rendering the local law invalid.<sup>186</sup> This declaration relies upon the text of the New York State Constitution, which states, “every local government shall have power to adopt and amend local laws *not inconsistent with the provisions of this constitution or any general law* relating to its property, affairs or government.”<sup>187</sup> The current interpretation of express preemption, however, allows the Legislature to avoid any constitutional scrutiny by simply including broad language barring local autonomy—even if that law would strip a local government of substantial rights over its property, affairs, or government—within every single statute. This loophole cannot be acceptable, as it effectively nullifies the very purpose of the home rule doctrine. It is also notable that the New York Constitution explicitly states the “[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.” This clearly demonstrates the drafters’ deference toward local government power.

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185. *Id.*

186. *Albany Area Builders Ass’n v. Town of Guilderland*, 546 N.E.2d 920, 922 (N.Y. 1989).

187. N.Y. CONST. art. IX, § 2, cl. (c) (emphasis added).

The courts should instead interpret the home rule provisions to mandate a balancing test. On one side of the scale should be the policy interests behind the State pronouncement, and on the other should be the significance of the infringement upon a local government's right to regulate its property, affairs, or government—three areas specifically emphasized by the Constitution's text. This would restore confidence in the home rule powers enshrined in the Constitution and close a loophole that state lawmakers could otherwise use to triumph over local governments sans scrutiny.

Second, New York courts should abandon the implied preemption doctrine. Implied preemption has long been criticized, as it essentially substitutes judicial discretion for local government discretion.<sup>188</sup> Unlike express preemption, implied preemption has been created exclusively by the judiciary.<sup>189</sup> In 2008, former Lieutenant Governor Stanley N. Lundine chaired the New York State Commission on Local Government Efficiency and Competitiveness, which called for a constitutional amendment “prohibiting the judicial application of implied preemption.”<sup>190</sup> Implied preemption, as demonstrated by the aforementioned cases, allows courts to merely guess that New York State legislation meant to preempt local legislation, even where the legislation fails to expressly make such a statement.<sup>191</sup>

Implied preemption has been rejected by other state courts of last resort.<sup>192</sup> In *Municipality of Anchorage v. Repasky*,<sup>193</sup> Alaska's high court noted:

State law can also prohibit a municipality from exercising authority “by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.” *In general, for state law to preempt local*

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188. See Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 640 (2001).

189. *Id.* at 639–40.

190. *Report and Recommendations Concerning Constitutional Home Rule*, *supra* note 69, at 20–21.

191. See, e.g., *Consolidated Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487, 490 (N.Y. 1983) (holding that a local law, intended to impose fees on proposed major power plant facilities, was impliedly preempted by a New York State Law—Article VIII—and thus invalid).

192. See *Report and Recommendations Concerning Constitutional Home Rule*, *supra* note 69, at 21.

193. 34 P.3d 302 (Alaska 2001).

authority, it is not enough for state law to occupy the field. Rather, “[i]f the legislature wishes to ‘preempt’ an entire field, [it] must so state.”<sup>194</sup>

Additionally, in *City of Ocala v. Nye*,<sup>195</sup> the Florida Supreme Court suggested it does not recognize implied preemption.<sup>196</sup> Finally, Ohio’s highest court was clear about its rejection of implied preemption in *Cincinnati Bell Telephone Co. v. City of Cincinnati*.<sup>197</sup> The court in *Cincinnati Bell Telephone Co.* held “there is no constitutional basis that supports the continued application of the doctrine of implied preemption” and even went so far as to overturn precedent which relied on implied preemption.<sup>198</sup>

Refusing to recognize implied preemption would not make New York stand out amongst other states. Rather, as discussed above, other state courts similarly refuse to recognize the vague doctrine. Implied preemption expands the power of the State at the expense of the municipality. Moreover, implied preemption makes local governments wary with every local law they impose, not knowing whether or not it will be crushed by State law.<sup>199</sup>

Finally, New York State courts must constrain their State concern analysis to afford local governments their home rule powers and be faithful to the New York State Constitution. The current State concern jurisprudence is broad and “the line between matters of State concern and matters of local concern is increasingly indistinct.”<sup>200</sup> The New York State Court of Appeals even noted in *Empire State Chapter of Associated*

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194. *Id.* at 311 (emphasis added).

