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Municipal Incorporation Criteria Set By Townships Are Not Preempted By Village Law

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ing a complaint for an aggrieved client. Moreover, the decision necessitates that the practitioner should make full use of New York's liberal pleading system, which allows a plaintiff to pursue alternative and inconsistent theories of recovery[115] and freely permits him to amend his complaint during the course of litigation.[116]

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Comprehensive growth plans document the development strategies of municipalities.[117] Often motivated by drastic population shifts and correlative problems in pollution, housing, and public

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[115] *See* CPLR 3014, 3017 (1974). CPLR 3014 permits claims to be pleaded inconsistently, alternatively or even hypothetically. *Id.* This liberality in pleading is premised upon a legislative recognition that litigation is often unpredictable, and that parties therefore should be permitted to set forth all arguments which offer a reasonable possibility of success. CPLR 3014, commentary at 8 (1974); *see, e.g.*, Abbot v. Page Airways, Inc., 23 N.Y.2d 502, 514, 245 N.E.2d 388, 395, 297 N.Y.S.2d 713, 722 (1969). *See also* SIEGEL § 214; 3 WK&M ¶ 3014.11-12. Additionally, CPLR 3017 allows the pleader to demand alternative and inconsistent forms of relief. *See* CPLR 3017 (1974).

[116] CPLR 3025(b) provides that "a party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." CPLR 3025(b) (1974).

[117] General comprehensive plans represent: (1) a source of information as to economic activity, population composition, channels of movement and physical resources; (2) a program of correction, indicating an area's functional deficiencies; (3) an estimate of the future, guiding the municipality in promoting general welfare; (4) a clarification of goals and the type of city the community wants; (5) a technique for coordination; and (6) a device to stimulate public interest and responsibility. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353, 356-61 (1955). The enhancement of regional welfare may be accomplished through the use of regional planning mechanisms, such as master plans, that lodge most decisionmaking power at the local level, subject to standards reflecting area-wide interests. Bagne, *The Parochial Attitudes of Metropolitan Governments: An Argument for a Regional Approach to Urban Planning and Development*, 22 ST. LOUIS U.L.J. 271, 287 (1978). Master plans have almost been likened to small-scale constitutions since they require future implementary legislation to be in conformity with the plan's goals. *See* Haar, *supra*, at 357. Professor Haar has objected to the use of the term "master plan" because it connotes a rigid design or blueprint rather than a flexible working guide. *Id.* at 354 n.4. The term also may create an exclusive concern with purely physical arrangements and facilities, thus indirectly leading planners to minimize the plan's social and economic goals. *Id.* The terms "developmental plan," "long range comprehensive plan," or "general community plan" are preferred by the planning community. *Id.*

transportation,[118] these plans have been praised widely for their emphasis upon general regional welfare.[119] Nonetheless, several cases have inquired into the validity of ordinances intended to facilitate the execution of growth plans.[120] In this regard, a question has arisen as to whether the Village Law precludes a locality from enacting requirements for municipal incorporation in order to preserve its comprehensive plan.[121] Recently, in *Marcus v. Baron*,[122] the Appellate Division, Second Department, held that a local law enacted to effectuate a locality's comprehensive plan was not preempted by the Village Law.[123]

In *Marcus*, the Ramapo Town Supervisor conducted a hearing to assess the adequacy of a petition for the incorporation of the Village of Wesley Hills.[124] The supervisor determined the petition

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[118] Golden v. Planning Bd., 30 N.Y.2d 359, 374, 285 N.E.2d 291, 299, 334 N.Y.S.2d 138, 149 (1972); *see* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926).

[119] *See* Alterman, *Decision-Making in Urban Plan Implementation: Does the Dog Wag the Tail, or the Tail Wag the Dog?*, 3 URB. L. & POL'Y 41, 44-45 (1980); Bagne, *supra* note 117, at 287; Haar, *"In Accordance With a Comprehensive Plan,"* 68 HARV. L. REV. 1154, 1175 (1955); Haar, *supra* note 117, at 361; Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 972 (1976); Mandelker, *Standards for Municipal Incorporations on the Urban Fringe*, 36 TEX. L. REV. 271, 289 (1958).

[120] *See* Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 601, 557 P.2d 473, 483, 135 Cal. Rptr. 41, 51 (1976); Padover v. Township of Farmington, 374 Mich. 622, 132 N.W.2d 687, 689-91 (1965); Golden v. Planning Bd., 30 N.Y.2d 359, 365-83, 285 N.E.2d 291, 293-305, 334 N.Y.S.2d 138, 141-56 (1972); Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia, 72 App. Div. 2d 957, 958, 422 N.Y.S.2d 249, 250-51 (4th Dep't 1979).

