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Setting Limits: Litigation Between Mayor, City Council

On Feb. 6, I had the privilege of participating in a symposium, sponsored by the Center for New York City Law and the New York Law School Law Review, on the role played by the New York City Law Department in the governance of the city.

The event was occasioned by the recent publication of "Fighting for the City: A History of the New York City Corporation Counsel" by Professor William Nelson of the New York University School of Law, a historical study of the Law Department, from its 17th-century origins to the present.[1] The publication of this book came to fruition thanks to the generosity of many contributors, not least among whom is the publisher of the New York Law Journal.

In my presentation, I touched on legal disputes that occasionally lead to litigation among independently elected city officials, whose statutory attorney is the corporation counsel. I elaborate here on disputes between the mayor and the City Council.

I hasten to note at the outset that the relationship between the Law Department and the extraordinarily able legal staff of the City Council is excellent, and our collaboration is professional and yields fruitful results. Still, there have been times in recent years when good faith disputes between the mayor and the Council have resulted in litigation. Although the Law Department ordinarily determines the position of the city in litigation under Chapter 17 of the City Charter,[2] it is self-evident that it cannot represent independent elected officials in the event of a dispute. Thus, when a legal dispute between the mayor and Council proceeds to litigation, the corporation counsel generally represents the mayor, while the City Council has retained private counsel or relied on its in-house attorneys.[3]

A number of factors may account for such litigation over the last couple of decades, among them the revision of the New York City Charter in 1989, which abolished the Board of Estimate. In the course of that revision significant functions were reallocated. This led to uncertainty about the scope of power of the mayor and the City Council as the two primary inheritors of the board's powers. Term limits and politics may also have played a role.

Some of the resulting mayor/council cases concerned interpretation of state law or of the Charter, such as the Council's successful challenge to the last administration's proposal to privatize public hospitals, the litigation between the mayor and the Council concerning budget modification procedures, and a dispute over who approves cable franchise renewals under state law.[4] The mayor and Council even litigated over whether the High Line, an unused elevated railway on the West Side of Manhattan, could be demolished without following the Charter's Uniform Land Use Review Procedure, and, although the Appellate Division held that it could be demolished, the Bloomberg administration instead developed an imaginative plan to preserve the structure as a vital public amenity.[5]

More typically, disputes between the Council and the mayor involve disagreements over the validity of local laws on a variety of subjects, with the mayor's position usually, but not always, prevailing. The legal issue in many of these cases is whether the local law in question "curtails" a power of the mayor or whether the local law is preempted.

Curtailment

What we can refer to here as the doctrine of curtailment is based on §23(2)(f) of the Municipal Home Rule Law and §38(5) of the Charter, which require a referendum for any local law that "[a]bolishes, transfers or curtails" the powers of an elected officer, including of course the mayor. These provisions are set forth together with other referendum requirements that are generally designed to ensure that local legislative bodies do not act to alter the power of other officials without the consent of the electorate. This concept is analogous to separation of powers claims that are made at other levels of government. The question of curtailment most often arises in connection with alleged encroachments upon appointment powers, but also is an issue when a local law affects other powers of elected officials. The determination whether a local law "curtails" a power of an official is not always clear, and the cases between the mayor and Council have helped to clarify the scope of this doctrine.

Curtailment was in issue when, in 1994, the City Council enacted a local law providing for the establishment of a police investigation board, two of whose members would be appointed by the mayor, two by the Council and a chair appointed jointly by the mayor and Council. Section 6 of the Charter provides the mayor with the power to appoint officers of the city, and it was the position of the mayor and the corporation counsel that this included the power to appoint all of the members of the board. The First Department agreed that the law improperly transferred the mayor's appointment power without a referendum, and struck down the local law.[6]

