Perspective

Durham, New Hampshire: A Victory for Home Rule?

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In June 1973, Constantine Gratsos, an agent of Aristotle Onassis, met with New Hampshire Governor Meldrim Thomson, Jr., to discuss the construction of a $600 million oil refinery in New Hampshire by Onassis' Olympic Refineries, Inc. This meeting was kept secret until the governor called a press conference on November 27, 1973, to announce that the college town of Durham had been selected as the refinery site. Durham convulsed. The proponents of the project stressed New England's critical need for more and cheaper oil, speculated about future offshore drilling and tax bonanzas, and promised jobs and satellite industry. The opponents worried about the environment, disliked some of the project's foremost proponents, and feared that a mammoth company and its equally large cash flow would dominate state politics. They also believed that the state government, the Manchester Union Leader, and the big money of Onassis would have the final say in spite of promises to respect Durham's tradition of home rule.

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4. Id.
6. Id. at 2, col. 3.
7. Supra note 5.
8. A Concord businessman, typical of many, stated, "I'm against anything that Mel Thomson is for . . . ." Manchester Union Leader, Dec. 21, 1973, at 7, col. 2.
10. The Manchester Union Leader is the only statewide circulation newspaper in New Hampshire.
THE DURHAM STORY

Olympic agents quietly began their acquisition program in October 1973. They "began buying options to 3,000 acres of woods and fields on Durham Point without telling land owners the intention was to put an oil refinery there." Silence may be defensible, but one landowner "was told the land was wanted for a 'game preserve.'" Another was assured that if she granted the option there would be "absolutely no development." Olympic's position on this issue was that "anything less than secrecy during land acquisition would have resulted in sky-rocketing prices and the possibility of one property owner 'holding up the entire project.'"

As Olympic acquired more and more land, rumors of some major impending development circulated in the small community. On November 27, 1973, the rumors were confirmed by Governor Thomson's announcement. On November 29, Olympic agents, charged with the responsibility of bringing Olympic's oil refinery to Durham, met with town officials in Durham "to explain fully to these officials what our plans are and to show our good faith and desire to work along with local groups." Aware of the criticism already leveled at the proposed project, Olympic agents expressed "confidence that the refinery in no way will be detrimental to any area or we wouldn't be here." They also made clear their belief that they "saw no chance of the secured land options being negated by the fact the property owners were not aware a refinery was being planned." They promised that New Hampshire's heating oil and gasoline requirements would be assured, and that 1,000 persons would be employed in the operation of the 375,000 barrel per day refinery. To start the refinery, however, Olympic would have to obtain federal, state, and local permits, and the "important zoning changes which were the key item involving the towns."

On December 2, a group of state legislators signed a petition calling for recognition of Durham's right of home rule. The petition read:

We, the undersigned members of the New Hampshire legislature, support the right of the town of Durham to determine its own future.

12. Id.
14. Id.
16. Id. at 1, col. 5.
17. Id.
18. Id. at 4, col. 1.
19. Id.
20. Id.
growth and development. We will oppose any attempt to subvert this right by legislative act or executive order.\textsuperscript{21}

On the same day, an Olympic agent stated that he had received half a dozen phone calls from officials in Lowell, Massachusetts, attempting to lure the refinery there. Some New Hampshirites were irritated by what they saw as Olympic’s implied threat to take the refinery elsewhere. When asked if the state might override Durham’s possible rejection of the refinery, the Olympic agent replied that Olympic probably would not want to use eminent domain.\textsuperscript{22}

