

GOVERNMENTAL IMMUNITY FROM ZONING

The power of a state agency or subdivision to utilize and develop land that is within the boundaries of a local government unit frequently conflicts with the local government's power to restrict the use of land through zoning.¹ To grant immunity from zoning² to the intruding government³ may result in irreparable harm⁴ to the otherwise consistent land-use plan of the host government.⁵ Alternatively, to deny such immunity may result in drastic consequences⁶ for the intruding government's own development plans.

In the typical controversy, a state agency or governmental subdivision attempts to use or develop land that has been zoned by a local government entity, such as a municipality. If the proposed use is prohibited under the zoning ordinances, the intruding government may petition the zoning board for a variance or special exception,⁷ but often the intruding entity claims it is im-

¹ 2 R. ANDERSON, *AMERICAN LAW OF ZONING* 2d, § 12.02, at 397 (1976) [hereinafter cited as ANDERSON]. There are also cases in which a governmental unit claims immunity from its own zoning ordinances. *See, e.g.,* McGrath v. City of Manchester, 113 N.H. 355, 307 A.2d 830 (1973); Nehrbas v. Incorporated Village of Lloyd Harbor, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1947). Violation of one's own zoning ordinances is far less onerous than violation of another community's zoning ordinances and is analogous to a de facto variance. *Orange County v. City of Apopka*, 299 So. 2d 652, 654 (Fla. App. 1974). The law applicable in cases involving immunity from a municipality's own zoning ordinances is substantially similar to the law applicable in cases involving immunity from a foreign government unit's ordinances. *See* 8 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS*, § 25.15, at 37 (3d ed. 1976) [hereinafter cited as MCQUILLIN].

² Although many similar principles arise in a consideration of immunity from building codes and regulations, this note will focus only on zoning ordinances. For a recent decision addressing governmental immunity from building codes, *see* *State v. City of Kansas City*, 228 Kan. 25, 612 P.2d 578 (1980).

³ As used in this note, "intruding government" means any state agency or political subdivision desiring to use land which is within the jurisdictional boundary of a local government entity. "Host government" refers to the local government entity — a municipality, township or county — which has enacted zoning ordinances covering the subject property. These terms are intended to be interpreted in a neutral, non-prejudicial manner.

⁴ *See, e.g.,* Kedroff v. Town of Springfield, 127 Vt. 624, 256 A.2d 457 (1969) (sewage treatment plant permitted in residential district).

⁵ For the definition of "host government" as used in this note, *see* note 3 *supra*.

⁶ *See, e.g.,* Baltis v. Village of Westchester, 3 Ill. 2d 388, 121 N.E.2d 495 (1954) (water tower and underground water storage tank prohibited in residential district).

⁷ Most states allow any party desiring to use land in a manner violative of applicable zoning ordinances to petition an administrative board for relief from strict enforcement of the zoning ordinances to that party, in the form of a special use permit or variance. 3 ANDERSON, *supra* note 1, § 18.01, at 136. A variance is a decision by a zoning board not to enforce the ordinance against the applicant because of a finding that a hardship exists. *Id.* § 18.02, at 137. A special use permit is a deviation allowed on the condition that certain criteria are present, "e.g., substantial public service and convenience from the use and absence of danger or annoyance to nearby property owners or residents." *See* 8 MCQUILLIN, *supra* note 1, § 25.160, at 476.

mune from zoning restrictions and the controversy reaches the courts without passing through an administrative proceeding.⁸ The issue of immunity arises in the courts when the host government sues for an injunction⁹ or the intruding government sues for a decree that it is immune from local zoning by virtue of its status as a governmental body.¹⁰ The immunity that is asserted is the power to make land-use decisions without regard to local zoning.

The parties' competing powers to zone and to develop land typically are derived from state-enabling acts.¹¹ The legislature could state in the enabling statutes whether immunity should result and under what conditions.¹² Most enabling acts, however, lack such a statement, and thus leave the controversy to be resolved by the courts.¹³ Where the enabling acts are silent, the courts have traditionally applied three tests to resolve the controversy: the eminent domain test,¹⁴ the superior sovereignty test,¹⁵ and the governmental-proprietary test.¹⁶ These tests provide that an intruding government that has the power of eminent domain, or is higher in the governmental hierarchy, or is exercising a governmental function, is granted judicial immunity from zoning ordinances unless there is an express legislative directive to the contrary.¹⁷ Some courts justify the result on the basis of an inference of legislative intent

⁸ See, e.g., *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 1980 Mass. Adv. Sh. 1289, 1291, 405 N.E.2d 637, 638. Several recent decisions have required the intruding government entity to submit to the decisionmaking authority of the local zoning board. See text at note 163 *infra*.

⁹ See, e.g., *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 322 So. 2d 571, 573 (Fla. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

¹⁰ See, e.g., *Orange County v. City of Apopka*, 299 So. 2d 652, 653 (Fla. App. 1974).

¹¹ See 8 MCQUILLIN, *supra* note 1, § 25.48 and 10 *id.* § 28.02, at 4-5. Zoning is an element of the state police power, which is the broad power to act to protect the public health, safety and welfare. 1 ANDERSON, *supra* note 1, § 2.02, at 29-30. The authority exists solely in the state unless delegated to a local subdivision by a legislative enabling act or by a constitutional home rule provision. See *id.* §§ 2.15, 2.16; 8 MCQUILLIN, *supra* note 1, § 25.06, at 19.

¹² See, e.g., CAL. GOV'T CODE § 53091 (West Supp. 1980), which provides: "this section does not require a school district to comply with the zoning ordinances of a county or city unless such zoning ordinances make provision for the location of public schools and unless the city or county planning commission has adopted a master plan."

¹³ Perhaps one reason for the legislature's usual silence on this issue is that the political ramifications of state usurpation of local autonomous decisionmaking powers or of explicit local restrictions on the power of state agencies may be severe. It is also possible that the legislature fails to consider the possibility of a conflict or assumes that it does not need to direct judicial resolution of this controversy.

¹⁴ See, e.g., *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960); *Seward County Bd. of Comm'rs v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976); *South Hill Sewer Dist. v. Pierce County*, 22 Wash. App. 738, 591 P.2d 877 (1979).

¹⁵ See, e.g., *County of Los Angeles v. City of Los Angeles*, 212 Cal. App. 2d 160, 28 Cal. Rptr. 32 (1963); *Mayor of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977); *Appelbaum v. St. Louis County*, 451 S.W.2d 107 (Mo. 1970).

¹⁶ See, e.g., *County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth*, 1980 Mass. Adv. Sh. 1289, 405 N.E.2d 637; *Nehrbas v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957). *Accord*, *New Orleans v. State*, 364 So. 2d 1020 (La. 1978).

¹⁷ See, e.g., *Russell v. Zoning Bd. of Appeals of Brookline*, 349 Mass. 532, 209 N.E.2d 337 (1965).

underlying the enabling act of the intruding government.¹⁸ Other courts, rather than inferring legislative intent, have relied on their common law powers to hold that immunity results directly from the presence of the above mentioned factors.¹⁹ The general rule that emerges from the application of the traditional tests is that government entities are immune from zoning ordinances.²⁰

Judicial dissatisfaction with these traditional single-factor tests, and changes in both governmental policy²¹ and the nature of state government²² have prompted several courts to vary them.²³ Ultimately, courts in a growing number of jurisdictions have taken the further step of abandoning the old tests in favor of an interest balancing approach that examines the equities of the particular factual situation.²⁴ Three different tests have developed. The first balancing of interests test applies a two-tiered analysis.²⁵ Courts adopting this approach first decide whether the legislature intended to grant immunity,²⁶ inferring the legislative intent of the enabling acts from a weighing of the competing interests of the parties.²⁷ If immunity is granted, these courts then examine the reasonableness of the proposed land-use.²⁸ The second balancing of interests approach denies an intruding government unit the opportunity to assert immunity.²⁹ These courts allow only an assertion that a zoning board's prohibi-

¹⁸ See, e.g., *City of Des Plaines v. Metropolitan Sanitary Dist. of Greater Chicago*, 48 Ill. 2d 11, 268 N.E.2d 428 (1971).

¹⁹ See, e.g., *Nehrbas v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 193, 140 N.E.2d 241, 242, 159 N.Y.S.2d 145, 147 (1957).

²⁰ Comment, *Balancing Interests to Determine Governmental Exemption from Zoning Laws*, 1973 U. ILL. L. F. 125, 125. See also cases cited at notes 14-16 *supra*.

²¹ See, e.g., *Town of Oronoco v. City of Rochester*, 293 Minn. 468, 197 N.W.2d 426 (1972). The court rejected the traditional tests "because the pungent realities of urban sprawl and overpopulation have accentuated the need for land-use planning and control that serves as foundation for the exercise of police power in the area of zoning." *Id.* at 471, 197 N.W.2d at 429.

²² See, e.g., *In re Suntide Inn Motel*, 563 P.2d 125 (Okla. 1977). The dissenting justice criticized the application of the traditional tests to increasingly decentralized state governments. "There were, at last official count, 235 state boards, agencies and commissions. It is unrealistic to assume that all 'state' demands upon municipal land which these agencies could potentially make, would be for equally important public purposes or that their site selections would always be reasonable." *Id.* at 132 (footnote omitted).

²³ See, e.g., *Connors v. New York State Ass'n of Retarded Children, Inc.*, 82 Misc. 2d 861, 370 N.Y.S.2d 474 (1975) (In New York, an intruding government that is granted immunity on the basis of the governmental-proprietary test must act reasonably and rationally and is not free to make arbitrary site selections. *Id.* at 864, 370 N.Y.S.2d at 477); *Porter v. Southwestern Public Serv. Co.*, 489 S.W.2d 361 (Tex. Civ. App. 1972). (In Texas, courts will not grant immunity on the basis of the eminent domain test if the intruding government entity acquired the property with notice of the zoning ordinances. *Id.* at 364-65).

²⁴ See cases cited in notes 25 & 30 *infra*.

²⁵ See, e.g., *Rutgers, State Univ. v. Piluso*, 60 N.J. 142, 152-53, 286 A.2d 697, 702-03 (1972).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 153-54, 286 A.2d at 703.

²⁹ See, e.g., *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 322 So. 2d 571, 579 (Fla. App. 1975), *aff'd*, 332 So. 2d 610, 613 (Fla. 1976); *Lincoln County v. Johnson*, 257 N.W.2d 453, 457 (S.D. 1977).

tion of a proposed use is unreasonable because of an overriding public interest sought to be promoted by the proposed use.³⁰ The third balancing approach also adopts a two-tiered analysis.³¹ Under this test, immunity and reasonableness are decided separately by the court.³² Immunity is decided solely by balancing the parties' competing interests on an ad hoc basis.³³ Reasonableness is then decided by examining whether the initial land use decision is "unreasonable, arbitrary, or discriminatory."³⁴ In contrast to the common outcome of the traditional tests, applications of the three interest balancing approaches often result in an intruding government being held subject to local zoning ordinances.³⁵

While it is evident that courts are increasingly willing to adopt the alternative balancing of interests analysis, the traditional tests retain their vitality in a majority of jurisdictions.³⁶ This note will examine both the traditional sole-factor tests and the alternative balancing of interests tests. It will present first the three traditional tests, analyzing both the primary supporting rationales and the recent court criticisms of each test. The alternative tests will then be examined. The note will conclude with an analysis of several salient features of the new tests, and proposals for modifications of these features, in an effort to determine which features are most appropriate for the resolution of this recurring land-use controversy. It is submitted that the traditional sole-factor tests are inappropriate for resolving intergovernmental immunity controversies and should be abandoned in favor of the third balancing of interests test, which balances specific competing interests in deciding the issues of immunity and reasonableness. Not even this balancing of interests test, however, considers all of the factors relevant to maximizing the public benefit. Therefore, modifications of this test will be proposed in an effort to propose a test that will include all relevant factors.

