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DO NORTH CAROLINA LOCAL GOVERNMENTS NEED HOME RULE?

FRAYDA S. BLUESTEIN*

Local governments derive all of their powers by delegation from states. Nationally, the scope and form of delegated authority varies. Most states delegate broad "home rule" authority to their local governments over matters of local concern. This Article compares local government authority in North Carolina to local government authority in other states. North Carolina is often described as a "Dillon's rule" state, indicating that in the absence of home rule, courts narrowly construe local authority under the framework developed by Judge John F. Dillon in the late 1800s. Recent North Carolina appellate court opinions hold that Dillon's rule has been replaced by a legislative directive for broad construction, but that Dillon's rule will be applied if enabling legislation is unambiguous. An analysis of the legal structure and judicial interpretation of local government authority in home rule states and in North Carolina shows that despite their lack of home rule authority, North Carolina local governments have powers effectively equivalent to those in home rule states. The need for specific legislative authority in North Carolina, however, limits flexibility, efficiency, and predictability. The Article recommends changes in state law and in the legislative process in order to clarify the applicability of the broad construction statute and to reduce the use of litigation and local legislation to define the scope of local authority.

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INTRODUCTION

Local governments are creatures of state government. They have no independent recognition in our federalist system of government and are not separately mentioned in the Federal Constitution. The legal recognition and authority of local governments exists entirely by state action. North Carolina local governments are created by the State and derive all their powers by delegation from the State. In this respect, North Carolina local governments are the same as those in other states.


By providing for a dual system of government, national and state, the United States Constitution left with the states local government for local affairs and gave to the nation general government for general affairs only. It does not mention cities, towns, municipal corporations, or indeed any local organs of government.

Id. at § 1.34.


3. The comparative analysis in this Article focuses primarily on cities, and not on counties or special purpose local governments. Most national literature has this same focus. See Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 COLUM. L. REV. 346, 354 (1990) (criticizing this focus). The discussion of authority in North Carolina, as well as the recommendations, however, apply equally to cities and counties in North Carolina, since cities and counties in North Carolina increasingly have a great deal of common and overlapping authority. See Warren Jake Wicker, Introduction to City Government in North Carolina, in MUNICIPAL GOVERNMENT IN NORTH CAROLINA, 3, 17-22 (David M. Lawrence & Warren Jake Wicker eds., 2d ed. 1996). Nationally, counties have traditionally functioned as agencies of the state, administering state programs such as court systems and human services programs, though in recent years they have taken on more regulatory and general-purpose local government functions. See OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW § 8, at 26-28 (2d ed. 2001).


5. Dale Krane, Platon N. Rigos & Melvin B. Hill, Jr., Preface to HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK ix, ix (Dale Krane, Platon N. Rigos & Melvin B. Hill, Jr. eds., 2001) [hereinafter HOME RULE IN AMERICA] ("[B]ecause the legal system of each state determines the powers that cities may exercise, local governments are often called creatures of the state.").
The scope and structure of delegated powers in each state are often characterized as being either "home rule" or "Dillon's rule." Home rule refers to a broad delegation of authority by the state over matters of local concern. Dillon's rule, on the other hand, is a rule of judicial construction, developed by Judge John F. Dillon, which suggests that local authority should be narrowly construed. As such, Dillon's rule does not actually describe a state's local government structure. When used to describe a state, Dillon's rule refers to the fact that local government powers are interpreted narrowly in the absence of a home rule provision or other legislative directive calling for a broader interpretation.

Unlike most states, North Carolina local government powers are established through specific statutory delegations rather than through broad statutory or constitutional grants of authority over local matters. This is to say, North Carolina is not a home rule state. And although North Carolina is often described as a Dillon's rule state, that designation is probably not accurate, at least according to the most recent North Carolina appellate court opinions on the subject. This means that North Carolina is a non-home rule, non-


7. For a more complete definition of home rule, see infra notes 27-32 and accompanying text.

8. For an explanation of Dillon's rule, see infra notes 164-67 and accompanying text.

9. See RICHARDSON ET AL., supra note 6, at 18 (listing North Carolina as a Dillon's rule state); James H. Svara, NORTH CAROLINA, in HOME RULE IN AMERICA, supra note 5, at 312, 313 (describing North Carolina as a "modified" Dillon's rule state, taking into consideration the legislative directive for broad construction of local government powers).

10. See Bowers v. City of High Point, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994) ("[I]t is a well-established principle that municipalities, as creatures of the State, can exercise only that power which the legislature has conferred upon them"); see also 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 L. REV. 671, 674 (observing that North Carolina cities and counties do not have constitutional home rule and have limited statutory delegations to control local structural matters).

Dillon's rule state. This double negative description, however, does not tell us much about the actual authority local governments have in North Carolina compared to that of local governments in other states. Understanding the actual scope and meaning of local authority requires analysis of both the legal structure and wording of the delegation, as well as its interpretation by the courts.

This Article describes how local government authority in North Carolina compares with local government authority in home rule states, and addresses the question of whether North Carolina local governments would be better off with home rule authority. While there are many other ways in which local authority can be described and evaluated, the effort here is to assess the basic source and extent of authority derived through state delegation, focusing exclusively on the state-local relationship, and not on the federal-state-local, interlocal, or other relationships that may affect local power more generally. Home rule may appear to offer broader authority and more independence from state legislative preemption than North Carolina's non-home rule system. An analysis of states' legal structures and judicial interpretations of local authority, however, suggests otherwise. Grants of home rule authority in other states generally do not create significant limitations on state preemption of local government regulation. In addition, the scope of authority actually delegated to North Carolina local governments is probably as broad, perhaps even broader, than the authority local governments have in many home rule states.

This Article begins by describing the key provisions and predominant legal structures in home rule states and the judicial
interpretations of the home rule provisions. Part II describes the legal structure of local government authority in North Carolina, including the statutory delegations as well as the judicial interpretations of their scope. Part III compares North Carolina with home rule states and concludes that North Carolina local governments and home rule local governments share several characteristics: (1) a broad delegation of authority to regulate and address local issues; (2) a continuing presence of state preemption through enactment of general laws; and (3) a tendency by the courts to interpret the scope of authority narrowly or inconsistently, regardless of how broadly the delegation of authority is worded. Despite these common themes, the North Carolina "non-home rule" system of specific statutory delegation has important structural differences, which have practical effects on North Carolina local governments as compared to those in home rule states.17

Implicit in the comparison of home rule and North Carolina local government authority is a value judgment about an ideal or optimal system of delegation. Many who comment on home rule and other aspects of local government structure evaluate the desirability of the system in terms of its promotion or frustration of particular policies, such as urban sprawl, smart growth, or fiscal policies.18 Consumers of local government authority, however, comprise a diverse set of stakeholders with a variety of perspectives. More autonomy for local governments may be a good thing or a bad thing, depending upon a stakeholder's particular interests. As discussed in Part III of this Article, contradictory assumptions about the effect of increasing or decreasing local authority can be found in the literature and suggest that broad generalizations about how local governments nationwide will use their authority may not be particularly useful.

This Article concludes with recommendations for improving structural aspects of the North Carolina system to promote policy-neutral values of flexibility, efficiency, and predictability rather than to promote particular political or policy outcomes. Specifically this Article recommends that the legislature: (1) use broad language in drafting enabling legislation and avoid the inclusion of unnecessary limitations19 in statutory delegations of local authority; (2) adopt new legislation clarifying the scope and applicability of the broad construction standard courts must use in reviewing cases challenging

17. See infra Part III.
19. As explained in Part IV of this Article, unnecessary limitations are those that limit exercise of delegated authority and do not involve important policy issues.
local government authority; and (3) delegate local authority to conform charter provisions to the general law without legislative approval.

I. LOCAL GOVERNMENT AUTHORITY IN HOME RULE STATES

The United States Constitution allocates power between the federal government and the states. It does not mention local governments. Local governments are created by states and have neither inherent rights to their existence, nor to any particular grant of authority. As stated by the United States Supreme Court in the landmark case of *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 entrusted 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, may take without compensation such property, hold it itself, or vest it in other agencies, 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 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.

20. See Krane, Rigos & Hill, *supra* note 5, at ix ("Many people are astonished to learn that the U.S. Constitution makes no mention of cities, counties, or any other type of local jurisdiction.").

21. Political and legal efforts to establish inherent rights of local governments are well documented but have not been successful. See Reynolds, *supra* note 3, § 26 at 78-79 ("[T]he doctrine of inherent home rule has now been clearly rejected in almost all U.S. jurisdictions and may thus be considered of little contemporary significance. But it has been noted that it has a 'persistence in the romantic literature of local government law' that often requires contrary citations simply to establish the principle's current non-existence." (internal citations omitted)).

22. 207 U.S. 161 (1907). This case involved a constitutional challenge by citizens of a town that was consolidated with the city of Pittsburgh pursuant to the provisions of a state statute authorizing consolidation.

23. *Id.* at 178–79.
While all states have created local governments and have granted them authority, the structure and scope of authority varies. This section describes both the legal structures and judicial interpretations of home rule delegations, which exist in some form in most states.

Local government powers are established in state statutes, state constitutions, or some combination of these two sources. 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. Most states have some form of home rule. Only Virginia and North Carolina have no home rule authority in either their constitutions or statutes.

24. See Dale Krane, Platon N. Rigos & Melvin B. Hill, Jr., Appendix: Home Rule Across the Fifty States, in HOME RULE IN AMERICA, supra note 5, at 471, 476 (summarizing the structural arrangements in each state and their impact on the administration and functioning of local government).

25. See ANTIEAU, supra note 14, § 21.01, at 21-4 (listing forty-three states as having some form of home rule); Krane, Rigos & Hill, supra note 24, at 476 (identifying only six states with no effective home rule: Alabama, Idaho, Nebraska, Nevada, New Hampshire, and Vermont).


27. One source defines home rule 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, Platon N. Rigos & Melvin B. Hill, Jr., Glossary, in HOME RULE IN AMERICA, supra note 5, at 493, 495.

28. It is misleading to assume that the presence of home rule authority in the constitution means that local governments actually have home rule powers. The New Hampshire Constitution provides for local government charters to be approved by local referendum, but in practice local authority is limited to structural matters. N.H. CONST. part 1st, art. XXXIX; see also John F. Camobreco & Mark V. Ebert, New Hampshire, in HOME RULE IN AMERICA, supra note 5, at 277, 278. The Nevada Constitution provides for legislative creation of home rule but the legislature has not acted on that authority to date. NEV. CONST. art. VIII, § 8; see also Robert P. Morin & Eric B. Herzik, Nevada, in HOME RULE IN AMERICA, supra note 5, at 269, 270. Though there is no constitutional or statutory provision for home rule in North Carolina, it is listed as having structural home rule powers in a comprehensive summary of home rule in the United States. See Krane, Rigos & Hill, supra note 24, at 476.

29. See Keeok Park, Virginia, in HOME RULE IN AMERICA, supra note 5, at 427, 428.

30. The North Carolina Constitution authorizes local governments to preserve the environment and control pollution. N.C. CONST. art. XIV, § 5, para. 1. In Smith Chapel Baptist Church v. City of Durham, 348 N.C. 632, 502 S.E.2d 364 (1998), the Supreme Court of North Carolina held that this provision provides direct authority to a city to impose fees for storm water programs despite the lack of express legislative authority for such fees. Id. at 636, 502 S.E.2d at 367. Some argued that this reading of the constitution provided a degree of home rule for local governments with respect to environmental issues. See MILTON S. HEATH, JR., MEMORANDUM: NORTH CAROLINA ENVIRONMENTAL BILL OF RIGHTS: ORIGINS AND IMPLICATIONS, Jan. 1999, at 3 (describing the legislative history in support of this argument) (on file with the North Carolina Law Review). On reconsideration, however, the court held that the city exceeded its authority in imposing the fees based on the plain meaning of the statute authorizing imposition of fees for storm
According to one definition, home rule is "[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." The difference between home rule and non-home rule authority may be stated in simple terms as follows: in a home rule state, local governments have authority to act on matters of local concern unless a state statute preempts local action; in a non-home rule state, local governments may act on a matter only if a state statute authorizes local action. A home rule state is generally understood to be one in which local governments operate under a broad delegation of authority over matters of local concern.

