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**GIVING LIFE TO HOME RULE: THE CASE FOR
THE LOCAL LAW POWERS OF NEW YORK
LOCAL GOVERNMENTS**

2004 Edwin L. Crawford Memorial Lecture on Municipal Law

NOVEMBER 18, 2004



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**A. Kevin Crawford, Esq.
Association of Towns of the State of New York**

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Edwin L. Crawford

Edwin L. Crawford was an attorney, a public servant and an advocate for local government issues. A resident of Broome County, Ed served as town attorney for the Town of Vestal, and later as the Town's supervisor and Chairman of the Town Board for four years. During this time, he also served as a member and chairman of the Broome County Board of Supervisors and the Broome County Legislature. In 1969, he was elected Broome County Executive. From 1977 until his death, Ed served as Executive Director of the New York State Association of Counties. He volunteered his time for dozens of organizations, including service on the Board of Directors for the National Association of Counties.

About the Lecture Series

This Lecture Series was established in 1996 at Albany Law School to honor the memory of Ed Crawford. The program strives to educate and promote dialogue on important and timely issues affecting local governments.

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It's probably not an understatement to say that as legal advocates, at least for those who enjoy winning advocacy, most would prefer to argue the other side of the case for the home rule powers of New York's cities, counties, towns and villages. When I'm done this afternoon, I hope that is not true for those of you here today. It certainly would not have been true of Ed Crawford.

I want to begin as other speakers in this series have by remembering Mr. Crawford. I have an advantage most of them did not have. To paraphrase a now popular refrain (i.e., from the 1988 Dan Quayle Vice Presidential debate)—I knew Ed Crawford but not only am I no Ed Crawford—I'm no relation at all actually. I mention that only because many have thought that the case over the years. I did have the benefit of working with Ed, however, for many of my early years as counsel at the Association of Towns and benefited from that opportunity as I am sure all of you here did who had the same chance to know him or work with him. He believed in the efficacy of local government and worked tirelessly on its behalf. He strived mightily to keep counties fully empowered and able to accomplish the many and varied missions of local government.

I believe the last major project Ed worked on together with the Association of Towns and NYS Conference of Mayors, with Jeff Haber and Ed Farrell their respective Executive Directors both then and now, was the formation of a statewide municipal insurance vehicle which is called NYMIR and on which I now direct half of my time as its Executive Director. NYMIR has succeeded in large part due to the watchful eyes and careful oversight by Jeff and Ed - but also because it was put together right in the first place; one of many things Ed Crawford did right in his tenure here in Albany as Executive Director of NYSAC and as an advocate for local government.

On many of our joint lobbying efforts on mandate reform and the like, Mr. Crawford would speak eloquently about the home rule powers of counties and their partner local governments. So he would be pleased that it is our topic today. Now Dean Salkin might tell you that I was initially lukewarm on home rule as a topic for this year feeling that it had been done to death so to speak. Obviously, I was wrong! Even I think I was wrong (and I seldom admit to that!). It's true that Professor Briffault addressed the joint Federal and State Bar meeting here in Albany just a year ago last month on this topic. It's also the case that our Association also includes it in some form on a regular basis at our annual educational and training meetings. I'm sure the other Associations do as well. Well-researched presentations regularly appear in publications like the New York State Bar's Municipal Lawyer.

My task this afternoon is a little different than those presentations I think. I'd like to try and give life to home rule, which means less of the case law, which hasn't, by and large, been kind. Without sticking our heads in the sand, I instead want to focus on what we might do for the future - because some change in fortune is needed or I fear we do risk seeing home rule on life support where too many would prefer it to be.

So, can we give life to home rule given our State's constitutional and statutory framework and in light of the developments in our New York case law over these past forty years?

Well, as we recently learned, in spite of apparently overwhelming odds, anything is possible. How about those Red Sox!!

The analogy to the recent baseball playoffs occurs to me for two reasons. First, those of you who knew Ed Crawford will remember, I think, that he was never more animated and enthused than when he spoke of his days as an announcer for the Binghamton Triplets minor league baseball franchise. He was also a fixture at state government softball league games where the Municipal Council's entry was heavily dependant on the contingent from NYSAC. He was never shy about a little critique here and there either as I remember—not that there wasn't a lot to critique!

The baseball playoffs are a good analogy for a second reason as well, I think.