I. TRADITIONAL TESTS

The majority of jurisdictions continue to apply one or more of the three traditional tests: the eminent domain test, the superior sovereignty test, and the governmental-proprietary test. Several recurrent criticisms of these tests,

³⁰ See, e.g., *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 322 So. 2d 571, 576 (Fla. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976); *Lincoln County v. Johnson*, 257 N.W.2d 453, 458 (S.D. 1977).

³¹ See, e.g., *City of Fargo v. Harwood Twp.*, 256 N.W.2d 694, 698-700 (N.D. 1977).

³² *Id.*

³³ *Id.* at 698-99.

³⁴ *Id.* at 700.

³⁵ See, e.g., *Pal-Mar Water Management Dist. v. Martin County*, 377 So. 2d 752 (Fla. App. 1979); *Brown v. Kansas Forestry, Fish & Game Comm'n*, 2 Kan. App. 2d 102, 576 P.2d 230 (1978); *City of Fargo v. Harwood Twp.*, 256 N.W.2d 694 (N.D. 1977).

³⁶ Johnston, *Recent Cases in the Law on Intergovernmental Zoning Immunity: New Standards Designed to Maximize the Public Interests*, 8 URB. LAWYER 327, 328 (1976). At this writing, only Delaware, Florida, Kansas, North Dakota, New Jersey, Ohio and South Dakota have abandoned the traditional tests in favor of a balancing of interests approach.

however, have recently been expressed by courts and commentators.³⁷ This section will examine each of the tests, concentrating on the courts' various rationales for adopting and retaining them and on the criticisms expressed by the courts that have modified or abandoned them. Following this examination, this section will analyze the tests in light of specific policy objectives that are defeated by a judicial grant of zoning immunity.

A. Eminent Domain Test

The power of eminent domain is the sovereign's right to "condemn" private land for a public use without the owner's consent.³⁸ Numerous courts consider a delegation of eminent domain powers to the intruding government to be sufficient justification for a grant of immunity from zoning.³⁹ The only issue is whether the power to condemn is present; the issue of whether the subject property was actually taken through condemnation or purchased is irrelevant.⁴⁰ These courts deem the condemnation power superior to the zoning power, finding that "[e]minent domain is an inherent and necessary attribute of sovereignty, existing independently of constitutional provisions and superior to all property rights."⁴¹ The courts applying this test infer a legislative intent that the power of eminent domain not be restricted by the zoning power.⁴² One court has noted, for example, that to subordinate the exercise of eminent domain to zoning ordinances would relegate the authority of the intruding government to that of a private landholder thus frustrating the purpose of the statute that gave it its condemnation power.⁴³ By virtue of their eminent domain powers, therefore, intruding government units are deemed inherently superior to entities exercising the power to zone.

There are three recurrent criticisms of the eminent domain test. First, several courts have commented that the conflict between the powers is illusory. Second, courts have criticized the assumption that the party possessing the right to condemn is inherently superior. Finally, one court has rejected the claim that municipal restrictions on the power of eminent domain, which is ex-

³⁷ Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869, 869-79 (1971); Comment, *Balancing Interests to Determine Governmental Exemption from Zoning Laws*, 1973 U. ILL. L. F. 125, 125-36; Johnston, *Recent Cases in the Law on Intergovernmental Zoning Immunity: New Standards Designed to Maximize the Public Interests*, 8 URB. LAWYER 327, 331-35 (1976).

³⁸ 1 NICHOLS, P., *THE LAW OF EMINENT DOMAIN* § 1.11 (3d ed. rev. 1980).

³⁹ See cases cited at note 14 *supra*.

⁴⁰ *City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 398-99, 368 P.2d 637, 640 (1962); *Evans v. Just Open Gov't*, 242 Ga. 834, 837, 251 S.E.2d 546, 549 (1979).

⁴¹ *State ex rel. Helsel v. Board of County Comm'rs*, 37 Ohio Ops. 58, 61, 79 N.E.2d 698, 704 (1947) (quoting 29 C.J. *Eminent Domain* § 2 (1947)).

⁴² See, e.g., *Seward County Bd. of Comm'rs v. City of Seward*, 196 Neb. 266, 274, 242 N.W.2d 849, 854 (1976); *South Hill Sewer Dist. v. Pierce County*, 22 Wash. App. 738, 742-43, 591 P.2d 877, 880 (1979).

⁴³ *City of Des Plaines v. Metropolitan Sanitary Dist.*, 48 Ill. 2d 11, 14, 268 N.E.2d 428, 430 (1971).

exercised in the public interest, are against public policy, since municipal restrictions also serve a public interest.

First, several courts have focused on the attributes of zoning and condemnation powers and concluded that the conflict between the powers is illusory.⁴⁴ These courts reason that, since zoning ordinances usually have no impact on the exercise of the right of eminent domain, full effect can be given to both powers.⁴⁵ In reaching this position, some courts have reasoned that zoning ordinances restrict only the right to use land, not the right to acquire it.⁴⁶ Since eminent domain only empowers the intruding government to acquire land and does not enhance its right to use land, there is no real conflict between the powers.⁴⁷ It has also been noted that the right to select a specific site for a particular purpose is not necessarily included in the power of eminent domain.⁴⁸ Unless the zoning plan of a locality entirely prohibits a particular activity, the plan's only effect on the development plans of the intruding government is to delimit the selection of a specific site.⁴⁹ Therefore, effect can be given both the zoning power and the condemnation power.⁵⁰ Since the power to use land and the power to select a specific site are not components of eminent domain, the power to condemn is not curtailed by requiring that it be exercised in compliance with zoning ordinances.⁵¹

The second recurrent criticism of the eminent domain test is directed at the premise that eminent domain is intrinsically superior to zoning. It is argued that an inference of legislative intent that immunity be accorded the grantee of the power of eminent domain is unwarranted, since the nature and source of

⁴⁴ *Brownfield v. State*, 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).

⁴⁵ *Id.* at 285, 407 N.E.2d at 1367. The court rejected the eminent domain test on the ground that:

while [the notion that zoning ordinances may completely frustrate attempts to exercise the power of eminent domain] is a legitimate concern, it does not justify the invocation of absolute immunity in all cases. Unless a municipality completely prohibits a certain use within its corporate limits, the state may acquire property for that use and still comply with local zoning restrictions.

Id.

⁴⁶ *West v. Housing Auth. of Atlanta*, 211 Ga. 133, 84 S.E.2d 30 (1954). In holding that zoning ordinances do not prevent the acquisition of property, the court reasoned that compliance with zoning ordinances is not a condition precedent to the exercise of the power of eminent domain. The court further noted that condemnation is merely a "preparatory step" to use, which use may or may not be subject to zoning. *Id.* at 135, 84 S.E.2d at 32-33.

⁴⁷ *Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 332 So. 2d 571, 578 (Fla. App. 1975).

⁴⁸ *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962). The court noted that the general enabling acts authorizing the city to condemn land for a sewage disposal plant "do not purport to give the city the right to select the exact location in St. Louis County." *Id.* at 642.

⁴⁹ *City of Fargo v. Harwood Twp.*, 256 N.W.2d 694, 698 (N.D. 1977). The court observed that "[r]easonable zoning ordinances limit, but do not eliminate, a governmental unit's power to locate its facilities through its eminent domain power." (quoting Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869, 875 (1971)).

⁵⁰ *St. Louis County*, 360 S.W.2d at 642.

⁵¹ See note 45 *supra*.

eminent domain and zoning powers are substantially similar.⁵² Zoning is attributable to the police power, which is the inherent power of the sovereign to protect the public health, safety and welfare.⁵³ Since both eminent domain and zoning are inherent attributes of sovereignty, there appears to be no valid justification for subordinating zoning powers to condemnation powers.⁵⁴ Moreover, several courts have noted that an intruding government entity, whether it is a state agency or a political subdivision, has no right to condemn unless the legislature delegates the power to it.⁵⁵ A claim that eminent domain is superior because it is an inherent power, therefore, is deemed unconvincing.⁵⁶

Finally, the Supreme Court of Ohio has expressly distinguished between private restrictions on land-use and zoning ordinances. In a case involving private restrictive covenants,⁵⁷ the court held that immunity was warranted for a condemning government entity because an attempt by a private party to infringe on the right of eminent domain, which "rests upon public necessity, . . . is clearly against public policy and is therefore illegal and void."⁵⁸ In a recent case involving zoning ordinances,⁵⁹ however, the court refused to extend immunity to a condemning intruding government.⁶⁰ The court reasoned that the rationale with respect to private restrictive covenants did not apply because "[b]oth the municipality's exercise of its zoning powers and the state's exercise of the power of eminent domain are intended to effectuate public purposes."⁶¹ In view of the relatively equal interests sought to be promoted by the exercise of each power, eminent domain was rejected as a justification for granting immunity.⁶²

⁵² *Porter v. Southwestern Pub. Serv. Co.*, 489 S.W.2d 361 (Tex. Civ. App. 1972). The court restricted the eminent domain test on the following rationale:

Eminent domain involves the deprivation of the right of the property owner to keep his property when it is needed for public use. Zoning regulations, derived from the police powers, deprive the property owner of the use of his property contrary to standards promulgated for the health, safety and welfare of the public generally. Both powers are inherent in state government and may be delegated for appropriate purposes. Neither power is an unbridled one; in short, there must not be an abuse of the power.

Id. at 363.

⁵³ See note 11 *supra*.

⁵⁴ See note 52 *supra*.

⁵⁵ *City of Fargo v. Harwood Twp.*, 256 N.W.2d 694, 697 (N.D. 1977) (citing with approval *City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 400-01, 368 P.2d 637, 641-42 (1962) (dissenting opinion)).

⁵⁶ 256 N.W.2d at 697.

⁵⁷ *Doan v. Cleveland Short Line Ry. Co.*, 92 Ohio St. 461, 112 N.E. 505 (1915).

⁵⁸ *Id.* at 468-69, 112 N.E. at 507.

⁵⁹ *Brownfield v. State*, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980).

⁶⁰ *Id.* at 285, 407 N.E.2d at 1367.