On December 17, Governor Thomson denied that he had given “the cold shoulder” to Durham’s State Representative Dudley Dudley, when she presented him with a 200 foot petition signed by 4,000 people opposed to the refinery.\textsuperscript{23} Representative Dudley later said that she was not opposed to the refinery per se, but only insofar as it was proposed for Great Bay and the Isle of Shoals.\textsuperscript{24} She said she would not be opposed to a location further inland.\textsuperscript{25} Representative Dudley advocated prohibiting the construction of any refinery without a majority vote of a town meeting and also sought to exclude refineries and terminal facilities from the definition of a public utility.\textsuperscript{26} This would short-circuit the power Governor Thomson claimed under New Hampshire Revised Statutes sections 339.39-40, which by his interpretation enabled him to appoint a fuel administrator with the power to choose refinery sites.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{21} Portsmouth Herald, Dec. 3, 1973, at 1, col. 1.
\item \textsuperscript{22} Id. at 2, col. 3. Eminent domain is a taking by the state through the power of governor and council. N.H. Rev. Stat. Ann. §§ 4:30-34 (1917, amended 1973). It is unlikely that eminent domain could have been used for Olympic’s private purpose. Ordinarily, eminent domain is proper only for a public use and only where use of this extraordinary power is necessary. D. Hagman, Urban Planning and Land Development Control Law 174, 176 (1971). In rare cases private parties have been authorized by the legislature to maintain condemnation actions. Public service corporations such as power companies and railroads have long held the power to condemn. See generally 1 P. Nichols, The Law of Eminent Domain §§ 7.52 et seq. The power has also been used on behalf of certain narrow categories of private enterprise. See generally id. §§ 7.62 et seq. The New Hampshire Constitution requires that property taken by the legislature from a non-consenting citizen be applied only to public uses. N.H. Const. pt. 1, art. 12. To meet this requirement the condemnation must be quasi-public in character; it is not met by condemnation for a private enterprise which may incidentally benefit the public at large. Rockingham County Light & P. Co. v. Hobbs, 72 N.H. 531, 58 A. 46 (1904). Olympic’s refinery does not seem to meet the New Hampshire standard for public uses.
\item \textsuperscript{23} Manchester Union Leader, Dec. 18, 1973, at 2, col. 3.
\item \textsuperscript{24} Id. at col. 4. Great Bay is a salt water bay extending inland to Durham, and the Isle of Shoals is a group of small islands off the coast of New Hampshire.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Supra note 23 at col. 4.
\item \textsuperscript{27} The Act is silent as to refineries but declares that the administrator “shall have authority to make such rules and regulations with respect to the sale and distribution of fuel . . . as the public good may require.” N.H. Rev. Stat. Ann. § 339:40 (1923).
\end{itemize}
On December 19, Onassis made a 5\(\frac{1}{2}\)-hour whirlwind tour of New Hampshire. William Loeb, editor and publisher of the Manchester Union Leader, wrote an editorial entitled, "To the Two Big O's—Oil and Onassis!"

When Mr. Aristotle Onassis arrives in New Hampshire today, he may be minus the white beard and the red suit. However, the season of his coming here is appropriate in the sense that he is the nearest thing to Santa Claus that the State of New Hampshire will ever see.\(^\text{28}\)

Onassis claimed, "The last thing I would like to do is impose an unpleasant investment onto the inhabitants of New Hampshire."\(^\text{29}\) Governor Thomson, who was also present, interjected:

"I have assured the people of Durham there will be no imposition of anything . . . if they are not smart enough to understand this could be of great advantage to them, there are many others that do want it.\(^\text{30}\)

In other words, the tradition of home rule would not be violated.

On December 21, the Manchester Union Leader announced a probe into the validity of the Dudley petition. Many of the signers, the probe concluded, were members of the University of New Hampshire community.\(^\text{31}\)

An editorial in the Portsmouth Herald expressed the views of many:

The impression was definitely created in our mind that Onassis was coming to New Hampshire to lay quiet some of the fears and tremors created by the proposed refinery.

. . . .

But this didn't happen. No announced opponents of the project were allowed to approach within arm's length of the great man . . . .

. . . .

If there's one thing more than any other that's plaguing the whole population, it's secrecy. People want to know where that pipeline is going to run; how far will the plant be from the shore and so on.\(^\text{32}\)

On December 26, an imperious Olympic agent said:

I don't think the opposition is really that serious. There are some rightfully concerned citizens in Durham, but I'm pretty confident that we can convince people the refinery is a good thing for them and the state.\(^\text{33}\)

\(^29\) Id. Dec. 20, 1973, at 1, col. 8.
\(^30\) Id. at 12, col. 4.
\(^31\) Id. Dec. 21, 1973, at 1, col. 6. The University of New Hampshire community is viewed as being significantly more liberal than the rest of the state.
HOME RULE

Until now, only state and local elected officials had spoken, but on February 1, 1974, Congressman Louis C. Wyman said that although he favored the refinery, the controversial issue of a refinery should be decided by the people of Durham and "nobody else."\(^34\)