The effect of a home rule delegation is described as having two dimensions: (1) it provides broad authority for local governments to govern local affairs without the need for specific grants of authority from the state; and (2) it limits interference by state legislation in matters of local concern. To understand the extent to which each of these dimensions is actually present, it is important to examine both the language of the home rule delegation and the interpretation courts have given that language.

A. Legal Structures in Home Rule States

Grants of home rule authority may be found in a state's constitution, statutes, or both. Constitutional provisions that include a direct delegation of authority without the need for implementing
legislation are called "self-executing" home rule delegations. In all other cases, the specific form and extent of delegation is a matter of state legislative discretion. The specific language of home rule delegations varies from state to state, but many contain common elements. As described below, whether they are constitutional, self-executing, or purely legislative, the legal structure of most home rule delegations preserves a significant role for statewide legislation defining the scope of local authority.

Turning first to the specific language of home rule delegations, it is interesting to note that many of them actually reserve to the state substantial authority to legislate through general laws. A typical home rule grant authorizes a city to "make and enforce ... local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." A similar formulation grants cities the authority to determine their local affairs and government, "not inconsistent with the laws of the General Assembly." The Washington Constitution provides that local charters are "subject to and controlled by general laws."

35. ANTIEAU, supra note 14, § 21.03, at 21-14. For an example of a self-executing home rule provision, see COLO. CONST. art. XX, § 6.

36. ANTIEAU, supra note 14, § 21.01, at 21-8 (stating that with legislative home rule, a state legislature "is authorized to withdraw or limit home rule powers by statute").

37. Id. § 21.03, at 21-18 ("[S]ome home rule states expressly permit state legislative action even in areas of local concerns, provided the legislative action is by general law (applicable to all similar types of local governments)." (footnote omitted)). Some state constitutions limit the use of special or local laws on particular subjects. See, e.g., N.C. CONST. art. II, § 24. In home rule states, limitations on local acts function to restrict state interference with the exercise of local home rule authority. See, e.g., N.J. CONST. art. IV, § 7(10) (allowing local acts regulating the internal affairs of local government only by petition from the local government and subject to local approval). In contrast, in a non-home rule state such as North Carolina, local acts are most often used to create or confirm local authority, usually at the request of the local government. See David M. Lawrence, The Legal Nature of the City and Its Governing Board, in MUNICIPAL GOVERNMENT IN NORTH CAROLINA, supra note 3, at 31, 34.

38. Some provisions apply only to "charter" cities or other classifications of local governments based on population. See COLO. CONST. art. XX, § 6; LA. CONST. art. VI, § 5(E); MO. CONST. art. VI, § 19(a); NEB. CONST. art. IX, § 5; OKLA. CONST. art. XVIII, § 3(a); R.I. CONST. art. XIII, § 2; TEX. CONST. art. XI, § 5; W. VA. CONST. art. VI, § 39a. Some states have both home rule and non-home rule cities, depending upon whether the city has adopted a charter or is of sufficient size to be eligible for home rule powers. Courts generally apply Dillon's rule to non-home rule cities in home rule states. See Richard Wandling, Illinois, in HOME RULE IN AMERICA, supra note 5, at 128, 130 (explaining that non-home rule cities in Illinois remain subject to Dillon's rule).

39. IDAHO CONST. art. XII, § 2 (emphasis added).

40. IOWA CONST. art. III, § 38A; see also KY. CONST. § 156b; OHIO CONST. art XVIII, § 3; R.I. CONST. art. XIII, § 2; UTAH CONST. art. XI, § 5.

41. WASH CONST. art. XI, § 10. Another expression of home rule provides authority over all local matters "not expressly denied by general law or charter." N.M. CONST. art.
Legislative authority to structure or limit home rule authority is even more apparent in states where home rule is not provided for in the constitution but is instead a matter purely of legislative creation. In these states the legislature has complete discretion in developing and modifying over time the scope of home rule authority granted, not unlike the situation in non-home rule states. Indeed, whether the constitution preserves legislative authority or the home rule power originates with the legislature itself, home rule powers are often shaped by lists of specific delegations to which the local charters must conform.

This summary of home rule delegations shows that while they provide broad authority over local matters, the language of the delegations preserves significant state legislative authority. Judicial interpretation of home rule provisions further defines the scope of authority to exercise particular powers at the state and local levels.


A key issue in cases involving the scope of home rule authority is the appropriate standard of review a court should apply. In addition, legal challenges in home rule states involve questions about: (1) whether a particular local law conflicts with state law; (2) whether local legislation overrides a state law on the same subject or whether state law preempts local law; and (3) whether the exercise of local authority involves a matter of local concern.
1. Standard of Review

The form of the home rule delegation may influence a court's approach to analyzing the scope of authority granted.44 Where a home rule delegation includes or consists of a list of specifically authorized powers, courts are more likely to interpret the scope of the authority granted more narrowly, sometimes applying the Dillon's rule analysis, discussed later in this Article.45 Courts in these jurisdictions may employ a more restrictive standard when analyzing whether a particular action is within the scope of the specific home rule delegation or exclusion.46 In some states, however, courts have interpreted the grant of home rule, by itself, to constitute a rejection of Dillon's rule, and have afforded broad deference in upholding local exercise of authority over matters of local concern.47 For example, a Utah court held that application of Dillon's rule eviscerates the legislative intention behind home rule and "seriously cripples effective local government."48 The court held that as long as the action is reasonably and appropriately related to the objectives, the

44. RICHARDSON ET AL., supra note 6, at 11–12 (suggesting a system of classifying types of home rule based in part on whether the state addresses the judicial interpretation of state grants); id. at app. A at 41 (listing states according to whether or not the courts interpret local authority using Dillon's rule).

45. See, e.g., Richard C. Kearney, Connecticut, in HOME RULE IN AMERICA, supra note 5, at 78, 79 (noting that Connecticut's legislative home rule takes the form of specifically delegated powers, which are interpreted by the courts using Dillon's rule). This form of legislative home rule is difficult to distinguish from the system of delegation (and its interpretation by the courts) in North Carolina.

46. Indiana courts continued to apply Dillon's rule even after the adoption of home rule, until the legislature explicitly repealed Dillon's rule in 1980 and directed the courts to use a more liberal standard. See Blomquist, supra note 43, at 140. Similar directives to the courts regarding the standard of review can be found in the South Carolina Constitution, requiring that the state constitutional and statutory delegations of authority be liberally construed in favor of local governments to include powers fairly implied and not prohibited, see S.C. CONST. art. VIII, § 17, in the Illinois Constitution, stating that "powers and functions of home rule units shall be construed liberally," ILL. CONST. art. VII, § 6(m), and in a Montana statute which mandates liberal construction, MONT. CODE ANN. § 7-1-106 (2005).

47. See City of Boca Raton v. State, 595 So. 2d 25, 28 (Fla. 1992) (holding that special assessment is within the scope of home rule authority and delegation removes judicial limitations); Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs, 66 P.3d 873, 880 (Kan. 2003) (holding that county home rule authority should be liberally construed to allow use of eminent domain for economic development); Hospitality Ass'n of S.C. v. County of Charleston, 464 S.E.2d 113, 117–18 (S.C. 1995) (holding that home rule delegation abolished Dillon's rule and provides adequate authority to impose service charge within broad grant of police power); Williams v. Town of Hilton Head Island, 429 S.E.2d 802, 805 (S.C. 1993) (holding that home rule abolishes Dillon's rule, citing cases in accord from other jurisdictions).

court should not interfere with the means chosen to carry out the action.49

Some home rule provisions specifically direct the courts regarding 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.50 The Illinois constitution calls for liberal construction of local powers,51 but specifies that local governments may exercise power concurrently with the state except as to those powers the legislature has restricted.52 Thus even when the constitution calls for broad construction, the enumeration of specific powers granted or denied has the potential to limit the scope of home rule authority.

2. Local-State Conflicts and Preemption

As noted above, many home rule provisions require that the exercise of local government authority must not conflict with general state laws. The judicial analysis of this issue often follows basic law on preemption: local provisions are in conflict with general laws if they allow what state law prohibits, or prohibit what state law allows.53 In some states, the analysis follows implied preemption analysis, 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.54 As summarized by one court, "[t]he doctrine of preemption is premised on the right of the state to so extensively and intensively occupy a particular field or subject with state laws that there is no reason for municipal regulation."55 The potential breadth of this analysis can significantly diminish the scope of local authority in home rule states.

49. Id. at 1127.
50. See Ark. 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, Ind. Code Ann. § 36-1-3-4 (LexisNexis 2000), and Iowa's Constitution, Iowa Const. art. III, § 38A, explicitly abrogate Dillon's rule.
51. Ill. Const. art. VII, § 6(m).
52. Id. art. VII, § 6(i). The constitution does include limitations on legislative restriction of local powers. Id. art. VII, § 6(l).
53. Cf. City of N.Y. v. Bloomberg, 846 N.E.2d 433, 436 (N.Y. 2006) (invalidating a local provision prohibiting the city from doing business with vendors that discriminate between spouses and domestic partners in providing benefits as inconsistent with bidding requirements in general law requiring award of contracts based on price).
54. See S.C. State Ports Auth. v. Jasper County, 629 S.E.2d 624, 629 (S.C. 2006) (concluding that permissive language indicates no legislative intent to occupy the field to the exclusion of local action).
In another home rule state case the court created the following test for determining when local regulations are preempted: "1) has the [state] legislature withdrawn the power of municipalities to act; 2) does the local ordinance logically conflict with the state legislation; 3) does the ordinance defeat the purpose of the state legislation; or 4) does the ordinance go against the spirit of the state legislation." A similar analysis used by the Michigan courts includes as a factor whether the "nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." Courts determining whether particular local actions conflict with general laws have also reached different conclusions about whether a home rule provision authorizes local governments to go beyond a general law, or whether this constitutes a conflict.

Another important issue in determining the scope of authority in home rule states is whether the home rule provision creates any limitation on the state's authority to enact general laws on matters of local concern. In some cases the state's authority to enact general laws is limited to matters of statewide concern. Courts have also held that the state retains authority to regulate even if local matters are affected. Some states recognize state authority over local matters as long as legislation is enacted by general, rather than local

56. State ex rel. Ziervogel v. Wash. County Bd. of Adjustment, 676 N.W.2d 401, 412 (Wis. 2004) (invalidating a local ordinance dealing with variances based on its definition of unnecessary hardship); see also Sherwin-Williams Co. v. City of L.A., 844 P.2d 534, 536 (Cal. 1993) ("A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (citations omitted)).


58. See Savage v. Prator, 921 So. 2d 51, 54-56 (La. 2006) (summarizing cases under home rule stemming from local regulations that create higher penalties or prohibitions); Coastal Recycling, Inc. v. Connors, 854 A.2d 711, 715 (R.I. 2004) (holding that the "occupies the field" argument for state preemption is at odds with the home rule provision in the constitution); City of Portland v. Dollarhide, 714 P.2d 220, 228 (Or. 1986) (higher penalty under local ordinance invalid).