⁶¹ *Id.*

⁶² *Id.* The court instead adopted an alternative test wherein it sought "to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens." *Id.*

B. *Superior-Sovereignty Test*

Courts applying the second traditional test grant immunity in all cases where the intruding government is deemed superior to the host government.⁶³ A comparison of each party's position in the governmental hierarchy is usually determinative.⁶⁴ Therefore, the state and its agencies with statewide jurisdiction are immune from local zoning authority unless the state has expressly subjected itself to local ordinances.⁶⁵ Some courts justify the grant of immunity on the theory that any derogation of sovereign powers must be explicit.⁶⁶ Others reason that a local government should not be permitted to use its zoning to "thwart the state from performing its duty."⁶⁷

Critics of this superior-sovereignty test have generally acknowledged the importance of benefiting the greater number of citizens,⁶⁸ but have disagreed with the proposition that a hierarchical ranking should be determinative.⁶⁹ Critics have focused on the practical difficulties of ascertaining a meaningful hierarchical ranking.⁷⁰ Ranking of government entities has been inconsistent among the states.⁷¹ In addition, in many states, municipalities derive their zoning powers directly from a home-rule provision in the state constitution rather than through legislation.⁷² That the power to zone emanates from a superior source weakens the premise that a municipality should not be allowed to use its zoning power to thwart a state function.⁷³ Moreover, in non-home-rule states, zoning is an element of the statewide police power delegated by statute to state subdivisions.⁷⁴ In enacting zoning ordinances, the grantee of the power acts in

⁶³ See cases cited at note 15 *supra*.

⁶⁴ *Aviation Serv. v. Board of Adjustment of Hanover*, 20 N.J. 275, 119 A.2d 761 (1956). The court, in dictum, enunciated the general principle of the superior sovereignty test as follows: "where the immunity from local zoning regulation is claimed by any agency or authority which occupies a superior position in the governmental hierarchy, the presumption is that such immunity was intended in the absence of express statutory language to the contrary." *Id.* at 282, 119 A.2d at 765.

⁶⁵ See, e.g., *Mayor of Baltimore v. State*, 281 Md. 217, 223, 378 A.2d 1326, 1329 (1977).

⁶⁶ See, e.g., *Union Bldg. & Constr. Corp. v. Borough of Totowa*, 98 N.J. Super. 446, 449, 237 A.2d 637, 638 (1968).

⁶⁷ *Kunimoto v. Kawakami*, 56 Hawaii 582, 585, 545 P.2d 684, 686 (1976).

⁶⁸ *Rutgers, State Univ. v. Piluso*, 60 N.J. 142, 153, 286 A.2d 697, 702 (1972).

⁶⁹ *Id.* at 153, 286 A.2d at 703.

⁷⁰ Comment, *Balancing Interests to Determine Governmental Exemption from Zoning Laws*, 1973 U. ILL. L. R. 125, 128.

⁷¹ Compare *City of Richmond v. Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958) (In Virginia, counties and cities are both "coequal political subdivision[s] and agenc[ies] of the State." *Id.* at 684, 101 S.E.2d at 644); with *County of Los Angeles v. City of Los Angeles*, 212 Cal. App. 2d 160, 28 Cal. Rptr. 32 (1963) (In California, despite a constitutional grant of home rule power to a city, the county is the superior sovereign. *Id.* at 164-65, 28 Cal. Rptr. at 24-35).

⁷² *Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 322 So. 2d 571, 576-77 (Fla. App. 1975).

⁷³ *Id.*

⁷⁴ See note 11 *supra*.

its capacity as a state agency.⁷⁵ Hence, critics assert that zoning ordinances should not be annulled as against a party with a statewide jurisdiction merely because the zoning power is exercised by a local subdivision.⁷⁶ Finally, the applicability of the test is limited, since it clearly offers no guidance to courts confronted with opposing parties of equal sovereignty, such as neighboring municipalities.

The practical difficulty of ranking state agencies is not the only criticism of the test voiced by recent court decisions. A second focus of criticism is that, even if governmental units can be ranked according to their position on the governmental hierarchy, there is no guarantee that the entity representing the broader constituency also represents the greater social utility.⁷⁷ For example, the Court of Appeals of Kansas recently decided a case involving the state recreational commissioner's attempt to construct an all-night parking lot and rest room facility in a county residential district.⁷⁸ The court recognized that, despite the intruding government entity's statewide jurisdiction and responsibility, the segment of the population that would be served by the proposed project was "relatively small,"⁷⁹ and the social utility of the proposed project was "marginal."⁸⁰ Other state agencies, however, clearly benefit all of the citizens of a state for a function that is of paramount importance. A common example of the latter is a state agency charged with the development of a state

⁷⁵ See, e.g., *In re Suntime Inn Motel*, 563 P.2d 125 (Okla. 1977). The dissenting justices argued:

it is important to understand that this conflict is not simply between a city and a state agency attempting to exercise a sovereign power. The Legislature has specifically empowered cities to enact and enforce zoning regulations. . . . This zoning power is also a sovereign power, and in their exercise thereof, cities are 'equally agents of the state.'

Id. at 131 (citations omitted).

⁷⁶ *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 360 A.2d 607 (1976). In rejecting the superior sovereignty test, the court commented:

Resolving the conflict simply by saying that the 'state' agency must prevail because it is exercising the power of the sovereign overlooks that the zoning power the city seeks to exercise is also a sovereign power. Such a resolution ignores the interests the state seeks to promote by legislative grants of powers to municipalities. Interests such as those fostered by comprehensive land use planning statutes are too important not to be recognized as involving exercises of state power.

Id. at 180, 360 A.2d at 610.

⁷⁷ *Brown v. Kansas Forestry Fish & Game Comm'n*, 2 Kan. App. 2d 102, 111, 576 P.2d 230, 236 (1978) (citing with approval *In re Suntime Inn Motel*, 563 P.2d 125 (Okla. 1977) (dissenting opinion), where the judge criticized the majority's reliance on the superior sovereignty test, noting that: "[i]t is unrealistic to assume that all 'state' demands upon municipal land which these state agencies could potentially make would be for equally important public purposes. . . ." *Id.* at 132).

⁷⁸ *Brown v. Kansas Forestry, Fish & Game Comm'n*, 2 Kan. App. 2d 102, 576 P.2d 230 (1978).

⁷⁹ *Id.* at 114, 576, P.2d at 238.

⁸⁰ *Id.*

university.⁸¹ Though the superior-sovereignty test fails to recognize the distinction between the two factual settings presented above, many jurisdictions have not abandoned the test.⁸² The trend is to examine the issue of sovereignty in the context of other criteria relevant to resolving the controversy.⁸³

C. *Governmental-Proprietary Test*

Courts employing the governmental-proprietary test grant immunity to any intruding government for any proposed activity that is in furtherance of a governmental, as opposed to proprietary, function.⁸⁴ To distinguish between a governmental function and proprietary function, some courts draw on a test that originated in tort law.⁸⁵ The test based on the tort distinction defines a governmental function as one that is directed toward effectuating public policy and a proprietary function as one that is similar to that of a profit-making corporation.⁸⁶ Another group of courts applies a different distinction. They differentiate between activities that are mandated by the legislature, or by societal conditions, and activities that are permissive.⁸⁷ For the first group of courts, which distinguishes between public and private activities, a municipality acting in its governmental capacity acts as an arm of the state and thus shares the sovereign immunity of the state, whereas a municipality acting in a proprietary capacity is liable for its torts to the same extent as a private corporation.⁸⁸ The courts that distinguish between mandatory and permissive activities reason that to subject a mandatory activity to local zoning control would frustrate the legislative mandate⁸⁹ or would prevent the achievement of the important societal goal that renders the activity mandatory.⁹⁰ Each definition leaves some discretion to the courts to characterize activities as governmental or proprietary.

⁸¹ See, e.g., *Rutgers, State Univ. v. Piluso*, 60 N.J. 142, 153, 286 A.2d 697, 703 (1972) (state university benefits all citizens of state; social utility is great).

⁸² See, e.g., *Lincoln County v. Johnson*, 257 N.W.2d 453, 457 (S.D. 1977) (reserving the issue of the acceptability of the superior sovereignty test to an appropriate case).

⁸³ See, e.g., *Rutgers, State Univ. v. Piluso*, 60 N.J. 142, 153, 286 A.2d 697, 702-03 (1972) (holding that the "nature and scope of the instrumentality seeking review" is one of many factors to be considered by the court).

⁸⁴ See cases cited at note 16 *supra*.

⁸⁵ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 131 at 979-82 (4th ed. 1971) [hereinafter cited as PROSSER].

⁸⁶ See, e.g., *Town of Bloomfield v. New Jersey Highway Auth.*, 18 N.J. 237, 245-46, 113 A.2d 658, 662 (1955); *Water Works Ed. of Birmingham v. Stephens*, 262 Ala. 203, 209, 78 So. 2d 267, 272 (1955).

⁸⁷ See, e.g., *Connors v. New York State Ass'n of Retarded Children*, 82 Misc. 2d 861, 864, 370 N.Y.S.2d 474, 477 (1975); *Village on the Hill, Inc. v. Massachusetts Turnpike Auth.*, 348 Mass. 107, 118, 202 N.E.2d 602, 610-11 (1964).

⁸⁸ PROSSER at 977-78.

⁸⁹ See, e.g., *Nowack v. Department of Audit and Control*, 72 Misc. 2d 518, 519-20, 338 N.Y.S.2d 52, 54 (1973).

⁹⁰ See, e.g., *Nehrbas v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 193, 194-95, 140 N.E.2d 241, 242, 243, 159 N.Y.S.2d 145, 147, 148-49 (1957).

There are three general areas of criticism of the governmental-proprietary test. First, in practice the classifications under both tests have proven inconsistent and unpredictable.⁹¹ Second, the test based on the traditional tort distinction has been deemed to have been unjustifiably appropriated from the tort field.⁹² Finally, several courts have criticized the test that is based on a desire not to frustrate a legislative or societal mandate on the ground that the mandate is not frustrated except in the situation where the zoning ordinances prohibit entirely the proposed use.⁹³

The first general criticism of the governmental-proprietary distinction is directed at the lack of consistency that has characterized judicial classifications.⁹⁴ Activities that have been held proprietary in one state have been held governmental in others,⁹⁵ and classifications have changed over time.⁹⁶ In one state, for example, sewage disposal was held governmental for the purpose of tort liability but proprietary for the purpose of zoning immunity.⁹⁷ As a result of such confusion, one court declared the governmental-proprietary distinction to be illusory, noting that all activities of a government are essentially governmental.⁹⁸

The second criticism focuses on the propriety of applying a concept that originated as a device for limiting sovereign immunity in tort to intergovernmental zoning controversies.⁹⁹ The distinction originated in the tort field in response to public policy determinations that government immunity should be

⁹¹ See, e.g., *Lincoln County v. Johnson*, 257 N.W.2d 453, 457 (S.D. 1977).

⁹² See, e.g., *O'Connor v. City of Rockford*, 3 Ill. App. 3d 548, 551, 279 N.E.2d 356, 359 (1972), *rev'd on other grounds*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972).

⁹³ *City of Richmond v. Board of Supervisors*, 199 Va. 679, 686, 101 S.E.2d 641, 646 (1958).

⁹⁴ *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955). *Accord*, *Lincoln County v. Johnson*, 257 N.W.2d 453, 457 (S.D. 1977) (rejecting the criterion because of the inconsistencies of application); *Brownfield v. State*, 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980) (rejecting the distinction because of its difficulty of application). See generally 2 ANDERSON, *supra* note 1, § 12.03 at 398-99. "The great difficulty lies in determining which functions are governmental, and which are proprietary. The distinction is of ancient vintage, but it is neither clear nor stable. . . . The only dependable criteria are those found in the local zoning cases of recent vintage." *Id.* (footnotes omitted).