[121] *See* Marcus v. Baron, 106 Misc. 2d 71, 73-74, 431 N.Y.S.2d 627, 629 (Sup. Ct. Rockland County 1980), *rev'd*, 84 App. Div. 2d 118, 445 N.Y.S.2d 587 (2d Dep't 1981). "Incorporation" describes the prescribed set of legal acts which enable a municipality to be brought into existence. 62 C.J.S. *Municipal Corporations* § 12 (1949). The net effect of incorporation is to impose a legal division between the incorporated area and the surrounding region. *Id.* § 114. A township, therefore, has no legal right to legislate for a municipal corporation located within its borders concerning any matters involving the police power. *Id.* The ordinances and regulations of the township have no binding force on the incorporated villages within the township limits. *Id.*

[122] 84 App. Div. 2d 118, 445 N.Y.S.2d 587 (2d Dep't 1981).

[123] *Id.* at 124, 445 N.Y.S.2d at 593.

[124] *Id.* at 122-23, 445 N.Y.S.2d at 592. Sections 45.4 to 45.7 of Ramapo Local Law No. 3 provide for a hearing before the town supervisor regarding the petition for incorporation, the submission of a report concerning the application by the town supervisor to the Ramapo Town Board, a meeting of the town board and a determination based upon the supervisor's report, and the rendering of a final decision by the town supervisor as authorized by the town board. *Id.* at 121, 445 N.Y.S.2d at 591; Ramapo, N.Y., [1967] N.Y. Local Laws 1910 (No. 3). Article 2 of the Village Law, entitled "Incorporation," also contains a provision requiring a hearing. N.Y. VILLAGE LAW § 2-204 (McKinney 1973). Section 2-206 enumerates certain objections that may be directed to the incorporation application at the hearing, such as unqualified petition signatories, insufficiencies in the number of signatures, and insufficiencies with respect to population and territory. *Id.* § 2-206.

to be insufficient based upon, *inter alia*, noncompliance with the Village Incorporation Law of the Town of Ramapo[125] (Local Law No. 3), which sets forth municipal incorporation requirements in addition to those prescribed by the legislature in article 2 of the Village Law.[126] The petitioners, seeking to invalidate the local law, instituted Article 78 proceedings.[127] Thereupon, the Supreme Court, Special Term, annulled the supervisor's determination of insufficiency under Local Law No. 3[128] and held that such local law was preempted by the Village Law.[129]

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[125] *See* 84 App. Div. 2d at 122-23, 445 N.Y.S.2d at 592. The town supervisor found that the incorporation application did not contain allegations that the proposed incorporation was in the public interest of the territory to be incorporated, the remaining town area, or any school, fire or other improvement districts wholly or partially within the area to be incorporated. *Id.* These allegations were required by section 45.3 of Local Law No. 3, *see* Ramapo, N.Y., [1967] N.Y. Local Laws 1910 (No. 3); note 126 *infra*. In his report to the town board, the supervisor also alleged an "impermissible reference" in the petition to two affidavits concerning certification of the number of signatories, the impermissible inclusion of town property in the proposed incorporated territory, failure to allege the proper legal basis on which incorporation petitions are to be signed, and the adverse effect of the incorporation on the town's controlled growth program, zoning plans, and the public interest. 84 App. Div. 2d at 122-23, 445 N.Y.S.2d at 592.

[126] *See* N.Y. VILLAGE LAW § 2-202 (McKinney 1973 & Supp. 1981-1982). The Town of Ramapo adopted its master plan in 1966 after a 2-year study of existing land uses, public facilities, transportation, industry and commerce, housing, and population trends. 84 App. Div. 2d at 119-20, 445 N.Y.S.2d at 590. In an attempt to safeguard its comprehensive plan, the town board, in 1967, enacted article 45, section 45.3, of the Town Code, entitled "Village Incorporation Law of the Town of Ramapo." 84 App. Div. 2d at 121, 445 N.Y.S.2d at 591; *see* Ramapo, N.Y., [1967] N.Y. Local Laws 1909-10 (No. 3). The Article sets out the following incorporation guidelines:

> Petition for incorporation.
>
> (a) Every petition for incorporation of a village shall include all the requirements contained in section [3-302] of the Village Law of the State of New York.
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> (b) It shall further contain allegations that the proposed incorporation is in the over-all public interest. (1) Of the territory proposed to be incorporated; (2) Of the remaining area of the local government in which such territory is located; and (3) Of any school district, fire district or other district corporation, fire protection district or town improvement district, situated wholly or partly in the territory to be incorporated.

Id.

[127] 84 App. Div. 2d at 119, 445 N.Y.S.2d at 590.