59. See WIS. CONST. art. XI, § 3(1); see also ANTIEAU, supra note 14, § 21.05, at 21-28, ("Even constitutional home rule for local governments has not customarily denied the state legislatures power over matters described as of 'general' or 'statewide' concern." (citations omitted)).

60. See, e.g., City of N.Y. v. State, 730 N.E.2d 920, 925 (N.Y. 2000) (holding that where the state has a substantial interest the state may legislate even if local interests are also affected).
or special laws. For example, in Oklahoma a state law regarding collective bargaining was upheld when characterized as a general law, even though it had previously been invalidated when interpreted to be a special act.

The Colorado Constitution specifically provides that local ordinances on matters of local concern override conflicting state laws. 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. As set out in City and County of Denver v. State, courts first determine whether the challenged law (whether state or local) involves a matter of local, state, or mixed state and local concern. In cases involving a conflict between a state and local provision on a matter of local concern, 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. Where the matter is of mixed local and state concern, the local government may act as long as there is no conflict with state law. In the event of a conflict between a local provision and a state provision on a matter involving a mixture of state and local interests, the state law supersedes. The courts acknowledge that there is no fixed standard for determining what is local, state, or mixed, and therefore apply an ad hoc evaluation. The courts have identified four factors to consider in making this evaluation:

61. See, e.g., R.L. CONST. art. XIII, § 4 (stating that the state may regulate local matters by general law except matters relating to the form of the local government); State ex rel. Worthington v. Cannon, 181 So. 2d 346, 347 (Fla. 1965) (noting that the state constitution prohibits local acts by the state after a home rule charter is adopted).


64. COLO. CONST. art. XX, § 6.


66. Id. at 767.

67. Id.

68. Id.

69. "[A]ffairs that are of primarily local, state or mixed concern often 'imperceptibly merge.'" City of Commerce v. State, 40 P.3d 1273, 1280 (Colo. 2002) (citing City and County of Denver v. State, 788 P.2d 764, 767 (Colo. 1990)).
(1) the need for statewide uniformity of regulation; (2) the impact of municipal regulation on persons living outside the municipal limits; (3) historical considerations, specifically whether the matter is one traditionally governed by state or by local government; and (4) whether the Colorado Constitution specifically commits the matter to state or local regulation.

The Supreme Court of Colorado applied this analysis in *City of Commerce v. State*, a case in which several home rule cities challenged state uniform laws governing the use of automatic vehicle identification systems (red-light cameras). Despite prior case law holding that traffic enforcement on local streets is a matter of local concern, the court found that the interest in uniformity justified state preemption. A strong dissent in *City of Commerce* and another recent Colorado case suggests that, despite the court's attempt at a uniform standard, the challenge of identifying clear delineations of appropriate spheres of authority between state and local entities in home rule states remains elusive. The application of the Colorado framework in these recent cases illustrates that, notwithstanding a constitutional limitation on state preemption and the development of a specific judicial standard, it is extremely difficult for courts to make clear and consistent distinctions between what is of statewide, as opposed to local, concern.

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70. *Id.*
71. *Id.* at 1276.
72. *Id.* at 1280–81.
73. In *City of 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 (held to affect a statewide rather than a mixed state and local matter) regarding adjudicated children living in state-created foster homes. *See id.* at 153. Justice Coats dissented, stating,

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.* at 163–64, (Coats, J., dissenting).
74. *See id.* at 1286 (Mullarkey, C.J., dissenting).
3. Local Versus State Concern

It has been observed that "[t]here is no clear or workable test separating local from state concerns. Courts have acknowledged that there is considerable overlap in these two categories."\(^{75}\) Matters of local concern are sometimes defined as those whose results affect "only the municipality itself, with no extraterritorial effects."\(^{76}\) In practice, however, it appears that relatively few things have exclusively local effects and that many are of mixed state and local concern. As summarized in one treatise,

With an expanding view of the role of the state, many home rule powers, aside from local government structural concerns, have been determined to fall in the shared category. It is only in the very limited area where a power is deemed 'exclusively' of local concern that the state will be foreclosed from acting.\(^{77}\)

While courts have generally concluded that structural and administrative functions internal to the local government are matters of local concern,\(^{78}\) a wide range of local government activities may be viewed as involving matters of statewide concern. These may include general police power regulations.\(^{79}\) One formulation holds that matters of statewide concern include matters involving the "health,

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\(^{75}\) ANTIEAU, supra note 14, § 21.05, at 21-26 (citing Adler v. Deegan, 167 N.E. 705 (N.Y. 1929)). This problem was recognized early in the history of home rule. John F. Dillon noted in his treatise, "[n]o general rule has been laid down defining what constitutes municipal affairs or business, probably because it has been impossible to do so in such terms as to furnish a satisfactory guide to the courts and the profession." JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 165, at 316 (5th ed. 1911).


\(^{77}\) ANTIEAU, supra note 14, § 22.01, at 22-5 (citing Bd. of Educ. v. Town and Borough of Naugatuck, 843 A.2d 603 (Conn. 2004) (holding that procedure for adopting town budget was a local concern, not superseded by a general state law)).

\(^{78}\) ANTIEAU, supra note 14, § 22.06, at 22-28 ("Overwhelmingly, matters pertaining to the structure of government, qualifications of local legislators, and the enactment of charter amendments, ordinances and resolutions are held to be local concerns." (footnote omitted)).

\(^{79}\) 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." City of Canton v. State, 766 N.E.2d 963, 966 (Ohio 2002). The Louisiana constitutional home rule provision states that, "[n]otwithstanding any provision of this Article, the police power of the state shall never be abridged." LA. CONST. art. VI, § 9(B). The Supreme Court of Louisiana, in New Orleans Campaign For a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002), relied on this provision to uphold a state statute that prohibited local governments from establishing minimum wage requirements for private employers. See id. at 1108.
safety, security and general welfare of all the inhabitants of the State, and not to matters affecting merely the personnel and administration of the offices local to [the local jurisdiction] and which are of no concern to citizens elsewhere. 80

Regulations affecting local employees provide a good example of the difficulty courts have developing consistent rulings on what is of state as opposed to local concern. While many judicial decisions in home rule states have upheld local hiring and employment policy decisions that conflict with state law, 81 some matters relating to local employment, such as civil service requirements, minimum compensation, and retirement benefits, have been held to be of statewide concern. 82 In California, the court invalidated a state provision requiring counties to submit to arbitration holding that it interfered with local authority, 83 while in Oklahoma, collective bargaining was held to be a matter of statewide concern. 84

Particular subjects may not be entirely matters of state or local control. For example, noise may be a matter of local or statewide concern, depending upon the nature of the regulation involved. 85 Local streets may generally be considered a matter of local control, but regulation of traffic has been generally viewed as a matter of preemptive statewide regulation. 86 A local government law treatise summarizing cases dealing with specific topics of state and local regulation illustrates that many important functions are of mixed or statewide concern in home rule jurisdictions, including education; highways and streets; taxes, fees, and finances; public health;

81. ANTIEAU, supra note 14, § 22.08, at 22-23 (“Generally, matters involving local government officers and employees are deemed local, rather than state concerns.”).
82. See generally id. (summarizing cases involving local authority to adopt various types of employment policies).
83. County of Riverside v. Superior Court, 66 P.3d 718, 730 (Cal. 2003) (“John Donne wrote, ‘No man is an island, entire of itself.’ So, too, no county is an island, entire of itself. No doubt almost anything a county does, including determining employee compensation, can have consequences beyond its borders. But this circumstance does not mean this court may eviscerate clear constitutional provisions, or the Legislature may do what the Constitution expressly prohibits it from doing.” (citation omitted)).
86. ANTIEAU, supra note 14, § 22.11, at 22-42.
environment and land use; criminal law and police protections; courts; regulation of private utilities; and local tort liability.  

As the foregoing summary demonstrates, judicial interpretations about what constitute statewide as opposed to local issues and about which local provisions are in conflict with general laws sometimes have a narrowing impact on the scope of the home rule delegation. Despite their structural and judicially created limitations, local governments in home rule states have successfully relied on their broad authority to support controversial local initiatives. For example, the Supreme Court of Pennsylvania recently upheld a local policy extending employee benefits to employees’ life partners against a challenge that the policy conflicted with state law defining marriage. Home rule has also been used to uphold city regulation and litigation regarding firearm use and manufacturing. Home rule authority 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. Court opinions in these cases often reflect deference to the legislative intention to delegate broad authority and to provide flexibility in the means of carrying out that authority.

On the other hand, controversial issues are often the subject of state preemptive action. For example, limitations on lawsuits against gun manufacturers are among the general laws that limit local authority, even in home rule states. And recent reaction to the United States Supreme Court decision in Kelo v. City of New London has included proposed legislation that would limit use of

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87. Id. § 22, at 22-39.  
93. See Glasscock Co. v. Sumter County, 604 S.E.2d 718, 722 (S.C. Ct. App. 2004) (upholding a local exception to competitive bidding requirements and stating that to rule otherwise "would effectively strip our state's local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt").  
94. See KY. REV. STAT. ANN. § 64.045 (LexisNexis 2004); MONT. CODE ANN. § 7-1-115 (2005).  
95. 125 S. Ct. 2655 (2005). This United States Supreme Court decision held that the condemnation at issue did not violate the Federal Due Process Clause. Id. at 2665. State
eminent domain for economic development and would expressly preempt local authority in home rule jurisdictions.\textsuperscript{96} As one commentator has noted, "what the legislature has given, it may take away."\textsuperscript{97}

It is difficult to generalize based on the case law about the overall effect of state preemption in home rule states on the exercise of local authority. The cases do not reflect the many local government activities that are not challenged in court. Contemporary assessments of home rule in some states do indicate that it provides a good deal of flexibility within the scope of powers that are not preempted.\textsuperscript{98} A recent national survey of local government home rule suggests, however, that the expectation that home rule creates local autonomy, including freedom from or limitations on the states' authority to preempt, has been largely disappointed. In *Home Rule in America: A Fifty-State Handbook*, a comprehensive summary of home rule among the fifty states, numerous entries begin or end by noting such disappointment.\textsuperscript{99} This publication also notes that citizens in some constitutions or laws may still limit governmental use of eminent domain for economic development purposes.


\textsuperscript{97} Sandalow, *supra* note 33, at 647.

\textsuperscript{98} See Briffault, *supra* note 89, 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).

\textsuperscript{99} See Benifield, *supra* note 43, at 239 (Mississippi: "[I]t is difficult to ascertain the implications of [home rule] provisions, since the constitution and statutes micromanage or mandate so many policies."); John G. Brettling, *New Mexico, in Home Rule in America, supra* note 5, at 295, 301 (New Mexico: "The notion that broad functional home rule exists is an exaggeration."); Paul Coates, Jack Whitmer & Tom Bredeweg, *Iowa, in Home Rule in America, supra* note 5, at 148, 148 (Iowa: "For cities, the promise of home rule has been disappointing because it has not resulted in any significant independence from state interference."); Lon S. Felker, Michael P. Marchioni & Platon N. Rigos, *Tennessee, in Home Rule in America, supra* note 5, at 391, 397 (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."); Kearney, *supra* note 5, at 84 (Connecticut: "In many important respects, local autonomy is a popular myth in Connecticut."); Dale Krane, *Nebraska, in Home Rule in America, supra* note 5, at 258, 258 (Nebraska: "[M]any observers believe that ‘for all practical purposes, home rule in Nebraska does not really exist.’ " (quoting Arthur B. Winter, *Nebraska Home Rule: The Record and Some Recommendations, 59 Neb. L. Rev. 601, 626 (1980))); Morin & Herzik, *supra* note 28, at 269 (Nevada: "Home Rule exists in name only."); Platon N. Rigos, John J. Bertalan & Richard C. Felock, *Florida, in Home Rule in America, supra*
home rule states have chosen not to pursue local government charters even when they have the option to do so by local initiative.\textsuperscript{100} It has also been observed that the usefulness of home rule may be more influenced by the political, economic, historical, and other social factors that are present in a particular state rather than by the governing legal structures.\textsuperscript{101}

Certainly the desire for greater autonomy from state interference with local government activity has been an important motivation historically for advocates of home rule.\textsuperscript{102} While advocates of home rule or greater local autonomy may view statewide legislative efforts as interference, others suggest that this is and has always been a fundamental aspect of the relationship in which the state has absolute

\textsuperscript{100} See Krane, supra note 99, at 259; Tim Schorn et al., South Dakota, in HOME RULE IN AMERICA, supra note 5, at 383, 383; Felker et al., supra note 99, at 392 (citing Nebraska, South Dakota, and Tennessee as examples of this trend).