⁹⁵ Compare *County of Westchester v. Village of Mamaroneck*, 22 A.D.2d 143, 146, 255 N.Y.S.2d 290, 292 (1964) *aff'd*, 16 N.Y.2d 940, 212 N.E.2d 442, 264 N.Y.S.2d 925 (1965) (sewage disposal plant governmental) with *Jefferson County v. City of Birmingham*, 256 Ala. 436, 441, 55 So. 2d 196, 200 (1951) (sewage disposal plant proprietary for zoning controversy).

⁹⁶ Compare *Nehrbas v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 194-95, 140 N.E.2d 241, 243, 159 N.Y.S.2d 145, 148-49 (1957) (garbage collection and disposal governmental) with *O'Brien v. Town of Greenburgh*, 239 A.D. 555, 559-60, 268 N.Y.S. 173, 178-79 (1933), *aff'd*, 266 N.Y. 582, 195 N.E. 210 (1935) (garbage collection and disposal proprietary).

⁹⁷ *Jefferson County v. City of Birmingham*, 256 Ala. 436, 441, 55 So. 2d 196, 200 (1951) (sewage disposal plant — governmental for tort liability; proprietary for zoning controversy).

⁹⁸ *Lincoln County v. Johnson*, 257 N.W.2d 453, 457 (S.D. 1977) (citing *Township of Washington v. Village of Ridgewood*, 26 N.J. 578, 584, 141 A.2d 308, 311 (1958)).

⁹⁹ See, e.g., *State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 890 (Mo. 1960); *Seward County Bd. of Comm'rs v. City of Seward*, 196 Neb. 266, 275-76, 242 N.W.2d 849, 854-55 (1976).

restricted.¹⁰⁰ A recent decision of the Illinois Court of Appeals acknowledged the public policy justification for the governmental-proprietary distinction in tort cases, but refused to extend the rule to an intergovernmental zoning controversy.¹⁰¹ The court commented that "[t]he reasons of policy which accounted for the development of this distinction [in tort] have little validity or application in resolving the present conflict of the powers of two public bodies."¹⁰² The implication from this comment is that, although the governmental-proprietary distinction may be valid as a device to *limit* governmental immunity in tort, it should not be used as a device to *grant* governmental immunity from zoning. Moreover, although it may be justified in a dispute between a government entity and an individual, it is not a justifiable distinction in a dispute between two public parties representing relatively equal interests.

The third general criticism of the governmental-proprietary rule is directed at the courts that distinguish between mandatory and permissive functions and grant immunity in order not to frustrate a legislative or societal mandate. Unless the zoning scheme of the local government entity forbids the proposed activity entirely, the mandate is not frustrated by requiring that it be exercised in conformity with the local zoning ordinances.¹⁰³ Several courts, therefore, have held that the conflict between the development plans of the intruding government and the land-use plans of the host government is reconcilable,¹⁰⁴ and that such reconciliation is preferable to annulment of either party's proposals.¹⁰⁵ In addition, the enactment of zoning ordinances has been recognized as a governmental function, carried out for the essential purpose of protecting the health, safety and welfare of the public.¹⁰⁶ If both parties are acting in their governmental capacities, the justification for upholding zoning ordinances seems equal to, not subordinate to, the justification for upholding the intruding government's action.

In recognition of the shortcomings of the governmental-proprietary test, several jurisdictions have reduced its vitality, without discarding it altogether.¹⁰⁷ Some courts apply the rule only when a municipality claims im-

¹⁰⁰ *State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 890 (Mo. 1960); *Cloyes v. Township of Delaware*, 23 N.J. 324, 327-29, 129 A.2d 1, 2-4 (1957).

¹⁰¹ *O'Connor v. City of Rockford*, 3 Ill. App. 3d 548, 551, 279 N.E.2d 356, 359 (1972), *rev'd on other grounds*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972).

¹⁰² *Id.* at 551, 279 N.E.2d at 359.

¹⁰³ *Brownfield v. State*, 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980) (citing *City of Richmond v. Board of Supervisors*, 199 Va. 679, 686, 101 S.E.2d 641, 646 (1958) (city sought to construct prison on land zoned 'agricultural' by county; city has no power to select the location, therefore the ordinance does not impair the city's right to establish the prison)).

¹⁰⁴ *City of Richmond v. Board of Supervisors*, 199 Va. 679, 686, 101 S.E.2d 641, 646 (1958).

¹⁰⁵ *St. Louis County v. City of Manchester*, 360 S.W.2d 630, 640 (Mo. 1962); *Brownfield v. State*, 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980).

¹⁰⁶ *See, e.g.*, *St. Louis County v. City of Manchester*, 360 S.W.2d 638, 640 (Mo. 1962); *Wippler v. Hohn*, 341 Mo. 780, 785-86, 110 S.W.2d 409, 411 (1937).

¹⁰⁷ *See, e.g.*, cases cited at notes 108 and 109 *infra*.

munity from its own zoning ordinances, and apply a different test to controversies involving outside government entities.¹⁰⁸ Other courts hold that the immunity conferred by the test is qualified, and that the intruding government must act in a reasonable manner.¹⁰⁹ Because of the broad judicial discretion that has been exercised by the courts in deciding whether an activity is governmental or proprietary, this test appears to be the most flexible of the sole-factor tests. The courts thus seem more willing to retain and modify it than the other traditional tests.

D. Analysis of Traditional Tests

The common result of the traditional tests is that immunity is accorded the intruding government.¹¹⁰ Immunity from zoning can frustrate the entire land-use allocation scheme of a state subdivision. While a denial of immunity may similarly frustrate the development plans of the intruding government, the likelihood of such a result is less substantial because of the usual presence of alternative sites, and therefore it does not support the frequency with which courts have granted immunity. Moreover, the court's propensity to grant immunity frustrates the likelihood of cooperation and compromise between the competing government units. If immunity were predicated on the circumstances of the controversy rather than on the governmental relationship, the intruding government would be induced to approach the zoning authority in an effort to obtain approval for its proposed project. Such a rule would minimize the danger of an intruding government disrupting the land-use plans of the host government. Even if immunity was later found to be justified, the intruding government's decision would be based on a more complete appreciation of the local government's interests and a more complete analysis of alternative sites and methods.

The courts' propensity to grant immunity thus hinders the likelihood of reasonable usage of land. Moreover, in the interest of maintaining easily applicable standards, the courts that continue to apply the traditional tests fail to address many factors relevant to a fair resolution of the controversy. For example, there is no effort to determine whether the zoning plan permits the proposed use at an alternative site. If such a site exists, the conflict between the zoning power and the power to use land is reconcilable, since both powers can be exercised fully. Under such circumstances, there is no valid justification for negating the applicable zoning ordinances. To subordinate all zoning or-

¹⁰⁸ See, e.g., *A1A Mobile Home Park, Inc. v. Brevard County*, 246 So. 2d 126, 131 (Fla. App. 1971) (applying governmental-proprietary distinction to intramunicipal zoning immunity controversy); *Orange County v. City of Apopka*, 299 So. 2d 652, 654 (Fla. App. 1974) (acknowledging rule in *A1A Mobile Home Park*, but refusing to apply the test in intergovernmental zoning immunity controversy).

¹⁰⁹ See, e.g., *Connors v. New York State Ass'n of Retarded Children, Inc.*, 82 Misc. 2d 861, 864, 370 N.Y.S.2d 474, 477 (1975).

¹¹⁰ Comment, *Balancing Interests to Determine Governmental Exemption from Zoning Laws*, 1973 U. ILL. L. F. 125, 125. See also cases cited at notes 14-17 *supra*.

dinances, without considering the degree to which they infringe on the proposed project, or the degree to which the specific site is essential to the project, is arbitrary.

In addition, the factors that are determinative under the traditional tests bear little relation to the substantive elements of the dispute. The existence of the power of eminent domain, or the governmental nature of an activity, neither ensure that the project's proponents are qualified to make land-use allocation decisions that minimize the impact on legitimate local interests, nor do they establish that the intruding government's project is inherently superior to zoning, which is also a governmental activity premised on a sovereign power. The superior sovereignty test may have been justified at one time on the merits of preventing local infringement on state activities. This justification, however, has been weakened by the present diffusion of state powers to an increasingly broad spectrum of state agencies for purposes ranging from hospitals and universities to liquor distributors,¹¹¹ trailer parks,¹¹² and rest room facilities.¹¹³ A rule that does not distinguish between these functions shows no semblance of fairness and does not address the true substance of the controversy. The essential issue should be whether the public benefit of the proposed project requires that legitimate local interests be subordinated. This issue should not turn on the powers delegated to the intruding government, but rather on the equitable considerations underlying the controversy as a whole.

II. ALTERNATIVE APPROACHES

The recent trend among courts that have criticized the three traditional tests is to examine all relevant factors of the dispute in an effort to make the decision that will maximize the public benefit. In contrast to the traditional tests, no single factor is determinative. Three different tests have developed.

The first test, developed by the New Jersey Supreme Court, balances the parties' interests in the context of ascertaining the intent of the legislature on the issue of immunity, and then, if immunity is granted, examines the reasonableness of the initial land-use decision.¹¹⁴ The second test, developed by the Florida Supreme Court, denies the intruding entity the opportunity to assert immunity, but allows the intruding government to challenge the reasonableness of the zoning board's decision on the ground that the specific interests favoring the proposed use outweigh the host government's interests.¹¹⁵ The

¹¹¹ See, e.g., *Salt Lake County v. Liquor Control Comm'n*, 11 Utah 2d 235, 237-38, 357 P.2d 488, 490 (1960).

¹¹² See, e.g., *Township of Lower Allen v. Commonwealth*, 10 Pa. Commw. Ct. 272, 272-75, 310 A.2d 90, 90-91 (1973).

¹¹³ See, e.g., *Brown v. Kansas Forestry, Fish & Game Comm'n*, 2 Kan. App. 2d 102, 105, 576 P.2d 230, 232 (1978) (rejection of state commission's superior sovereignty argument).

¹¹⁴ *Rutgers, State Univ. v. Piluso*, 60 N.J. 142, 152-53, 286 A.2d 697, 702-03 (1972).

¹¹⁵ *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens*, 322 So. 2d 571, 579 (Fla. App. 1975), *aff'd*, 332 So. 2d 610, 612-13 (Fla. 1976).

third test, developed by the North Dakota Supreme Court, combines elements of the first two.¹¹⁶ The North Dakota test allows an assertion of immunity, as well as an assertion of unreasonableness, but decides immunity by balancing the specific interests of the parties in the context of the specific facts before the court.¹¹⁷

A. *The New Jersey Response*

The first alternative approach was developed in *Rutgers, State University v. Piluso*.¹¹⁸ In *Rutgers*, a state agency, charged with the operation of the state University, sought to construct student housing units in excess of the maximum number permitted by the zoning ordinances of Piscataway Township.¹¹⁹ The University applied for a variance from the Piscataway zoning board, but it was denied. After its application was turned down, the University brought suit seeking a judicial declaration that, as a state agency, its activities were immune from local zoning.¹²⁰ The trial court granted the University's motion for summary judgment on the ground that the University was an instrumentality of the state.¹²¹

On appeal, the Supreme Court of New Jersey affirmed the grant of immunity,¹²² but criticized the traditional tests used to decide immunity, stating that they were too simplistic.¹²³ The court instead adopted a new test wherein the legislative intent of each party's enabling act is determinative.¹²⁴ In this new test, the legislative intent is to be "divined from a consideration of many factors, with a value judgment reached on an overall evaluation."¹²⁵ The factors that the court considered to be indicative of legislative intent were: "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land-use regulation would have upon the enterprise concerned and the impact upon legitimate local interests."¹²⁶ After applying these factors to the facts at hand, the court held that the legislature intended that the growth and development of the University be immune from local land-use regulations.¹²⁷ This legislative intent was divined from the University's having

¹¹⁶ *City of Fargo v. Harwood Twp.*, 256 N.W.2d 694 (N.D. 1977).