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Following this ruling, the Council tried again by enacting new legislation, this time providing for appointees that were "designated" by the Council but appointed by the mayor. The First Department agreed with the mayor's position, presented by the Law Department, that the designation procedure for two board members was nothing more than advice and consent before the fact rather than after it, and struck down the new local law as a curtailment of the mayor's appointment power.[7]

A recent dispute between the mayor and the Council decided partly on curtailment grounds was *Mayor of City of New York v. Council of City of New York*, 6 Misc3d 533 (Sup. Ct., N.Y. Co. 2004). In that case, the Council enacted, over the mayor's veto, the so-called "sweatshop law," prohibiting city agencies from purchasing clothing or textiles from any manufacturer that did not pay its workers a "nonpoverty wage" as determined by the city comptroller. The mayor challenged the local law, arguing among other things that it unlawfully curtailed his procurement authority while enhancing that of the comptroller. The court agreed and struck down the law as an unlawful curtailment, holding also that state law establishes the exclusive means by which government agencies may supervise the wages and working conditions of manufacturers that supply them with clothing.

In a case decided last year, *Mayor of City of New York v. Council of City of New York*, 9 NY3d 23 (2007), one in which the position of the City Council prevailed, the Court of Appeals provided guidance on the issue of whether a power of an official has been curtailed by local legislative action. The Council in 2001 passed legislation over the mayor's veto that allowed unions representing fire alarm dispatchers and emergency medical technicians employed by the Fire Department to bargain separately on a variety of matters with the city as employer, rather than acting through the citywide bargaining representative, District Council 37 of the American Federation of State, County and Municipal Employees. The mayor sued to annul the local law on the ground that it curtailed his authority to bargain collectively on behalf of the city, and, further, that it was preempted by the New York State Taylor Law (Civil Service Law Article 14) governing public sector labor relations. The Court of Appeals, in a 6-1 vote, not only found that there was no preemption but also disagreed with the position advanced by the Law Department that the law could result in substantive advantages for the favored unions by action of the Council and therefore curtailed the exercise of the mayor's power to bargain with the municipal unions.

In doing so, the Court refined its test for curtailment by emphasizing the distinction between, on the one hand, a law that prescribes a procedural rule for bargaining and thus, in the Court's view, merely regulates city operations, and, on the other hand, a law that limits an elected official's "structural authority." As an example of the first type of enactment, the Court cited performance requirements established by the Council for municipal recycling, while the Court used one of the police investigation board cases described above as an example of a curtailment requiring a referendum. Although the Law Department did not prevail in the collective bargaining case, and although one could dispute (as the dissent in the case did) whether the particular local law at issue met the standard articulated by the Court, the holding did provide necessary guidance for local elected officials in New York City and throughout the state in assessing the legality of legislative proposals.

Preemption

Curtailment doctrine, while important, is of interest primarily to practitioners of municipal law. Preemption, the other doctrine commonly litigated between the mayor and City Council, is more frequently encountered in a variety of contexts. At the state level, this doctrine is grounded in Article IX, §2(c) of the state Constitution, which prohibits local legislation that is inconsistent with the state Constitution or any general law, and has been construed also to bar local legislation that is inconsistent with special laws (i.e., laws applying to specified municipalities but not to the entire state) where those laws touch on matters of state concern.[8] Although only the concept of inconsistency appears explicitly in the state Constitution, state appellate courts have used the term "preemption" to refer to both direct conflict of a local law with a state law and situations where the local law intrudes upon an area for which the state has "assumed full regulatory responsibility."[9] This latter form of preemption may be based upon an explicit statement by the Legislature or may be implied from the comprehensiveness of the state legislative scheme. Both federal and state courts have applied similar criteria in ascertaining whether local and state laws are preempted by federal legislation.[10]