Interestingly, the problem for home rule—just as it was for the Red Sox until recently—could be said to be the result of an ancient curse. Not the curse of the Bambino which dates from the 1918 trade of Babe Ruth from the Red Sox to the NY Yankees, but the "Curse of Cardozo" dating back to concurring opinion written by the renown Benjamin Cardozo in 1929. More on that in a bit. First, let's take a minute to talk a little about what the Home Rule Law actually says, and then what it has come to mean by describing just a few important cases.

What is Home Rule?

To begin then, let's first admit that Home Rule is not a simple topic. I'd hazard a guess many of our Association's own members would be hard-pressed to provide a good explanation. They only know it's important and they should defend it. It takes on many forms in states across the country. Many are at variance with our own State's approach: a constitutional grant -implemented by legislation (i.e. the Municipal Home Rule Law and Statute of Local Governments). All these approaches from around the country have in turn been reframed by judicial interpretation and pronouncements which are themselves all over the map. The

courts, as I will mention again later, are themselves unsure what to make of it. In the end, it appears we cannot escape the topic even if we wanted to; nor should we if we have the interests of effective local government in our sights as I hope you do – and as I do.

Home Rule in New York has two basic components. One is an affirmative grant of power to local governments to manage their affairs using a mechanism called the local law. The other restricts the State Legislature from intruding upon matters of local, rather than state, concern -- a shield if you will. I will focus today on these two substantive areas of authority and not discuss any issues of procedure or process except to note that there is a particular procedure to be followed when local governments exercise these powers and, depending on the subject matter, it may involve mandatory or permissive referenda. In all cases, it is an exercise of power by a legislative body and includes a public hearing before the body or sometimes the chief executive.

The Affirmative Grant of Power

In addition to any powers granted to local governments by state law – such as the statutory provisions which make up the Town Law, Village Law, County Law or individual city or village charters, Article IX of the NYS Constitution affirmatively provides local governments with the power to adopt and amend local laws relating to their "property, affairs or government". Local governments are further empowered to adopt and amend local laws in specified areas whether or not they relate to the property, affairs or government of the local government. Article IX identifies those latter specific subject areas in which local legislative bodies are empowered to act. These constitutional grant provisions are then implemented and amplified by section 10 of the Municipal Home Rule Law.

"§10 – General powers of local governments to adopt and amend local laws

1. In addition to powers granted in the constitution, the statute of local governments or in any other law.

(i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government and, (ii) every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:

a. A county, city, town or village:

(1) the powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees ...

(2) In the case of a city, town or village, the membership and composition of its legislative body ...

b. A county:

(1) The adoption, amendment or repeal of a county charter ...

c. A city:

(1) The revision of its charter or the adoption of a new charter ...

d. A town:

...(3) The amendment or supersession in its application to it, of any provision of the town law relating to the property, affairs or government of the town or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section, notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law." [with certain enumerated exceptions] [emphasis added]

e. A village:

...(3) The amendment or supersession in its application to it of any provision of the village law....

The Restriction on the Legislature

The flip side of Article IX's affirmative grant of home rule power was, in effect, a shield meant to protect local governments from acts of the State Legislature. Under Article IX of the State Constitution, the Legislature has power to act in relation to the property, affairs or government of any local government only by general law, or by special law only

(a) upon request of two-thirds of the total membership of its [the local government] legislative body or on request of its chief executive officer concurred in by a majority of such membership, or

(b) except in the case of the city of New York, on certificate of necessity from the governor reciting facts which in his judgment constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.

To understand either of the components of home rule I've just described requires an understanding of the terms general law and special law. A "general law" is defined as a state statute which in terms and in effect applies alike to all towns, all counties, all cities or to all villages. A special law is the converse, one that applies to one or more but not all towns or all villages, etc. A state law that applies to all towns with 50,000 or more in population, for example, is a special law and not a general law. The State Environmental Quality Review Act which does apply to all towns and to all villages, etc., is an example of a general law. There are obviously many, many examples of the latter general law classification. The General Municipal Law's competitive bidding statutes and WICKS law provisions being two more common examples. When the Legislature acts by general law, therefore, that is a very real limitation on how local governments conduct their business – and why mandates that usually take that form are often so troublesome. Local governments are bound to follow them and the Constitution provides no protection from such general enactments. This then, is one very real limitation on home rule for New York's local governments.

Now, What Did Cardozo have to say?