¹¹⁷ *Id.* at 698-99.

¹¹⁸ 60 N.J. 142, 286 A.2d 697 (1972).

¹¹⁹ *Id.* at 147, 286 A.2d at 699.

¹²⁰ *Id.*

¹²¹ 113 N.J. Super. 65, 70, 272 A.2d 573, 576 (1971). The trial court applied the superior-sovereignty test, yet it also examined the policy objective underlying the statutory grant of authority to the University. *Id.* at 70-73, 272 A.2d at 576-77.

¹²² 60 N.J. at 159, 286 A.2d at 706.

¹²³ *Id.* at 150, 286 A.2d at 701.

¹²⁴ *Id.* at 152, 286 A.2d at 702.

¹²⁵ *Id.* at 152-53, 286 A.2d at 702.

¹²⁶ *Id.* at 153, 286 A.2d at 702.

¹²⁷ *Id.* at 153, 286 A.2d at 703.

been established as an instrumentality of the state to perform an "essential governmental function for the benefit of all the people of the state."¹²⁸

The court qualified the University's immunity by adopting a second tier of analysis wherein the court scrutinized the reasonableness of the University's exercise of its decisionmaking power. The standard of reasonableness was whether the immunity was exercised in such a manner "as to arbitrarily override all important legitimate local interests."¹²⁹ In this case the court found that the local interests asserted by Piscataway were not legitimate, and that the University had applied for a variance, and it concluded, therefore, that the action of the University in violation of the ordinance was not unreasonable.¹³⁰ Thus, *Rutgers* established a two-tier test in which the court first decides whether immunity is warranted on the basis of an inference of legislative intent, and, if it is, the court then examines the specific land-use proposal to ensure that it is not arbitrary.

Several elements of the *Rutgers* test are noteworthy. First, the factors examined by the court indicate an appreciation of the true nature of the controversy. The dispute is between government entities seeking to maximize the benefits to their constituencies, and the resolution of the dispute should turn on a comparison of the merits of these competing public interests. Second, the factors considered by the court in deciding the issue of immunity are greatly expanded over the sole-factor tests. By looking to many factors that together comprise legislative intent, instead of a single factor, the court approaches more closely the true intent of the legislature. Finally, the nature of the test as a two-tiered analysis ensures review of the interests that underlie not only the nature of the intruding government's powers but also the specific exercise of those powers. Through this bifurcated review, the *Rutgers* court incorporated many factors that are appropriate to the resolution of the controversy.

In addition to evaluating many appropriate factors in making its decision, the *Rutgers* analysis also seeks to maximize predictability. By imputing its decision on immunity to the legislature, predictability is enhanced because the determinative issues relate to general legislative policies rather than specific adjudicative facts. Indeed, the *Rutgers* court stated that most state agencies engaged in essential state activities will be granted immunity on the basis of a finding of legislative intent to grant immunity.¹³¹ Local governments, presumably, can expect to be bound by zoning ordinances. Moreover, the court also emphasized the issues that relate to the nature of the proposed activity rather than those issues that relate to the specific manner in which the parties have

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 154, 286 A.2d at 703. Although the reasonableness of Piscataway's zoning ordinance itself was not at issue, the court expressed a strong aversion to the objectives of the ordinance. According to the court, the ordinance was probably enacted to prevent the disputed property from becoming exempt from local property taxes and to avoid the need to establish a new elementary school. *Id.* at 148-49, 286 A.2d at 700-01.

¹³¹ *Id.* at 153, 286 A.2d at 703.

sought to effectuate that activity. The latter issues are considered only to the extent that they bear on the arbitrariness of an immune intruding government's proposals.

A recent decision applying the *Rutgers* test focused on the issue of arbitrariness and indicated the extent to which the specific exercise of decision-making power will be scrutinized. In *Pemberton Township v. State*,¹³² a New Jersey Superior Court applied the *Rutgers* test to determine whether a group home for juvenile delinquents proposed by the state Department of Corrections could be established in a residential district of Pemberton Township.¹³³ The Department ignored the township's zoning ordinances, "proceeding under the impression that the State was immune from such restrictions,"¹³⁴ and purchased the property for conversion without reading or discussing the applicable zoning regulations.¹³⁵ The controversy reached the court when the township sought a restraining order to prevent the group home.¹³⁶ The court analyzed immunity by examining each factor enumerated in *Rutgers*, and found that the legislature intended that the Department not be restrained by local regulations.¹³⁷ Despite a finding that the proposed project would have a severe adverse impact on the township's legitimate interests,¹³⁸ immunity was granted.¹³⁹

Having granted immunity, the court next analyzed the issue of the reasonableness of the Department of Corrections' decisionmaking process and held that the Department's conduct was not reasonable.¹⁴⁰ *Rutgers* was cited for the equitable proposition that "the instrumentality ought to consult with the local authorities and sympathetically listen and give every consideration to local objections, problems and suggestions."¹⁴¹ The court found that, for the Department to meet its burden of reasonableness, it would have had to consider af-

¹³² 171 N.J. Super. 287, 408 A.2d 832 (1979).

¹³³ *Id.* at 289, 408 A.2d at 833.

¹³⁴ *Id.* at 291, 408 A.2d at 834.

¹³⁵ *Id.* at 291, 408 A.2d at 834.

¹³⁶ *Id.* at 287, 408 A.2d at 832 (court's syllabus).

¹³⁷ *Id.* at 300-03, 408 A.2d at 839-40. The court found that the Department of Corrections was a state agency performing an essential function for all the citizens of the state, that the proposed use of the property was not remotely different from neighboring uses, that the social utility of the proposed project was great, that the possible effect of zoning ordinances on the state's project was great, and the potential adverse local impact was severe. *Id.* at 300-01, 408 A.2d at 839.

¹³⁸ *Id.* at 301, 408 A.2d at 839.

¹³⁹ *Id.* at 303, 408 A.2d at 840.

¹⁴⁰ *Id.* at 304-09, 408 A.2d at 841-43.

¹⁴¹ *Id.* at 304, 408 A.2d at 841. The court's conclusion as to the standard to be applied to determine reasonableness was primarily based on the *Rutgers* test. The court also discussed the Municipal Land Use Law, N.J. STAT. ANN. § 40.55D (West Supp. 1981), enacted subsequent to the *Rutgers* decision, to support its holding. The underlying policy of this statute is to require assimilation of local land-use decisions in state development proposals. 171 N.J. Super. at 306, 408 A.2d at 842 (quoting *Garden State Farms, Inc. v. Bay*, 77 N.J. 439, 455-56, 390 A.2d 1177, 1185 (1978)). The *Pemberton* standard is substantially similar to the *Rutgers* standard, and its requirements may be imposed by a court even in the absence of such a statute.

firmatively the land-use ordinances applicable to the site selected, and to state "valid reasons" if it decided to reject them.¹⁴² Though the court did not mandate a variance procedure, it did express the requirement "that a sufficient opportunity be provided for local citizens to air their concerns."¹⁴³ The court also emphasized the importance for the municipality affected by a nonconforming use to have available to it "as much information as possible in order to know the local consequences likely to result."¹⁴⁴ Since the above requirements were not satisfied by the Department of Corrections prior to its decision to proceed with the community house, the permanent restraining order was granted, despite the Department's immunity.¹⁴⁵

The *Pemberton* decision is important for two reasons. First, it demonstrated a valid attempt to distinguish between the issues involved in an analysis of immunity and the issues involved in an analysis of reasonableness. Second, the decision focused on the affirmative burden of reasonableness imposed on the intruding government, and clarified the essential elements of that burden. Each of these features represents the court's interpretation of the test that was developed by the Supreme Court in *Rutgers*.

The first notable feature of *Pemberton* is the distinction that was made between issues bearing on immunity and issues bearing on reasonableness. The immunity issue, again based on an inference of legislative intent, was decided on the basis of the nature and scope of the instrumentality seeking immunity as well as the nature of the authority conferred on that instrumentality.¹⁴⁶ The superior court spoke in general policy terms and did not address the specific exercise of the powers conferred on each party.¹⁴⁷ The court's considerations thus approximated those confronting the legislature in enacting the township's zoning enabling act and the Department's development enabling act. The reasonableness issue was then decided by examining the specific manner in which the intruding government exercised its decisionmaking authority.¹⁴⁸ In the context of reasonableness, the court focused on the failure of the intruding government to provide adequate opportunity for a public hearing and to scrutinize local interests and zoning ordinances.¹⁴⁹ Thus, the *Pemberton* court examined separately the general policy issues underlying the legislative enabling acts and the specific procedural issues underlying the exercise of decisionmaking authority.

The second notable feature of *Pemberton* was the court's explication of the

¹⁴² 171 N.J. Super. at 309, 408 A.2d at 843.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 307, 408 A.2d at 842.

¹⁴⁵ *Id.* at 308-09, 408 A.2d at 843.

¹⁴⁶ *Id.* at 300-01, 408 A.2d at 839.

¹⁴⁷ *Id.* For example, the court analyzed the importance of community life in the rehabilitation process and the possibility that zoning ordinances in communities throughout the state could frustrate the Department's programs. *Id.*

¹⁴⁸ *Id.* at 307-08, 408 A.2d at 842-43. For example, the court discussed the lack of effort by the intruding government to investigate alternatives and to present guidelines to the community to ensure consistent operation of the institution. *Id.*

¹⁴⁹ *Id.* at 308, 309, 408 A.2d at 843.

affirmative burden imposed on the intruding government to ensure that its actions were reasonable. The court held that the intruding government's decision will be struck down as arbitrary unless it is based on a "careful balancing of the need for the undertaking against its negative effects upon the community,"¹⁵⁰ after full opportunity for "local citizens to air their concerns."¹⁵¹ The court expressed an aversion to permitting the Department to make a unilateral decision to ignore local zoning, and, therefore, required the intruding government to affirmatively consider the effects of the proposed use on the host government.¹⁵² The *Pemberton* decision demonstrates that the protections afforded by the requirement of reasonableness are primarily procedural. Substantive issues were addressed in the balancing of interests performed by the court to decide immunity. The only possible substantive protection afforded by the requirement of reasonableness is that adverse local impacts may be ignored only for a valid reason. So long as reasonable efforts are made to ascertain the legitimate concerns of the locality, however, it is unlikely that this requirement will be sufficient to cancel a project, although it may force a modification of plans.¹⁵³

The result in *Pemberton* demonstrates the compromising nature of the New Jersey test. Even though the intruding government's interests may be sufficiently strong to justify immunity, the primary benefit of immunity — independent decisionmaking — is sharply curtailed by the procedural requirement that the agency listen to local concerns. Conversely, although the host government's interests must be given "genuine consideration" by an immune, intruding government, the intruding government still may make the initial decision without applying for a variance, and still may ignore the host government's interests if it can state valid reasons for disregarding them.¹⁵⁴ Furthermore, since an immune, intruding government need not apply for a variance, the host government will bear the burden of going forward with a judicial suit to halt the proposed land use on the ground that local interests were arbitrarily overridden. The merits of this compromise arrangement can best be analyzed after a comparison with the Florida and North Dakota approaches.

