NOTES

APPLICATION OF LOCAL ZONING ORDINANCES TO STATE-CONTROLLED PUBLIC UTILITIES AND LICENSEES: A STUDY IN PREEMPTION

> The area of state-local conflicts is one in which very few principles have evolved that are capable of concrete application to specific cases. Indeed, the question may be raised whether the courts have even begun to develop the relevant criteria that must be used in deciding these conflicts.[1]

This note discusses the conflicts that arise when municipalities seek to enforce zoning regulations against state-controlled liquor licensees[2] and public utilities.[3] Two hypothetical examples illustrate how these conflicts can occur. Assume that a state liquor control board issues a license to operate a liquor store in a residential section of a municipality which has a zoning prohibition against liquor stores at that location. Since the state statute and local ordinance both apply to the state licensee, the question arises whether the municipality, through its zoning ordinance, can prohibit the licensee from operating his business at the intended location. A court considering this question encounters the issue of preemption because both the state statute and the local ordinance have taken locational factors into account. On what basis should the court decide? The preemption question arises in similar fashion in the utility area. A state public utility commission may authorize a public utility to construct an electric generating plant in a municipality whose zoning ordinance prohibits such a structure at the designated location.

Opposing locational determinations by a state licensing agency and a municipality present a court with a clear confrontation of authority between two creatures of the state. The question which determination is to prevail is answered simply in those states where the statute specifically prescribes the level whose decision is deemed preeminent. When areas of authority are

1. 1 MANDELKER, MANAGING OUR URBAN ENVIRONMENT 101 (1963).

2. The conflicts arising when a municipality attempts to regulate the sale and distribution of liquor by a state licensee are similar to those which arise when a municipality attempts to regulate and control any state licensed activity or business. Therefore, it is possible to discuss the preemption problem in the license area by structuring this note around cases involving state liquor licensees.

3. Conflicts between municipality and public utility often occur when the utility, stressing the importance of cost and engineering over beauty or other considerations, seeks to locate its facilities in or near a residential development.

not prescribed by statute, some courts traditionally have reached an equally summary result by application of mechanical doctrines which accord preference to the state agency. A more sophisticated approach which considers the policy issues supporting each decision has been developed elsewhere. This note examines the traditional doctrines and contrasts them with the more sophisticated approach which takes direct account of the interests that both governmental levels serve.[4]

I. Some Preliminary Policy Considerations

A court that is unwilling to find state preemption whenever there is a conflict with a local zoning ordinance may decide to look behind the appearance of conflict to determine if it represents an actual conflict of purpose between the two regulations. Because each governmental unit may apply different criteria to pursue different goals within its enabling authority, it is only in this fashion that a court can fully ascertain actual conflict. Actual conflict is defined as opposing locational determinations based on similar criteria, *i.e.*, the purpose for each decision is the same in that both the state agency and the municipality consider similar factors in reaching their determinations. Two difficulties inhere in this approach; both are formidable. First, a court must be able to establish the criteria on which each determination is purportedly based. Even more difficult, it must next distinguish those criteria that have a significant influence from those not seriously considered. Of course, a court could reject the determination of either the state agency or the municipality if that unit erroneously applied the evidence in considering its decision. For example, if the conflicting determinations were based on considerations of competition, a court could reject that part of the state agency's determination based on these factors if the evidence supported the competition conclusion reached by the municipality.

If a court concludes that the criteria actually utilized by each unit are similar, straight preemption occurs; the state agency's decision prevails. The basis for this result is the traditional doctrine that the state agency, operating for the entire state, functions as a higher government authority.

However, if the court concludes that the local zoning ordinance covers

4. Since location and amenity conflicts raise functional problems, this note develops the thesis that these conflicts should be decided functionally, *i.e.*, by considering and weighing the competing state and municipal interests. This approach is the one most likely to achieve a suitable solution and it eliminates the unsatisfactory and unnecessary application of traditional doctrines in those cases in which the legislature, without making an attempt at reconciliation, has conferred overlapping powers to the municipal and state authorities.

factors not considered in the state agency's decision, the court may attempt to accommodate both the state and the local purpose and refuse to find preemption. For example, the state decision might be limited to a review of the licensee's character, while the zoning determination might be designed to restrict the intended site to land uses compatible with the surrounding neighborhood. It is possible that the court could accommodate both goals by upholding the applicability of the zoning ordinance while permitting the licensee to locate his business in another part of the municipality, which result would simultaneously satisfy the state agency's goal of satisfactory character and the municipality's efforts to preserve compatibility of land use. However, it is more likely that a court disposed towards investigating the basis of the conflicting decisions is attempting to pursue a balancing approach to select one of the decisions.

The reason a court would inquire into the purpose attempted to be served by each determination is to permit it to favor the determination that is based on the criteria it deems should control the location of the licensee. At this point, a court is distinctly in a policy making posture. For example, if a court held that compatibility factors should control the locational determination, it would uphold a zoning ordinance that had been enacted to accomplish this purpose over a state agency's decision based solely on competitive considerations. However, this example belies the more likely situation; balancing will almost always be a more intricate process than deciding in favor of a single factor that is isolated in only one of the regulations. Decisions at both levels reflect considerations of numerous factors. A court is unlikely to be persuaded that a single one should control. Moreover, it is possible that a court will conclude that several factors are relevant to the locational determination in a case in which one determination rests on one or more of these factors while the opposing determination is based on the remaining ones. The balancing process, therefore, will usually require a court to decide for the unit that, in its locational determination, attempted to achieve those purposes the court judges to preponderate, both in number and in importance.

It would be naive to assert that any court employing a balancing process would operate wholly independently of the influence of traditional doctrines. Whatever system of measure courts may employ to compare opposing determinations, most courts will continue to place into the balancing equation the traditional favor for the decisions of state agencies. Additionally, zoning ordinances that cause harsh results will incline courts to disfavor enforcing local action. Such factors as the expense or difficulty of adapting the intended location of the licensed business to a land use compatible with the zoning restriction and the unavailability to the licensee of a suit-

able alternative, must be recognized as persuasive to a court considering an argument (which will usually be advanced by counsel for the state agency) which espouses traditional doctrines of preemption.

Comparison of Licensee and Utility Cases

In weighing the opposing state and local determinations in the liquor licensee and utility cases, the court will be faced with issues that are basically the same though cast in a different guise. In the liquor license cases the issue is the power of the municipality to restrict the number and location of a *local* business in the community interest. Either the zoning ordinance seeks to exclude the licensee from the municipality entirely, or it seeks to exclude the licensee from a section of the municipality.[5] But it is immaterial to the licensee which of these exclusions occurs because his license is confined to one location and either restricts entirely the operation of his business. Thus the zoning determination has a direct impact on the state licensee.

In the case of the utility (a *state-wide* or *area-wide* business), the application of the local ordinance will most likely lead to total exclusion, but sometimes there may be an alternative location within the muncipality. In addition, an amenity issue may arise which involves the character of the proposed facilities rather than their location.[6] Consequently, the issue is whether local considerations of amenity or compatibility of land use override the considerations of efficiency and economy which led the state utility commission to authorize the facilities and their specific location. Furthermore, the impact of the zoning determination is less direct in the utility case because the utlity is a monopoly and must operate somewhere; the issue is cost and efficiency, not (as in the liquor license cases) the right to do business.

If the liquor licensee cannot relocate, and identical or similar criteria—e.g., competitive and compatibility factors—form the basis of the state and local decisions, it will be more difficult for the local ordinance to prevail in the license cases than in the utility cases for two reasons: in the utility cases, (1) the opposing determinations are always based on different criteria, and (2) the zoning ordinance can never have a completely restrictive effect.

This note discusses (1) the cases in which the conventional doctrines

5. To some extent the character of the exclusion will depend more on the size and character of the municipality than on the formal nature of the zoning ordinance. In a small municipality, to exclude the licensee from "residential" zones may mean total exclusion if the commercial zone is small or does not permit a liquor outlet.