\textsuperscript{101} The summaries of individual states in HOME RULE IN AMERICA, supra note 5, document how economic, financial, and political factors affect the extent to which local governments exercise significant independence. See Meredith Ramsay, Massachusetts, in HOME RULE IN AMERICA, supra note 5, at 203, 205 (Massachusetts: “Regardless of formal decision-making structures, political and economic forces in the larger environment strongly affect home rule powers.”); Alvin D. Sokolow & Peter M. Detwiler, California, in HOME RULE IN AMERICA, supra note 5, at 58, 58 (California: “[L]ocal discretion, however, is now compromised by constraints on local government revenue authority—a result of the gradual abandonment of the property tax as a local revenue source and the domination of state fiscal rules.”); Clive S. Thomas, Anthony T. Nakazawa & Carl E. Shepro, Alaska, in HOME RULE IN AMERICA, supra note 5, at 33, 33 (Alaska: “[L]ocal control ... depends on political considerations, especially at the state level, despite the strong constitutional provisions.”).

\textsuperscript{102} See Dale Krane, Platon N. Rigos & Melvin B. Hill, Jr., Introduction to HOME RULE IN AMERICA, supra note 5, at 1, 11 (“This reform strategy was known as the home rule movement and originally was conceived as a means for ending the interference of local state legislative delegations in municipal affairs.” (citing ALBERTA M. SBRAGIA, DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT 90 (1996))). On the contrary, David Barron has argued that there were competing visions within the home rule movement some of which actually sought limitations on local government authority by pointing out that “[t]hrough complex combinations of state law grants and limitations, these home rulers highlighted, empowered, even created those aspects of the 'local' that seemed to serve their desired substantive ends. Those aspects of the 'local' that seemed antithetical to their particular reformist visions would be suppressed, limited, even erased.” David J. Barron, Reclaiming Home Rule, 116 HARV. L. REV. 2255, 2321 (2003).
power over local governments. Despite this sense that home rule either should or does involve substantial autonomy and freedom from state interference, the legal structure of home rule rarely incorporates meaningful limitations on the state legislature's ability to enact laws governing a wide variety of issues that might be considered to involve matters of local concern.

II. LOCAL GOVERNMENT AUTHORITY IN NORTH CAROLINA

As noted earlier, North Carolina is one of only a few non-home rule states. As the following description shows, despite the lack of a broad constitutional or statutory recognition of local government authority over matters of local concern, North Carolina local governments have been delegated extensive authority. Judicial interpretation of the scope of this authority, however, has been inconsistent and at times restrictive.

A. Authority by Statutory Delegation

North Carolina local government authority exists by statutory delegation. There are provisions in the state constitution that relate to local governments, but they either authorize the legislature to enact laws relating to local governments or provide limitations on local government actions. The provisions neither confer nor mandate establishment of specific local authority. As the Supreme Court of North Carolina has stated, "[i]t is a well-established principle that municipalities, as creatures of the State, can exercise only that power which the legislature has conferred upon them."

103. See Sandalow, supra note 33, at 645 (arguing that home rule is a method by which states distribute their power, not a condition of local autonomy); RICHARDSON ET AL., supra note 6, at 7 ("[T]he term 'home rule' has acquired an almost talismanic aura over the years and often, inaccurately, connotes almost total freedom of local governments from state control.").

104. See supra notes 29-30 and accompanying text.

105. See infra Part II.B.

106. 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."); id. art. VII, § 3 (delineating the authority of merged or consolidated local governments); id. art. V, § 2 (delineating the scope of local authority to levy taxes and authorizing the legislature to enact laws allowing local governments to contract with private parties for a public purpose); id. art. V, § 4 (establishing limitations on local debt); id. art. II, § 24 (limiting local legislation on listed subjects, but not limiting state preemption by general laws on these subjects).

107. See sources cited supra note 106.

There is nothing in the constitution or other law that limits the extent to which the state can withdraw or preempt authority previously delegated to local governments.\(^{109}\) In addition, the scope of authority delegated, as well as the possibility of implicit preemption, are subject to interpretation by the courts.

When compared to the broad delegations typical of home rule states, North Carolina local governments' dependence on specific statutory delegation together with the unlimited power of state preemption of local authority may seem somewhat restrictive. The statutory delegations to local governments in North Carolina, however, actually encompass quite a broad range of powers and authority. Enabling laws in the North Carolina General Statutes, Chapter 160A (governing cities)\(^{110}\) and Chapter 153A (governing counties)\(^{111}\) provide local governments substantial authority in a wide range of areas. Most significant is the broad grant of general police power authority. Under this authority, cities and counties 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."\(^{112}\) For cities, the statute provides that ordinances must be consistent with the laws and constitutions of North Carolina and the United States.\(^{113}\) State courts have held that the same limitation applies to counties.\(^{114}\) Beyond this limitation, these broad grants of police power authority do not contain specific procedural or other limitations. More specific statutes authorizing police power regulation also exist, such as those authorizing regulation of begging,\(^{115}\) sexually oriented businesses,\(^{116}\) noise regulation,\(^{117}\) possession or harboring of dangerous animals,\(^{118}\) and removal and disposal of abandoned and junked motor vehicles.\(^{119}\) A separate

\(^{109}\) See Owens, supra note 10, at 674 (citing N.C. CONST. art. VII, § 1, which gives the state authority for organizing and creating the powers and duties of local governments in its discretion).


\(^{111}\) §§ 153A-1 to -473.

\(^{112}\) See § 153A-121(a) (counties); § 160A-174(a) (cities).

\(^{113}\) See § 160A-174(b) (enumerating conditions that would constitute inconsistency, essentially codifying the tests for explicit and implicit preemption that a court would apply).


\(^{115}\) See § 160A-179.

\(^{116}\) See § 160A-181.1.

\(^{117}\) See § 160A-184.

\(^{118}\) See § 153A-131.

statute specifically provides, however, that the enumeration of specific regulatory powers is not intended to limit the general authority granted in the broad delegation of ordinance-making authority.\textsuperscript{120} Both cities and counties also have extensive authority to regulate land use and development.\textsuperscript{121}

State statutes also authorize local governments to operate listed public enterprises\textsuperscript{122} and to operate other facilities including libraries, public recreation facilities, hospitals, and animal shelters.\textsuperscript{123} While the activities authorized for cities and counties have become increasingly overlapping, there are some activities that only cities are authorized to conduct and some that are exclusive to counties. Most notably, road construction and maintenance is limited to cities and the state, while counties have exclusive local responsibility for funding public schools and for administering a number of state-mandated functions, such as public health, mental health, and social services. Counties also have primary local responsibility for courts.\textsuperscript{124}

Local governments in North Carolina also have authority to generate revenue through the property tax (subject to specific limitations as to uses and amount),\textsuperscript{125} local option sales taxes,\textsuperscript{126} special assessments (for listed purposes),\textsuperscript{127} user fees,\textsuperscript{128} and miscellaneous other local taxes and charges.\textsuperscript{129} Cities and counties

\textsuperscript{120} See § 153A-124; § 160A-177.

\textsuperscript{121} See § 153A-320 to -390; § 160A-360 to -459. For an analysis of the statutory authority North Carolina local governments have in the area of smart growth initiatives, see Owens, supra note 10, at 673.

\textsuperscript{122} See § 153A-275; § 160A-312. Authorized public enterprises for both cities and counties are wastewater, water, public transportation, solid waste collection and disposal, off-street parking, airports, and storm water management programs; and for cities only, electricity, cable television, and gas. See § 153A-274; § 160A-311.

\textsuperscript{123} See § 131E-7; § 153A-263; § 153A-442; § 160A-353; § 160A-493.

\textsuperscript{124} A. FLEMING BELL, II AND WARREN JAKE WICKER, COUNTY GOVERNMENT IN NORTH CAROLINA 904 (4th ed. 1998); Wicker, supra note 3, at 18 (listing forty-four services authorized for both cities and counties, fifteen for counties only, and eight for cities only).

\textsuperscript{125} See § 153A-149; § 160A-209.

\textsuperscript{126} See § 105-465; § 105-483.

\textsuperscript{127} See § 160A-216; § 153A-185.

\textsuperscript{128} Specific statutes authorize some user fees, as in the case of public enterprises. See § 160A-314, § 153A-277. In its decision in Homebuilders Association of Charlotte v. City of Charlotte, 336 N.C. 37, 442 S.E.2d 45 (1994), the Supreme Court of North Carolina held that local governments have implicit authority to charge reasonable fees to defray the expenses of regulatory programs. Id. at 46, 442 S.E.2d at 51. But see Durham Land Owners Ass'n v. Durham County, ___ N.C. App. ___, ___ S.E.2d 200, 206 (2006) (holding that counties do not have authority to charge impact fees for school construction).

\textsuperscript{129} See generally DAVID M. LAWRENCE, LOCAL GOVERNMENT FINANCE IN NORTH CAROLINA (2d ed. 1990) (detailing North Carolina law governing local government finance).
have specific authority to engage in a wide range of activities to promote local economic development.\textsuperscript{130} North Carolina cities have authority to annex property, including by petition from affected property owners,\textsuperscript{131} as well as on the cities' own initiative without approval of the property owners, subject to certain conditions as to degree of development and ability to deliver services.\textsuperscript{132} Local governments have broad authority for interlocal cooperation, including the authority to exercise power and engage in undertakings jointly, through joint agencies, or through contracts.\textsuperscript{133} Cities and counties have authority for some purposes to establish separate entities, such as service districts or authorities, governed by the city or county governing board or their appointees, but with separate authority to tax, borrow or regulate.\textsuperscript{134} They also have authority to establish regional authorities to address issues as provided by specific statutes.\textsuperscript{135}

To varying degrees, the statutes delegating authority to local governments contain limitations either as to the substantive scope of authority granted or as to procedures required for the exercise of authority granted. In the context of local government dependence on statutory authority, local governments must strictly comply with each specific limitation, whether substantive or procedural in character. Failure to comply with even the most detailed procedural requirement makes the action subject to legal challenge and possible invalidation.\textsuperscript{136} For example, the authority to regulate abandonment of junked vehicles includes a definition of a junked motor vehicle, lists factors to be considered in determining whether removal is

\textsuperscript{130} See § 158-7.1 (authorizing construction of infrastructure, acquisition of property, and appropriation of funds to promote local industrial or commercial development).

\textsuperscript{131} See § 160A-31.

\textsuperscript{132} See § 160A-34; § 160A-46.

\textsuperscript{133} See § 160A-462.