On February 18, the Governor's office announced that it had requested the University of New Hampshire to conduct an impact study\(^35\) regarding the oil refinery. On the same day, Representative Russell Chase challenged the concept of home rule when he suggested that the town of Durham was "less qualified than the Legislature to judge such a serious question."\(^36\) He also stated that the oil refinery was of "such importance to the state that the Legislature should make the decision."\(^37\)

On February 26, Olympic officials unveiled in Concord, the state capital, a topographical model of the proposed refinery. Representative Chris Spirou asked why it was shown in Concord before Durham. An Olympic spokesman answered that "this affair concerns the state government and since we're here at the invitation of the Governor out of respect to him we decided on Concord. He deserves all the merit of this project."\(^38\) Representative Maurice Reed commented that although he supported home rule, "this thing concerns the whole state."\(^39\) The environment and all other issues aside, the main issue was fast becoming the question of home rule.

On February 27, Olympic officials met with Durham residents to answer their questions. When one resident asked if Olympic's original promise to abide by the wishes of the town was to be kept, the Olympic official replied that the "authority of the state" would guide the company.\(^40\)

To ensure that the state would have the necessary authority, Representatives Roberts of Belknap County and Coutermash of Hillsborough County introduced H.B. 34. The bill in relevant part

36. Manchester Union Leader, Feb. 18, 1974, back page, col. 3.
37. Id.
39. Id. col. 7.
provided that a single state permit would enable construction and operation of any energy facility (refineries included). The state, through an energy facility evaluation committee, would hold all hearings related to the energy facility, and any decision on the location of an oil refinery would be made by the committee rather than by local ordinance or regulation.

On March 1, Loeb's Union Leader questioned the accuracy of a series of polls taken by the Boston Globe measuring public support for the refinery in New Hampshire. The Globe found that supporters outnumbered opponents three to one among the state's "likely voters." Loeb responded:

[W]e harbor the suspicion that the Union Leader poll, which showed that among the more than 9000 citizens who responded the refinery was backed by a 25-1 margin, is probably more nearly representative of statewide sentiment on the refinery proposal.41

On March 3, the chairman of the Durham Board of Selectmen read a statement endorsed by the entire Board. The Selectmen were disturbed to discover that

[A]n Olympic representative has proposed to amend HB 34 in a way which would force acceptance of the refinery on a town—any town—even if the vast majority of citizens in that town were opposed to it.

From this, we can only conclude that . . . the Olympic people have no understanding of the form of government we cherish in New England. We think they will find that our system . . . is more important to our way of life than any conceivable benefit to be derived from a refinery . . . . We want to inform them that we will resist all efforts on their part, or the part of any of their supporters, to deprive us [of] our right of local self-government.42

Three days later, and after waiting in lines for almost an hour, 1,400 voters filled the Oyster River High School gymnasium to debate article 14 on their annual town warrant.43 The article read:

To see if the Town is in favor of amending the Durham Zoning Ordinance to permit an oil refinery.

The people of Durham, by a vote of 1,254 to 144, expressed a resounding "no to Aristotle Onassis's plan to build an oil refinery . . . and no to the State House in Concord . . . ."44 The vote had no legal effect because the resolution did not address itself specifically to the question

42. Id. Mar. 4, 1974, at 1, col. 3-4.
44. Warrant Articles, art. 14, 1974 Town Warrant, Durham.
of the zoning variance Olympic would need to go ahead with its project. However, the writing was on the wall because the same voting procedure would be necessary to decide the ultimate zoning variance question.

The next day, March 7, the New Hampshire House voted on a roll call, by a margin of 233 to 109, to reject H.B. 34. Later in the day, the House, by a voice vote passed an amended version of H.B. 18\(^4\) requiring approval by majority vote of the affected town before the state might approve oil refinery site plans. H.B. 18, as amended, applies to municipalities without a zoning ordinance.