6. For example, instead of overhead electric lines the municipality may require underground cables.

have been applied; (2) the policy considerations which should underlie the resolution of the preemption issue; (3) some statutory solutions to the problem of state-local conflicts; and (4) the regulatory statutes governing public utilities and liquor licenses. Basically, these regulatory statutes fall into three categories. First, constitutional or statutory language may specifically provide that the state shall have exclusive control over a particular business or activity.[7] This "occupation of the field"[8] is the clearest example of state preemption of municipal regulation in an area. Second, the legislature may, without reconciling the state and local powers, confer power on both the municipality and state to regulate that particular business or activity.[9] Although this specific authorization precludes state "occupation of the field," the local ordinance will be preempted by state legislation if the two are in conflict.[10] Third, the state may pass legislation in the field without an express indication whether municipalities may also legislate in

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7. With respect to the sale of alcoholic beverages see, *e.g.*, CAL. CONST. art. XX, § 22 (Supp. 1963): "The State of California . . . shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages within the state." MICH. CONST. art. XVI, § 11: "The legislature may by law establish a liquor control commission, who, subject to statutory limitations shall exercise complete control of the alcoholic beverage traffic within this state . . . ." UTAH CODE ANN. § 32-1-6(b) (1953): The liquor control commission shall "Decide, within the limits and under the conditions imposed by this act, the number and location of the stores and package agencies to be established in the state." VA. CODE ANN. § 4-96 (1950):

> No county, city or town shall, except as otherwise provided . . ., pass or adopt any ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertizing or dispensing of alcoholic beverages in Virginia. And all local acts, including charter provisions and ordinances of cities and towns, inconsistent with any of the provisions of this chapter, are hereby repealed to the extent of such inconsistency.

Contrariwise, a municipality may be granted the power to license as well as the exclusive power to control the location of licensees. *E.g.*, GA. CODE ANN. § 58-1028 (Supp. 1963) (licensing statute): "All muncipal and county authorities . . . shall within their respective jurdisdiction have authority to determine the location of any distillery, wholesale business, or retail business licensed by them."

8. The "occupation of the field" concept is discussed in 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 5.22 (1965).

9. NEB. REV. STAT. § 53-147 (1943) provides that cities and villages may "regulate by ordinance," not inconsistent with the provision of the liquor control act, the business of state beer licensees.

10. 1 ANTIEAU, *op. cit. supra* note 8, at § 5.20. The legislature, however, can provide that even where there is conflict the local provision shall be controlling. For example, in Paul v. State, 48 Tex. Civ. App. 25, 106 S.W. 448 (1907) the court upheld a provision in the city's charter which stated "that the provisions of this act in so far as they may conflict with any state law shall be held to supersede the state law to that extent and it shall not be held invalid on account of such conflict."

the same field.[11] The second and third types of legislation, especially the latter, present the greatest problems.

II. Outcome Influenced by the Content of the Statute

Since a court, in determining whether there is state preemption, is concerned with the applicability, not the reasonableness of the ordinance, even a reasonable exercise of the municipality's zoning power must give way when it conflicts with the power of the state or any of its agencies, unless the statute involved contains an express[12] grant of power to cities to regulate or restrict the *location* of state-controlled businesses or a grant of power which can be interpreted to confer this power. Thus, when the liquor, utility, or zoning statute grants exclusive power to control the location of liquor licensees and public utilities to either the state or municipality, the problems discussed in this note are eliminated. Further, by defining the areas of state and local authority, such a statute greatly reduces the possibility of state-local conflicts. Even if a conflict occurs the preemption question can be easily decided without resort to vague, mechanical standards such as "legislative intent" and state "occupation of the field."

This exclusive power to prescribe the location of a state liquor licensee has been conferred on municipalities in various forms. For example, the licensing statute may (1) grant a municipality the power to "regulate and control" the sale of alcoholic beverages;[13] (2) provide either that a state

11. See, *e.g.*, the statute discussed in Square Deal Coal Haulers & Yardmen's Club, Inc. v. City of Cleveland, 86 Ohio L. Abs. 83, 176 N.E.2d 348 (Cuyahoga County C.P. 1961).

12. Cooke v. Loper, 151 Ala. 546, 44 So. 78 (1907); National Amusement Co. v. Johnson, 270 Mich. 613, 259 N.W. 342 (1935); Brackman's, Inc. v. City of Huntington, 126 W. Va. 21, 27 S.E.2d 71 (1943).

13. Mo. Rev. Stat. § 311.220(2) (1959): The proper municipal authorities "may make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits . . . where not inconsistent with the provisions of this law." Neb. Rev. Stat. § 53-147 (1943): "The governing bodies of cities and villages are hereby authorized to regulate by ordinance, not inconsistent with provisions of this act, the business of all beer licenses carried on within their corporate limits." Neb. Rev. Stat. § 53-116 (1943): "The power to regulate all phases of the control of the manufacture, distribution, sale and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the (state) commission." In Phelps, Inc. v. City of Hastings, 152 Neb. 651, 42 N.W.2d 300 (1950) the court held an ordinance prescribing the location of a state licensee's place of business not inconsistent with section 53-147 of the licensing statute. The power to "regulate" has traditionally been held to include the power to locate.

Pursuant to these provisions a municipality may pass a general police power ordinance limiting the number (State *ex rel.* Hewlett v. Womach, 355 Mo. 486, 196 S.W.2d 809 (1946) (en banc)) and location (Phelps, Inc. v. City of Hastings, *supra*; see State *ex rel.* Floyd v. Noel, 124 Fla. 852, 169 So. 549 (1936)) of retail liquor outlets within its borders.

license shall not issue to an applicant who intends to operate his business within a city "zone" where the sale of beer or liquor is prohibited by ordinance, or that a city can establish "zones" within which the business of a state licensee cannot be located;[14] or (3) provide that a state license shall not issue in contravention of a "proper" or "valid"[15] zoning ordinance or an ordinance adopted pursuant to the zoning laws of the state.[16] In a few

14. ARK. STAT. ANN. § 48-517 (Supp. 1963) (licensing statute): "All incorporated cities and towns . . . may impose additional restrictions, fixing zones and territories and providing . . . such other rules and regulations as will promote public health, morals and safety. . . ." KAN. LAWS 1963, ch. 268: "[T]he governing body of any city . . . may establish zones within which no place of business [of a state licensee] may be located not inconsistent with the provisions of this act." MONT. REV. CODE ANN. § 4-403 (1)(a) (Supp. 1965) (licensing statute): "[N]o retail license may be issued by the board for any premises situated within any zone of a city or town wherein the sale of liquor is prohibited by ordinance, a certified copy of which has been filed with the board." TENN. CODE ANN. § 57-208 (1955) (Beer & Light Alcoholic Beverages Act): "[C]ities and towns [may fix] . . . zones and territories . . . and such other rules and regulations as will promote public health, morals and safety . . . ." TEX. PEN. CODE art. 667-10½ (Supp. 1964) provides that cities may establish zones within residential areas in which the sale of beer may be prohibited.

Under these provisions a general police power ordinance which permits the sale of intoxicants only on designated streets is reasonable, Madison v. City of Maryville, 173 Tenn. 489, 121 S.W.2d 540 (1938), and a state licensee can be prohibited from operating his business in premises located on any street on which such sales are not permitted. Also, a city may, by a zoning ordinance, restrict the areas within the city where alcoholic beverages may be sold. Louder v. Texas Liquor Control Bd., 214 S.W.2d 336 (Tex. Ct. Civ. App. 1948).