195. 608 So.2d 15 (Fla. 1992).

196. *Id.* at 17 (stating “The ‘Municipal Home Rule Powers Act,’ enacted by the legislature in 1973, states that as provided by the Florida Constitution municipalities ‘may exercise any power for municipal purposes, except when expressly prohibited by law.’ . . . Thus, municipalities are not dependent upon the legislature for further authorization, and legislative statutes are relevant only to determine limitations of authority.”).

197. 693 N.E.2d 212 (Ohio 1998) (where the issue was “whether a municipality is preempted by [Ohio law] from enacting a net profits tax.” The court held that “a tax enacted by a municipality pursuant to its taxing power is valid in the absence of an express statutory prohibition of the exercise of such power by the General Assembly.”).

198. *Id.* at 218.

199. See *21st Century Local Government*, N.Y. STATE COMM’N ON LOC. GOV’T EFFICIENCY & COMPETITIVENESS 1, 37 (2008) [https://www.cgr.org/consensusny/docs/NYS\\_LGEC\\_Report.pdf](https://www.cgr.org/consensusny/docs/NYS_LGEC_Report.pdf).

200. See *Report and Recommendations Concerning Constitutional Home Rule*, *supra* note 69, at 26–27.

*Builders & Contractors v. Smith*, “[a] great deal of legislation relates both to ‘the property, affairs or government of a local government’ and to ‘[m]atters other than the property, affairs or government of a local government’—i.e., to matters of substantial State concern.”<sup>201</sup> This extremely broad scope of State concern makes it nearly impossible for local governments to have any meaningful control over their property, affairs, or government.<sup>202</sup>

The State concern analysis desperately needs clarification by the New York courts. Some have suggested that the New York State Constitution should be amended “to clarify when a Home Rule message is not required; that is, to delineate the subject areas where the State could act on matters that affect localities because they may, in fact, be matters of substantial state concern.”<sup>203</sup> Further, “the State’s authority over these enumerated subject areas should not be as unfettered as it is[,]” but rather should be subject to judicial findings that the matter relates to a specific and substantial State interest and that there is “a more compelling connection than a mere rational relationship between the law and the specific substantial state interest.”<sup>204</sup> However, this type of reform could be easily accomplished by the courts, absent any constitutional amendment. New York courts merely need to elaborate on the State concern analysis to: (i) specify which areas of legislation implicate a substantial State concern, and (ii) require a narrow tailoring of that legislation to the State concern.

### C. *Applying a Revised Home Rule Jurisprudence to Energy Siting*

Were New York courts to honor the home rule provisions of the New York State Constitution and apply the aforementioned revised

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201. *Empire State Chapter of Associated Builders & Contractors, Inc. v. Smith*, 992 N.E.2d 1067 (N.Y. 2013).

202. See Michael A. Cardozo & Zachary W. Klinger, *Home Rule in New York: The Need for a Change*, 38 PACE L. REV. 90, 118 (2017) (“While there are certainly areas where local and state interests overlap, and at times where there may be a legitimate need for state intervention with (or even without) local consent, the substantial state concern doctrine has almost completely eviscerated article IX’s Home Rule protections.”); James D. Cole, *Constitutional Home Rule in New York: “The Ghost of Home Rule”*, 59 ST. JOHN’S L. REV. 713, 718 (1985) (“In virtually every subsequent judicial decision dealing with these matters, *Adler* has been cited for the proposition that as to matters of state concern, the legislature may act through the ordinary legislative process, unrestricted by the home rule provisions of the constitution.”).

203. Cardozo & Klinger, *supra* note 202, at 118.

204. *Id.*

jurisprudence, Section 94-c would be deemed unconstitutional.

