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New Hampshire Town And City

State Preemption of Local Regulation

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By Cordell Johnston

Anyone who has been to a few NHMA workshops or read our articles in *Town & City* is probably familiar with the idea that New Hampshire is not a “home rule” state. Cities and towns have only the powers the legislature has expressly given them. All municipal authority must find its basis in some state law.

For example, cities and towns may adopt zoning ordinances and land use regulations only because there is a statute (RSA 674) that gives them that authority. The appointment of local police officers and their powers to enforce the law are authorized by state law (RSA 105). Selectmen and city councils can adopt ordinances governing the use of public roads because state law says they can (RSA 41:11 and 47:17).

Finding a statute that authorizes local action is not, however, the end of the inquiry. Even when a municipality has the general power to adopt ordinances or regulations in a particular area, that power may be limited by state or federal preemption.

Q. What is preemption?

A. Preemption results from the very nature of municipal existence. Because municipalities are subdivisions of the state and derive all of their power from it, when a municipal ordinance conflicts with a state law, the state law wins—that is, the local ordinance is *preempted* and therefore is unenforceable. Even in an area in which municipalities clearly have authority to act (such as zoning), there may be a state law that overrides local ordinances.

Q. Isn't this the same as saying that a municipality doesn't have authority to regulate in the first place?

A. No. There are plenty of areas in which municipalities have no authority. For example, municipalities do not have the power to establish their own taxes (even the famously “local” property tax is actually imposed by state law, *see* RSA 72:6) or adopt their own criminal codes. If a city or town tried to enact an income tax or criminalize the wearing of hats, the action would be invalid not because there is a conflicting state law, but simply because the municipality does not have authority to regulate the subject matter at all.

In contrast, when we talk about preemption of municipal regulation, ordinarily we are referring to an area in which cities and towns *do* have authority, but in which the state has placed limits on that authority.

Q. What's a common example of a state law that preempts local authority?

A. Although we may not think of it in terms of state preemption, one of the most familiar examples is the zoning variance. Cities and towns are given great discretion in adopting zoning ordinances, but if a property owner satisfies certain criteria established in *state* law, the zoning board of adjustment *must* grant a variance from the terms of the ordinance. The state law trumps the local ordinance.

Q. What are some other examples?

A. Land use regulation has long been considered a matter for local control, and probably for that very reason, it also provides many examples of preemption. Just in the last three years, the legislature has enacted statutes that

prohibit municipalities from requiring fire suppression sprinklers in one- and two-family residences (RSA 674:36, IV and :51, V);

require municipalities, upon request, to divide lots that were previously merged under local ordinances without the owner's consent (RSA 674:39-aa); and

limit the scope of municipalities' review of modification and collocation applications with respect to personal wireless service facilities (RSA 12-K; *see also* "Upgrades to Wireless Infrastructure" by Paul Sanderson in this issue of *Town and City*).

Other subjects on which the legislature has either partially or completely preempted local land use regulation include manufactured housing, agricultural uses of land, building on class VI and private roads, workforce housing, and small wind energy systems. ✕

Q. Those examples all seem pretty clear. Is preemption always spelled out explicitly in state statutes?

A. Unfortunately, no. In some cases the courts have found "implied preemption" on the ground that the state's regulatory scheme is so comprehensive and detailed that the legislature must have intended to exclude municipal regulation—even though there is no express statement to that effect in the statute. For example, the New Hampshire Supreme Court has found implied state preemption of local regulation in the areas of hazardous waste facility siting (*Stablex v. Hooksett*, 122 N.H. 1091 (1982)); landfill regulation (*North Country Environmental Services v. Bethlehem*, 150 N.H. 606 (2004)); and air emissions (*Bio Energy, LLC v. Hopkinton*, 153 N.H. 145 (2005)).

Preemption is not always complete—even within a preempted area, there may be matters that the municipality can still regulate. For example, in the *Bethlehem* case, the court ruled that although the town could not apply its building code requirements to a landfill, it could enforce a provision in the ordinance that excluded privately owned landfills from any district in the town.