15. CAL. BUS. & PROF. CODE § 23790: "No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city . . . ."

16. CONN. GEN. STAT. REV. § 30-44 (1961): "The commission shall refuse permits for the sale of alcoholic liquor (1) in no-permit towns, [and] (2) where prohibited by the zoning ordinance of any city or town . . . ." This statute clearly indicates that a state license issued contrary to the provisions of a zoning ordinance is void. Town of Newington v. Mazzoccoli, 133 Conn. 146, 48 A.2d 729 (1946). However an ordinance which provides that there can be one retail outlet for every fifteen hundred residents is not a zoning ordinance and hence cannot preclude a state licensee from conducting his business. State *ex rel.* Haverback v. Thomson, 134 Conn. 288, 57 A.2d 259 (1948). The court indicated that although a city may establish zones, the legislature had not "delegated to municipalities authority to limit, in the guise of a zoning ordinance, the number of liquor outlets in the town . . . ." *Id.* at 293, 57 A.2d at 261. FLA. STAT. ANN. § 561.44 (1961): "Incorporated cities and towns are hereby given the power hereafter to establish zoning ordinances restricting the location wherein a [state liquor licensee] . . . may be permitted to conduct his place of business and no license shall be granted to any such licensee to conduct a place of business in a location where such place of business is prohibited from being operated by such municipal ordinance . . . ." LA. REV. STAT. ANN. § 26:280 A. (1950): "No permit shall be granted . . . in contravention of any municipal ordinance adopted pursuant to the zoning laws of this state." MD. CODE ANN. art. 2B, § 43 (1957): "No license or permit . . . shall be issued in violation of any zoning rule or

states there are similar statutory provisions granting municipalities the power to regulate state-licensed trailer-camps.[17]

regulation . . . ." MINN. STAT. ANN. § 340.13(3) (Supp. 1964): "No license shall be issued for premises located within the areas restricted against commercial use through zoning ordinances . . . and no license shall be issued contrary to the provision of any charter, ordinance, or any special law restricting areas within which intoxicating liquors may be sold. . . ." OKLA. STAT. ANN. tit. 37, § 534(c) (Supp. 1964): "The location of a retail package store shall be subject to the nondiscriminatory zoning ordinances of the town or city in which located . . . ."

This express statutory language would seem to preclude state-local conflict, but an allegation that the ordinance is not "valid" (Jon-Mar Co. v. City of Anaheim, 201 Cal. App. 2d 832, 20 Cal. Rptr. 350 (1962); Floresta, Inc. v. City Council, 190 Cal. App. 2d 599, 12 Cal. Rptr. 182 (1961)) raises the preemption issue in another form. In rejecting the contended invalidity of a zoning ordinance which allegedly singled out the sale of liquor for special treatment thus infringing upon the regulatory power of the state licensing agency, one court said:

> The argument confuses the function of zoning with that of the control of the sale of liquor. The essence of zoning lies in metropolitan and regional planning; it is the use and treatment of public and private land and its appurtenences in the interests of the community as a whole. The factors and reasons that determine the imposition of metropolitan zoning are entirely different from those which control the regulation of the consumption of liquor. To compress zoning or city planning into the mould of liquor regulation is to reduce its compass to a single aspect of its impact. Floresta, Inc. v. City Council, *supra* at 185.

In *Floresta,* the challenged zoning ordinance provided that an establishment selling liquor could not be located within two hundred feet of a residential district unless a permit was obtained for that purpose. In that case the ordinance prohibited the petitioner from establishing a cocktail lounge in a shopping center. Excluding such an establishment from a commercial district was held neither arbitrary nor discriminatory. See Eckert v. Jacobs, 142 S.W.2d 374 (Tex. Ct. Civ. App. 1940).

17. IND. ANN. STAT. § 35-2881 (Supp. 1965) provides:

> No governmental body other than the state board of health shall have authority to license or regulate mobile home parks except that . . . county and municipal authorities within their respective jurisdiction[s] shall have jurisdiction regarding zoning and building codes and ordinances pertaining to mobile home parks.

Although there are no reported cases interpreting this provision, it would appear that a local zoning ordinance may exclude a mobile home park licensed by the state authority.

The Illinois mobile home park act, ILL. ANN. STAT. ch. 111½, § 168 (Smith-Hurd Supp. 1964), is similar in that a permit from the state health department authorizing the construction of a mobile home park "does not relieve the applicant from securing building permits in municipalities or counties having a building code, or from complying with any municipal or county zoning or other ordinance applicable thereto." Moreover, section 185 provides that "if the provisions of this Act as to location, construction, layout, sanitation, operation and maintenance are met as a minimum, then this Act shall not apply in any county, city, village or incorporated town which provides for the licensing and regulation of trailer parks." These sections authorize both state and local regulation of the same field. The statute was passed primarily to fill in gaps caused by the absence of municipal regulations, but where a local regulatory ordinance has been passed, either the statutory or municipal regulations are applicable, depending on which imposes higher standards. Rezler v. Village of Riverside, 28 Ill. 2d 142, 190 N.E. 2d 706 (1963).

MICH. STAT. ANN. § 5.278(24) (1961), pertaining to mobile homes not located in licensed parks, provides that "nothing in this act or in the regulations or bylaws hereby authorized shall supersede or be in conflict with local zoning . . . regulations, local

In the public utility area, instead of granting control to either the state or municipality, those statutes that defer to local zoning ordinances attempt to accommodate the powers of the utility and zoning commissions by requiring consideration by the state agency of all competing interests. These statutes usually provide that if the municipal authorities refuse a building permit to a public service corporation on the ground that the proposed structure would violate an ordinance, the corporation may petition the state Public Service Commission for a determination that the structure is reasonably necessary for the welfare or convenience of the public and hence exempt from the provisions of the local ordinance.[18] A determination of "reasonable necessity" may not be made, however, until both the state and municipal interests have been considered and weighed. The commission must not only consider the effect of the structure's presence on the municipality and persons living adjacent to its proposed location, but also the probable effects and benefits to the entire state and the territory

ordinances or other legal restrictions for the protection of the public health and welfare." In regard to state licensed parks section 5.278(46) provides: "Nothing in this act nor any act of the state health commissioner shall relieve the applicant . . . from responsibility for securing any building permits or complying with all applicable codes, regulations or ordinances not in conflict with this act." A municipality may restrict the location of mobile home parks by reasonable zoning ordinances, notwithstanding the issuance of a state license. June v. City of Lincoln Park, 361 Mich. 95, 104 N.W.2d 792 (1960); Cook v. Bandeen, 356 Mich. 328, 96 N.W.2d 743 (1959); Gust v. Township of Canton, 342 Mich. 436, 70 N.W.2d 772 (1955); Stevens v. Township of Royal Oak, 342 Mich. 105, 68 N.W.2d 787 (1955).

However, the existence of a regulatory and licensing statute that does not defer to local ordinances or power increases the possibility that trailer camp ordinances will be invalidated because of state occupation of the field or conflicting state law. For example, if a municipality has traditionally regulated the location of trailer parks pursuant to power granted by the zoning enabling act authorizing the city to regulate the location of buildings and structures used for residential purposes (Huff v. City of Des Moines, 244 Iowa 89, 56 N.W.2d 54 (1952)), and a statute is then enacted vesting power in the state department of health to license trailer camps and "to delegate to local boards of health the duties of inspection and regulation of mobile home parks located within the jurisdiction of such local board of health, where, in the opinion of the state department of health, such delegation can best effectuate the policies of this chapter" (IOWA CODE ANN. § 135D.20 (Supp 1964)), may the municipality continue to regulate the location of trailer camps, or has the statute occupied the field and thereby preempted local zoning and general police power ordinances? Even if the statute leaves uncovered a certain area of activity, to what extent may the municipality legislate without fear of conflict with state law?

18. COLO. REV. STAT. ANN. § 106-2-9 (1953); CONN. GEN. STAT. REV. § 16-235 (1958); ME. REV. STAT. ANN. ch. 239, § 4953 (1964); MASS. GEN. LAWS ANN. ch. 40 A, § 10 (1960); N.H. REV. STAT. ANN § 31:62 (1955); N.J. STAT. ANN. § 40:55-50 (1940); PA. STAT. ANN. tit. 53, § 48309 (boroughs) & tit. 16, § 2038 (county) (1956); VT. STAT. ANN. tit. 24, § 3010 & tit. 30, § 221 (1959). For a discussion of several of these statutes, see Note, 13 SYRACUSE L. REV. 581, 587 (1962).

served by the petitioner.[19] Thus a balancing process replaces considerations of "legislative intent" in the determination of preemption. In addition, these statutes assure municipalities that they may enact a zoning ordinance without fear that it will be judicially invalidated on the ground that it has invaded a field "occupied" by the state.

Under these statutes, when will permission to locate public utility facilities contrary to local ordinance provisions be granted under such proceedings?