[128] Marcus v. Baron, 106 Misc. 2d 71, 78-79, 431 N.Y.S.2d 627, 631-32 (Sup. Ct. Rockland County 1980). Special term rejected the town supervisor's findings, *see* note 125 *supra*, stating that there was no dispute as to the signatories' qualifications, that town-owned property could be included in the territory proposed to be incorporated since the Village Law did not prohibit it, and that the Village Law was silent concerning the inclusion of affidavits in the petition. *Id.*

[129] 106 Misc. 2d at 74, 431 N.Y.S.2d at 629. Special term found that the town supervisor performs a ministerial function in determining an application's compliance with article 2 of the Village Law, and that to allow him the "all-important discretionary power" to pass upon

On appeal, the Appellate Division, Second Department, affirmed Special Term's invalidation of the supervisor's denial of the petition under Local Law No. 3, but reversed on the issue of preemption.[130] Writing for the majority, Justice Titone[131] noted that absent a clear state intention to "occupy the entire field,"[132] local laws which address subject matter already dealt with by state laws are not preempted mandatorily.[133] The majority stated, moreover, that local laws properly may enhance such common subject matter by providing additional reasonable requirements.[134] The court observed that when supplemental restrictions are imposed in connection with a comprehensive growth plan, there is no conflict between the state and local law, and, therefore, no need for preemption.[135] Indeed, the court stated that the legislature had not precluded localities from enacting incorporation criteria supplemental to those delineated in general state legislation.[136] The court

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an incorporation's effect on the public interest would be unwise. *Id.* at 74-75, 431 N.Y.S.2d at 629-30. Special term also found Local Law No. 3 inconsistent with the Village Law and that no special circumstances surrounded Ramapo's situation such that Local Law No. 3 could be sustained. *Id.* at 76, 431 N.Y.S.2d at 630. Noting that the legislature recently had declined to enact a bill amending article 2 of the Village Law to read substantially similar to Local Law No. 3, special term inferred a legislative intention to maintain the status quo with respect to village incorporation. *Id.* at 76-77, 431 N.Y.S.2d at 631.

[130] 84 App. Div. 2d at 124-26, 445 N.Y.S.2d at 593. The appellate division concurred with special term's rejection of the supervisor's findings concerning the "impermissible" affidavits, inclusion of town-owned property, and lack of legal signatories. *Id.* Since the appellate division held Local Law No. 3 to be constitutional, however, reversal was necessary due to the missing allegations required by the law. *Id.* at 132-33, 445 N.Y.S.2d at 598.

[131] Concurring with Justice Titone in the majority opinion were Presiding Justice Mollen and Justice Weinstein. Justice Hopkins filed a lone dissent.

[132] 84 App. Div. 2d at 125, 445 N.Y.S.2d at 593. The majority noted that the state's intention to preempt local action in a given field may be inferred from an elaborate statutory scheme or a determination of state policy. *Id.*

[133] *Id.*

[134] *Id.* The majority observed that a local law imposing additional reasonable requirements merely supplements the general legislation and that equating the constitutional definition of "inconsistent" with that of "different" "vitiate[s] the flexibility of home rule as enunciated by the Legislature and the Executive branch in enacting the Municipal Home Rule Law." *Id.* (quoting Town of Clifton Park v. C.P. Enterprises, 45 App. Div. 2d 96, 98, 356 N.Y.S.2d 122, 124 (3d Dep't 1974)). Moreover, the majority noted that a "special local problem" authorizes passage of a local law which is clearly inconsistent with a general law. 84 App. Div. 2d at 126, 445 N.Y.S.2d at 594. As an indication of the lack of express or implied state intention to proscribe local action, Justice Titone interpreted article 2 of the Village Law as providing "minimum" geographical, demographic, and procedural requirements, without a "hint or suggestion" that responsible town officials are to be prevented from considering the adverse effects of incorporation upon comprehensive town plans. *Id.*

[135] *Id.* at 126, 445 N.Y.S.2d at 593.

[136] *Id.* at 125-26, 445 N.Y.S.2d at 593-94. As a "complete answer" to the preemption

founded this conclusion upon the fact that article 2 of the Village Law does not expressly proscribe consideration of the deleterious effects of incorporation upon comprehensive growth plans.[137] In further defense of Local Law No. 3, the court referred to the "fragmentation of local governing bodies"[138] resulting from the incorporation of smaller municipalities within the existing governmental body.[139] Justice Titone praised the local law's emphasis upon consideration of regional interests[140] and concluded that section 272-a of the Town Law, which empowers towns to "prepare . . . a comprehensive master plan for the development of the entire area of the town," legitimizes the use of incorporation criteria as a "proper zoning technique."[141]