Two days earlier, at the behest of Governor Thomson, more than 200 town moderators\(^4\) had asked their town councils to consider the oil refinery question. Some town moderators refused to ask the model question suggested by Governor Thomson, “Would you be in favor of an oil refinery for New Hampshire?” Others amended the model by tacking on home rule and environmental safeguard contingencies.\(^4\) The resulting votes showed strong support for the refinery across the state, but the importance of maintaining local control over site selection was termed of overriding importance.\(^4\) It appears that most of New Hampshire wanted the Olympic refinery, but if having it meant the demise of home rule in New Hampshire, New Hampshire would have to do without. The *New Hampshire Times* put it this way:

> A century from now, when historians look back on the 1974 session of the New Hampshire Legislature, they'll call it the Oil Refinery Session and remember MARCH 7 as a turning point in New Hampshire history. That's the day when unexpectedly the 400-member House, the House too big to be bought, said no to the plan of a foreign billionarie to build a $600 million oil refining complex on Durham Point in violation of a local zoning ordinance.\(^5\)

To summarize, the New Hampshire House rejected H.B. 34 which would have given final say to the state, and passed H.B. 18 which reaffirmed home rule. The House did not specifically vote against the oil refinery. The town of Durham never addressed the question of a zoning


\(^4\) Town moderators prepare and marshal the warrant at town meetings. N.H. Const. pt. 2, art. 32.

\(^4\) Representative Dudley conveyed this information to the author in a phone conversation on February 6, 1975.

\(^4\) Supra note 45 at 13, col. 2.

\(^5\) New Hampshire Times, Mar. 13, 1974, at 28, full page. This position may be contrasted with that taken by William Loeb in the Manchester Union Leader, replying to a reader's letter:

> People such as yourself who oppose the refinery are kooks. You don't know a damn thing about refineries. You have never seen one. What you have done is fallen for scare talk by some university nuts who used you and played you for a sucker.

ordinance variance, because Olympic Refineries never asked for the variance. Olympic knew they would fail when the New Hampshire House voted to sustain the town's right to have the final say.

On April 5, the University of New Hampshire released the impact study requested by Governor Thomson.51 The study's environmental, economic, and social conclusions, however, had been mooted a month earlier.

THE PROCESS

The facts of the Durham story are developed to lay the groundwork for an analysis of the process, not the result. The oil refinery proposed by Olympic was not sited at Durham Point. The propriety of this result is reinforced by the conclusions of the environmental impact study requested by the governor.52 The study rejected Durham Point as an oil refinery site on the substantive environmental issue. The study also made cogent general criticisms of land-use planning in New Hampshire:

From the governmental and public perspective, New Hampshire clearly lacks many of the tools needed to cope effectively with massive developmental intrusions—whether in the form of oil refineries, steel mills, or housing tracts. Whether such intrusions should take place at all, or if so, where and under what conditions, are questions which have not been adequately considered, much less answered. As a result, the state and its people are vulnerable to the consequences of a type of decision-making process that is largely ad hoc, entrepreneurial, and sometimes parochial in character. The consequences are increasingly evident in the form of suburban sprawl, substandard housing tracts, air and water pollution, clogged traffic, and the loss of many social and environmental amenities once characteristic of the state. Conspicuously absent are comprehensive, well-articulated policies, plans, and guidelines which would maximize the opportunities for orderly development and intelligent decision-making. Equally absent are the kinds of institutional arrangements and the administrative technology which would encourage the emergence of such policies and at the same time be supportive of their application in a consistent and effective way.

New Hampshire . . . lacks and badly needs a comprehensive, statewide land-use plan . . . . In the absence of such a plan, it is difficult if not impossible to make intelligent choices on the proper siting of refineries, power plants, and other types of massive intrusion. In place of decisions which would reflect, among other elements, a

52. See supra note 35 for a breakdown of the study's contents.
careful analysis of the long-term social, economic, and environmental consequences likely to flow from certain kinds of development, we find instead the prospect of *ad hoc* "emergency" decision-making which usually bears little relationship to the larger and more permanent needs and concerns of the state. The costs of this kind of entrepreneurial development often turn out to be quite high, but unfortunately these costs normally remain "hidden" to the average citizen until *after* the particular development has taken place. An appropriate state land-use plan would help to make such costs apparent at an early, crucial stage of the decision-making process.

It seems also clear that at the local level, particularly in the absence of strong and effective administrative and legislative arrangements for industrial regulation at the State level, communities are unlikely to be able to resist wholesale governmental transformation at the whim of so major an industry as oil refining. For it can be expected that this industry will seek the path of least resistance, since many forms of governmental regulation designed to respond to public interests represent—from the perspective of industry—higher fiscal costs than are desirable. In that circumstance, the evident weaknesses of towns represent from the viewpoint of industry an opportunity to establish facilities with the fewest impediments to maximum fiscal gain.