Following the petition,[20] the commission may decide the applicability issue in favor of either the city or the utility. To justify a decision that the utility is not subject to a local ordinance, lack of an available alternative lo-

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19. New York Cent. R.R. v. Department of Pub. Util., 199 N.E.2d 319 (Mass. 1964). This case involved an appeal by a railroad from a decision of the department of public utilities which refused to exempt the public service corporation from a zoning by-law on the ground that the railroad had not shown by a preponderance of the evidence "that the public generally will receive any benefit from [the proposed] . . . development." *Id.* at 323. The corporation wanted to use residentially zoned land to store new automobiles unloaded from railroad cars. The court vacated the department's order and remanded the case for failure to make adequate findings of facts on the relevant issues:

> These issues include (a) the extent of the usefulness of the proposed facility to shippers, manufacturers, motor vehicle distributors, and consumers; (b) the suitability of the locus for the proposed facility and for other uses, the physical character of the locus, the uses existing in the neighborhood, the proximity of the locus to the railroad and to a motor assembly plant . . ., and the other uses (which include residences, public and recreational buildings, welfare institutions, passenger stations, reservoirs, airports, radio and television towers, cemeteries, and some raising of livestock) permitted in this general residence district by [the] . . . zoning by-law; (c) the probable effect of the facility upon the gross and net revenues of the railroad; upon the railroad's ability to continue to perform its intrastate and interstate public functions; upon local and State tax revenues, local employment, and the orderly development of Framingham [the zoning municipality], and upon abutting owners; (d) the effect of the facility upon highway congestion not only in Framingham but in reducing use of highways throughout the State for long distance shipments of motor vehicles from factory to consumer; (e) the possibility that injury to abutting owners can be minimized by proper screening of the facility by trees and otherwise; and (f) the relative advantages and disadvantages of the proposal from the standpoint of the public welfare and convenience. *Id.* at 325 n.4.

In Wilson Point Property Owners Ass'n v. Connecticut Light & Power Co., 145 Conn. 243, 140 A.2d 874 (1958), it was contended that CONN. GEN. STAT. REV. § 16-235 (1958), which provides that the local zoning commission, subject to the review of the public utility commission, may "regulate and restrict the [proposed] location of" utility facilities, was unconstitutional in that it delegates legislative power to administrative agencies (zoning and utility commissions) without any legislative standard to guide them. In rejecting this contention the court said that there are standards and that the same standards guide both the zoning and utility commissions, *i.e.*, they are "guided by a combination of the standards of public convenience and necessity and the standards of public health, safety and welfare and the stabilization of property values." Jennings v. Connecticut Light & Power Co., 140 Conn. 650, 670, 103 A.2d 535, 546 (1954).

20. Failure to petition the utility commission for an exemption subjects the proposed facilities to the operation of the zoning ordinance. Yahnel v. Board of Adjustment, 76 N.J. Super. 546, 185 A.2d 50 (1962).

cation need not be shown;[21] evidence supporting the conclusion that the facility is needed,[22] and that the proposed location is the most economical and feasible one, will be adequate justification,[23] especially when there is little or no effect on surrounding property values.[24] Nor will the fact that the proposed location is not the best available[25] or that the utility has failed to introduce evidence negating the existence of a suitable alternative, support a conclusion that the ordinance is applicable to the utility.[26]

The New Jersey provision[27] is representative of the statutes discussed in this section: its application in *In re Public Serv. Elec. & Gas Co.*[28] affords a view of the criteria by which the commissions and courts consider and resolve the applicability issues arising under this and similar statutes. The utility desired to erect poles and electric transmission lines over a private right of way which traversed the city and bordered a residential area. The state utility commission granted immunity from the zoning ordinance on the ground that the proposed structure was reasonably necessary for the service and convenience of the public. On appeal the city contended that it had a right to require the utility's use of underground cables rather than over-

21. Wilson Point Property Owners Ass'n v. Connecticut Light & Power Co., 145 Conn. 243, 140 A.2d 874 (1958).

22. The utility commission can make its finding that public convenience and necessity requires the erection of the proposed facilities on the basis not only of the utility's franchise area but on the needs of those areas that the commission *may* require the utility to service. Wilson Point Property Owners Ass'n v. Connecticut Light & Power Co., *supra* note 21.

23. Reber v. South Lakewood Sanitation Dist., 147 Colo. 70, 362 P.2d 877 (1961); Wilson Point Property Owners Ass'n v. Connecticut Light & Power Co., *supra* note 21.

24. Wilson Point Property Owners Ass'n v. Connecticut Light & Power Co., *supra* note 21; *In re* Public Serv. Elec. & Gas Co., 35 N.J. 358, 173 A.2d 233 (1961). Since the objectionable features of using coal rather than oil would be eliminated by smoke arresters and the proposed electric generating plant would be modern in design and appropriately landscaped, the court in *Wilson* found there were sufficient reasons in the record to support the utility commission's determination that the plant would not constitute a nuisance or depreciate property values. The same decision was reached in *In re Public Serv.* on the ground that the overhead electric transmission lines were to be erected above railroad tracks *already* passing through the town.

25. New York Cent. R.R. v. Department of Pub. Util., 199 N.E.2d 319 (Mass. 1964); Town of Wenham v. Department of Pub. Util., 333 Mass. 15, 127 N.E.2d 791 (1955).

26. New York Cent. R.R. v. Borough of Ridgefield, 84 N.J. Super. 85, 201 A.2d 67 (1964).

27. N.J. STAT. ANN. § 40:55-50 (1940) (zoning enabling act):

> This article or any ordinance or regulation made under authority thereof, shall not apply to existing property or to buildings or structures used or to be used by public utilities in furnishing service, if upon a petition of the public utility, the board of public utility commissioners shall after a hearing, of which the municipality affected shall have notice, decide that the present or proposed situation of the building or structure in question is reasonably necessary for the service, convenience or welfare of the public.

28. 35 N.J. 358, 173 A.2d 233 (1961), noted 42 N.C.L. REV. 761, 771 (1964).

head lines. The court, in rendering its decision in favor of the utility, listed and discussed the relevant factors that should be considered in the process of balancing the state and local decisions.[29]

First, the statutory requirement that the structure be reasonably necessary for the "public" refers to the entire public served by the utility, not the local public benefited by the zoning ordinance. This factor favored the utility because the increase in population in the area serviced by the utility required greater generation of electric power and transmission lines with greater voltage capacity than underground cables.

Second, the proposed *use* need only be reasonably, not indispensably necessary for the public welfare at some site. Evidence of future need for the proposed use coupled with the fact that the zoning municipality lay between the generating station and the area whose needs for electric power were expanding swung this factor in the utility's favor.

Third, the particular *location* chosen by the utility must be reasonably necessary. The evidence showed that of the alternative sites the right of way in question was the only feasible one.

Fourth, the advantages and disadvantages of alternative methods to the utility, the consuming public and the zoning municipality must be compared. In applying this criterion the court made the following considerations: the cost of underground cables was nearly four times that of overhead lines; the requirement that the cables be insulated would greatly diminish their volt carrying capacity, and although a single cable would satisfy

29. *In re Public Serv.* is also an interesting case because it considered a general police power ordinance whose purpose was the same as the zoning ordinance—to control the method of transmitting electricity. Notwithstanding the identity of purposes, the court treated the two ordinances differently because the statute controlled only the zoning ordinance. The police power ordinance required all electric power lines to be installed underground if they carried more than 33,000 volts. The proposed lines had a 220,000 volt capacity and were to carry 132,000 volts. Thus the court was faced with the preemption issue, *i.e.*, whether the city has power to compel the "method" of transmitting electricity generated by a state controlled utility. The court's approach in resolving the issue against the city is reminiscent of that used when a zoning ordinance is involved but there is no statute subjecting the utility to the zoning ordinance in that the court did not weigh the competing considerations favoring municipal and state regulation.