\textsuperscript{134} See § 153A-301 (creating County Service Districts); § 160A-536 (creating Municipal Service Districts); § 160A-552 (creating Parking Authorities); § 160A-579 (creating Public Transportation Authorities).

\textsuperscript{135} See, e.g., § 153A-422 (authorizing the creation of Regional Solid Waste Management Authorities); § 160A-422 (authorizing Regional Transportation Authorities).

\textsuperscript{136} See Heaton v. City of Charlotte, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971) (holding that "a zoning ordinance or an amendment thereto which is not adopted in accordance with the enabling statutes is invalid and ineffective"); Raynor v. Comm'rs of Louisburg, 220 N.C. 348, 351, 17 S.E.2d 495, 498 (1941) (holding that failure to comply with statutory requirement to advertise for bids renders contract invalid). But see Sonopress, Inc. v. Town of Weaverville, 139 N.C. App. 378, 386, 533 S.E.2d 537, 541 (2000) (stating that the annexation procedure statute, § 160A-38(g)(1), provides that the standard for review of alleged procedural irregularities is whether they "materially prejudice" the substantive rights of the petitioner).
warranted, establishes procedural requirements for enforcement, and places some limitations on what may be included in the ordinance.\textsuperscript{137} In contrast, the authorization to regulate noise simply states that a city "may by ordinance regulate, restrict, or prohibit the production or emission of noises or amplified speech, music, or other sounds that tend to annoy, disturb, or frighten its citizens."\textsuperscript{138} Where the statutes provide broad authority, the local government is free to establish the specific definitions and regulatory provisions in the locally adopted ordinance.

Detailed substantive and procedural limitations can be found throughout the many important local government enabling statutes, including planning and land-use regulation\textsuperscript{139} and annexation.\textsuperscript{140} Some of the state-mandated procedures, especially notice and hearing requirements, might otherwise be required as a matter of constitutional due process or, as in the case of annexation, to protect against overreaching where extraterritorial powers are granted without requiring legislative or voter approval.

Detailed state laws also restrict local government administrative functions, including public records,\textsuperscript{141} open meetings,\textsuperscript{142} finance (including budget preparation and adoption, as well as accounting and disbursement of funds),\textsuperscript{143} procurement,\textsuperscript{144} property disposal,\textsuperscript{145} conflicts of interest,\textsuperscript{146} and voting by the local governing board.\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{137} See § 160A-303.2.
\item \textsuperscript{138} § 160A-184.
\item \textsuperscript{139} See, e.g., § 160A-364 (specifying procedures for adopting or amending subdivision ordinances); § 160A-372 (specifying what can be included in a subdivision control ordinance); § 160A-384 (specifying procedures for adopting zoning ordinances); § 160A-385 (specifying procedures for amending zoning ordinances).
\item \textsuperscript{140} See § 160A-49 (specifying the procedure for annexation, including a notice of intent, notice of public hearing, actions to be taken prior to informational meeting, procedure for public informational meeting, and passage and contents of annexation ordinance); § 160A-47 (specifying the documents the annexing municipality must prepare, including a report and plans regarding extension of services to the annexed area).
\item \textsuperscript{141} See § 132-1.
\item \textsuperscript{142} See § 143-318.10.
\item \textsuperscript{143} See § 159-7 to -38 (delineating procedures for adoption of the budget including a balanced budget requirement, duties of finance and budget officers, minimum requirements for the accounting for and investment of funds, and procedures and limitations applicable to capital projects).
\item \textsuperscript{144} See § 143-128 to -135.9 (establishing minimum formal and informal bidding thresholds, defining procedural requirements for advertisement and receipt of bids, listing permissible exceptions to bidding, establishing mandatory minority participation requirements, and listing authorized construction contracting methods).
\item \textsuperscript{145} See § 160A-265 to 160A-280.
\item \textsuperscript{146} See § 14-234.
\end{itemize}
These laws generally apply to local governments (and, in some cases, to state agencies) uniformly, without regard to the size of the jurisdiction, and contain specific minimum requirements.\textsuperscript{148}

With regard to certain structural aspects of local government, the legislature has delegated what might be considered home rule authority. Cities and counties 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.\textsuperscript{149} Cities have authority to change their name\textsuperscript{150} and "style," that is, whether they are called city, town, or village.\textsuperscript{151} These types of structural choices are probably equivalent to those that would be considered matters of local concern in a home rule state.\textsuperscript{152}

This summary of delegated authority in North Carolina illustrates the wide range of subjects that are both specifically and generally addressed in state law. While the state legislature has delegated significant authority to address local and even extraterritorial matters, the form in which these delegations are made

\textsuperscript{147.} See § 153A-44 (delineating limited bases for which county board members may be excused from voting); § 153A-45 (establishing county voting requirements for adopting ordinances); § 160A-75 (establishing city procedures governing board voting, delineating limited bases for which board members may be excused from voting, and establishing voting requirements for adopting ordinances).

\textsuperscript{148.} The public records law applies to any public body, see § 132-1; local government finance laws apply to local governments as defined in § 159-7(c) to -7(15); procurement laws apply to the expenditure of public funds by state and local governments, see § 143-129; property disposal requirements apply to all cities and to counties by operation of § 153A-176, see § 160A-266; and the conflicts of interest laws apply to all public agencies, see § 14-234, but do contain an exception applicable to small jurisdictions as defined in § 14-234(d1).

\textsuperscript{149.} See § 153A-58 to 153A-64 (counties); § 160A-101 to 160A-111 (cities).

\textsuperscript{150.} See § 160A-101(1).

\textsuperscript{151.} See § 160A-101(2). There are no classes of cities in North Carolina, so different styles of city do not indicate different levels of authority and do not have any other legal significance. See § 160A-1(2) ("'City' is interchangeable with the terms 'town' and 'village,' . . . and shall mean any city as defined in this [statute] without regard to the terminology employed in charters, local acts, other portions of the General Statutes, or local customary usage."). In cities, these changes may be made by the governing board by ordinance, see § 160A-102, or upon citizen initiative, subject to a referendum, see § 160A-102 to -104. There are no other provisions for citizen initiative, recall, or referendum in the general laws governing North Carolina local governments, although there are a few local charters that contain such provisions. See David M. Lawrence, Initiative, Referendum, and Recall in North Carolina, POPULAR GOV'T, Fall 1997, at 8, 8–18. The statutes governing counties require voter approval of locally initiated structural changes. See § 153A-60.

\textsuperscript{152.} See supra note 78 and accompanying text. Structural matters are generally understood to be included in home rule delegations. See SILVESTRI & NELSON, supra note 1, at § 1.41.
HOME RULE

includes, in many cases, specific substantive and procedural limitations. Local attorneys and other officials must understand both the scope of authority granted as well as any procedural requirements that apply. 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.

Where the authority for a particular activity is not clear, local governments may seek special legislation passed by the state legislature—a local act—to provide clear authority. Local governments also regularly seek special legislation in order to modify specific procedural limitations contained in the general law. While there are constitutional limitations on the use of local legislation for certain specified subjects, local acts on a wide range of subjects are easy to obtain. Under a courtesy system well established in the general assembly, local acts that have the support of the local delegation are usually approved unanimously by the legislature. Indeed, legislators often view their support of local legislation as a tangible constituent service. In addition, it can be argued that the local act system, when used to authorize new or innovative programs or activities, provides a 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 legislation that modifies authority for one or more units through uncodified provisions. Local attorneys sometimes fear that the presence of a

153. See, e.g., An Act to Authorize the Town of Caswell Beach to Regulate Golf Carts, ch. 58, § 1, 2005 N.C. Sess. Laws 97 (authorizing the Town of Caswell Beach to regulate the operation of electric golf carts on public streets within the town).

154. See, e.g., An Act to Allow the Town of Kill Devil Hills to Make Certain Assessments Without Petition, ch. 142, § 1, 2005 N.C. Sess. Laws 248 (exempting the Town of Kill Devil Hills from the requirement of a petition for the use of special assessments for listed purposes).


157. See David M. Lawrence, The Legal Nature of the City and Its Governing Board, in MUNICIPAL GOVERNMENT IN NORTH CAROLINA, supra note 3, at 31, 34.
local bill specifically authorizing a particular power implies that the authority does not otherwise exist in the general law.\(^{158}\)

As noted earlier, local governments without home rule have no authority except that which is specifically delegated.\(^{159}\) As such, there is significant focus on the specific language, scope, and meaning of the numerous enabling statutes and local acts. Ultimately, questions about the meaning of these laws are resolved by courts. The following section addresses the legal standard courts apply in cases analyzing the scope of local authority.

B. Judicial Interpretation

In a case involving an allegation that a local government action is invalid for lack of statutory authority, the role of the court is often to determine whether the challenged action is within the scope of authority granted, even though it may not be specifically enumerated in a statute.\(^{160}\) In some cases, it may also require an analysis of whether the action is preempted, either explicitly or implicitly, by other state legislation.\(^{161}\) The basic job of the court, then, is to determine whether the legislature intended to authorize the challenged local action.\(^{162}\) Courts are guided by standards of judicial review through which they determine how narrowly or broadly specific delegations should be interpreted. In the absence of legislative statements directing courts as to the legislature’s intent

\(^{158}\) See Owens, supra note 10, at 704 (“If one jurisdiction secures such authorization, others often seek the same to avoid the negative implication that those without explicit authorization do not have the power to use that tool.”). It is unclear whether this fear is justified in all cases. The implication of a lack of statutory authority is probably not warranted in the most common case, where a local act is adopted without legislative reference to or debate about its relation to existing law, as opposed to a case where authority under general law is sought and denied, and then local authority is obtained.

\(^{159}\) See supra notes 31–32 and accompanying text.

\(^{160}\) See, e.g., Homebuilders Ass’n of Charlotte v. City of Charlotte, 336 N.C. 37, 42–44, 442 S.E.2d 45, 49–51 (1994) (applying statutory “broad construction” rule and concluding that fee was a reasonably necessary or expedient supplementary power in case where plaintiff challenged locally enacted fee as void for lack of statutory authority).

\(^{161}\) See, e.g., Craig v. County of Chatham, 356 N.C. 40, 44, 565 S.E.2d 172, 175 (2002) (regarding whether a state law preempts county regulation of swine farms, stating that “we look to the North Carolina General Statutes to see what power the General Assembly has delegated broadly to counties on a statewide basis or more specifically to counties such as Chatham in the area of swine regulation”).

\(^{162}\) See Durham Land Owners Ass’n v. Durham County, __ N.C. App. __, __, 630 S.E.2d 200, 203 (2006) (“[I]t is the duty of the Court, where the language of a statute is susceptible of more than one interpretation, to adopt the construction and practical interpretation which best expresses the intention of the Legislature . . . .”).
regarding the standard of review, courts have historically applied a narrow standard of review.163

The Dillon's rule of judicial review was specifically developed to address questions about the scope of local government authority. Developed by judge and local government law scholar John F. Dillon in the late nineteenth century, the rule 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."164 The rule further provides that "[a]ny fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."165

North Carolina is often described as a "Dillon's rule state," meaning in absence of home rule authority, the scope of local authority is determined under Dillon's rule. The Dillon's rule/home rule comparison actually sets up a false dichotomy.166 Home rule

163. See Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 551, 554, 276 S.E.2d 443, 445 (1981) ("[I]t is generally held that statutory delegations of power to municipalities should be strictly construed, resolving any ambiguity against the corporation's authority to exercise the power.").

164. JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 101-02 (Chicago, James Cockroft & Co. 1872) (emphasis omitted). The restrictiveness of this rule is likely a function of Dillon's concern over the abuse of local authority at the time of his writing. He notes in the introduction to the first edition of his treatise that "the administration of the affairs of our municipal corporations is too often both unwise and extravagant." Id. at 22. The introduction includes recommendations for limitations on local authority, especially in the area of debt, as well as his strongly held view that local authority should be established by general laws. See id. at 22-26. His rule of judicial interpretation is consistent with his view that the courts share the responsibility for seeing that local authority is kept in check, as he notes,

The courts, too, have duties, the most important of which is to require these corporations, in all cases, to show a plain and clear grant for the authority they assume to exercise; to lean against constructive powers, and, with firm hands, to hold them and their officers within chartered limits.

Id. at 25-26. While Dillon is known for his restrictive views on the scope of local government authority, it would be an error to assume that he was hostile toward municipal government in general. His passionately expressed view was that the system and operation of municipal government "is, beyond controversy, the fairest to the individual citizen, and, on the whole, the most satisfactory in its operations and results of any that has yet been devised." Id. at 26.

165. Id. at 102.

166. See RICHARDSON ET AL., supra note 6, at 13 ("The literature treats Dillon's Rule and home rule as polar opposites with respect to local government autonomy and assumes that either one or the other exists in a state. But both of these assumptions are incorrect. The two doctrines often coexist with one another and neither implies any particular degree of local government autonomy.").
describes the source and extent of delegation by the state, whereas Dillon’s rule is a rule of judicial interpretation that may be used regardless of the form of delegated authority, unless the legislature has expressed an intention for a more liberal standard. When the issue is framed in this way it is clear, as the North Carolina Court of Appeals has recently affirmed, that North Carolina is not a Dillon’s rule state.

In the early 1970s the North Carolina legislature enacted a state law expressing its intent that local government authority should be broadly construed. The statute reads:

It is the policy of the General Assembly that the cities of this State should have adequate authority to execute 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 necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

As noted above, 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.

North Carolina courts have not consistently heeded this legislative directive to construe broadly local-enabling legislation. Instead, courts have intermittently applied Dillon’s rule and other limiting rules of construction. The record of cases is quite mixed, both in terms of outcomes (which things have been held to be within the local government’s authority and which things have not) and,

167. As noted earlier, Dillon’s rule has been applied even in home rule states. See supra text accompanying notes 44–52.
168. See infra text accompanying notes 179–82.
169. N.C. GEN. STAT. § 160A-4 (2005). The county provision is nearly identical except that it does not contain the proviso regarding consistency with state and federal law. See § 153A-4. Though neither the broad construction provision nor the general police power delegation for counties contain the preemption language, case law indicates that the state’s preemptive authority is preserved. See Craig v. County of Chatham, 356 N.C. 40, 50, 565 S.E.2d 172, 179 (2002) (holding that state’s complete and integrated regulatory scheme implicitly preempts local regulation of the same activity); State v. Tenore, 280 N.C. 238, 245, 185 S.E.2d 644, 648–49 (1972) (holding that statewide law preempts local ordinance regulating the same subject).
170. See § 153A-124 (counties); § 160A-177 (cities).
more importantly, in terms of the legal standards applied by the courts. As documented in a recent comprehensive analysis of Dillon's rule in North Carolina, early cases (prior to 1890) interpreted local government authority broadly, allowing various activities that were not specifically authorized but considered "reasonably necessary." Around the turn of the century, due to changes in social and economic conditions, judicial interpretations became more restrictive. North Carolina courts continued to use Dillon's rule even after the legislature enacted the "broad construction" statute, despite the fact that the more generous standard in the statute appears to be entirely inconsistent with the rule.

A watershed decision was thought to have been rendered in 1994 when the Supreme Court of North Carolina, in Homebuilders Association of Charlotte v. City of Charlotte, upheld the City of Charlotte's imposition of fees for regulatory permits, specifically relying on the broad construction statute and refusing to apply the more restrictive Dillon's rule formulation. This case did not, however, end the court's pattern of variable judicial approaches. Later that year the Supreme Court of North Carolina used the Dillon's rule formulation to invalidate a local government employment benefit policy that went beyond the provisions of the statute governing benefits. A restrictive interpretation was used again, more recently in Smith Chapel Baptist Church v. City of Durham, when the Supreme Court of North Carolina ruled that

171. See Owens, supra note 10, at 682.
172. See id. at 682–83 (documenting historical changes in the urban and political environment resulting in more restrictive rulings during the turn of the century).
173. See Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 554, 276 S.E.2d 443, 445 (1981) (narrowly construing city's authority to reject bids on sale of property); see also Owens, supra note 10, at 694–96 (documenting cases decided after enactment of the broad construction statute).
175. Id. at 43–44, 442 S.E.2d at 49–50.
176. See Bowers v. City of High Point, 339 N.C. 413, 417–23, 451 S.E.2d 284, 287–91 (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!, LOC. GOV'T L. BULL., Mar. 1995 at 1. It is important to note that the directive to use a broad construction is in Chapters 160A (cities) and 153A (counties). See N.C. GEN. STAT. § 160A-4 (2005) (cities); § 153A-4 (counties). Bowers v. City of High Point involved a narrow interpretation of a statute in Chapter 143. See Bowers, 339 N.C. at 418–19, 451 S.E.2d at 288–89. A court may well determine that even if broad construction displaces Dillon's rule or other restrictive default standard of judicial interpretation, it does so only with respect to power explicitly contained in Chapters 160A and 153A.
imposition of fees for storm water programs exceeded the authority granted local governments to charge fees for utility systems.\textsuperscript{178}

The most significant recent case in this area exhibits a valiant effort by the court to reconcile prior, seemingly inconsistent rulings under a unifying standard for judicial review. Those who follow developments in local government law may be cautiously optimistic by strong statements in this case, but would be justified if they do not see it as a major step toward predictability in this area of law.

In \textit{Bellsouth Telecommunications, Inc. v. City of Laurinburg},\textsuperscript{179} 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.”\textsuperscript{180} Placing itself clearly within the \textit{Homebuilders} precedent, the court relied on the “broad construction” statute, holding that this language prevents application of Dillon’s rule in cases “where 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[].’”\textsuperscript{181} To reconcile the prior rulings in \textit{Bowers} and \textit{Smith Chapel}, the court explained that the narrow construction of Dillon’s rule is appropriate “where the plain meaning of the statute is without ambiguity.”\textsuperscript{182}

While the first part of the ruling provides a refreshingly honest look at the variable records of prior cases, it is uncertain how much predictability the newly enunciated standard will provide. The focus under the new standard will be on whether a particular statute is ambiguous, or whether instead the court must rely on the plain meaning of the statute to determine whether the authority in question has clearly been delegated.

In addition, courts will be responsible for deciding when powers authorized “necessitate additional and supplementary power to carry them into execution and effect.”\textsuperscript{183} It is difficult to discern what evidence the courts will rely on in making this determination. In the \textit{Bellsouth} case, the court applied the new standard to determine

\textsuperscript{178} See \textit{id.} at 815, 517 S.E.2d at 881. This decision was based on an application of the “plain meaning” rule of statutory interpretation. See \textit{id.} at 811, 517 S.E.2d at 878.


\textsuperscript{180} See \textit{id.} at 85–86, 606 S.E.2d at 727–28.

\textsuperscript{181} \textit{id.} at 83, 606 S.E.2d at 726 (alteration in original).

\textsuperscript{182} \textit{id.} (“[W]here the plain meaning of the statute is without ambiguity, it ‘must be enforced as written.’” (quoting \textit{Bowers v. City of High Point}, 339 N.C. 413, 419–20, 451 S.E.2d, 284, 289 (1994))).

\textsuperscript{183} \textit{id.}
whether a fiber-optic network falls within the plain meaning of a cable television system as defined in the enabling statute. Concluding that the language of the statute is ambiguous, the court applied the broad construction rule. While 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." A less sympathetic court could have concluded that the legislature could not possibly have intended to authorize the city to operate technology that did not exist when the enabling law was enacted.

It is possible to understand the continuing variability in local government authority cases in terms of the controversial or experimental nature of the action challenged, or to explain them as reflecting historical developments of the time. Viewed in objective terms, it may be possible to understand the divergent decisions as reflecting an underlying philosophy of judicial restraint, which requires deference to the legislative branch and avoidance of judicial legislating. After all, the legislature can always correct an erroneous court decision on the scope of authority delegated, and a deferential judiciary might prefer to let a more democratic process resolve the issue. Even with this limited judicial role in mind, however, it is difficult to reconcile some of the North Carolina court decisions. Indeed, the fact that the North Carolina appellate courts do not consistently view the broad construction and Dillon's rule concepts as being mutually exclusive is evident in a post-*Bellsouth* case that cites

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184. *Id.*
185. *Id.* at 86–87, 606 S.E.2d at 728.
186. Professor Owens notes that controversial issues have tended to fare poorly throughout the history of local government authority jurisprudence and suggests that changes in court composition may more likely explain inconsistent results than changes in legislation or legislative intent. *See* Owens, *supra* note 10, at 700. Indeed, faculty at the Institute of Government regularly advise local government officials to seek local legislation if activity is controversial, affects fundamental rights, or has extraterritorial effect.
187. As Professor Owens has documented, the legislature promptly responded to the ruling in *Smith Chapel* and enacted specific authority for storm water program fees. *See* Owens, *supra* note 10, at 698 n.141. This event can be viewed in different ways. Either it is proof that judicial restraint was appropriate since the legislature has the power to clarify its intent and that, in doing so, the political process was able to function in creating the final version of the law, or it is proof that the court was wrong about the legislature's intent and it was inefficient for the legislature to have to correct the error.
both standards in describing the general scope of local government authority.188

Thus, while North Carolina local governments have been delegated extensive authority, the form and specific wording of enabling statutes has the potential to limit flexibility in implementation. Although many local activities do not become the subject of legal challenges, the experience for local governments when they are has been mixed. Judicial review of delegated authority still appears to be unpredictable despite the specific legislative directive for broad construction that has existed for over thirty years.

III. COMPARING NORTH CAROLINA TO HOME RULE STATES

A. Assessing Home Rule

Is home rule better than non-home rule? There is, of course, no universal, objective answer to this question.189 It is important to frame this question, and indeed to approach any comparison of the systems of delegation, in terms of what interests are considered and what objectives or conditions are of concern. While a complete analysis of the effects of varying degrees of local autonomy is beyond the scope of this Article, it is interesting to consider the various perspectives from which this issue is often addressed. It has been argued that from a purely structural standpoint, home rule is important “because it fills a gap in our legal system—the lack of any place for local governments in our legal structure.”190 Another observer argues that “[s]ince local government autonomy and capacity are critical elements of . . . [public sector] reform proposals, the legal theory of local government as a ‘creature of the state’ cannot continue as a feature of the intergovernmental framework.”191 Indeed, the argument for autonomy based on the scope and

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188. See Campbell v. City of Laurinburg, 168 N.C. App. 566, 571, 608 S.E.2d 98, 100 (2005). This case refers to the powers “necessarily or fairly implied in or incident to the power expressly granted,” see id. (quoting Madry v. Scotland Neck, 214 N.C. 461, 462, 199 S.E. 618, 619 (1938)), and cites N.C. GEN. STAT. § 160A-4 in the same paragraph, see id.

189. See Briffault, supra note 89, at 256 (arguing that “130 years after the birth of the home rule concept, its meaning remains controversial, uncertain, and highly variable”).