In sum, this initial examination of the likely impact of an oil refining industry on public and governmental institutions in New Hampshire concludes that in most important respects, New Hampshire is simply not yet ready for this development. Serious and extensive consideration needs first to be given to a range of questions, including land-use, conservation of scarce resources, including water; significantly improved capabilities for implementing state standards; and finally to penalties and assurances in the event of non-compliance, before this State rushes pell-mell into an era of uncontrolled and presently uncontrollable industrialization.53

The New Hampshire House voted to uphold home rule and in doing so, it effectively voted against the proposed refinery. The study played no substantive part in the outcome of the refinery question. The study, although it anticipated that the industrial interests would prevail, accurately observed that the oil refinery decision was the consequence of a "decision-making process that is largely *ad hoc*, entrepreneurial, and sometimes parochial in character."54 The New Hampshire House, in effect, made a decision on the oil refinery by deciding something else—home rule. The House did not know if the refinery would be good or bad for New Hampshire, but it did know that it wanted to sus-

54. *Id.* 38.
tain the principle of home rule, even if doing so meant the loss of a refinery that most representatives wanted.

The merits as to whether a refinery should be situated in New Hampshire are argued in the impact study, but the validity of this study is not the crucial question. More important is the decision-making process of which the study was only a minor part. Soon, New Hampshire must squarely address the substantive issues of a development such as a refinery. The crucial question is, when that time comes, will New Hampshire have a position grounded in forethought on these substantive issues?

Currently, there is no single agency in New Hampshire charged with assessing the environmental impact of major industrial projects. Six governmental entities have uncoordinated responsibility for developments such as an oil refinery. These include: 1) the Department of Health and Welfare, Division of Public Health Services; 2) the Bulk Power Supply Facility Site Evaluation Committee; 3) the Public Utilities Commission; 4) the New Hampshire State Port Authority; 5) the State Fire Marshall; and 6) the Fish and Game Department.

These six governmental units are not coordinated and do not share the common goals that would be implied by the existence of a state or

55. Id., ch. XI, 8-17.
56. N.H. Rev. Stat. Ann. § 125:80 (1967, amended 1973). This statute creates a state air pollution control agency. It has the power to: 1) promulgate rules and regulations relating to air pollution; 2) inspect or investigate conditions believed to be the source of air pollution or to be in violation of agency rules or regulations; 3) establish emission tests; 4) require source owners to monitor emissions and make periodic reports to the agency; 5) establish a state-wide system for the requiring of permits for the construction and operation of new stationary sources and the construction and operation of modifications to existing sources. N.H. Rev. Stat. Ann. § 125:81 (1967, amended 1971).
57. N.H. Rev. Stat. Ann. ch. 162-F (1971). This committee is the certifying body responsible for the preconstruction review of bulk power supply sites. Section 162-F:1-a amended this chapter effective Sept. 4, 1973, so as to place the location of oil refineries under the committee's jurisdiction.
61. N.H. Rev. Stat. Ann. § 206:10 (1935, amended 1941). The Fish and Game Department has the power to make and enforce rules and regulations for the control, management, restoration, construction, and regulations of the fish, game, bird, and wildlife resources of the state. Included in these powers is the duty to set standards for thermal discharges into surface waters.
regional plan. None of the units provided the House with substantial factual background, and the impact study was not made public until a month after the House upheld the right of the people of Durham to make decisions, informed or otherwise.

When the people of Durham voted to defeat the refinery, they acted in the absence of a state or regional plan—and to a large extent, their decision was based on self interest and ignorance. A state or regional plan, or the university impact study, might conceivably have recommended Durham Point as an appropriate site for an oil refinery. If this had been the case, the Durham decision would have been incorrect—incorrect for Durham, for New Hampshire, and for New England.

Laurence Gerckens suggests that “planning means systematic forethought in action.” The form which “systematic forethought” takes, e.g., a state or regional plan, or a state environmental protection agency, is not as important as that some system should exist. To the extent that any system can measure and balance the equities of the parties involved, it will produce more correct decisions than an ad hoc decision-making process.