The court reasoned that the need for uniform regulation should be given great weight. Municipal boundaries are not barriers to the activities of public utilities; the utility in this case supplied electricity to the most densely populated and highly industrialized areas in the state. A utility could not properly perform its function if each municipality in which it operated had the power to enact into law its own notions with respect to the method of transmitting electricity. It was to assure uniform and adequate services that the state created the utility commission, vesting in it plenary regulatory power over utilities. Consequently, a municipality cannot control the method of transmitting electricity without *express* power to do so. Not being able to find any express legislative authorization for the ordinance, the court held it invalid.

present needs, a second cable would soon need to be installed to meet forecasted demands; and there was no real danger of adverse effects on local neighborhoods because the right-of-way stretched along a railroad track which had already detracted from the appearance of the surrounding area. There was also evidence that the utility planned to use safety precautions and that injuries had never resulted from fallen lines.

Finally, all competing considerations and interests must be weighed before making a determination of reasonable necessity. If they are equally balanced the utility may be exempted from the operation of the zoning ordinance because the broad interest of the public in having an adequate supply of electricity outweighs the local interests of the zoning municipality. On the basis of the evidence in this case the court held it could not find the commission's decision unreasonable or capricious and affirmed the utility's immunity from the zoning ordinance. This case underlines an important consideration in any process of balancing state and local interests. Detrimental neighborhood effects will support the constitutionality of a zoning ordinance. But the ordinance must nevertheless give way when superior statewide considerations intervene unless the balance of detriment is clearly in the muncipality's favor.

III. Outcome Influenced by Preference for Governmental Level

A. *The Conventional Approach*

If the applicable statute neither grants special powers to municipalities nor defers to the local ordinances, the validity of the local ordinance depends on judicial interpretation of legislative intent as the most frequently used criterion to determine whether the state has preempted local authority. In the liquor license area the applicable statutes are the liquor control and zoning enabling acts. Although the liquor commission and the municipality are both creatures of the state,[30] the courts classify the commission as a "state agency" and impute to it some degree of state sovereignty; a municipality is regarded as occupying a lower position in the governmental hierarchy. Therefore, when the preemption question arises, judicial preference is given to the decision of the licensing agency unless its authority is, by the licensing statute, made subject to the municipality's zoning regulation. Preemption will result if the only basis of the ordinance is the general

30. Under the United States Constitution municipal corporations are regarded as political subdivisions of the state which lack vested rights or powers which they may assert against the state. City of Trenton v. New Jersey, 262 U.S. 182 (1923); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

zoning power conferred on the municipality by the zoning enabling act.[31] The reason advanced is that to hold otherwise would render meaningless the power of the liquor commission to decide the location of state licensees and a municipality could effect "a sort of left-handed Prohibition created by a process of exclusion by ordinance,—a result not intended by the Liquor Control Act."[32]

There are additional factors that influence a court to prefer the determinations of both the liquor and utility commissions. One is that judicial analysis is usually confined to the locational conflict between the local and state agencies, even though the *purposes* of the state statute and the zoning ordinance do not conflict. Another factor is judicial reluctance to question either an administrative or a legislative determination. Therefore a court will neither ascertain the basis of each regulation nor determine which policy should prevail.

An additional basis for finding state preemption is for the court to take an expansive view of the state statute. For example, a court will look to the language of the liquor act and determine the functions performed by the licensing agency. If they cover the purposes of the zoning ordinance, the ordinance will be preempted on the ground that the decision of the agency higher in the governmental hierarchy must prevail. For instance, if authority is granted to the state licensing agency to prescribe the location of state licensees,[33] or to consider, before issuing a license, the local conditions of the municipality where the applicant intends to locate[34] there will usually be a finding of state preemption.[35] A similar result will follow when

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31. Square Deal Coal Haulers & Yardmen's Club, Inc. v. City of Cleveland, 86 Ohio L. Abs. 83, 176 N.E.2d 348 (Cuyahoga County C.P. 1961); Salt Lake County v. Liquor Control Comm'n, 11 Utah 2d 235, 357 P.2d 488 (1960).

32. Salt Lake County v. Liquor Control Comm'n, *supra* note 31.

33. KY. REV. STAT. ANN. § 241.060(2) (1955) provides that the state liquor control board shall "limit in its sound discretion the number of licenses . . . to be issued in this state or any political subdivision, and restrict the locations of licensed premises." Section 241.075(1) and (2) provides that the state board shall divide first class cities into two different areas for the purpose of locating off-sale and on-sale premises. See Curl v. Bartholomew, 321 S.W.2d 251 (Ky. 1959). In the absence of a showing that the state's police power is being abused or exercised unreasonably, a zoning ordinance will not be permitted to contravene such broad authority. Marino v. City of Baton Rouge, 61 So. 2d 588 (La. Ct. App. 1952).

34. Staley v. City of Winston-Salem, 258 N.C. 244, 128 S.E.2d 604 (1962). An additional factor here was an "intent," based upon years of failure in regulating the sale of intoxicants, to prescribe uniform regulation throughout the state.

35. The basis of these decisions is that preemption is implicit in the city-state power structure.

the liquor act provides for a hearing of local objections prior to the issuance of the state license.[36]

The rationale of the liquor license cases is also applied in the utility field when the zoning and utility statutes are silent concerning the effect of zoning ordinances on public utilities. Hence in determining whether the decision of the utility commission has a preemptive effect on municipal zoning ordinances, the majority of courts considering the applicability issue have yielded to the decision of the utility commission on the basis of "legislative intent." The factors held to indicate this intent are the broad regulatory power of the utility commission, the public need for the facilities, the statutory duty of the utility to provide adequate services, and the desirability of uniform regulation when the utility's operations transcend municipal

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36. *E.g.*, ARIZ. REV. STAT. ANN. § 4-201B, C (Supp. 1964); KY. REV. STAT. ANN. § 243.360(1) (1955). The fact that a liquor act is comprehensive will not necessarily result in state preemption. But when this quality is coupled with statutory language empowering the commission to authorize the licensee to operate his business at the location indicated in his license application (OHIO REV. CODE ANN. § 4303.27 (Page 1954), applied in Spisak v. Village of Solon, 68 Ohio App. 290, 39 N.E.2d 531 (1941)), or language providing that the commission's decision is binding unless the municipality has exercised the local option privilege (OHIO REV. CODE ANN. § 4301.32 (Page 1954); Spisak v. Village of Solon, *supra*; Hilovsky v. Hilovsky, 379 Pa. 118, 108 A.2d 705 (1954)), an ordinance attempting to regulate the location of a state licensee will be preempted by state law. Although *Spisak* involved a home-rule municipality, the problem of state preemption is just as acute as in non-home rule states since there is a tendency to classify liquor control as a matter of state concern with which local ordinances may not conflict. 1 MANDELKER, *op. cit. supra* note 1, at 101.

Moreover, when the state licensee operates a restaurant, hotel or similar business within which the liquor act expressly permits the sale of alcoholic beverages, the municipality may not prohibit the sale of such beverages through an ordinance which permits the establishment of such a business within the zone but excludes any sale of liquor on the premises. Staley v. City of Winston-Salem, 258 N.C. 244, 128 S.E.2d 604 (1962) (restaurant); Hilovsky v. Hilovsky, *supra* (restaurant); Appeal of Sawdey, 369 Pa. 19, 85 A.2d 28 (1951) (hotel).

There are statutes whose language renders state preemption more probable. For example, the liquor act may provide that the state licensing agency may refuse to issue any license if not demanded "by public interest or convenience," or, if the community is already saturated with a sufficient number of liquor outlets. DEL. CODE ANN. tit. 4, § 453 (10) (1953). The character of the locality is an important consideration but the cases are not clear whether the state licensing agency includes zoning ordinances in its consideration and, if it does, whether they are controlling. Lyons v. Delaware Liquor Comm'n, 44 Del. 304, 54 A.2d 889 (1948). The state agency may allow fewer retail liquor licenses in a residential area than in a business or shopping area of the same size. Lyons v. Delaware Liquor Comm'n, *supra*. When one considers these provisions in the light of the constant drift of regulatory powers to the state level, it is not unreasonable to conclude that a court will find a legislative intent to confine the locating power in the state agency to the exclusion of local ordinances.

borders.[37] Consequently, a municipality in these jurisdictions may not regulate the location[38] of utility facilities or the means[39] by which the utility provides its services unless it has received an *express* grant of power either in the public utilities act or in the zoning enabling act;[40] the *general* power to enact zoning ordinances does not satisfy this requirement.[41] The fact that

37. Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 295, 144 N.Y.S. 2d 379 (Sup. Ct. 1955) (depreciation of property value secondary to public welfare); Long Island Lighting Co. v. Village of Old Brookville, 72 N.Y.S.2d 718 (Sup. Ct.), *aff'd*, 273 App. Div. 856, 77 N.Y.S.2d 143, *aff'd*, 298 N.Y. 569, 81 N.E.2d 104 (1948); Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954).