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assertion, Justice Titone pointed to a 1976 amendment to the Municipal Home Rule Law which expressly empowers a town to amend or supersede any statutory provision of the Town Law relating to the property, affairs, or government of the town. *Id.* The amendment grants a town this power of supersession, subject to legislative prohibition, even though the Town Law provision is a general law. *See* MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney Supp. 1981-1982). Special term had refused to apply this amendment because Ramapo's Local Law No. 3 had been enacted in 1967, while the 1976 amendment had not been given retroactive effect by the legislature. 106 Misc. 2d at 76, 431 N.Y.S.2d at 630. The issue of retroactivity, however, was deemed irrelevant by Justice Titone, since courts generally must apply the law extant at time of decision. 84 App. Div. 2d at 133, 445 N.Y.S.2d at 594. The majority thus argued that the amendment was dispositive of the preemption argument. *Id.*

[137] 84 App. Div. 2d at 131-32, 445 N.Y.S.2d at 594. Article 2 of the Village Law, section 2-208, entitled "Decision as to legal sufficiency of petition," requires merely that "the supervisor . . . shall determine whether the petition complies with the requirements of this article." N.Y. VILLAGE LAW § 2-208 (McKinney 1973).

[138] 84 App. Div. 2d at 132, 445 N.Y.S.2d at 595.

[139] *Id.* Justice Titone stated that incorporation criteria established by expert planners, *see* Mandelker, *Standards For Municipal Incorporations*, *supra* note 119, at 271, had largely been incorporated into Ramapo's Local Law No. 3. 84 App. Div. 2d at 132, 445 N.Y.S.2d at 595. The majority also quoted a legislative committee report as stating that local governments must be sufficiently large and invested with planning authority in order to provide significant financial support to metropolitan areas. *Id.*

Moreover, Justice Titone analogized to related fields, such as annexation (citing Board of Trustees v. Town Bd. of Warwick, 56 App. Div. 2d 928, 928-29, 393 N.Y.S.2d 47, 48 (2d Dep't 1977)), and merger of two or more villages (citing *In re* Borough of Eden Park, 158 Pa. Super. 401, 43 A.2d 529, 530 (1975)). 84 App. Div. 2d at 129-30, 445 N.Y.S.2d at 596. The majority reasoned that in these areas the overall public interest is scrutinized to determine whether the merging communities form "one harmonious whole." *Id.*

[140] 84 App. Div. 2d at 131, 445 N.Y.S.2d at 596-97.

[141] *Id.* at 131-32, 445 N.Y.S.2d at 597; *see* N.Y. TOWN LAW § 272-a (McKinney 1965). Justice Titone noted the "total anomaly" of ruling that while a town may, by statutory grant, control subdivision within its territorial limits "with particular emphasis in its unincorporated areas," *see* N.Y. TOWN LAW § 261 (McKinney 1965), it is helpless against the erosion of this control by the incorporation of smaller municipalities within the town's boundaries. 84 App. Div. 2d at 131-32, 445 N.Y.S.2d at 597. The majority cited the remarks of John McAlevey, former Town Supervisor of Ramapo, who stated at the petition hearing

In dissent, Justice Hopkins argued that the legislature's authority to create municipal corporations is "plenary and exclusive,"[142] and stressed that if the power to set incorporation criteria exists at the township level, it is only by "necessary implication" from the New York State Constitution or the Municipal Home Rule Law.[143] Finding no grounds to infer such power in the constitution or the Municipal Home Rule Law,[144] Justice Hopkins concluded that the power did not exist.[145] Finally, although conceding that village incorporation within a town's boundaries might frustrate the area's planning and zoning ordinances,[146] the dissent con-

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that unchecked incorporation would squander the public resources, thwart the capital program adopted by the town, and frustrate Ramapo's master plan and zoning ordinance. *Id.*

[142] 84 App. Div. 2d at 134, 445 N.YS.2d at 598 (Hopkins, J., dissenting).

[143] *Id.* at 135, 445 N.Y.S.2d at 599 (Hopkins, J., dissenting); *see* N.Y. CONST. art. IX, § 2(c); N.Y. MUN. HOME RULE LAW § 10(1) (McKinney 1969 & Supp. 1981-1982). Justice Hopkins pointed out that both the constitution and the Municipal Home Rule Law grant local governments the power to adopt and amend local laws "not inconsistent with any general law relating to . . . property, affairs or government" of the local government. 84 App. Div. 2d at 135, 445 N.Y.S.2d at 599 (Hopkins, J., dissenting). Justice Hopkins remarked also that the language, "property, affairs or government," found in both the constitution and in the Municipal Home Rule Law, traditionally favored state power and would not have been used by the legislature had it intended to subordinate state concerns to local powers. *Id.* (Hopkins, J., dissenting) (quoting Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 497, 362 N.E.2d 581, 584, 393 N.Y.S.2d 949, 954 (1977)).