190. Id. Briffault argues that home rule provides “some appropriate formal legal recognition of the distinctive and important place of local governments in the federal-state-local, and especially the state-local, governmental scheme.” Id. at 257.

importance of local government services and regulations in current society is compelling.\textsuperscript{192}

Given the continuing preemptive role states have, even under most forms of home rule, it is difficult to see how home rule provides more recognition than other forms of delegated authority. Indeed, the role and importance of local governments in North Carolina cannot be said to be less significant than in it is in home rule states. As the state-to-state comparison of local government authority observes, "[o]n the surface, North Carolina appears to be in want of local autonomy, but a complex mix of provisions and practices enhances the position and integrity of local governments."\textsuperscript{193}

For local government advocates, including local government officers and their professional organizations, the question is framed in terms of whether home rule is better for local governments.\textsuperscript{194} These stakeholders, not surprisingly, argue that greater authority is necessary to respond to increasingly complex problems and to develop ways to provide services in the face of fewer resources, greater demands for services, and increasing "unfunded mandates." According to one observer, "[l]ocal officials want more revenue, more financial authority, more state aid, more discretion in spending funds, and fewer expensive mandates."\textsuperscript{195} As noted earlier, this desire is often disappointed, even in home rule states. A recent study of cities in Massachusetts concluded that home rule as it operates in that state actually hinders local governments in their efforts to resolve local problems.\textsuperscript{196}

Home rule has also been evaluated in terms of how it affects social problems in modern America. Thus, there are those who argue either for or against increased home rule based on its impact on particular issues, such as smart growth or urban sprawl.\textsuperscript{197} For example, some argue that sprawl is a direct result of too much local

192. See Briffault, supra note 89, at 256. "[T]he vast majority of public services are provided, and much critical public regulation is undertaken, at the local level. Approximately three-quarters of the total number of state and local employees are actually employed by local governments." Id.

193. Svara, supra note 9, at 312.

194. See David R. Berman, State-Local Relations: Authority, Finances, Takeovers, 2004 MUN. Y.B. 45, 45 (2004) (observing that local government officials are increasingly concerned about threats to home rule powers, state intervention and the state's growing interest in the structure of local governments, and point to preemption and cutback in aid as major problems).

195. Id. at 47.

196. BARRON, FRUG, & SU, supra note 13, at xi–xiii.

197. See generally Barron, supra note 102 (summarizing the role of home rule in the debates over urban sprawl).
autonomy, while others argue that the solution to sprawl lies in increasing that autonomy.\textsuperscript{198}

Home rule, together with liberal laws allowing incorporation of suburban areas, has also been criticized as contributing to social and economic inequity. The following example of this admittedly normative analysis proposes that

the virtues of enhancing local autonomy tend to be greatly exaggerated. Localism reflects territorial economic and social inequalities and reinforces them with political power. Its benefits accrue primarily to a minority of affluent localities, to the detriment of other communities and to the system of local government as a whole . . . . Localist ideology and local political action tend not to build up public life, but rather contribute to the pervasive privatism that is the hallmark of contemporary American politics. Localism may be more of an obstacle to achieving social justice and the development of public life than a prescription for their attainment.\textsuperscript{199}

Home rule is often promoted, on the other hand, as an important component of a healthy democracy in that it encourages participation at the local level and provides a sense of individual empowerment that is critical to the success of democracy.\textsuperscript{200} Local autonomy is necessary, it is argued, because “[p]eople will bother to participate in local government decision making only if local governments have real power over matters important to local people.”\textsuperscript{201} Recent history suggests, however, that where citizens had a choice, they sometimes opposed increasing local autonomy through home rule because of a concern that it will lead to increased taxes and excess regulation.\textsuperscript{202}

\textsuperscript{198}. RICHARDSON ET AL., supra note 6, at 34 (concluding that Dillon’s Rule is not a key influence on growth management efforts). See generally Barron, supra note 102 (tracing the history of home rule and its role in the sprawl debates and arguing for a rejuvenated role for home rule in combating sprawl).

\textsuperscript{199}. Briffault, supra note 13, at 1–2; see also Briffault, supra note 3, at 425 (arguing that economic localism reinforces inequality and does not support extending local autonomy).

\textsuperscript{200}. See Briffault, supra note 89, at 258 (arguing that citizen participation at the local level is easier and more satisfying, promotes national democracy, and requires local autonomy); Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057, 1070 (1980).

\textsuperscript{201}. Briffault, supra note 89, at 258. Note than in an earlier piece, Briffault argued that the link between local government and greater citizen participation is uncertain and undocumented, see Briffault, supra note 3, at 397, and that the large number and inequitable development of local governments actually lessens both the significance and likelihood of local political participation, see id. at 407.

\textsuperscript{202}. See Stanley Ziemba, Four South Suburbs Try to Gain Home Rule, CHI. TRIB. (South-Southwest ed.), Mar. 2, 2004, § 2, at 2 (“It’s the revenue-raising power that tends to
Citizens and local government officials are only two of the groups one can identify as being affected by local government autonomy. Other groups include businesses and interest groups (those organized groups who represent discrete interests of particular groups of citizens or businesses), as well as state legislators and executive officers. For these stakeholders, the allocation of authority between state and local governments may have an impact on their effectiveness in promoting desired policies and laws. A lobbyist for a statewide organization, along with many state-level legislators and officials, may feel that it is more efficient and politically effective to debate important issues, including some involving purely local matters, in one state-level forum rather than in many individual localities. While this dichotomy is reflected in the case law as courts are called upon to determine what is of local or statewide interest, it can be argued that statewide organizations and legislatures are in a better position to determine which issues require uniform, statewide treatment than are the courts. When presented with proposals for change, legislators are reluctant to give up control of authority and often view the state’s role in controlling local activities as an important check on local favoritism or inequity, while business interests opposed to home rule proposals have argued that local home rule would lead to a “crazy quilt of conflicting local laws.”

B. Home Rule for North Carolina

Do North Carolina local governments need home rule? Clearly there are multiple and conflicting views about the effect home rule may or may not have on various normative values and issues presently facing citizens of local governments (who are, or course, also citizens of state and federal governments). Whatever the actual effects of home rule may be, it is difficult to imagine that the

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203. See supra notes 53–74 and accompanying text.
204. See Berman, supra note 194, at 50 (summarizing recent home rule proposals in New Hampshire, Michigan, and Missouri); see also Krane, Rigos & Hill, supra note 102, at 2 (presenting arguments for and against home rule).
effects of North Carolina's non-home rule structure are significantly different. North Carolina, with its substantial delegations of authority to local governments, liberal incorporation and annexation policies, and fair share of economic inequity and political history, is probably not distinguishable from the other local governments praised or criticized by advocates in these normative debates.

The question addressed in this Article intentionally sidesteps the value-laden assessment of whether home rule is good or bad, either in general or in terms of particular social issues. Instead, the question is whether North Carolina local governments need home rule to improve flexibility, efficiency, and predictability in carrying out the functions for which they are responsible. This comparison does not attempt to identify which issues should be addressed locally rather than at the state level. Instead it recognizes the practical reality that in both home rule and non-home rule states, the legislature retains and is unlikely to relinquish significant authority to legislate on matters, including matters some may consider to be purely local, that it considers to be important enough to address through statewide legislation.206

For purposes of this discussion, flexibility means the ability of the local government to use various approaches to carry out its delegated authority. This argument does not reflect a preference for more authority, but instead a preference for experimentation and tailoring of programs locally within the parameters set by the state in the statutory delegation. Efficiency means the ability of government at both the state and local level to implement policies and deliver services with a minimum of procedural delay. This includes minimizing the need for interpretations by courts or by clarifying legislative action, as well as providing maximum discretion in local administrative arrangements for carrying out delegated powers. Predictability means the ability of governmental officials, citizens, businesses, and other interested stakeholders to know what authority local governments have been given and to understand, again, with minimal need for judicial or legislative clarification, the scope and limitations of that authority.

206. See Berman, supra note 194, at 47. Berman quotes a West Virginia state legislator as saying, "I've never heard anyone in the legislature say they were against home rule. But when the doors are closed, they don't want to give up the revenue, the power, the authority." Id. (quoting Josh Hafenbrack, Mayors Want More Tax Tools; West Virginia City Officials Say Legislature Must Loosen Control, CHARLESTON DAILY MAIL, Oct. 10, 2003, at 1A).
As documented in *Home Rule in America*, the actual discretion and authorized powers of local governments varies significantly, even among states classified as having home rule.\(^{207}\) For many kinds of local government activities, North Carolina local government authority is essentially equivalent to that enjoyed in home rule states. A Brookings Institution study of Dillon's rule, which includes an analysis of local government autonomy, ranks North Carolina third nationally.\(^{208}\)

On the issue of state preemption, it is clear that home rule can, but does not always, make a difference. In those cases where a home rule delegation has been interpreted to limit the authority of the state to legislate on local matters, there is perhaps some greater predictability for local governments. This potential advantage must certainly be offset, however, by the difficulty of discerning which matters are of local concern, as ultimately determined by the courts. As described in Part I of this Article, for most jurisdictions it appears that home rule does not significantly reduce the potential for state legislative preemption of many areas of interest to local governments.

As noted in the preceding section, judicial interpretation of local government authority is not significantly more predictable in many home rule states than it is in North Carolina. While the standard of review has varied in North Carolina despite the presence of legislative direction, commonly litigated issues in home rule states have also created a lack of predictability.\(^{209}\) It appears that a specific legislative directive, rather than the mere existence of home rule authority, is often necessary to override the courts’ tendency to interpret local authority narrowly. Questions about whether matters are of state or local concern and about whether local provisions conflict with state general laws have also been subject to varying interpretations by courts in home rule states. As noted above, the legal analysis of implicit preemption is similar and commonly applied in both home rule and non-home rule states, and reflects the basic structure of states’ superior authority regardless of how local authority is delegated.

\(^{207}\) See Krane, Rigos & Hill, *supra* note 24, at 475 (showing substantial diversity of home rule and local government discretionary authority across the fifty states). “Home rule encompasses substantial interstate variation in the choices accorded local officials over many different types of policy decisions.” *Id.*

\(^{208}\) RICHARDSON ET AL., *supra* note 6, at 26–27.

\(^{209}\) See *id.* at 16 (“The multitude and difficulty of issues raised by home rule lead to many more cases in state courts interpreting home rule than Dillon’s Rule.”).
Perhaps the most significant difference between the home rule and non-home rule states is that authority in non-home rule states is delegated through individual statutes, rather than in one or more broad delegations. As noted earlier, however, this difference is diminished with respect to those home rule states in which authority is enumerated in specific statutory provisions.\textsuperscript{210} Since North Carolina local governments act pursuant only to specific statutory authority and without any presumption in favor of authority over local matters, the scope of authority is directly affected by the specific wording of each individual statute. The number and specificity of enabling statutes amplifies the potential for uncertainty and legal challenge. The broader delegation of authority in home rule states allows more activity to be undertaken without specific limitation, and reduces the opportunities for challenge, except upon the broader issues of state versus local concern, or conflict with general laws, as described above.

Flexibility is also diminished by limitations contained in some enabling laws under which North Carolina local governments operate. While some specific procedural requirements may well be politically important, others are not. It may be argued that some consistency in procedural requirements may benefit consumers of local government law, including citizens and businesses. For example, having general laws that require all local governments to follow the same procedures for notice of meetings or letting of contracts may make it easier for citizens and businesses to participate in, and contract with, local governments throughout the state. It is difficult, on the other hand, to perceive the political importance of a state law that specifies which contracts that have been publicly bid must be approved by the governing board and which do not.\textsuperscript{211}

Under the home rule framework, preemptive general laws are likely to address issues of political weight, leaving the details of most functions to the local unit. The numerous statutes that together define local government authority in North Carolina vary significantly in the extent to which they do or do not leave the details of implementation to the local unit, and the legislature has no explicit or implicit standard or protocol for determining how to frame enabling authority. It is an ad hoc process that is a function of the individual circumstances and events surrounding the enactment and subsequent amendment of each statute over time. While this process exists in

\textsuperscript{210} See supra note 43 and accompanying text.
\textsuperscript{211} See infra note 222 and accompanying text.
home rule states as well, it does not affect all of the local government’s authority; only that which the state sees fit to regulate by general law.