38. Consolidated Edison Co. v. Village of Briarcliff Manor, *supra* note 37; Long Island Lighting Co. v. Village of Old Brookville, *supra* note 37; Duquesne Light Co. v. Upper St. Clair Township, *supra* note 37; Gulf C. & S.F. Ry. v. White, 281 S.W.2d 441 (Tex. Ct. Civ. App. 1955); see West Tex. Util. Co. v. City of Baird, 286 S.W.2d 185 (Tex. Ct. Civ. App. 1956). *Contra*, City of Richmond v. Southern Ry., 203 Va. 220, 123 S.E.2d 641 (1962) (no jurisdiction in utility commission to decide applicability issue).

39. *In re* Public Serv. Elec. & Gas Co., 35 N.J. 358, 173 A.2d 233 (1961); Long Island Lighting Co. v. Village of Old Brookville, 84 N.Y.S.2d 385 (Sup. Ct. 1948). Following the affirmance of Long Island Lighting Co. v. Village of Old Brookville, *supra* note 37, the village passed a general police power ordinance prohibiting the construction above ground of electric transmission lines and requiring underground conduits instead. In holding the ordinance invalid as beyond the legislative power of the village, the court, relying on the statutory powers of regulation and supervision vested in the public service commission, concluded that the municipality could not prohibit such construction on private lands and in a predominantly rural area. Since the village was willing to permit the utility to use its land regardless of the surrounding development as long as underground conduits were used, it is clear that the ordinance was enacted solely to regulate the means used by the utility to provide its services. Thus, it is apparent that in the first *Long Island Lighting* case the purpose of the village in seeking to apply its zoning ordinance was to control the means of transmitting electricity rather than the location of transmission facilities. Such an application of a zoning ordinance has been judicially condemned. *In re* Public Serv. Elec. & Gas Co., *supra* (dictum).

40. See State *ex rel.* Kearns v. Ohio Power Co., 163 Ohio St. 451, 127 N.E.2d 394 (1955).

41. Consolidated Edison Co. v. Village of Briarcliff Manor, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct. 1955); Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954).

Deciding whether a state has preempted an area depends on the meaning given the appropriate statutory language. When the statute does not specifically defer to municipal ordinances the courts are left to decide whether a local ordinance is applicable to utility facilities. Judging from the cases in which courts have decided the preemption issue in favor of the state on the basis of relatively inconclusive statutory language, a court most likely would not subject a utility to a local ordinance if it had to decide the applicability issue relying on statutory language like the following. ARK. STAT. ANN. § 35-301 (1947) provides that all state-created electric power companies may construct their electrical lines over *public and private* lands, municipal permission being required only for use of the streets. Because of the express permission to erect facilities on private land and the clear exclusion of any local power over the use of private land, it is not unreason-

these courts have held the general zoning power insufficient grounds on which to resolve the applicability issue in favor of the municipality makes clear that the outcome in these cases is influenced by a preference for the decision of the utility commission.

B. *Inadequacies of the Conventional Approach*

Despite judicial inertia, the conventional approach to the preemption problem must be abandoned because of its many inadequacies. For example, in the utility area, judicial adherence to the conventional approach, has neglected some important considerations for deciding the location conflict. In two cases, *Consolidated Edison Co. v. Village of Briarcliff Manor,*[42] and *Long Island Lighting Co. v. Village of Old Brookville,*[43] the utility desired to erect electric transmission lines through a district zoned residential in which they had previously acquired a right-of-way over private land. In both cases, the ordinance was held to be preempted. The village in *Long Island Lighting* contended that the towers and lines were commercial structures prohibited in *residential* districts by the zoning ordinance. A similar ordinance in *Consolidated Edison,* however, had the effect of banning the proposed line from the *entire* village since only a small portion of it was zoned commercial. This distinction, although not discussed in the two cases, would seem to be relevant to the preemption question. If it is conceded that zoning protects a legitimate interest of a municipality, an ordinance that prohibits a structure in one but not in another district of the municipality should be given greater recognition than one that prohibits or has the effect of prohibiting a particular use in the entire municipality,[44] unless the size and character of the municipality affects the nature of the zoning districts.

Furthermore, while in *Consolidated Edison* the court would not consider whether the towers and lines could be more economically and suitably located at an alternative site, in *Duquesne Light Co. v. Upper St. Clair Township,*[45] efficiency and economy were determinative of the decision and this factor was given considerable weight by the court in holding the zoning ordinance inapplicable. If public convenience and necessity dictate a find-

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able to conclude that a court would find a "legislative intent" to preempt the field. CAL. PUB. UTIL. CODE § 762 provides that if the utility commission "orders the erection of a new structure, it may also fix the *site* thereof." (Emphasis added.)

42. 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct. 1955).

43. 72 N.Y.S.2d 718 (Sup. Ct.), *aff'd,* 273 App. Div. 856, 77 N.Y.S.2d 143, *aff'd,* 298 N.Y. 569, 81 N.E.2d 104 (1948).

44 In holding that both municipalities exceeded their power in attempting to subject a utility to a zoning ordinance, New York denies the distinction.

45. 377 Pa. 323, 105 A.2d 287 (1954).

ing of non-applicability, the same considerations should support applicability if the utility might be more suitably located, either within or without the zoning municipality, since the increased cost resulting from unsuitable location will be borne by the public in the form of higher rates.

In the liquor license cases too, if the purpose or effect of the zoning ordinance is to exclude the licensee from the municipality, the ordinance may be held invalid. For example, since the zoning enabling act confers power on municipalities to "regulate" lawful uses of land, several courts have held invalid per se a zoning ordinance that *excludes* a state licensee from the entire municipality on the ground that this is not a "regulation" but a "prohibition."[46] Other courts, however, have not held such an ordinance invalid per se, and have considered the conditions within the municipality before applying the test.[47] And other courts have taken the approach that an exclusionary ordinance is not invalid if the proposed use is incompatible with present or expected development within the community.[48]

The preemption issue should not be decided in favor of the state merely because the ordinance excludes the use from the municipality. To do so fails to give due consideration to the integrity of the zoning ordinance when the exclusion of the licensee is necessary for the protection of land uses within the municipality. As a result, a zoning ordinance may be invalidated whenever it affects the location of a state licensee. Carried to its logical conclusion, this analysis may allow a liquor outlet to be located within any residential district regardless of its effect on the community. This approach confuses the function of zoning with the control of liquor sales by identifying zoning regulations with liquor legislation, conflicts with the idea that the municipality is more aware of the community's needs than any other governmental unit[49] and assumes the impossibility of harmonizing the purposes of the liquor and zoning laws. In fact, these laws represent two methods, mutually complementary, of promoting the general welfare. The fact that zoning may cover some aspect of the regulation of alcoholic beverage does not mean that it is a form of liquor control; its sweep and

46. *E.g.*, Commonwealth v. Amos, 30 Del. Co. 522 (Pa. 1941).

47. Gust v. Township of Canton, 342 Mich. 436, 70 N.W.2d 772 (1955); East Fairfield Coal Co. v. Miller, 71 Ohio L. Abs. 490 (Mahoning County C.P. 1955).

48. Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962); Carlton v. Riddell, 72 Ohio L. Abs. 254, 132 N.E.2d 772 (Ct. App. 1955).