[144] 84 App. Div. 2d at 135, 445 N.Y.S.2d at 599 (Hopkins, J., dissenting). The state constitution defines a local government as "a county, city, town or village." N.Y. CONST. art. IX, § 3(d)(2). Justice Hopkins inferred, therefore, that the legislature intended to treat the rights of towns and villages equally. The fact that villages are voluntary corporations created by their inhabitants, whereas townships are created by the state for the purpose of serving as agencies of the state, *see* note 121 *supra*, was deemed irrelevant by the dissent. 84 App. Div. 2d at 137, 445 N.Y.S.2d at 600 (Hopkins, J., dissenting). The constitution grants local governments power to amend and adopt local laws on certain subjects unless the legislature restricts adoption of such a law. N.Y. CONST. art. IX, § 2(c)(ii). Justice Hopkins noted that none of the delineated powers includes creation of local governments. 84 App. Div. 2d at 136, 445 N.Y.S.2d at 599-600 (Hopkins, J., dissenting). Since the Municipal Home Rule Law allows the adoption of local laws not inconsistent with "any general law relating to its property, affairs or government," and the Village Law is a general law, Justice Hopkins contended that the required statutory implication was contrary to that espoused by the township. *Id.*

[145] 84 App. Div. 2d at 139, 445 N.Y.S.2d at 601 (Hopkins, J., dissenting). In response to the majority's belief that the amendment to the Municipal Home Rule Law was a satisfactory defense to the charge of unconstitutionality, *see* note 136 *supra*, Justice Hopkins observed that the 1976 amendment was inapposite, since it only authorized supersession of the Town Law, while the general law at issue in *Marcus* was the Village Law. 84 App. Div. 2d at 136, 445 N.Y.S.2d at 599 (Hopkins, J., dissenting).

[146] 84 App. Div. 2d at 139, 445 N.Y.S.2d at 601 (Hopkins, J., dissenting). The dissent admitted that invalidation of Local Law No. 3 might frustrate the symmetry of the township's zoning and planning ordinances, thereby hampering orderly development of land and population. *Id.* (Hopkins, J., dissenting).

cluded nonetheless that an express statutory grant enabling passage of the local law was necessary.[147]

Although the *Marcus* court based its approval of Ramapo's Local Law No. 3 upon a policy favoring comprehensive plans[148] and upon a skillful skirting of the preemption issue,[149] it is submitted that an equally compelling justification for Ramapo's local law can be found in Article IX of the New York Constitution.[150] Enacted to provide local governments with a liberal measure of home rule,[151] Article IX circumscribes the legislature's powers in matters concerning the "property, affairs or government" of a local entity.[152] It is submitted, in this regard, that the development and

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[147] *Id.* (Hopkins, J., dissenting). In dictum, Justice Hopkins noted that if towns were permitted to adopt laws containing incorporation requirements in addition to those prescribed by the state, it might "inaugurate a parochial resistance by towns to new villages" and create disuniformity throughout the state. *Id.* (Hopkins, J., dissenting). The dissent viewed the state as an arbitrator, resolving conflicts between municipalities rather than allowing "internecine struggles" between them. *Id.* (Hopkins, J., dissenting).

[148] *Id.* at 126, 445 N.Y.S.2d at 594.

[149] *Id.* at 124-26, 445 N.Y.S.2d at 593-94. While the majority's resolution of the preemption problem does not appear faulty, it is submitted that this issue, due to conflicting and confusing precedents, could have been resolved in either party's favor. *Compare* Town of Clifton Park v. C.P. Enters., 45 App. Div. 2d 96, 98, 356 N.Y.S.2d 122, 124 (3d Dep't 1974) (prohibition against laws "inconsistent" with any general law is "a check against local laws which would contradict or would be incompatible or inharmonious with the general laws of the State") *with* Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 17 App. Div. 2d 327, 329, 234 N.Y.S.2d 862, 864-65 (1st Dep't 1962) ("local laws which do not prohibit what the state law permits nor allow what the state law forbids are not inconsistent"). It is further suggested that the *Marcus* court was correct in allowing the public need for comprehensive planning to illuminate its analysis of the preemption problem.

[150] *See* N.Y. CONST. art. IX.