In a case by the name of *Adler v Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929) Chief Justice Cardozo issued a concurring opinion in litigation involving the State Dwelling Law which was challenged as violative of earlier versions of city home rule provisions from our State Constitution. Not unlike our State's current home rule provisions (enacted in 1963 and now applicable to all classes of local government), the 1923 State Constitution required the State Legislature to act in relation to the property, affairs or government of any city only by general laws which were defined as laws that in terms and effect applied alike to all cities. The Multiple Dwelling Law, although general in nature, was in fact limited to the City of New York and to any other cities and villages that might in turn adopt it by local law. It was passed in the usual way by the Legislature, without an emergency message from the Governor. The Court of Appeals decided that the matters of health in the City of New York (which were the focus of the Multiple Dwelling Law) affected not only those in the City of New York but also the welfare of the State as a whole. Cardozo put it this way: "[t]he Multiple Dwelling Act ... seeks to bring about conditions whereby healthy children shall be born, and healthy men and women reared, in the dwellings of the great metropolis. To have such men and women is not a city concern merely. It is the concern of the whole state. Here is to be bred the citizenry with which the State must do its work in the years that are to come." The Court thus concluded that the Multiple Dwelling Law was properly enacted and that "home rule was no longer a factor." (James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule"*, *St. John's Law Review*, Vol 59:713, 740)

In his concurring opinion, Chief Justice Cardozo identified three categories into which various subjects might fall. There were subjects exclusively of state concern, those exclusively within the property, affairs or government of local governments, and those which included elements of both. He listed domestic relations, wills, inheritance, crimes not essentially local as well as the organization and procedure in courts as examples of matters of exclusive state concern. Matters of strictly local concern included laying out of parks, building of recreation piers, and the provision for public concerts. We do a little more than that these days I'd submit. Cardozo then wrote about the third zone where state and city concerns "overlap and intermingle". In these areas, he rejected a "predominantly of state concern" balancing test standard, finding that: "[a] subject including elements of state and local concern will be classified as a matter of state concern if it is to a substantial degree of matter of state concern." [emphasis added] Since that time, virtually every case dealing with actions of the State Legislature has followed Cardozo's lead and held that the Legislature may act by its ordinary legislative process, unfettered by the home rule provisions of the Constitution, as long as the subject matter is simply to some substantial degree a matter of state concern.

For example, the Court of Appeals has decided that the salaries of county district attorneys are a matter of state concern that the legislature could address through its normal legislative process. *Kelly v. McGee*, 57 N.Y. 2d 522, 433 N.E. 2d 908 457 N.Y.S.2d 434 (1982). District attorneys, with their responsibilities in enforcing the state's penal laws, were acting in areas of state concern. Thus, §183-a of the Judiciary Law (requiring payment of specified salaries to full-time district attorneys) served the State's interest by guaranteeing reasonable salaries that would attract the best available candidates to serve as district attorneys. The same result was reached in the case of *Cuomo v. Chemung County Legislature*, (122 Misc. 2d 42, 469 N.Y.S. 2d 868 (1983)) where the issue was the filling of a vacancy in the office of sheriff and the county was attempting to act under a provision of its county charter to fill the vacancy. The Court concluded that since the duties of sheriff involved enforcing the penal laws of the state as well as the operation of correctional facilities, the office of sheriff was one of sufficient statewide concern to warrant state regulation of filling such vacancies. Perhaps the low point in the case law, again all which can be traced back to Cardozo's opinion (i.e., "curse") from *Adler*, was a local residency requirement at issue in *Uniformed Firefighters Association v. City of New York*, 50 N.Y. 2d 85, 405 N.E. 2d 679, 428 N.Y.S.2d 197 (1980). That case involved a New York City local law making residence in the City a condition of appointment as a member of the police, fire, corrections and sanitation departments. The local law was inconsistent with a state enacted Public Officers Law provision, which established liberal residency provisions for those same employees. The City

argued that the state residency law was not a general law and that under home rule it could be superseded by local law. The Court of Appeals disagreed, however, holding that "while the structure and control of the municipal service departments... may be considered of local concern", the residency of civil servants unrelated to job performance is a matter of statewide concern not subject to municipal home rule. (It's noteworthy that they never actually said how it was of statewide concern. It was almost as if that was the city's burden.) Again, once it was determined that the provisions of the Public Officers Law constituted matters of state concern, home rule was no longer a factor and the State Legislature was free to pass a special law, without the need for a home rule request. The Court then determined that the city's residency law was invalid to the extent that it was inconsistent with state provisions.