49. One of the primary purposes of use zoning is the conservation of property values. Business and structures, such a liquor stores, taverns and high-tension wires might, by their inappropriate location, reduce surrounding property values as well as endanger the health, safety and comfort of local residents.

design are wide and its limited application in regulating the location of a liquor outlet does not correspondingly limit its scope or purpose.[50]

The conventional approach gives rise to an additional problem in litigating preemption issues. Whether the legislature "intended" the liquor and public utility commissions to occupy the entire fields of liquor and utility regulation cannot be precisely determined because published legislative histories are rare. Consequently, the legislative intent must be culled from statutory language, and often the mere fact that the liquor and utility commissions are given comprehensive regulatory powers is held determinative of a legislative intent to "occupy the field." This approach fails to recognize that the zoning statute also is comprehensive. Moreover, one may question the conclusion that the liquor and utility commissions are state agencies and hence the zoning ordinance, enforced by a local agency, should be relegated to an inferior position. The municipality, the licensing agency and the utility commission are all state agencies charged with the duty of performing certain public functions. Since all these agencies derive their power from the legislature, it is not untenable to argue that none has a claim to a position of pre-eminence.[51] Of course, it is hornbook law that state regulation by a superior governmental entity always preempts if the local ordinance conflicts with it. Assuming this to be correct, preferring the decision of the higher governmental level makes sense only when there is a real conflict in purpose between the state and municipal regulations.

Moreover, the occupation of the field doctrine may serve as a cloak for invalidating municipal regulations with which a court finds itself unsympathetic.[52] For example, one court held a zoning ordinance preempted by the licensing act primarily on the ground that prior to the creation of the liquor control board the state had witnessed years of failure in properly regulating the manufacture and sale of intoxicants and hence the legislature must have "intended" the licensing act to "occupy the field." Thus the court used the occupation of the field doctrine to support a decision which it believed necessary because of a need for uniform regulation.[53]

50. One court stated in rejecting the preemption argument:

Of course, ordinances which impose general regulations of the liquor traffic through licenses, taxes or other such mechanisms of control must succumb to the exclusive power of the department as to that subject matter. [Citations omitted.] The [zoning] . . . ordinance, however, seeks only to restrict the sale or consumption of liquor . . . within 200 feet of residences. Instead of eliminating the use of alcoholic beverages . . . the ordinance permits the sale of liquors . . . elsewhere in the city. The ordinance is a geographic restriction as to the place of sale and use of liquor, not an invasion of the state's general regulation and limitation of the consumption of liquors as such. Floresta, Inc. v. City Council, 190 Cal. App. 2d 599, 606-07, 12 Cal. Rptr. 182, 186 (1961).

51. See Note, MINN. L. REV. 284, 288-89 (1964).

52. 1 ANTIEAU, *op. cit. supra* note 8, at 291.

53. Antieau has also noted that the doctrine, generally speaking, is of no help to the

IV. Outcome Influenced by Consideration of the Underlying Policies and Competing Interests

Close analysis has not been a trademark of the cases deciding preemption issues in the license and utility areas. If the licensing agency, utility commision or municipality has not been *expressly* given the *exclusive* power to prescribe the location of liquor outlets and utility facilities, the correct method of analysis is one in which the court first looks to the basis on which each type of regulation is predicated to determine whether their purposes are in conflict and then, if the purposes do not conflict, decides whether the considerations favoring uniform, central control outweigh those favoring the application of the local regulation. This balancing approach necessitates delineation of the criteria utilized in each determination. To determine these criteria one must first question what the state purports to regulate, and then what the municipality purports to regulate.

A. *Liquor Licensees*

What are the principal factors the state considers when it grants a liquor license? The character of the licensee and his proposed location are primary considerations. However, since the purpose of the liquor act is to control indirectly undesirable social behavior by regulating and restraining the traffic in and consumption of intoxicating beverages, location is considered in the licensing decision primarily as an element in restricting the number of licensees.

When the factors in the municipal decision are listed, it can be seen that there are zoning considerations which are not taken into account at the state level. Since the traditional purpose of the zoning ordinance is to structure the community along rational lines by regulating the location, character and purpose of lands and buildings within the municipality, the most important zoning consideration is compatibility of land use. Thus, although locational factors enter into both the licensing and zoning decisions, they do so for different reasons—*i.e.*, the opposing state and local decisions are not predicated on the same criteria. Consequently, there is no conflict for preemption purposes, so the balancing process should be invoked to resolve the issue whether a decision on compatibility at the local level should prevail over the state decision to license.

While land uses which are detrimental to adjacent property can constitutionally be regulated under the zoning ordinance, the granting of a state license alters the usual situation and provides the state licensee with

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practicing attorney because it is impossible to determine beforehand what is the "field" and whether it has been "occupied." *Ibid.*

some protection from municipal interference. The court must determine whether the marginal benefit to the municipality of increased compatibility in land use is worth the marginal cost to the licensee of foregoing business operations at the location in question. The marginal gain to the municipality will depend on the character of the neighborhood and how well the proposed use fits the desirable physical form and character of the community. If the neighboring properties are residential, the proposed use will produce harmful effects on neighboring properties in the form of a capital loss.[54] Aside from the monetary considerations there are specific problems the solution to which will also increase the marginal gain to the community. For example, preclusion of the noncompatible land use (liquor outlet) will decrease noise and danger to pedestrians. Moreover, exclusion of the licensee who intends to locate near a school, church, hospital or playground[55] will have a beneficial effect on the community.

To be balanced against the marginal benefit to the community is the marginal expense to the licensee of complying with the ordinance. The weight to be given the marginal cost factor will depend on whether the local regulation has a limiting or an exclusory effect. The ordinance will have a limiting effect when the licensee can secure another license even though he cannot conduct his business at the location in question. Thus the effect of the local regulation may often be capable of being quantified by determining the cost to the licensee of complying with the ordinance and operating his business at another location. The ordinance will have an exclusory effect when the licensee cannot secure another license because

54. See RICHENBACH, SOME ECONOMIC RECONSIDERATIONS OF ZONING—REMEDIAL, EMERGENT, AND UTOPIAN 113 (1963).

55. A number of states have enacted statutes that prohibit the sale of alcoholic beverages within specified distances from churches, schools and hospitals. *E.g.*, GA. CODE ANN. § 58-1029 (Supp. 1963): "No [state licensed] business . . . shall be operated within 100 yards of any church, and 200 yards of a school ground or college campus." Often a municipality will enact an ordinance which extends the no-sales limit beyond the statutory boundaries. Again, the question of state preemption arises. Greater stringency imposed by local regulation than that of the state is not in itself sufficient to invoke invalidity because of conflict. If the statute does not *expressly permit* a state licensee to operate his business beyond the prescribed distance, an ordinance which reasonably extends this distance is not prohibiting that which the statute permits and hence is not in conflict with state law. State *ex rel.* Collins v. Kiernam, 240 Mo. App. 403, 207 S.W.2d 49 (1947) ("supplemental" ordinance); see Miller v. Fabius Township Bd., 366 Mich. 250, 114 N.W.2d 205 (1962) ("supplemental" ordinance). This approach—resolving the applicability issue by determining whether the ordinance prohibits that which the statute permits, or vice versa—is unsatisfactory too because it relegates the municipality (a state agency) to a lower position in the governmental hierarchy than the liquor commission and fails to recognize not only that the zoning enabling legislation is as comprehensive as the liquor control act, but that the decisions of the state and local agencies are based on different criteria.

an alternative available location is unsatisfactory to the state licensing agency. Of course, another factor to consider is the extent to which the license applicant is willing to be mobile. Nevertheless, the ordinance will limit the licensee's freedom of location and this factor must be considered in the balancing process.

The second consideration in the balancing process should involve the propriety of the state decision that competition at the proposed location will not produce undesirable effects on the municipality. The correctness of the state agency's determination must first be reviewed. If the demand in the community for the services of the state licensed business is satisfied by existing facilities, or the proposed location is too close to that of a competitor, then the state agency's decision on this point should be overturned.[56] If the state agency's decision is affirmed, its impact on the zoning determination should then be considered.