[151] Holland v. Bankson, 290 N.Y. 267, 270, 49 N.E.2d 16, 17 (1943); Comment, *Home Rule: A Fresh Start,* 14 BUFFALO L. REV. 484, 492 (1964). "Home rule" constitutional amendments, widely adopted by the states, are designed to grant local governments initiative, at least in areas of local concern, without requiring them to obtain prior permission from the legislature. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Court,* 48 MINN. L. REV. 643, 650 (1964). State initiative was deemed desirable in order to provide a flexible system of change for the community faced with a problem requiring prompt resolution. *Id.* at 670. In New York, constitutional recognition of the local right of self-government first surfaced in 1894. *See* N.Y. CONST. art. XII, § 2 (1894, amended 1938). For the historical progress of the New York home rule provision, see Hyman, *Home Rule in New York 1941-1965: Retrospect and Prospect,* 15 BUFFALO L. REV. 335, 338-48 (1965); Comment, *Home Rule and the New York Constitution,* 66 COLUM. L. REV. 1145, 1147-48 (1966) [hereinafter cited as *Home Rule*].

[152] N.Y. CONST. art. IX, § 2(d)(2). Article IX, section 3, provides that "nothing in this article shall restrict or impair any power of the legislature in relation to . . . [m]atters other than the property, affairs or government of a local government." *Id.* § 3(a)(3); *cf.* N.Y. STAT. LOCAL GOV'TS § 11 (McKinney 1969) (legislature reserves the power to enact any law relating to a matter other than the property, affairs or government of a local government). The

effective implementation of comprehensive plans is part of such "property, affairs or government" of townships. Significantly, Article IX also contains the following prescription: "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."[153] Surely, this provision, echoed by the legislature in the Municipal Home Rule Law,[154] affords townships the power to delineate village incorporation criteria, especially since townships are the governmental units affected most directly by rampant village incorporation.[155]

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phrase "property, affairs or government" is traceable to the 1894 state constitution. *See* N.Y. CONST. art. XII, § 2 (1894, amended 1938). Early judicial efforts at construction of the phrase resulted in narrow interpretations. *See, e.g.*, Adler v. Deegan, 251 N.Y. 467, 491, 167 N.E. 705, 713-14 (1929); City of New York v. Village of Lawrence, 250 N.Y. 429, 439, 165 N.E. 836, 838-39 (1929). Decrying the courts' specialized reading of the home rule language, one commentator lamented that "[p]lain words have been given special significance, as though constitutional provisions were written in code." Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311, 313 (1954). It is submitted that the constitutional phrase "property, affairs or government" should be construed to grant townships authority to address the difficulties engendered by unwise municipal incorporations, especially in light of the proven deleterious effect of such incorporations on the general welfare. *See* D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 3, 19 (1966); *cf.* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("[w]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation"). It is submitted that the "new and different conditions" mentioned in *Euclid* may serve as a response to Judge Lehman's 1929 statement, relied on by the *Marcus* dissent, that "[i]t may hardly be doubted that the creation of a new city and the determination of its boundaries do not relate 'to the property, affairs or government of cities.' " City of New York v. Village of Lawrence, 259 N.Y. 429, 439, 165 N.E. 836, 838-39 (1929). Moreover, in the *Lawrence* opinion, Judge Lehman observed that "[w]here a change in the territorial boundaries of a city brings in its train substantial change in the city's internal affairs, its property, or its government, then the problem would have a somewhat different aspect." *Id.* at 446, 165 N.E. at 841. It is submitted that the incorporation of a village within a township, with its attendant disruption of the town's zoning plan and tax base, results in such a "substantial change."

[153] N.Y. CONST. art. IX, § 3(c).

[154] N.Y. MUN. HOME RULE LAW § 51 (McKinney 1969). It has been suggested that the mandate of liberal construction found in the constitution and the Municipal Home Rule Law abrogates the early restrictive view of municipal power, known as Dillon's Rule. Comment, *Home Rule: A Fresh Start*, 14 BUFFALO L. REV. 484, 490 (1964). Dillon's Rule was based on the proposition that local governments were creatures of the state, that they obtained their authority from the state, and, therefore, that any question of local authority was to be narrowly construed against the local entity. 1 J. DILLON, MUNICIPAL CORPORATIONS § 237 (5th ed. 1911). For a modern criticism of Dillon's position, see Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1059, 1109-15 (1980).