B. *The Florida Response*

The second alternative test developed independently of and simultaneously with the New Jersey test.¹⁵⁵ The Florida Supreme Court adopted the test in

¹⁵⁰ *Id.* at 309, 408 A.2d at 843.

¹⁵¹ *Id.*

¹⁵² *Id.* at 304, 408 A.2d at 841.

¹⁵³ The Supreme Court of New Jersey set out an example of an "unreasonable" decision by an intruding government: "... it would be arbitrary, if the state proposed to erect an office building in the crowded business district of a city where provision for off-street parking was required, for the state not to make some reasonable provision in that respect ..." *Rutgers, State Univ. v. Piluso*, 60 N.J. 142, 153-54, 286 A.2d 697, 703 (1972).

¹⁵⁴ *Pemberton Twp.*, 171 N.J. Super. at 309, 408 A.2d at 843.

¹⁵⁵ The Supreme Court of Minnesota, three months after *Rutgers*, and without citing *Rutgers*, adopted a balancing of interests test in *Town of Oronoca v. City of Rochester*, 293 Minn. 468, 197 N.W.2d (1972). The court rejected traditional tests as accentuating form over

City of Temple Terrace v. Hillsborough Association of Retarded Citizens.¹⁵⁶ In this case, a state agency began operation of a daycare center for retarded citizens in a house located in a residential district in the City of Temple Terrace, without applying to the zoning authority for a variance.¹⁵⁷ To prevent continued operation of the center, the city sued for an injunction.¹⁵⁸ The trial court denied the city's request for an injunction, and granted immunity to the state agency on the basis of the superior-sovereignty test.¹⁵⁹ The district court of appeals reversed.¹⁶⁰ In so doing, it examined and rejected each of the three traditional sole-factor tests, summarizing the deficiencies of each,¹⁶¹ before settling on an interest balancing approach, as the "fairest method by which this type of case can be decided."¹⁶²

The appellate court stated that, under the balancing of interests approach, it would generally require the intruding governmental unit first to apply to the zoning authority of the host government for zoning board approval.¹⁶³ The appeals court articulated two exceptions to this requirement: (1) when the legislature has expressly granted immunity,¹⁶⁴ and (2) when the intruding government is "so convinced of the overriding public need for a particular land-use that it decides to go forward without resort to local authorities."¹⁶⁵ On a petition for rehearing, the court of appeals recognized that the issues were of great public interest and, therefore, certified the case to the Supreme Court of Florida.¹⁶⁶

The Supreme Court affirmed the appeals court decision and adopted the balancing of interests test set forth in the appeals court decision, with one variation.¹⁶⁷ The Supreme Court, by implication, rejected the second exception to the variance requirement, which would have allowed an intruding government

substance, and adopted a new test which balances the need for the proposed use against the threat to the host government. *Id.* at 471, 197 N.W.2d at 428-29. On the basis of this test, immunity was granted to the city for the establishment of a solid waste disposal facility in an agricultural district of the township. *Id.* at 472, 197 N.W.2d at 429-30.

The District Court of Appeals for the Fourth District of Florida followed *Oronoco* in *Orange County v. City of Apopka*, 299 So. 2d 652 (Fla. App. 1974). In that case, a tri-city airport authority sought to establish an airport in an agricultural district of a county. *Id.* at 653. The court followed *Oronoco*'s balancing of interests approach and adopted a test that is substantially similar to that ultimately adopted by the Florida Supreme Court in *Temple Terrace*. *Id.* at 655-56. The *Orange County* court remanded the case to the circuit court to enter a judgment declaring the airport property subject to zoning. *Id.* at 656.

¹⁵⁶ 322 So. 2d 571 (Fla. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

¹⁵⁷ 322 So. 2d at 572, 573.

¹⁵⁸ *Id.* at 573.

¹⁵⁹ *Id.* at 573, 579.

¹⁶⁰ *Id.* at 579.

¹⁶¹ *Id.* at 576-78.

¹⁶² *Id.* at 578.

¹⁶³ *Id.* at 579.

¹⁶⁴ *Id.* at 578.

¹⁶⁵ *Id.* at 579.

¹⁶⁶ *Id.* at 580.

¹⁶⁷ 332 So. 2d 610, 613.

to proceed without petitioning the local zoning board if it was convinced of an overriding public need for the proposed project.¹⁶⁸ Instead, the Supreme Court commanded a petition to the local zoning authority in all cases when there is no express legislative grant of immunity.¹⁶⁹

Under the Florida test, therefore, the intruding government must submit to the zoning board's decisionmaking authority in all cases where there is no express legislative conferral of immunity. The zoning board must decide whether to allow the proposed use by balancing "the applicant's need for the use in question and its effect upon the host unit's zoning plan, neighboring property, environmental impact, and the myriad other relevant factors."¹⁷⁰ In the event that a zoning permit is denied, and the applicant is dissatisfied, the applicant is then entitled to judicial review of the interest balancing performed by the zoning board.¹⁷¹ The issue at trial is whether the zoning board's decision was reasonable, in light of several factors: "the type of function involved, the applicant's legislative grant of authority, the public need therefor, the existing land-use scheme, alternative locations for the facility in less restrictive zoning areas, alternative methods for providing the needed improvement, and the detriment to the adjoining landowners."¹⁷² In the event the denial of the variance is deemed unreasonable, the specific zoning ordinance will be held inapplicable to the specific proposed use.¹⁷³

The *Temple Terrace* decision departs from *Rutgers* in two ways. First, the Florida court rejects *Rutgers*' emphasis on legislative intent. Second, courts following the Florida approach apply the balancing test to the issue of reasonableness rather than the issue of immunity. As a result of these two departures, the Florida test is more flexible and offers considerably more protection to local interests than the New Jersey test.

The first distinction between *Temple Terrace* and *Rutgers* is the Florida court's rejection of *Rutgers*' emphasis on legislative intent. The *Rutgers* ap-

¹⁶⁸ See text at note 165 *supra*.

¹⁶⁹ 332 So. 2d at 613. The supreme court's opinion is ambiguous with regard to this issue. At one point, the court states: "We adopt [the appeals court] opinion as our own." *Id.* at 612. At another point, the opinion states: "[e]xcept where a specific legislative directive requires a non-conforming use in the particular area, local administrative proceedings will provide the forum in which the competing interests of local governmental bodies are weighed." *Id.* at 613 (footnote omitted). The supreme court apparently interpreted the appeals court decision as requiring local approval in all cases. *Id.* at 612 n.3. But see *Pal-Mar Water Management Dist. v. Martin County*, 377 So. 2d 752 (Fla. App. 1979). In this case, the Fourth District Court of Appeals of Florida interpreted the *Temple Terrace* standard as permitting an assertion of immunity based on an overwhelming public need for the proposed project. *Id.* at 755. Though the court in *Pal-Mar* was willing to entertain an assertion of immunity, it found that the state agency failed to meet its burden of proving public necessity and, therefore, was required to petition the zoning board for approval. *Id.*

¹⁷⁰ 322 So. 2d at 576 (quoting *Orange County v. City of Apopka*, 299 So. 2d 652, 655 (Fla. App. 1974)).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

proach weighs the competing interests in the context of an effort to discern the legislative intent underlying the intruding government's enabling act.¹⁷⁴ The New Jersey test, therefore, balances general policy issues.¹⁷⁵ Furthermore, in comparison to the Florida test, the New Jersey test resembles somewhat the traditional, sole-factor tests, in that it will generally result in a finding of legislative intent to immunize state agencies engaged in important activities.¹⁷⁶ In contrast, in the Florida test, competing interests are considered in light of the specific facts of the controversy before the court.¹⁷⁷ The specific need for the particular parcel is weighed against the local objections to the development of the project in the proposed manner and location.¹⁷⁸ The *Temple Terrace* approach balances the parties' interests to ascertain which land-use, that directed by the zoning ordinance, or that proposed by the intruding government, will maximize the public benefit.¹⁷⁹ *Temple Terrace* thus acknowledges the diversity of factual settings that characterizes intergovernmental zoning controversies generally.

The second distinction is that the Florida courts, in contrast to their New Jersey counterparts, place exclusive emphasis on the reasonableness of the zoning board's decision. In the *Rutgers* test, the principal issue is whether immunity should result.¹⁸⁰ Reasonableness is a secondary consideration offering primarily procedural protection to the host government's interests.¹⁸¹ In New Jersey, so long as the intruding government meets the test for immunity and has exercised that immunity with some concern for local interests, the proposed development can proceed.¹⁸² In *Temple Terrace*, however, absent express statutory immunity, the intruding government is always required to submit its case to the zoning board and the board's decision will stand unless the public need for the specific development on the specific site outweighs the effect on the existing land-use scheme, or there are no feasible alternative sites or methods.¹⁸³ Only where the court decides that the public would be benefitted more by allowing the proposed project than by prohibiting it will the project be allowed to proceed.

In making this decision, the Florida court ascertains whether the local zoning plan permits the proposed use at an alternative site.¹⁸⁴ A host government, therefore, can affect the final decision by providing for the proposed use at an alternative site. Moreover, the host government always makes the initial

¹⁷⁴ 60 N.J. 142, 152-53, 286 A.2d 697, 702-03.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 153, 286 A.2d at 703.

¹⁷⁷ *Temple Terrace*, 322 So. 2d at 578.

¹⁷⁸ *Id.* at 576.

¹⁷⁹ *Id.* at 579.

¹⁸⁰ See text at notes 122-28 *supra*.

¹⁸¹ See text at notes 150-53 *supra*.

¹⁸² *Pemberton Twp.*, 171 N.J. Super. at 308-09, 408 A.2d at 843.

¹⁸³ 322 So. 2d at 576, 579.

¹⁸⁴ *Id.*

decision through its variance procedure.¹⁸⁵ The burden of bringing a judicial suit, therefore, lies with the intruding government. Finally, a decision that the specific proposed project can proceed does not exempt future projects proposed by the intruding government from the requirement that they comply with zoning. Hence, the Florida approach provides greater procedural and substantive protections to the host government.