The Durham story illustrates the absence of systematic forethought. People in towns like Durham and states like New Hampshire will probably resist any such system to the extent that it dilutes local authority. Assume that the conclusions of the impact study are valid. If they are, the Durham story has a happy ending. But this would indicate only that people acting out of an indeterminate mixture of environmental concern, suspicion of outsiders, and ingrained conservatism may sometimes reach results identical to those of sound land-use planning. The results of the respective processes may not always, or even often, coincide.

It may be that the people of New Hampshire’s communities will never trust land-use decisions to an “outside” power and accordingly a process not purely local may be fanciful. But New Hampshirites are probably no more or less reasonable and trusting than other people who have seen fit to relinquish certain planning powers. What is the decision-making process which New Hampshirites overwhelmingly prefer to regional planning?

**HOME RULE**

Home rule has been defined as “local government authority granted by either the state constitution or legislature by which municipalities are empowered to set up by local action their own form of government.
and to determine their own substantive and procedural powers." Traditionally, the regulation of land use has been a local function, included in the general principle of home rule. The community considers itself capable of making land-use decisions and perceives local land-use regulation as a method of maintaining property values while preserving the "flavor" of the community. Implicit in the concept of home rule is faith that local governments can respond sensitively and quickly to local problems, thus fulfilling the ideals of grass-roots democracy.

The concept of home rule is being challenged. Concerned with their own protection, local communities often act to prohibit land uses perceived as undesirable, while indiscriminately accepting other uses promising economic gains. The negative results include exclusionary zoning and, at the other extreme, unplanned development. Babcock suggests that "the flaw is that the criteria for decision-making are exclusively local, even when the interests affected are far more comprehensive." In recognition of the pitfalls inherent in home rule land-use determinations, today's trend is toward encouraging greater state and regional participation in the land-use regulation process.

It can be argued that Durham, by including land-use regulation in its town charter, derives a home rule guarantee from the state constitution.

64. Nearly all 50 states have enacted enabling legislation modeled closely after the Standard State Zoning Enabling Act (SZEA) prepared by the United States Department of Commerce in 1922. See ALI MODEL LAND DEVELOPMENT CODE, Tent. Draft No. 1, 1968, at appendix A, and Tent. Draft No. 2, 1970, at xi. Basically, the SZEA authorizes local governments to divide their territory into zones and to specify the types of land use permitted in each zone. Since 1926, when local zoning power was upheld by the United States Supreme Court in the landmark case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), land use regulation has been left almost entirely in the hands of local government.
68. Exclusionary zoning, also called "snob" zoning, is used to exclude undesirable land use. The negative effects of this zoning have been to exclude the poor and minorities from the suburbs, communes from neighborhoods, and industry, as in the case of Durham, from the entire community. For a discussion of exclusionary zoning, see Bigham & Bostick, Exclusionary Zoning Practices: An Examination of the Current Controversy, 25 Vand. L. Rev. 1111 (1972); Note, Exclusionary Zoning and Equal Protection, 84 HARV. L. REV. 1645 (1971).
69. Supra note 65 at 153. Local determinations as to air pollution control, for example, have regional impact because of the nature of the problem; i.e., the affected air does not always remain over any one town.
70. For a discussion of state land-use regulations see Note, State Land Use Regulation—A Survey of Recent Legislative Approaches, 56 MINN. L. REV. 869 (1972).
No law changing the charter or form of government of a particular city or town shall be enacted by the legislature except . . . upon the approval of the voters of such city or town . . . . 71

The New Hampshire Supreme Court held that this article "was intended to prevent the form of government as provided by a charter from being altered by the legislature without a referendum of the people affected, and not to prevent the legislature from conferring additional powers . . . ." 72 Usually, the grant of home-rule power is accomplished by state constitution or legislation. In New Hampshire no chances were taken: the intent of the constitution is reinforced by three specific statutes. The first two empower cities and towns to pass by-laws, and the third empowers them to zone. Both are delegations of "additional" power. The by-law statutes provide respectively:

Towns may make by-laws for the care, protection, preservation and use of the public cemeteries, parks, commons, libraries and other public institutions of the town . . . and for making and ordering their prudential affairs. 73

And:

The city councils shall have power to make . . . salutary and needful by-laws . . . for the following purposes:

. . .
To abate and remove nuisances; to regulate the location and construction of . . . unwholesome or nauseous buildings or places. . . . 74

The zoning statute provides:

For the purpose of promoting health, safety, morals, or the general welfare . . . the legislative body of any city or town is empowered to regulate and restrict the height, number of stories and size of buildings and other structures . . . and other open spaces . . . and the location and use of buildings . . . and land for trade, industry, residence or other purposes. 75

The legislative grant of zoning power to cities and towns has been challenged and sustained. 76

Durham exercised the power granted by the zoning statute to enact a zoning ordinance in 1969. 77 The zoning districts include four classes

72. 112 N.H. 42 at 46, 288 A.2d 697 at 700 (1972).
76. In Brady v. City of Keene, 90 N.H. 99, 4 A.2d 658 (1939), this statute was held to be a constitutionally valid exercise of the police power.
of residential and four classes of non-residential. The non-residential classes are: commercial residential, business A, business B, and office and research. A class for industrial development is conspicuously absent. By its omission, Durham purposefully excluded industrial development, thereby setting the stage for the Olympic battle.

Durham's power of local land-use control is not without qualification. The statutes that give the power also provide that "no by-law or ordinance shall be repugnant to the constitution or laws of the state." The legislature could pass laws to which local by-laws or ordinances would be "repugnant." A second challenge could be grounded in part 2, article 1 of the state constitution:

The people . . . of New Hampshire . . . agree . . . to form themselves into a free, sovereign and independent body-politic, or state, by the name of The State of New Hampshire.

This statement impliedly places the state above the town. The decision in Amyot v. Caron strengthens that interpretation:

The right of local self-government which the legislature has power to delegate has been confused with a claim of the right without delegation . . . . The theory of a restriction on its power by an "inherence" of right . . . is not . . . a judicial implement of constitutional construction. The sovereignty of the people of the state is represented by their government . . . except only as the constitution places restraints upon it.

While it is certain that constitutional grants and statutory delegations of power exist, it is less certain that local self-government in New Hampshire is the result of anything stronger than a delegation by the state of the state's power. It is unlikely that the state, through its legislative body, could not work its will on matters such as those presented in the Durham story.

78. Id. § 2:10.
79. Id.
80. "Only uses listed . . . shall be allowed unless the Zoning Board of Adjustment finds that a petitioned use is substantially identical in purpose and operational characteristics to a conforming use permitted in the district." Id. § 4.11. The ordinance allows nonconforming uses "in existence at the time of passage of this ordinance," but these "may not be extended in any manner." Id. § 3.31.
82. 88 N.H. 394, 190 A. 134 (1937). In Amyot, the Finance Commission of Manchester petitioned the court for a writ of mandamus to direct the city's Board of Mayor and Aldermen to appropriate $2,200 to pay for the services of an investigator hired by the commission to investigate the board. The board claimed that its "right" of local self-government was violated by the legislative act which established the commission.
83. 88 N.H. at 400, 190 A. at 138-39. Arguably, the constitution restricts the state's power and recognizes an inherent right of local self-government. See text accompanying notes 71-72 for a discussion of this point.
The Durham decision has not altered the substantive arguments for or against home rule. The story stands for the proposition that decisions as critical as choosing the site of an oil refinery should be grounded upon broad considerations of land-use planning. Where input for decision-making is purely local, erratic results are likely. With such a system, today's Durham story could be tomorrow's Durham tragedy.

But systematic forethought does not necessarily preclude purely local determinations. The natural tendency is to approach the home rule question as an all or none proposition, and it need not be so. Equity suggests that the state should not decide what is good for the town when the town has an interest, anymore than a town should decide what is good for the state when the state has an interest. Systematic forethought allows the deliberate measure and balance of state and local interests.

The fact that home rule prevented an oil refinery from locating in Durham should not convince environmentalists to embrace home rule. For every Durham, where environmental values flourish, there are many other towns where such values are bad business. The best environmental insurance lies in established and reasoned regional plans.

In a press conference held at Plymouth State College, in New Hampshire, Ralph Nader suggested that "New Hampshire action in recognizing Durham's right to decide whether to accept an oil refinery within its borders may prove to be a landmark for similar decisions throughout the United States." A town's "right to decide whether to accept an oil refinery" is a potentially harmful power. If the evidence suggests that a refinery should not be placed, or if no evidence exists at all, no town should have the right to accept a refinery. The danger is that towns will allow and even seek refineries that have not been planned for. Home rule is no more inherently responsible than state or regional rule and may be less so. What matters above all is not who has the power, but with what care the power is used.

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