However, if one of the bases of the zoning ordinance is consideration of the competitive factor, then this consideration in the balancing process should be decided in favor of the state on the basis of preemption since the same criterion—the competitive factor—has entered into both the state and local decisions.[57]

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56. A statement made in 1908 is equally appropriate today:

> Experience in municipal affairs has demonstrated that increasing the number of saloons in a municipality beyond the reasonable wants of the people tends greatly to increase lawlessness, and makes the administration of law and the preservation of order more difficult. . . . When the number [of liquor outlets] is increased beyond that required to satisfy the normal demand, the saloon keepers are compelled, in order to make the business profitable, to resort to all manner of vices to create an artificial demand for liquor and an increase in the consumption of liquor beyond the normal. The evil consequences flowing from these practices, and the increased difficulty in the preservation of peace and order, and the enforcement of law caused by such a situation can be readily seen. . . . *In re* Jugenheimer, 81 Neb. 836, 116 N.W. 966 (1908).

57. Several courts have held consideration of the competitive factor in zoning to be unconstitutional or ultra vires. MANDELKER, *Control of Competition as a Proper Purpose in Zoning*, 14 ZONING DIG. 33, 34-39 (1962). Many zoning ordinances, however, have been upheld although a byproduct of their application was the limitation of competition through a restriction of the area in which a business could be conducted. *E.g.*, Appeal of Lieb, 179 Pa. Super. 318, 116 A.2d 860 (1955). Although courts have struck down zoning ordinances which attempt to directly control the number of liquor outlets according to population, State *ex rel.* Haverback v. Thomson, 134 Conn. 288, 57 A.2d 259 (1948), zoning ordinances have been upheld which indirectly control the number of such outlets by prohibiting the sale of alcoholic beverages within specified distances from other liquor outlets. State *ex rel.* Wise v. Turkington, 135 Conn. 276, 63 A.2d 596 (1948); Ragozzino v. Town of Lake Maitland, 54 So. 2d 364 (Fla. 1951) (750 feet); Chaikin v. City of Miami, 158 Fla. 742, 30 So. 2d 101 (1947) (2500 feet). Since the trend in zoning is away from its historic function due to the increasing scarcity of land for certain business uses in metropolitan areas, perhaps the zoning commission should be permitted to consider the proximity and demand factors and accomplish directly what they have been sustained in accomplishing indirectly.

B. *Public Utilities*

At the outset a brief discussion of the evolution of the public utility commission is relevant. It will serve the dual purpose of differentiating the purposes of the zoning and utility regulations, and defining the criteria to be used in balancing the state and local decisions.

With the expansion of urban communities, the domestic, commercial and industrial need for public utility services—gas, water, electricity and transportation—increases. Public utility companies (also referred to as public service corporations) were organized to provide these services.[58] These utilities operated on a statewide basis and hence the cities, by themselves, were incapable of uniformly supervising utility operations which spanned city lines. This caused utilities to be subjected to confusing and conflicting regulations. Moreover, since these companies were monopolistic in form[59] and grew as quickly as the cities which they serviced, there was always the danger that the public would suffer from unreasonable service and excessive rates. Consequently, state public utility commissions were created, assuring the public of reasonable rates and adequate service, the utilities of uniform regulation.

Although the purposes of the zoning and utility regulations do not conflict, state-controlled utilities do serve more than one municipality. Should the argument be made that uniform regulation requires that state utility regulation entirely preempts local zoning even though the state utility act is silent? The following discussion shows that strong arguments can be made both for[60] and against[61] state preemption per se.

Since utility operations transcend municipal boundaries because of the needs of customers in distant areas, both the consuming public and the utility have an interest in seeing that alterations and improvements in facilities are not impeded. Thus, when new utility facilities are needed to provide for the public demand, municipal regulations arguably should not be permitted to determine the type, method and location of construction when the effect of such regulations would either prevent or increase the cost of

58. A public utility has a duty to render adequate service to its customers. See United States Fuel Gas. Co. v. Railroad Comm'n, 278 U.S. 300, 309 (1929). This duty has been incorporated in state utility statutes. See, *e.g.*, ILL. ANN. STAT. ch. 111 2/3, § 32 (Smith-Hurd 1954): "[E]very public utility shall furnish, provide and maintain such service instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees, and public and as shall be in all respects adequate, efficient, just and reasonable." For a discussion of the scope of a public utility's duty to render adequate service, see Note, 62 COLUM. L. REV. 312 (1962).

59. Competition in these industries is not feasible. See Note, 62 COLUM. L. REV. 312 (1962).

60. Avery, *Zoning and Public Utilities,* 55 PUB. UTIL. FORT. 252 (1955).

61. Haller, *Zoning and the Utilities,* 56 PUB. UTIL. FORT. 231 (1955).

furnishing adequate services to customers not inhabitants of the regulating municipality. On the other hand, the objectives of zoning regulations and the municipal interest in stabilizing the use and value of their property also deserve consideration.

Conceding that both the state and municipality have legitimate interests to protect and that a less efficient or more costly location of a land use may, in terms of net community benefit, be more advantageous to general welfare than the most efficient and economical site, the preemption issue can once more be decided by balancing marginal gain to the locality against marginal loss to the utility. The comparative advantages and disadvantages to the utility, municipality and consuming public of alternative locations (both inside and outside the zoning municipality[62]) and facilities must be weighed. Important considerations are the various costs of different facilities at different locations, the feasibility of the proposed and alternative locations, the effect of the facility on surrounding property values, the possibility of hazards to persons and property and the effect on the utility's ability to satisfy present and future demands. Simply because the location or facility approved by the municipality is less convenient or more expensive to the utility should not lead to a decision favoring the utility, a trend that is noticeable in some of the cases. The courts must face more directly the effects of weighing one marginal advantage over another.

CONCLUSION

Preemption problems arise in the liquor license and public utility fields because of the legislative failure to define clearly the areas of state and local authority. Often a state regulatory statute is enacted without regard to another statute conferring similar power on the municipality. Consequently, if a state-local conflict arises the court must determine whether the state has impliedly preempted and thus foreclosed the field from municipal regulation. Often the test of preemption is defined in terms of "legislative intent." For example, a court may find the state regulation so complete and detailed that it demonstrates a legislative intent to preempt the entire field. The use of such a vague, fictional test is unfortunate, however, because the

62. A zoning ordinance which completely prohibits a proposed use from the municipality should not be held invalid before considering extraterritorial factors. If land for the proposed use is available in a neighboring municipality, the ordinance should not be held invalid on the ground that it fails to satisfy an existing public need. Moreover, a zoning ordinance to be valid must be enacted in accordance with a comprehensive plan and it is utterly impossible for a municipality to enact a comprehensive zoning plan if it must provide for every lawful use of land. For a discussion of those cases which have considered extraterritorial factors in determining the validity of local zoning, see Note, *Zoning: Looking Beyond Municipal Borders,* 1965 WASH. U.L.Q. 107.

underlying competing considerations are either not articulated or not given primary emphasis.

The failure of most state statutes to specify the areas of state and local control, coupled with the constant expansion of regulatory power at the state level, will make the resolution of state-local conflicts increasingly difficult. Moreover, the ever-increasing local interest in planning and zoning will lead to more municipal regulation of state-licensed businesses and utilities. Therefore, the courts will necessarily need to take a closer look at the basis of the state and local regulations to determine whether the local ordinance would thwart the purpose of the state statute. The preemption question should be decided only after the competing interests which support the state and local decisions have been balanced. Giving the courts the balancing function will allow them to second guess both the state agency and the municipality in the guise of deciding the "conflict." But there may be no alternative. For example, if the utility commission is given jurisdiction to decide the conflict, the local zoning ordinance may be given only slight consideration. The issues are difficult and it is equally difficult to see how a statute can resolve them without recourse to judicial intervention unless the state grants exclusive regulatory power to the locality or the state agency.

The balancing approach is the most satisfactory in the absence of statutory solutions to state-local conflicts. But the problems considered in this note can best be eliminated by legislative delineation of the boundaries of state and local control. For example, a regulatory statute could provide that its provisions shall be applicable throughout the state and that a municipality shall not enact any ordinance in conflict with the provisions of the statute unless *expressly authorized*. The statute could then authorize additional municipal regulations which are not in conflict with the provisions of the statute, and list the areas within which the local authorities could legislate. Statutes drawn in these terms would eliminate the unsatisfactory doctrine of preemption by implication.