In summary, the *Temple Terrace* approach exhibits greater flexibility than the *Rutgers* approach. In *Temple Terrace*, the equities that are balanced relate to the policies and interests that are unique to the factual situation before the court, rather than those which are generally before the legislature. Furthermore, the interest balancing occurs only in the context of an examination of the reasonableness of the zoning board's land-use decision. Since the Florida courts forbid an assertion of immunity by an intruding government unless the assertion is based on a specific statutory grant, greater deference is accorded the local government entity's zoning authority. Nevertheless, the Florida court's failure to permit a claim of immunity means that the court ignores several valid interests of the intruding government that bear on the issue of whether the intruding government should be free to make the initial land-use decision. Since there will be situations where an intruding government should be free to make the initial land-use decision,¹⁸⁶ an assertion of immunity should be permitted. Recently, the Supreme Court of North Dakota adopted a balancing of interests test that combines elements of the New Jersey and Florida approaches. An analysis of this test will indicate further the merits of each approach.

C. The North Dakota Response

The Supreme Court of North Dakota adopted an interest balancing approach in *City of Fargo v. Harwood Township*.¹⁸⁷ In this case, the City of Fargo attempted to develop a sanitary landfill on property outside the city limits that was zoned by the township for residential and agricultural uses only.¹⁸⁸ The city applied to the township for reclassification, but its application was denied.¹⁸⁹ Fargo, rather than appealing from the denial of reclassification, sued for a declaratory judgment that it was immune from Harwood Township's zoning ordinances.¹⁹⁰ Since the city sought to proceed without zoning approval, the reasonableness of the zoning board's decision was not at issue.¹⁹¹ The district court decided that the city was not immune from the zoning ordinances, and the city appealed to the state supreme court.¹⁹²

¹⁸⁵ *Temple Terrace*, 332 So. 2d at 613.

¹⁸⁶ See text at notes 213-17 *infra*.

¹⁸⁷ 256 N.W.2d 694 (N.D. 1977).

¹⁸⁸ *Id.* at 695.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 700.

¹⁹² *Id.* at 695.

On appeal, the city relied solely on the eminent domain test.¹⁹³ The supreme court rejected this test and instead adopted a balancing of interests test.¹⁹⁴ The test that was adopted permits an assertion of immunity, but imposes on the intruding government the affirmative burden of proving that the public interest favors allowing the proposed use.¹⁹⁵ In deciding immunity, the court weighed the policy implications raised by the specific exercise of the city's power to develop an extraterritorial landfill.¹⁹⁶ An examination of all relevant factors convinced the court that the city failed to prove either sufficient need for the specific site or adequate study of alternatives, and therefore, immunity was denied.¹⁹⁷ In an aside, the court stressed that the reasonableness of the zoning board's denial of reclassification was not before the court, but stated that the issues that would arise in such a claim would be the legal sufficiency of the board's decision and whether the decision was based on improper considerations, such as local bias.¹⁹⁸

The North Dakota approach, therefore, rejects the *Rutgers* court's approach to the balancing of competing interests in favor of the *Temple Terrace* approach. The *Rutgers* court reached a decision on the balance of interests in the context of legislative intent as divined by weighing the statutory grants of power. The North Dakota court, in contrast, focused on the issues discussed in the Florida test, namely the specific necessity for the proposed project and the selected site as well as the specific adverse effects that would result to either party by a grant or denial of authority to proceed with the proposed development. In *Fargo*, the court found that the intruding government had failed to prove that the need for the specific site outweighed the adverse impact on the host government.¹⁹⁹ This finding was based on the court's determination that many alternative sites for the landfill existed, and that the site selected was particularly suited for residential development.²⁰⁰

Thus, to the extent that the controversies are to be decided on a case-by-case basis, looking to the specific substantive conflict between the exercise of the powers by each party, North Dakota follows the Florida approach. Unlike the Florida approach, however, *Fargo* adopted a two-tier analysis. The balancing of interests occurred in the context of immunity, rather than

¹⁹³ *Id.* at 696.

¹⁹⁴ *Id.* at 698.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 699. The court considered the following factors: (1) the city did not study alternative methods or locations or the threat of flooding; (2) Fargo's current landfill, using a similar method, had been cited as a nuisance and was the subject of numerous complaints; (3) alternative sites existed which were generally suitable for the landfill; (4) the landfill would seriously affect the community and local property values; and (5) the property was wooded and scenic and highly desirable for residential use. *Id.*

¹⁹⁷ *Id.* at 700.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 699, 700.

²⁰⁰ *Id.* at 699.

reasonableness, and reasonableness then was decided on the basis of the factors used in the *Rutgers* test for reasonableness.²⁰¹

The *Fargo* court, therefore, allows the intruding entity to make the initial land-use decision, if it is able to prove sufficient necessity for the specific site selected to override local interests. Otherwise, the North Dakota Supreme Court held, an intruding government must comply with local zoning. Finally, the court leaves open the possibility of an appeal from the local zoning board's denial of reclassification on the ground that the board's denial was unreasonable.²⁰² The North Dakota court, therefore, incorporated elements of both the New Jersey approach and the Florida approach. The *Fargo* court, like the *Rutgers* court, permits the intruding government to assert immunity prior to, or in lieu of, a claim that the host government's actions are unreasonable. In contrast to *Temple Terrace*, therefore, *Fargo* applies a bifurcated analysis. Nevertheless, in deciding the issue of immunity, the *Fargo* court rejects New Jersey's emphasis on the legislative intent underlying the enabling acts. North Dakota thus assimilates an element of the *Temple Terrace* test as well. By emphasizing the interests that relate to the specific factual setting of the case before the court, the *Fargo* test exhibits the same heightened flexibility that characterizes the *Temple Terrace* test.

III. ANALYSIS OF ALTERNATIVE APPROACHES

Flexibility is only one element of the balancing of interests approach that renders the approach preferable to the traditional, sole-factor tests. Another advantage of the balancing tests is that they reject the factors that are solely determinative under the traditional tests. Those factors are only remotely related to determining which party's interests are paramount in a particular case. Moreover, the sole-factor tests fail to consider whether the proposed use can be reconciled with the local zoning plan. The alternative tests, in contrast, have focused increasingly on reconciliation and on cooperation between the parties. Their concentration on the interests underlying the specific dissonant decisions of the parties further ensures that the public benefit will be maximized.

Despite these advantages, several courts that recently have had the opportunity to adopt the alternative tests have chosen instead to continue to apply the traditional tests.²⁰³ The Supreme Court of Nebraska, for example, recently rejected the interest balancing approach on the ground that the approach "has its disadvantages because of lack of guidelines for its operation and increased

²⁰¹ *Id.* at 700.

²⁰² *Id.*

²⁰³ See, e.g., *Kunimoto v. Kawakami*, 56 Hawaii 582, 585-86, 545 P.2d 684, 686-87 (1976); *City of New Orleans v. State*, 364 So. 2d 1020, 1023 (La. 1978); *Seward County Bd. of Comm'rs v. City of Seward*, 196 Neb. 266, 274, 242 N.W.2d 849, 854 (1976).

difficulties of application.”²⁰⁴ This criticism, however, does not withstand scrutiny, nor can it justify retention of the traditional tests. The governmental-proprietary and superior sovereignty “guidelines” offer extremely limited guidance, as a review of precedents indicates.²⁰⁵ Furthermore, the “guidelines” of the traditional tests, the presence of the right to condemn, superior sovereignty, and the governmental-proprietary distinction, divert the courts’ focus from the true substance of the controversy. They achieve theoretical ease of application at the expense of reasoned adjudication of the controversy and at the cost of ignoring several extremely relevant factors.

Courts that desire to focus on the real issues of the controversy by adopting a balancing of interests test need not have hopelessly complex and unpredictable guidelines. Instead, effective guidelines that enhance predictability of issues and outcomes can be formulated. In achieving these guidelines, it is first necessary to decide whether, and for what purpose, both an assertion of immunity and an assertion of unreasonableness will be entertained. It is then necessary to decide what issues and interests are relevant to the resolution of each claim. Decisions to date by courts applying the balancing of interests test have not set forth cogent reasons for their decisions on these two points. As a result, no clear guidelines have been formulated. The variations of the balancing approach, and some possible modifications, will be discussed below in an effort to devise guidelines that will focus judicial review on the true issues.

The courts are divided on whether to allow an assertion of immunity as well as an assertion of unreasonableness. The New Jersey courts and the *Fargo* court allow an intruding government to present a case for immunity which, if successful, would allow it to make the initial land-use decision.²⁰⁶ In contrast, the *Temple Terrace* court requires the intruding government to submit its plans to local zoning boards in all cases except where there is an express statutory exemption.²⁰⁷ This latter court inquires only into the reasonableness of the local zoning board’s decision.²⁰⁸ The courts are also divided on the context in which the courts balance the relevant interests. The New Jersey cases principally examine general policy issues in the context of the legislative intent of the intruding government’s enabling act.²⁰⁹ In contrast, Florida and North Dakota balance the specific policy implications of the factual setting before the court, on a case-by-case basis.²¹⁰ The Florida courts perform this balancing to determine reasonableness,²¹¹ while the North Dakota courts balance the specific in-

²⁰⁴ *Seward County Bd. of Comm’rs v. City of Seward*, 196 Neb. 266, 276, 242 N.W.2d 849, 855 (1976).

²⁰⁵ See text and notes at notes 70-76, 91, 94-98 *supra*.

²⁰⁶ *Rutgers*, 60 N.J. at 152-53, 286 A.2d at 702; *Fargo*, 256 N.W.2d at 698-99.

²⁰⁷ 332 So. 2d at 613.

²⁰⁸ 322 So. 2d at 579.

²⁰⁹ *Rutgers*, 60 N.J. at 152-53, 286 A.2d at 702.

²¹⁰ *Temple Terrace*, 322 So. 2d at 576, 579; *Fargo*, 256 N.W.2d at 698-99.

²¹¹ 322 So. 2d at 576, 579.

terests to determine immunity.²¹² Because of this ad hoc balancing, the Florida and North Dakota approaches maximize flexibility and thus are able to respond to the diverse factual situations of each case.

The Florida approach, which prohibits an assertion of immunity, recognizes the risks of allowing an intruding government to make land-use decisions. Unilateral decisionmaking by an intruding government is likely to frustrate the achievement of local objectives and is difficult to review since such decisionmaking lacks the developed administrative record of a zoning hearing. It forces a host government to initiate costly and time consuming litigation to protect its rights, when a quicker and less expensive administrative hearing might well have produced a mutually satisfactory result. In contrast, the approach that requires an intruding government to submit to the zoning authority results in a relatively inexpensive and expeditious administrative proceeding. The initial decision is made on the basis of a fully developed record addressing all the interests asserted by each party. A zoning board hearing is also more likely to result in a compromise, since the parties are not necessarily hostile adversaries at that stage. At the hearing stage, their relationship may be more closely akin to that of a petitioner and a judge than that of two opposing parties. Finally, the public nature of the zoning board hearing ensures that all public interests are presented to the decisionmaking party and subsequently to the court. A trial setting is inappropriate for the presentation of public opinion and commentary, yet it would be the only recourse if the intruding government were free to make the initial land-use decision. These elements of administrative review all support a rule that would prohibit an assertion of immunity.

Nevertheless, a requirement that the intruding unit always apply to the zoning board for a variance, special exception, or non-conforming-use permit, may diminish the public benefit in some circumstances. First, the zoning board's review may be duplicative. Where a proposed development has been scrutinized by a state environmental protection board,²¹³ for example, an administrative forum with its attendant advantages has been provided. If the factors examined by an environmental board parallel the factors that would be examined by a zoning board,²¹⁴ there is no reason to require a further application

²¹² 256 N.W.2d at 698-99.