First, an express preemption balancing test would find Section 94-c invalid. As a threshold matter, the State law must first expressly preempt local law. If it does, courts should employ a balancing test to determine whether the express preemption is valid. The balancing test should consist of weighing the policy interests behind the State pronouncement against the significance of the infringement upon a local government's right to regulate its property, affairs, or government.

Here, Section 94-c seems to expressly preempt local law, both in its "unreasonably burdensome" clause<sup>205</sup> and in its "scope of section" provision,<sup>206</sup> which lays out the scope of the section and directly addresses the powers of municipalities. There is, however, uncertainty regarding whether New York courts would even find that Section 94-c expressly preempts local law, given the holding in *Consolidated Edison*.<sup>207</sup> Assuming *arguendo*, though, that Section 94-c expressly preempts local law, courts should engage in the aforementioned balancing test.

The purpose of Section 94-c is to streamline the permitting of large-scale renewable energy projects and to provide a single forum to review proposed projects to meet the State's renewable energy goals—detailed in the Green New Deal—while ensuring environmental protection and considering relevant social, economic, and environmental factors.<sup>208</sup> On the other hand, despite the purpose of Section 94-c and its broad policy

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205. See N.Y. EXEC. LAW § 94-c(5)(e) (McKinney 2020) ("A final siting permit may only be issued if the office makes a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions would comply with applicable laws and regulations. In making this determination, the office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.").

206. See *id.* § 94-c(6)(a) ("Notwithstanding any other provision of law . . . no other . . . municipality or political subdivision or any agency thereof may, except as expressly authorized under this section or the rules and regulations promulgated under this section, require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility with respect to which an application for a siting permit has been filed, provided in the case of a municipality, political subdivision or an agency thereof, such entity has received notice of the filing of the application therefor.").

207. *Consolidated Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487, 490 (N.Y. 1983).

208. See EXEC. LAW § 94-c(1).

goal of increasing renewable energy production, the encroachment on local governments' power to regulate their property is severe in this case. Section 94-c effectively forces local governments to relinquish control of their land to large wind and solar corporations, if an appointed official in Albany allows it—even if a local government has passed specific legislation to ban that exact activity. A recent renewable energy policy goal surely does not outweigh the longstanding power of local governments to regulate their own property, which is a right sacred enough to be enshrined in the New York State Constitution.

The State's interest in achieving Green New Deal renewable energy goals is made easier by streamlining the permitting of large-scale renewable energy projects, but that interest can still be realized without such an aggressive encroachment upon local governments' rights. These goals may be achieved without the “unreasonably burdensome” clause. In practice, this would mean that the State would have to reject proposals for large-scale energy projects in municipalities that have adopted laws or ordinances expressly prohibiting such projects. This practice would still allow the State to achieve its goals, as energy projects could still be permitted in municipalities without conflicting local laws or ordinances, while also showing respect toward (1) the will of the people in select municipalities and (2) local governments' defined powers within the New York State Constitution.

If a local government passes an ordinance to limit the implementation of a major renewable energy facility in any way, the State can upend the ordinance with one swift action of the ORES executive director—an unelected Albany official—via the “unreasonably burdensome” clause. The ability to strike down local laws results in a suppression of the will of the people in smaller municipalities across New York State who do not want large energy projects in their communities. Local governments have a recognized power to regulate their property and affairs,<sup>209</sup> and further defined power regarding “[t]he acquisition, care, management and use of its highways, roads, streets, avenues and property.”<sup>210</sup> Here, Section 94-c contradicts this power in a direct manner and inhibits the ability of a local government to manage large swaths of its own property.

Second, the elimination of implied preemption would result in a dismantling of Section 94-c. The case of *Consolidated Edison Co. of New*

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209. N.Y. CONST. art. IX, § 2, cl. (c).