IV. RECOMMENDATIONS

The foregoing analysis does not provide a strong case for a major change in the legal structure of local government authority in North Carolina. North Carolina local governments have been delegated substantial and broad powers, and the state relies upon local governments to deliver essential services to the citizens of the state. It seems unlikely that there will be support for a change in the non-home rule status in North Carolina. There is no political call for a constitutional amendment, and it seems unlikely that the legislature would support any significant diminution in its ability to make statewide law in its discretion. Further, it does not appear that North Carolina local governments 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 shown above, North Carolina local government authority is probably as broad as local government authority in many home rule states. To the extent that home rule is seen as an avenue toward freedom from state involvement in issues perceived to be local in nature, the sense of a need for home rule is probably misplaced. On the other hand, the system of delegation in North Carolina is complicated and may create more uncertainty and lack of flexibility in implementation than is necessary.

The following recommendations are intended to improve flexibility, efficiency and predictability in carrying out delegated local authority.

(1) Reduce unnecessary statutory detail. The legislature should impose upon itself a practice of wording enabling legislation as broadly as possible, specifically avoiding detail—whether substantive or procedural—that does not promote important statewide policies. The legislative body and its staff should scrutinize legislative wording

212. See Wicker, supra note 3, at 27 (“City governments in North Carolina play a major role in providing the services and the functions that are needed in an increasingly urban society.”).

213. As a practical matter, what constitutes important statewide policy will be determined by the actual political process based on the extent to which legislators perceive a statewide need, or the extent to which constituents or other lobbying interests organize to promote particular positions. Where statewide policy issues are not implicated, implementation of authorized powers should be left to local discretion.
with an eye toward maintaining local flexibility in implementation and administration wherever possible, adding specific limitations only when necessary to resolve policy issues of statewide importance. This would be consistent with the stated policy that the legislature intends to delegate sufficient authority to "carry ... into execution and effect" the authorized activity.214

This recommendation could be implemented prospectively. In addition, a process could be undertaken to review and recommend changes in existing law in order to establish a consistent degree of specificity, leaving detail in only where it is deemed to be legally or politically necessary. Implementation of this approach to drafting and amending enabling legislation could provide flexibility in local administration and possibly reduce the need for local bills modifying mandated procedures.

An example illustrates the potential benefit of this recommendation. Under current law, there are many requirements for providing advertised notice of various types of local government actions. Some include minimum times,215 minimum size,216 specific media,217 and specific content.218 These specific requirements are in addition to a broader general statute that identifies the minimum requirements for all published notices called for under state law.219 As noted earlier, the North Carolina courts have held that failure to comply with procedural requirements is a basis for invalidation of the action.220

While there is a strong public policy favoring public notice of governmental activities, the North Carolina statutes do not reflect a consistent or comprehensive approach to the provision of public information about specific government actions. And while official meetings of public bodies are subject to general notice

215. See § 143-129(b) (stating that in letting of public contracts, a minimum of one week must pass between the time of advertisement and the time of bid opening).
216. See § 160A-384(b) (stating that advertisement giving notice of proposed amendments to zoning regulations shall not be less than one-half of a newspaper page in size).
217. See § 143-129(b) (stating that electronic advertisement of proposed public contract must be approved by governing board).
218. See § 158-7.1(c) (stating that notice of hearing related to local development expenditures shall describe interest to be acquired, proposed acquisition cost, governing body's intent to approve the acquisition, and such other information needed to reasonably describe the acquisition).
219. See § 1-597 (requiring general circulation and a local subscription basis).
220. See supra note 135 and accompanying text.
requirements,\textsuperscript{221} the more particularized notice requirements do not necessarily reflect the most important or controversial matters a local government might undertake. Indeed, the form and medium for providing notice may vary based not only on the subject matter, but also on the size and sophistication of the community. Principles of flexibility and efficiency would suggest that detailed procedures should be specified only in those cases where a statewide standard is necessary to protect important policy goals that exist in all or most local communities. Statewide procedures for involuntary annexation or condemnation of property may be more justifiable on policy grounds than statewide requirements for most regulatory or contracting activities at the local level. Even where statutes include specific options that may be used at the local government's discretion, such as the choice to advertise electronically for certain matters, if this option appears only in certain statutes, it raises the implication that the option is not available in other contexts. Under the approach recommended here, options would be left open in all cases unless specific minimum requirements were deemed necessary on a statewide basis.

A similar approach could be taken regarding statutes that specifically require governing board approval for certain actions.\textsuperscript{222} These do not follow a consistent pattern, and in some cases they are modified in local charters by local act. While the requirement for board approval in many cases may reflect a desire by the state legislature that certain decisions be made in public, the wide variation in the size of units governed by identical provisions makes strict rules in this area inappropriate. A legislative statement that governing board approval for local government actions is not required unless a particular statute specifically calls for it would go a long way toward clarifying this issue under the current law. This recommendation suggests that the choice about how decision making should be delegated within a jurisdiction should generally be left to the governing board's discretion except in cases where board action and public notice is considered essential.

As these examples illustrate, this recommendation seeks to focus attention at the state level on the trade-off between specificity and flexibility, and to promote the notion that the creation of procedural limitations should be undertaken for politically important purposes

\textsuperscript{221} See § 143-318.12.

\textsuperscript{222} Of the exceptions to the competitive bidding requirements listed in § 143-129(e) and (g), only two require board approval, but there is no obvious distinction among them that would explain this difference.
rather than through inattention or force of habit. The legislature could adopt the position that enabling legislation should avoid specifying procedures for implementation unless deemed essential by the legislature to carry out intended statewide policy, including the policy of promoting uniformity where the legislature deems it to be necessary. Though it is not always easy to determine when uniformity is essential, it seems more appropriate for this determination to be made by the legislature than by the courts.

(2) Clarify the standard of judicial review. The legislature should clarify the scope and applicability of the broad construction statute. First, the legislature should clarify whether the broad construction statute is intended to apply to authority granted outside the scope of 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 charters. In reality, however, local government authority can be found in multiple sections of the General Statutes, including many important provisions outside the basic city and county statutes. While the legislature may not intend to extend the broad construction language to all delegated authority, it seems appropriate that the standard should apply to police power regulations and similar actions that are authorized in other chapters. The legislature should revise the broad construction directive so that it applies to all delegated authority except those exempted. Through this approach, the legislature could specifically list any subjects, chapters, or specific grants of authority to which the directive would

223. Even the author of the restrictive Dillon's rule of judicial interpretation believed that a more deferential standard should apply to the mode adopted for carrying out authorized powers:

The rule of strict construction does not apply to the mode adopted by the municipality to carry into effect powers expressly or plainly granted, where the mode is not limited or prescribed by the legislature, and is left to the discretion of the municipal authorities . . . . [T]he usual test of the . . . act . . . is, Whether it is reasonable? and there is no presumption against the municipal action in such cases.

DILLON, supra note 75, § 239(91) at 453.

224. See N.C. GEN. STAT. §§ 153A-4, 160A-4 (stating that “the provisions of this chapter . . . shall be broadly construed” (emphasis added)).

225. Chapters that contain authority for local government activity include: motor vehicles, chapter 20 (such as § 20-141 which contains speed restrictions); social services, chapter 108A; environmental regulation and pollution control, chapters 113, 113A, and 143; public contracts, article 8 of chapter 143; mental health, chapter 122C; public health, chapter 130A, housing authorities, chapter 157; economic development, section 158-7.1; local government finance, article 3 of chapter 159; water and sewer systems, chapter 162A.
not apply, rather than leaving it to the courts to determine its application beyond the basic city and county chapters.

Second, the legislature should revise the broad construction statute to correct the ongoing inconsistency in judicial review of local government authority. As noted above, even the most recent interpretation of the broad construction statute falls short of fully implementing the current broad construction directive. Without diminishing the state's role in creating local government authority, or its power of explicit and implicit preemption, the legislature could clarify that as to those powers that are delegated, courts must interpret them broadly. 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 necessary to carry out the authority delegated, or as long as the powers are reasonably and appropriately related and not in conflict with other laws.

Another approach would be to amend the broad construction statute to create a presumption stating that additional and supplemental power shall be considered to be included unless specifically or implicitly preempted. This would, in effect, reverse the provision in Dillon's rule requiring any fair, reasonable doubt as to whether authority exists to be resolved against the local government. As noted earlier, this approach has been taken in several home rule states. This 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 upon a challenger the burden of demonstrating that the action is not reasonably related to delegated authority, or is in conflict with other law.

These recommendations give meaning and effect to the decades-old legislative statement of intention for broad construction. Like the first recommendation, this is not an argument for an increase in authority for local governments. The notion is that, given a legislative directive for broad construction, it is more efficient for the legislature to exercise its authority to preempt those areas where authority is not intended than for local governments through individual clarifying local acts or litigation to delineate the scope of authority already granted.

226. As noted earlier, this approach was used by North Carolina courts earlier in our history. See Owens, supra note 10, at 682 (stating that local governments "must have the choice of means adopted to ends and are not confined to any one mode of operation").

227. See supra text accompanying notes 50–52.
(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 a statutory amendment for cities and counties that allow locally enacted structural changes. The legislature regularly enacts local laws to align charters and other local acts for cities and counties with the general law, but the need for legislative involvement is purely technical. There should be no need for legislative approval when the local unit’s preference is to conform the charter provision, or previously enacted local act, to the otherwise applicable general law.

CONCLUSION

Despite their lack of official recognition in our federalist structure, it is clear that local governments across the country in both home rule and non-home rule states carry out essential functions that affect our daily lives and have become essential in the administration of state and federal programs. As shown in this Article, authority granted to local governments is quite broad in both home rule and non-home rule states. If the notion that local governments in North Carolina need home rule is based upon the idea that it would provide greater freedom from state preemption, the notion is based on a false assumption. Incorporation of some aspects of home rule authority into the North Carolina structure, however, could better effectuate the legislative directive for broad construction. No doubt one or more of the recommendations in this Article, if adopted, might be viewed as favoring one set of stakeholders over another. Stakeholders are likely to disagree on the effect of local government authority based on their perception of its impact on particular issues regardless of the particular structure involved. The changes suggested here are designed to bring the law of local government

228. See supra notes 149–51 and accompanying text.

229. See, e.g., An Act to Provide that Filling of Vacancies in the Offices of Register of Deeds, Sheriff, and County Commissioner in Beaufort County Shall be in Accordance with General Law, ch. 263, § 1, 2005 N.C. Sess. Laws 606 (repealing a Beaufort County local act in order to conform the law in that county to the general laws); An Act Amending the Charter of the Town of Wrightsville Beach to Allow the Town to Appoint a Board of Adjustment as Provided by General Law, ch. 265, § 1, 2005 N.C. Sess. Laws 607 (conforming the Town of Wrightsville Beach Charter to the general law regarding appointment of the Board of Adjustment).

230. Section 160A-3 does authorize cities to elect to use either their charter provisions or the general law, but where provisions are inconsistent and the charter provision does not purport to contain all the acts necessary to carry out the authorized activity, the statute provides that the charter provision controls. See § 160A-3(b).
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 they have been delegated.