The preemption issues litigated between the mayor and Council generally turn on the question whether local laws infringe upon powers or duties conferred upon the mayor or mayoral appointees by state or federal law, and have included attempts by the Council to regulate procurement by city officials and the provision of state-mandated social services. Cases turning on procurement matters include *Mayor of City of New York v. Council of City of New York*, 4 Misc3d 151 (Sup. Ct., N.Y. Co. 2004), in which the mayor challenged a local law prohibiting city agencies from doing business with financial institutions that engage in lending practices defined as "predatory." The law was declared void on the ground that it was preempted by federal and state statutes regulating financial institutions. Cases relating to the provision of social services include *Killett-Williams v. Bloomberg*, NYLJ, May 15, 2003 at page 21 (Sup. Ct., N.Y. Co. 2003), in which the mayor challenged a local law providing subsidized jobs for certain public assistance recipients and the unemployed, and *Mayor of City of New York v. Council of City of New York*, NYLJ, Dec. 1, 2004 at page 24 (Sup. Ct., N.Y. Co. 2004), in which the mayor challenged a local law relating to the

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education and work activities of public assistance recipients. Both enactments were struck down on the ground that they were preempted by provisions of state or federal law governing the provision of training and services to public assistance recipients and (in *Killett-Williams*) that the enactment infringed on powers conferred by state law to the city's commissioner of Social Services.

Appellate Cases

Two recent appellate cases involving disputes between the mayor and Council are of particular interest for their discussion of preemption. In *New York City Health and Hospitals Corporation v. Council of City of New York*, 303 AD2d 69 (1st Dept.), app. withdrawn, 1 NY3d 539 (2003), the City Council sought in 2001 to prevent the privatization of security functions by the New York City Health and Hospitals Corp. (HHC) by enacting a local law that required city-funded public hospitals to utilize only certain peace officers to perform security duties. HHC then sued the City Council on the ground that the law was preempted by the HHC Act, the state law originally enacted in 1969 that establishes HHC and sets forth its powers and duties. The city and the union affected by the enactment intervened as plaintiff and defendant respectively. The lower court upheld the local law, but the First Department unanimously reversed, finding that the HHC Act both impliedly and explicitly created an area of state regulation that preempted the local law. Although the particular result achieved by the Appellate Division's ruling was nullified by the subsequent enactment of state legislation requiring that security duties at HHC facilities be performed by peace officers (Chapter 671 of the Laws of 2003), its preemption discussion remains of considerable import.

Preemption also featured in the 2006 decision by the Court of Appeals in *Council of the City of New York v. Bloomberg*, 6 NY3d 380 (2006). That case concerned a 2004 local law that would have required businesses to provide health benefits equivalent to spousal benefits for domestic partners or designated household members of their employees as a condition for contracting with the city or with certain other public entities. Although Mayor Michael Bloomberg has long been supportive of efforts to encourage such benefits in the public and private sectors, the administration challenged the bill on the advice of the Law Department that it was inconsistent with state competitive bidding laws and ERISA, the federal law governing health and retirement plans. The mayor first sued the City Council for declaratory and injunctive relief to prevent the law's implementation and applied for a temporary restraining order and preliminary injunction. When the state Supreme Court declined to grant a temporary restraining order, the mayor withdrew the preliminary injunction application and announced that the law would not be implemented until its legality had been determined, relying upon his right and duty to refrain from implementing an unlawful enactment. The Council then commenced an Article 78 mandamus proceeding to compel the enforcement of its local law, and obtained an oral decision from the state Supreme Court granting the petition based solely on what that Court called a presumption of validity. The Appellate Division reversed the order unanimously and ruled for the mayor on the merits.

The Court of Appeals was presented with the issue of whether the mayor could appropriately decline to implement the enactment based upon his determination that it was unlawful. The four judges in the majority decisively ruled that he could. They declined to place the courts in the position of "directing an officer to violate his or her oath of office by enforcing an unconstitutional law" and stated that "[w]here a local law seems to the Mayor to conflict with a state or federal one, the Mayor's obligation is to obey the latter, as the Mayor has done here."[11] The three-judge dissent vigorously disagreed, asserting that an executive who believes a law to be unlawful must seek relief from the courts and must follow the law, regardless of its alleged invalidity, until it is judicially nullified.