[155] One commentator has noted that although the township is perhaps not the most effective unit of government in a metropolitan area, given the difficulties inherent in the present governmental scheme, the greater efficiency of the larger township as opposed to that of the smaller unit will generally militate against the incorporation. Mandelker, *Stan-*

It is submitted, nonetheless, that an *express* legislative sanction of village incorporation planning would be appropriate. Indeed, although Article IX limits the legislature's power in matters relating to the "property, affairs or government" of local governing bodies, the state still can legislate in this area by general law.[156] Significantly, such laws may be interpreted to preempt local ordinances enacted to facilitate the implementation of comprehensive plans.[157] Moreover, irrespective of the preemption issue, it is evident that a legislative initiative in the area of village incorporation would be possessed of several advantages. For instance, uniform village incorporation standards, susceptible to consistent judicial review, would be established.[158] Additionally, legislative action would obviate the need for judicial activism.[159] Accordingly, it is submitted that the following statutory scheme would be enacted:

Model Village Incorporation Law

a. The petition for village incorporation is to be submitted to the

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dards for Municipal Incorporations, supra note 119, at 294; *see* Ramapo, N.Y., [1967] N.Y. Local Laws 1909-10 (No. 3).

[156] N.Y. CONST. art. IX, § 2(d)(2); *see* Toia v. Regan, 54 App. Div. 2d 46, 53, 387 N.Y.S.2d 309, 314 (4th Dep't 1976), City of Corning v. Corning Police Dep't., 81 Misc. 2d 294, 298, 366 N.Y.S.2d 241, 246 (Sup. Ct. Steuben County 1974), *aff'd*, 49 App. Div. 2d 689, 373 N.Y.S.2d 1022 (4th Dep't 1975). The legislature is empowered "to act in relation to the property, affairs or government of any local government by general law or by special law only (a) on request of two-thirds of the . . . legislat[ure] or on request of" a city mayor in cases of emergency. N.Y. CONST. art. IX, § 2(b)(2). The constitution defines a general law as one "which in terms and in effect applies alike to all counties . . . all cities, all towns or all villages," *id.* § 3(d)(1), and a special law as one "which in terms and in effect applies to one or more, but not all, counties . . . cities, towns or villages," *id.* § 3(d)(4). The restrictions in the constitution concerning special laws were meant to prevent interference by the legislature in the government of localities and to eliminate nonuniformity of laws on a particular subject. 1 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 4.33, at 64 (3d. ed. 1973).

[157] *See* note 149 *supra*.

[158] *Home Rule, supra* note 151, at 1146.

[159] *See, e.g.*, Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). In *Golden*, a local ordinance prohibiting subdivisions without a permit or variance, enacted pursuant to Ramapo's comprehensive growth plan, was upheld in view of the paramount importance of land use and planning policy. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 145. The *Golden* Court upheld the ordinance despite a lack of specific constitutional or statutory authorization for its enactment. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144. Although judicial action without the benefit of legislative guidance is often, as in *Golden*, necessary and beneficial, an early commentator noted the difficulties inherent in court involvement in municipal affairs, stating that "[t]he process of adjudication is ill calculated to disclose the administrative and practical implications of [municipal problems] . . . . Still another difficulty . . . is the fact that judicial construction becomes . . . part of the constitutional language itself. As such it can be altered only by . . . constitutional amendment or the . . . tribulations of judicial reversal." J. MCGOLDRICK, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE—1916-1930, at 310-12 (1933).

town supervisor.[160]

b. After a public hearing, at which the merits of the incorporation petition are to be debated, the town supervisor will submit a recommendation to the town board, upon which they will pass. Based on the town board's decision, the town supervisor will prepare a final determination, stating his approval or disapproval of the petition for incorporation, and setting forth his findings of fact as to the following factors:

(1) the effect of the incorporation on the interests of the proposed village's inhabitants;[161]

(2) the effect of the incorporation on the interests of the inhabitants of the remaining township area;[162]

(3) the effect of the incorporation on the township's comprehensive growth plan and zoning plan;[163]

(4) the possibility of providing the required services by extending services provided by the township;[164]

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[160] The desirability of originating the village incorporation process with the town supervisor, it is suggested, stems from his close association with the town board, which is the repository of zoning power within the township. *See* N.Y. TOWN LAW §§ 261, 263 (McKinney 1965 & Supp. 1981-1982). The supervisor's intimate knowledge of township capabilities should facilitate evaluating the incorporation's effect. *See* notes 161-165 and accompanying text *infra*.

[161] *See* VA. CODE § 15.1-967(1)-(3) (1981).

[162] *Cf.* N.Y. GEN. MUN. LAW § 711(1) (McKinney 1974) (determination as to whether a proposed annexation is in the overall public interest). As noted by the *Marcus* majority, consideration of the village incorporation's impact on the remaining township area is a concomitant to the mandate of section 261 of the Town Law that comprehensive zoning plans are to apply only outside the limits of incorporated villages or cities. *See* Marcus v. Baron, 84 App. Div. 2d at 132, 445 N.Y.S.2d at 597; *cf.* Bennett v. Garrett, 132 Va. 397, 406, 112 S.E. 772, 774-75 (1922) (petition for incorporation denied as against the "general good of the community").