210. N.Y. CONST. art. IX, § 2, cl. (c)(6).

*York v. Town of Red Hook*<sup>211</sup> involves legislation most similar to Section 94-c. In *Consolidated Edison*, the New York State legislation at issue was Article VIII, a predecessor of sorts to Article 10 and Section 94-c.<sup>212</sup> Article VIII set up a Siting Board to certify all new major steam electric generating facilities and provided that “all interests involved in the decision as to where such facilities should be located . . . are to be balanced by one decision-maker, the Siting Board, in one proceeding, an application before that board.”<sup>213</sup> The New York State Court of Appeals noted that Article VIII, which was similar to Article 10, did not explicitly preempt local law.<sup>214</sup> The *Consolidated Edison* court, however, found that Article VIII impliedly preempted local law by relying upon the history and scope of the legislation and its comprehensive regulatory scheme.<sup>215</sup>

If New York courts were to wisely abandon the doctrine of implied preemption along with the uncertainty it brings to local legislators and citizens, a case like *Consolidated Edison* would reach a much different result. A challenge to the “unreasonably burdensome” clause of Section 94-c could experience success. Without implied preemption, courts would have to look to express preemption which, if applied with the appropriate balancing test, would not come out in favor of Section 94-c. This change in jurisprudence would ultimately give the home rule provisions of New York State Constitution the enforcement power they have lacked for years.

Finally, assuming a more structured framework to the State concern analysis, Section 94-c would not pass constitutional muster. Although in *Town of Islip* the New York Court of Appeals held that an environmental issue—specifically, the water supply on Long Island—was a substantial State concern,<sup>216</sup> the legislation at play in *Town of Islip* case greatly differs from Section 94-c. In *Islip*, the State concern was “the protection of the drinking water for a substantial portion of the State’s population and in an area which encompasses a substantial portion of the State’s

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211. 456 N.E.2d at 487.

212. *Id.* at 488.

213. *Id.*

214. *Id.* at 490 (Article VIII, similar to Article 10, also contained an “unreasonably burdensome” clause, allowing the Siting Board’s decision to overrule any local ordinance that it found to be unreasonably burdensome to the implementation of the proposed energy project.).

215. *Id.*

216. *Town of Islip v. Cuomo*, 473 N.E.2d 756, 757 (N.Y. 1984).

commerce and industry.”<sup>217</sup> Section 94-c promulgates a desired political outcome more than any substantial State concern. While the State law at issue in *Town of Islip* was passed to protect “the sole source aquifer for Nassau, Suffolk and part of Queens from pollution,”<sup>218</sup> the “unreasonably burdensome” clause of Section 94-c is not *required* for New York State to reach its energy goals nor secure the safety of its citizens.

Even if courts were to find electric generation siting to be a State concern, the methods of siting in New York are burdensome to municipalities and are not narrowly tailored. Article 10’s “unreasonably burdensome” clause grants the Siting Board authority to circumvent local ordinances, stating that “the [Siting] board may elect not to apply, in whole or in part, any local ordinance, law, [or] resolution . . . if it finds that, as applied to the proposed facility, such is unreasonably burdensome.”<sup>219</sup> Section 94-c is even more bold in its exclusion of local concern and consolidation of State power. Section 94-c effectively removes any local voice from the approval process, vesting approval authority within one executive office within the New York State Department of State.<sup>220</sup> Cooperation with local governments is purposely left to a minimum to streamline the project approval process and quickly meet environmental goals.

If nothing else, Section 94-c violates the spirit of home rule. As demonstrated by the multiple action groups across New York which have formed to voice concern regarding large-scale renewable energy projects, Article 10 and Section 94-c both legislate matters that are deeply personal to local government officials and their residents.<sup>221</sup> Slews of op-eds have appeared in local newspapers, from local government officials and residents alike, voicing opposition to the energy siting process, all pointing to violations of home rule powers.<sup>222</sup>

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217. *Id.* at 760.

218. *Id.* at 757.

219. N.Y. PUB. SERV. LAW § 168(3)(e) (McKinney 2011).

220. *See* N.Y. EXEC. LAW § 94-c(3) (McKinney 2020).