Holding

On the substance, the majority in *Council v. Bloomberg* held that local social policy goals could not trump state statutory requirements such as those that contracts be awarded to the lowest responsible bidder. The constitutional basis of the doctrine of preemption was at the heart of the Court's decision. The Court responded to the Council's recitation of its constitutional and statutory home rule powers, including the express power to legislate on working conditions of municipal contractors, by noting that preemption is a significant limitation on home rule: "But this grant of power to municipalities is expressly made subject to contrary State legislation. The Constitution and the [Municipal Home Rule Law] say that municipalities may adopt laws of the kind described . . . 'except to the extent that the legislature shall restrict the adoption of such a local law' . . ." [citations omitted].[12] The Court also found that, in seeking to use the city's power in the market place to advance governmental policies relating to employee benefit plans, the local law was preempted by federal law on that subject, set forth in ERISA .

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1. William E. Nelson, "Fighting for the City: A History of the New York City Corporation Counsel," New York: New York Law Journal, 2008. Professor Nelson's book was reviewed in NYLJ on Jan. 29, 2008 by Professor Richard Briffault of Columbia University Law School.

2. See, e.g., *Matter of Kay v. Board of Higher Education of the City of New York*, 260 App. Div. 9 (1st Dept. 1940), lv. to appeal

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denied, 260 App. Div. 849 (1941) (Board of Higher Education, then a city agency, could not pursue appeal using private counsel where corporation counsel opposed the appeal).

3. This arrangement is consistent with the Court of Appeals holding in *Cahn v. Town of Huntington*, 29 NY2d 451 (1972).

4. *Council of City of New York v. Giuliani*, 93 NY2d 60 (1999) (hospital privatization); *Council of the City of New York v. Giuliani*, 163 Misc. 2d 681 (Sup. Ct., N.Y. Co. 1994) (powers of the mayor and the council in relation to expense budget modifications); *Matter of Council of City of New York v. Public Service Commission of State of New York*, 99 NY2d 64 (2002) (Franchise and Concession Review Committee was "local legislative body" for purposes of regulations governing cable franchise renewal).

5. *Matter of New York City Council v. City of New York*, 4 AD3d 85 (1st Dept.), lv. to appeal denied, 4 NY3d 701 (2004) (actions related to possible demolition of High Line did not require Uniform Land Use Review Procedure review).

6. *Mayor of City of New York v. Council of City of New York*, 235 AD2d 230 (1st Dept.), lv. to appeal denied, 89 NY2d 815 (1997).

7. *Mayor of City of New York v. Council of City of New York*, 280 AD2d 380 (1st Dept.), lv. to appeal denied, 96 NY2d 713 (2001).

8. See, e.g., *DJL Restaurant Corp. v. City of New York*, 96 NY2d 91 (2001) (discussing preemption in rejecting challenge to the city's adult use zoning amendments); *Carey v. Oswego County Legislature*, 91 AD2d 202 (3d Dept.), aff'd, 59 NY2d 847 (1983) (local law superseded by state law of "overriding state-wide interest" regardless of whether state law is a "general law or local law").

9. *DJL*, cited supra, 96 NY2d at 95. See also *New York State Club Association v. City of New York*, 69 NY2d 211, 216-223 (1987), aff'd, 487 U.S. 1 (1988) (upholding local law prohibiting discrimination by certain private clubs).

10. See, e.g., *Affordable Housing Foundation Inc. v. Silva*, 469 F.3d 219 (2d Cir. 2006) (summarizing federal preemption doctrine in upholding a provision of New York law against a claim of preemption by federal immigration law).

11. *Council v. Bloomberg*, cited supra, 6 NY2d at 389.

12. *Council v. Bloomberg*, cited supra, 6 NY3d at 392-393.