Preemption

Although unrelated to the Cardozo curse, let me also spend just a minute on the subject of preemption (of home rule authority) before moving on to more fertile soil for home rule. An excellent example of this significant roadblock to home rule is the holding from a case called *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627, (1989). In *Guilderland*, the Court of Appeals stated that:

"[t]he preemption doctrine represents a fundamental limitation on home rule power [citations omitted]. While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies the untrammelled primacy of the Legislature to act * * * with respect to matters of State concern." (*Wambat Realty Corp. v State of New York*, 41 N.Y.2d 490, 497.) Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field [citations omitted]."

"Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute. Such local laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns. (*Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 97). Moreover, the Legislature need not express its intent to preempt [citations omitted]. That intent may be implied from the nature of the subject matter being regulated and the purpose

and scope of the State legislative scheme, including the need for State-wide uniformity in a given area [citations omitted]." [Note that this "need for uniformity rationale was the basis of the Court of Appeal's recent holding in *Cohen v. Saddle Rock*, 100 N.Y.2d 395, 795 N.E.2d 619, 764 N.Y.S.2d 64 (2003), where the issue was the variance standards recently added to Town and Village Law.] A comprehensive, detailed statutory scheme, for example, may evidence intent to preempt." [material added]

"Applying these principles to the case at hand, we hold that the State Legislature has enacted a comprehensive and detailed regulatory scheme in the field of highway funding, preempting local legislation on that subject. By several provisions of the Town Law and Highway Law, the Legislature has evidenced its decision to regulate how roadway improvements are budgeted, how these improvements are financed, and how moneys for these improvements are to be expended."

Reversing the Curse

Well, how do we rise from the ashes of *Guilderland*, *Adler*, *Uniformed Firefighters* and those from many other judicial pronouncements which adhere to the *Cardozo* line of thinking? How do we reverse the curse?

Well, let's look again to the recent baseball playoffs for inspiration. You may remember (as some will want to, as much as others try to forget), it's the ninth inning of game 4 of the *Red Sox/Yankees Series*. The *Hometown Team* is down a run and 3-0 in games with the greatest relief pitcher of all time on the mound needing only 3 outs to seal their fate. Maybe that's the desperate way we should feel today as home rule advocates. What do we do? What do we need? Well, in baseball, when you're losing it's pretty simple, you need base runners. You can't score runs unless you put runners on base. You start small. You score some runs, win one game and you build from there. In the ninth inning of game 4 at Fenway Park, 3 outs from elimination, *Kevin Millar* faced *Mariano Rivera*. It was *Kevin Millar* who said before that game: "Don't let us win tonight"; "This is a big game"; "Don't let the *Red Sox* win this game." *Millar* worked *Rivera* for a walk and the rest is now baseball history. Where do we find such base runners and table setters in the home rule arena? Who or what can be our *Kevin Millars* with that "if we can just get a toe hold" attitude that can turn the tide and build some momentum in our favor?

Well, I have three suggestions, one even emanating from *Cardozo* himself. The first base runner is the area of local government structure. The Constitution and

Municipal Home Rule Law are very clear on this point. Remember some of my previous MHRL recitations: "the powers, duties, qualifications, number, mode of selection and removal, terms of office..."; and "In the case of a city, town or village, the membership and composition of its legislative body." Think about it for a moment. These are powerful provisions that permit local governments – all four classes of general purpose local government - to define their very structure, even in matters with gravitas such as the term of office for their chief electeds, or the size of their legislative body. It includes the ability to decide something as important as how those members are selected. This is a powerful source of authority and one we must constantly keep in front of the legislative decision makers in the 1600 units of local government in our State. The Attorney General has opined, for example, that a village may limit the number of consecutive terms that one person may serve as mayor. Op Atty Gen. 83-10. How about that! While much of the country debated the issue of term limits, for example, forced onto statewide referenda by widely publicized petition drives that captured headlines and monopolized talk shows, many New York towns and villages (including New York City) stepped forward and often, without fanfare, simply put them in place with a local law. Again, these are not insignificant home rule powers. They certainly can set the table and begin to adjust people's attitudes and, more importantly, the attitude of the judiciary towards the concept of home rule.