221. *See Why We Oppose, supra* note 179 (In listing reasons why the towns of Yates and Somerset oppose the Article 10 application for a large-scale wind project that would include more than forty-five 600-foot tall wind turbines, the group mentions concerns that are extremely sensitive to that locality, including the turbines’ impact on local birds and bats, local tourism, and a local air reserve station.).

222. Note that many of these articles are in response to Article 23, which was a proposal by Governor Andrew Cuomo to overhaul Article 10. Section 94-c was passed in lieu of Article 23, but the two are almost identical. *See* Peter G. Barber, *Write your representative.*

## V. CONCLUSION

New York State has pursued robust environmental goals over the years, culminating in the passage of the Green New Deal. To achieve the ambitious goals of the Green New Deal, the State has consolidated the approval process for large-scale energy siting projects into the executive branch, removing any real power from local governments to dissent to these projects. Renewable energy projects consume hundreds—sometimes thousands—of acres of land, implant large pieces of industrial equipment, install underground cables and operating facilities, and have the potential to disrupt communities as a whole. The citizens and local governments impacted by these projects are left practically voiceless.

The issues surrounding Article 10 and Section 94-c cast light on the flawed jurisprudence employed by New York State courts in their home rule analysis. To be faithful to the New York Constitution, including its home rule provisions, courts must find a way to afford a more balanced power dynamic between the State and local governments. New York courts can do this by employing a balancing test to their express preemption analysis, abandoning the implied preemption doctrine, and clarifying the State concern doctrine to grant governments more specified protection.

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*Governor's proposal to have state trump home rule for solar farms eschews public and unfairly shifts tax burdens*, THE ALTAMONT ENTERPRISE (Mar. 12, 2020), <https://altamontenterprise.com/03122020/write-your-representative-governors-proposal-have-state-trump-home-rule-solar-farms-eschews> (“Simply put, the proposed act is an unjustified intrusion to the home rule afforded to the town to protect ‘its physical and visual environment’ by Municipal Home Rule Law §10(a)(11). The effort to impose this radical expansion of state authority in the budget amendment process is inimical to a proper consideration of the proposed act’s impacts upon the well-considered purposes of the local solar law.”); Jeff Dewart & Jim Simon, *Andrew Cuomo’s power grab is unconscionable*, LOCKPORT UNION-SUN & J. (Mar. 11, 2020), [https://www.lockportjournal.com/opinion/andrew-cuomo-s-power-grab-is-unconscionable/article\\_074761d1-2e42-58dc-b3e0-f718a1d95989.html](https://www.lockportjournal.com/opinion/andrew-cuomo-s-power-grab-is-unconscionable/article_074761d1-2e42-58dc-b3e0-f718a1d95989.html) (“The proposed changes are inconsistent with our New York State Constitution’s Home Rule provisions and removes all local land-use control for power plants, transmission lines and battery storage projects greater than 10 megawatts in size. This is achieved through broadening the definition of an ‘unreasonably burdensome’ local law to mean inconsistent with Cuomo’s energy goals.”); John Riggi, *Reply to Article 23: No home rule? No peace.*, LOCKPORT UNION-SUN & J. (Mar. 17, 2020), [https://www.lockportjournal.com/opinion/reply-to-article-no-home-rule-no-peace/article\\_099a5fff-f7b2-573d-a9ee-976c419367a8.html](https://www.lockportjournal.com/opinion/reply-to-article-no-home-rule-no-peace/article_099a5fff-f7b2-573d-a9ee-976c419367a8.html) (“The most troubling issue with Article 23 is the continuing, unchecked over-reach into home rule by this Governor and both houses of the state legislative branch. Article 23 has proven a bridge-too-far for the people of our once-great state. In response, towns across New York are now fighting the potential loss of home rule with passage of Article 23 Sanctuary Town resolutions. No home rule . . . no peace.”).

In an era of honoring the environment, New York would be wise to also honor home rule and local governments.