[163] Consideration of the incorporation's effect on the comprehensive plan, it is suggested, is a logical extension of *Euclid* and *Golden*, both of which indirectly disapproved of "natural" growth as harmful to the common interest. In *Euclid*, the Supreme Court upheld an ordinance restricting complainant's land to nontrade, noncommercial uses, even though the natural and expected use of the land was in the commercial and trade area. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926). Similarly, the *Golden* Court sanctioned the local ordinance as a lawful exercise, under section 261 of the Town Law, of the town's authority to direct local development, though it might divert such development from its natural course. Golden v. Planning Bd., 30 N.Y.2d 359, 371, 285 N.E.2d 291, 297, 334 N.Y.S.2d 138, 146 (1972). It is submitted that the unchecked incorporation of villages within a township's boundaries is of the species of a "natural" but harmful phenomenon involved in *Euclid* and *Golden*.

[164] *See* VA. CODE § 15.1-967(7) (1981). Upon petition of township residents, the town board may establish improvement districts to provide the township inhabitants with needed services. N.Y. TOWN LAW § 190 (McKinney 1965 & Supp. 1981-1982). The term "improvement district" includes, *inter alia*, sewer, drainage, water, park, lighting, and refuse and garbage districts. N.Y. TOWN LAW § 209-a (McKinney 1965 & Supp. 1981-1982). *See generally* 1 E. MCQUILLIN, *supra* note 156, §§ 3.18(c), at 38.49.

(5) population and geographical requirements.[165]
c. Should the parties seeking incorporation be dissatisfied with the town supervisor's determination, an appeal may be brought before a three-judge panel of the appellate division, which panel will decide whether the town supervisor's findings as to the above five factors are meritorious.[166]

It is hoped that the legislature will recognize the inadequacy of present legislation, and will move to bridge the gap between the public policy need for comprehensive planning and the existing statutory scheme, which grants municipal corporation status irrespective of area-wide problems and concerns.

Ricardo H. Piedra

Negation of factors upon which defendant-psychiatrist's judgment was premised is necessary to establish prima facie case of medical malpractice

The well-settled principle that a physician may not be held liable for a mere error in medical judgment is circumscribed by a patient's corresponding right to receive adequate medical treatment.[167] Accordingly, should a physician depart from acceptable

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[165] *See* N.Y. VILLAGE LAW § 2-200 (McKinney 1973 & Supp. 1981-1982).

[166] *Cf.* N.Y. GEN. MUN. LAW § 712 (McKinney 1974 & Supp. 1981-1982) (providing for appellate division review of the "overall interest" issue in case of deadlock among the governing boards of local governments affected by a proposed annexation). In its determination of the *Marcus* case, special term expressed reservations as to the wisdom of entrusting such a "far-reaching" decision to the town supervisor, and praised the provision for appellate division review in annexation proceedings. Marcus v. Baron, 106 Misc. 2d 71, 75, 431 N.Y.S.2d 627, 630 (Sup. Ct. Rockland County 1980).

[167] Absent negligence, a physician will not be liable for mere errors of judgment, provided that he acts in a bona fide manner after careful medical examination. Pike v. Honsinger, 155 N.Y. 201, 210, 49 N.E. 760, 762 (1898); Paradies v. Benedictine Hosp., 77 App. Div. 2d 757, 759, 431 N.Y.S.2d 175, 178 (3d Dep't 1980); Cohen v. State, 51 App. Div. 2d 494, 496, 382 N.Y.S.2d 128, 129 (3d Dep't 1976), *aff'd*, 41 N.Y.2d 1086, 364 N.E.2d 1134, 396 N.Y.S.2d 363 (1977); DeFalco v. Long Island College Hosp., 90 Misc. 2d 164, 170, 393 N.Y.S.2d 859, 863 (Sup. Ct. Kings County 1977); Whitree v. State, 56 Misc. 2d 693, 707-08, 290 N.Y.S.2d 486, 501-02 (Ct. Cl. 1968). Accordingly, a physician will not be held liable for pursuing an alternative medical procedure which is both proper and acceptable practice. Henry v. Bronx Lebanon Medical Center, 53 App. Div. 2d 476, 480, 385 N.Y.S.2d 772, 775 (1st Dep't 1976); Schreiber v. Cestari, 40 App. Div. 2d 1025, 1026, 338 N.Y.S.2d 972, 974 (2d Dep't 1972); Gielskie v. State, 10 App. Div. 2d 471, 474, 200 N.Y.S.2d 691, 694 (3d Dep't 1960), *aff'd*, 9 N.Y.2d 834, 175 N.E.2d 455, 216 N.Y.S.2d 85 (1961); Hirschberg v. State, 91