²¹³ An environmental protection board is not the only administrative board that considers questions analogous to those addressed by a local zoning board. A state health agency or department of transportation might also be included in this category. The essential requirements are that the reviewing board be independent of the government entity proposing the development and that the board provide an opportunity for public commentary and criticism.

²¹⁴ In Illinois, for example, the state environmental protection act provides that regulations relating to air, water, and noise pollution are to be promulgated by the Pollution Control Board, which is required to: "take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, [and] zoning classifications. . . ." ILL. ANN. STATS. ch. 111-1/2 § 1027(a) (1979 Supp.). A governmental unit that complies with regulations promulgated under this act is not required to comply with the local

to the zoning board. There is often sufficient overlap between environmental issues and zoning issues such that compliance with the former requirements will ensure protection of the interests advanced by zoning ordinances.²¹⁵ In addition, the establishment by the state legislature of an environmental administrative forum may indicate a legislative intent to immunize public developments from zoning ordinances. The strength of the inference of legislative intent will vary according to the degree to which the issues addressed by each administrative board overlap, but the court should entertain the argument. Compliance with strict environmental regulations is *prima facie* evidence that any initial decision by the intruding government will not be wholly unreasonable; therefore, immunity is not likely to lead to harsh results.

A second factor that militates against an absolute requirement that the intruding government initially approach the zoning board is the potential for excessive and unreasonable delay. For example, if an agency charged with traversing the state with a highway or pipeline were required to comply with all zoning ordinances along the route, the project might become so encumbered with administrative delays that its completion would be jeopardized. Thus, in a case involving a state agency seeking to develop a project which impacts on many localities throughout the state, the intruding government should have the authority to make the initial land-use decisions and the burden of any challenge should lie with the host units along the route.

Third, courts should weigh the intruding entity's expertise in making site selection decisions and the importance of location in the achievement of the project's objectives. In a situation where the specific site is crucial to the achievement of the project's objectives, the zoning board's decision, though entirely reasonable, should not automatically prevail. For example, a state agency charged with assisting ex-convicts to readjust to society has far greater expertise in the process of selecting a site for a suitable community group home than does the zoning board.²¹⁶ Moreover, the choice of location is crucial to the rehabilitation process.²¹⁷ In contrast, an intruding municipality seeking to

zoning ordinances of a non-home rule political subdivision. *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 367, 288 N.E.2d 432, 436 (1972).

²¹⁵ *Cf. Town of Oronoco v. City of Rochester*, 293 Minn. 468, 472, 197 N.W.2d 426, 429 (1972). The court granted immunity to a city proposing a solid waste disposal system in an adjacent township. The court, in balancing the interests of the parties, stated:

[a]lthough an alleged threat of pollution involves a public-interest consideration of the highest order, in the present matter we are satisfied that the approval of the Pollution Control Agency already granted, coupled with the duty and attendant ample opportunity of that agency to regulate in the future the operation of the landfill, adequately dispel any fear that development of the Oronoco site would not be in the public interest for reasons of environmental hazard.

Id.

²¹⁶ In *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 360 A.2d 607 (1976), the dissenting justice observed that "[z]oning boards have no expertise in determining locations which will aid in the rehabilitation process [of women convicts], particularly at such a crucial stage as readjustment to a free environment. Such determinations are within the expertise of the Bureau [of Corrections]." *Id.* at 190, 360 A.2d at 615 (dissenting opinion).

²¹⁷ *Id.*

establish a landfill in an adjacent county has no greater expertise in selecting the location than that of the host government. The exact location of a landfill, moreover, is not usually crucial to its success as a refuse depository. The difference between these two situations is relevant to the issue of which party should have the authority to make the initial land-use decision and which party should bear the burden of a challenge. Hence, where the intruding government claims greater expertise with regard to the particular land-use decision at issue, and where site selection is crucial to the successful achievement of the project's objective, the intruding government should be permitted to present the issue to the court in a claim for immunity.

Finally, an assertion of immunity should be allowed in order to ensure consideration of statewide concerns. Otherwise, a concerted effort in communities throughout a state to entirely exclude undesirable facilities might be successful. Many state facilities, such as state prisons, are necessary and yet highly objectionable. It may be difficult to get the approval of any host government for an undesirable project. If the jurisdiction does not permit an assertion of immunity, the intruding government's only recourse would be to claim that each local board's decision was unreasonable. The court then would decide only whether the public interests favoring the proposed use outweigh those mitigating against allowing the project in violation of local zoning ordinances. Under such an *ad hoc* balancing test, the state agency may have difficulty showing the need for a particular site when the remainder of the state may be equally suitable. A broader perspective, therefore, is needed to assess the merits of undesirable projects of statewide importance. Courts should weigh such statewide ramifications in the context of a claim of immunity.

In order to ensure review of the above considerations, courts must be willing to review a claim of immunity as well as a claim of unreasonableness. Nevertheless, because of the inherent advantages of a zoning board's review proceedings, there should be a strong presumption against immunity. The intruding government should be required to submit to the authority of the zoning board in all cases except where one or more of the above features are present. If the criteria are applied with consistency, governmental entities proposing developments can proceed with certainty as to the issues that are to be considered at trial, and as to the likelihood that immunity will be granted.

In addition to limiting the situations in which immunity is conferred, courts should not focus primarily on immunity at trial. Rather than stressing the question of which government unit should have the right to make the initial land-use decision, the courts should emphasize the issue of which land-use decision maximizes the benefit to the public. A decision comparing the public interests sought to be effectuated by the specific land-use proposals is more likely to result in an equitable solution than is a decision comparing the statutory authority of each adversary. This greater likelihood of an equitable solution results from the close nexus existing between the practical effects of the competing land-use decisions and the degree of public benefit which is achieved. No such nexus exists between the powers possessed by each of the government

units and the degree of public benefit. The issue of immunity is thus only indirectly related to the issue whether the intruding government's land-use proposal will enhance the public welfare.

The *Rutgers* test balances general policy issues in determining immunity.²¹⁸ The legislative intent underlying the enabling acts determines which government unit has the right to make the initial land-use decision.²¹⁹ This aspect of the New Jersey test is inappropriate to a decision on which land use maximizes the public benefit, since it weighs the general interests that would be weighed by the legislature rather than the specific interests that underly the specific land-use proposal. Concededly, the New Jersey test does address the reasonableness of the intruding government's conduct. This second tier of analysis, however, does not ensure that the greater public benefit is achieved. Rather, it ensures only that local adverse impacts are not disregarded completely.

The preferable approach is that of *Temple Terrace*, which focuses primarily on the public policy interests that are sought to be promoted by the parties' specific land-use proposals.²²⁰ The reasonableness standard of the Florida test places an affirmative burden on the intruding government entity to prove that the public interest is better served by allowing the proposed development than by prohibiting it.²²¹ This burden is noticeably different from that imposed in *Rutgers*, and guarantees that zoning ordinances will only be invalidated when the public welfare is enhanced by doing so. The deficiency of the *Temple Terrace* approach, however, lies in its failure to entertain an assertion of immunity. For the reasons discussed above, an intruding government should be permitted to allege that public policy favors immunity.

The optimal test, therefore, is similar to the *Fargo* test in that it would combine elements of the *Rutgers* approach and the *Temple Terrace* approach. As in *Rutgers*, an intruding government should be allowed to assert immunity. Unlike *Rutgers*, however, immunity should not be decided on the basis of the court's speculation relating to legislative intent, unless either government's enabling act clearly expresses an intent on the immunity issue. Nor should immunity be decided as it was in *Fargo*, by balancing the specific need for the project against its adverse local impact. This balancing properly relates to the reasonableness of the parties' conduct. Instead, immunity should be decided on the basis of the risk of duplicative or excessively time consuming review, the relative expertise of the parties in making site selection decisions, and the statewide ramifications of requiring the intruding government entity to submit

²¹⁸ 60 N.J. at 152-53, 285 A.2d at 702.

²¹⁹ *Id.*

²²⁰ 322 So. 2d at 576, 579.

²²¹ *Id.* at 579. The *Temple Terrace* court, since it refused to consider the issue of immunity, stated that the intruding government must always carry this burden of proof. *Id.* If, however, a court does permit an assertion of immunity, this burden should not be immutable. Therefore, whenever immunity is granted, the intruding government should have the benefit of a presumption of reasonableness, which the host government should be required to overcome.

to local zoning boards. If the enabling acts offer any clear guidance, they should be examined, but courts should be wary of inferring a legislative intent where none is implied.

Once a determination is made on the issue of immunity, the inquiry should shift to the issue of reasonableness, as set forth in *Temple Terrace*. Whichever party has the authority to make the initial decision, the intruding entity if it is immune or the host entity if the intruding entity is not immune, should have the benefit of a presumption of reasonableness. Thus, if immunity was denied, the intruding government must prove to the court that the public benefits of the proposed project compel the court to overrule the zoning board's decision.²²² If, however, immunity was granted, the project should be allowed to proceed unless the host government can affirmatively prove that the adverse local impacts outweigh the need for the specific project at the proposed site. Factors which should be considered include: the need for the specific site relative to the adverse local impacts of the project, the scope of the intruding government's authority, the social utility of the proposed project, the existence of alternative sites and methods, and the presence of improper considerations in the decisionmaking process. It is submitted that the approach set forth above is characterized by effective judicial guidelines, and yet maintains the flexibility necessary to an equitable solution to these recurring controversies.

CONCLUSION

The three traditional tests which usually have resulted in immunity from zoning for an intruding government entity are arbitrary and unrelated to consistent land use. These tests have survived in large part because of their mechanical ease of application. A better solution is to balance the interests promoted by allowing the proposed use at the selected site against the interests promoted by enforcing the zoning ordinances. Two distinct questions should be addressed by a court confronted with this controversy. The first is which party should have the right to make the initial land-use decision. In most situations, immunity from zoning procedures is not warranted, and the intruding government should submit its proposal to local administrative review. Second, a court should consider whether the exercise of the decisionmaking power conferred on one party or another by a grant or denial of immunity was

²²² In a jurisdiction that allows an assertion of immunity, even if immunity is rarely granted, a certain percentage of cases will reach the courts without passing through the administrative forum. If a controversy has reached the court without a zoning board decision, and immunity is denied, the case should be remanded to the administrative forum. Otherwise the only effect of a denial of immunity will be to create a presumption that the existing zoning ordinance is reasonable. None of the benefits derived from the availability of the administrative forum will have been provided. Moreover, to permit a judicial decision on reasonableness immediately after a denial of immunity will provide intruding entities an easy method to circumvent local controls entirely where an agency is certain that the balance lies in favor of the proposed project.

reasonable. This issue deserves greater emphasis, and should be resolved by balancing the public interests promoted by allowing the development to proceed in the specific proposed location against the interests promoted by enforcing the local zoning ordinances. Finally, cases should be resolved in a manner which encourages cooperation where it is warranted and ensures protection of the opposing party's interests where it is not. The two-tiered balancing of interests approach, incorporating these principles, is responsive to the complex factual variations which comprise the substance of intergovernmental zoning controversies.

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