Q. How does preemption work? Does it invalidate the local ordinance, or does it prevent local officials from taking action?

A. It depends. In many cases, the preempting state law prescribes things that must or must not be contained in a local ordinance. For example, state law says that a zoning ordinance may not exclude manufactured housing entirely, and may not prohibit "the tilling of soil and the growing and harvesting of crops" in any district. A zoning ordinance provision that violates one of these prohibitions is unenforceable.

In other cases, there may be no local ordinance that is affected, but certain regulatory action by a local authority may be preempted. For example, a zoning ordinance may regulate where factories can be located, and the planning board may exercise site plan review authority over a proposed factory, but it cannot use that authority to tell the applicant how many parts per billion of lead or mercury it can emit. A building inspector

may not issue a building permit to construct a building on a class VI road unless the requirements of RSA 674:41 are satisfied. And, as mentioned above, a zoning board of adjustment *must* grant a variance when the applicant satisfies the state's criteria.

Q. Can you cite some examples that are particularly relevant today?

A. Yes, a major area of preemption is the siting of "bulk power supply facilities" and "energy facilities." Under the applicable statute (RSA 162-H), the state's Site Evaluation Committee (SEC) has jurisdiction to review applications and issue certificates of approval. The SEC's jurisdiction preempts local land use regulation of these facilities. The Northern Pass transmission project, which has been highly controversial in much of the state, is governed by this process.

Also affected are the wind energy projects that have been similarly controversial in some areas of the state. A wind energy facility (or other "renewable energy facility") is subject to the SEC's jurisdiction if it has a generating capacity of between 30 and 120 megawatts. For a facility with a capacity of between five and 30 megawatts, the SEC *may* exercise jurisdiction on its own motion, or at the request of the local governing body, the applicant, or 100 registered voters in the host or abutting municipalities. If the SEC does not exercise jurisdiction, the facility is subject to local land use regulation.

Although local regulation is preempted when the SEC has jurisdiction, municipalities do have a role in the state process. Affected municipalities are entitled to receive notice of the application, require the applicant to hold informational meetings about the project, and have their views considered by the SEC.

Q. All of these examples involve preemption of local land use regulation. Is preemption an issue in any other areas?

A. Yes, there are plenty of other examples. One that has caused a great deal of concern since its enactment in 2003 is RSA 159:26, which states that "no ordinance or regulation of a political subdivision may regulate the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearms components, ammunition, or firearms supplies in the state." Thus, even though local governing bodies are expressly authorized to regulate the use of municipal property (*see* RSA 41:11-a), they are not permitted to regulate the carrying of guns in the town hall or elsewhere. (Note: The statute does expressly allow a zoning ordinance to regulate firearms businesses in the same manner as other businesses—so a gun store, for example, still has to comply with the zoning ordinance and other land use regulations.)

Another, perhaps less well known, provision is RSA 236:130, which prohibits any political subdivision from using a camera or other device to determine the ownership of a motor vehicle on any public way. Consequently, a municipality may not install cameras at intersections to record the license numbers of vehicles that run stop signs or red lights.

There are many other laws that we may not think of as examples of preemption, such as RSA 40:40-a, which is familiar to veterans of town meeting. This statute effectively preempts the moderator's authority over the meeting by requiring a secret ballot on any vote if so requested by five voters. In a sense, any state law that tells municipal officials how they "shall" exercise their authority is a form of preemption.

Q. Isn't preemption a bad thing for municipalities?

A. Maybe yes, maybe no. It's something that municipalities (and NHMA) tend to view with disfavor, but there are some areas in which it is necessary as a practical matter. If every municipality could regulate energy facilities, for example, it would be impossible for transmission lines of any length to receive the necessary approvals.

(Some might consider this a good thing, but the problems would become apparent very fast.) Further, some municipalities do not *want* the responsibility of dealing with such projects, primarily because their volunteer officials lack the time, expertise, and resources to deal with them.

Q. Is there anything else I should know about preemption?

A. Yes. It probably won't surprise you that municipal ordinances can be preempted by federal law as well as by state law. Perhaps that can be a subject for another time.

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