Cardozo himself in his opinion from Adler suggested a second area where local governments may freely exercise their home rule powers and that is in the land use arena. He said "A zoning resolution in many of its features is distinctly a city affair, a concern of the locality." (Adler at 485). The case of *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 NE2d 346, 548 NYS2d 144 (1989) is a good example of this second category of base runner/table setter and one which coincidentally includes the third fertile area for local government home rule activity, namely the supersession power. As I noted earlier, section 10 of the Municipal Home Rule Law contains authority not only for counties to enact local laws amending their charters, but also for cities to revise their charters and for towns and villages to supercede and amend provisions of the Town Law and Village Law respectively, notwithstanding that those provisions might be a general law. For example, the Town of Easthampton may supercede provisions in the zoning article of the Town Law such that a simple majority of the town board may enact a zoning amendment and need not marshal a super majority vote even if a protest petition is filed. *North Bay Associates v Hope*, 116 A.D.2d 704, 497 N.Y.2d 757 (2d Dept 1986); lv. denied, 68 N.Y.2d 603, 506 N.Y.2d 1026 (1986).

Kamhi was a case involving the land use powers of a town and the attempt by a town board to supercede provisions of Town Law with respect to required open space set asides in a site plan review context. Many lost site of the *Kahmi*

decision, coming as it did on the heels of the Town of Guilderland's unsuccessful appeal of its transportation impact fee local law. While both were argued the same day and both decisions written by Judge Kaye, they reached opposite conclusions as to the extent of a town's home rule authority. *Kamhi* is, I believe, a beacon of hope for local home rule enthusiasts. Let me read from Judge Kaye's opinion because it speaks volumes and can be a rallying cry for home rule fans. I think this case may even represent our home rule clean up hitter.

Judge Kay wrote:

To deny the Town's authority in this case--as the concurrence urges--would be to give little force to the independent grants of power specified in the Municipal Home Rule Law and the Statute of Local Governments; it would ignore the Legislature's direction that these statutes be liberally construed; and it would significantly diminish the long-heralded constitutional and statutory home rule reforms. As Chief Judge Cardozo observed, the home rule laws "adopted by the people with much ado and after many years of agitation, will be another Statute of Uses, a form of words and little else, if the courts * * * ignore the new spirit that dictated their adoption." [Citations omitted.]

A boast from Cardozo no less. More significantly, the Court's holding in *Kahmi* reflected Judge Kaye's questioning during oral argument – when she asked the advocates for the Respondent "just what does the MHRL mean, it must add something to local government authority that they did not otherwise have?" [paraphrasing] Also, recall that Yorktown hadn't even exercised its supersession powers properly, failing both to state an intent to supersede or to specify the sections of Town Law it meant to supersede as required by the MHRL. Yet, the Court of Appeals chose this case on those facts to breath life into New York's home rule laws. That reflects, in my view, their comfort with the proposition that the land use arena is, generally speaking, a matter of local government's property and affairs.

Conclusion

As advocates for local governments, employees of municipal associations or as elected officials representing local government. I'd urge us all to keep faith and keep returning to the Home Rule law. If we fail to use the powers we have been given, we no doubt will lose them. It is a use it or lose it proposition I believe. As attorneys, when approached by a municipal client searching for authority to help solve or address a problem, we need to remember the Municipal Home Rule Law as a powerful source of authority that can substantially supplement the specific grants of authority found in the Town Law, Village Law, General Municipal Law and elsewhere.

We also have a shared responsibility to keep an eye on the State Legislature and be sure that the legislative history surrounding their enactments contain the necessary background and information which will disarm any subsequent interpretation as to the limiting impact of those statutes on home rule authority. See *Cohen v. Saddle Rock*.

In short, there is work to be done but hope for home rule in New York. We can't sit idly by because there is a gap in our legal government structures that only the home rule power can fill. We only need to consider that it's fifteen years after Guilderland and nothing has been done within the preempting web of state highway funding enactments to address the pressing need which the town had rightly identified as going unmet. Yes, it's still up to us on so many fronts: ethics; public safety; quality of life issues; you name it. And while we could sit here today with our head in our hands, biting our nails, there is reason for hope and optimism. While preemption may be an 800 pound gorilla and the "shield" of Article IX closer to a sham, let's continue to be vigilant, start small with some base runners, win a few games, extinguish the curse and celebrate the powers that our Constitution does provide to New York's local governments.