
APPLICATION OF MUNICIPAL ORDINANCES
TO SPECIAL PURPOSE DISTRICTS
AND REGULATED INDUSTRIES:
A HOME RULE APPROACH[†]

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A striking feature of local government in the United States is the proliferation of overlapping governmental units of various sizes, scopes and authorities. Particularly in large metropolitan areas, a single parcel of property may be within the jurisdiction not only of a general-purpose municipality, but also a number¹ of special-purpose govern-

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1. In 1972, there were 78,218 units of local government in the United States, including 15,781 independent school districts and 23,885 special districts. These governments are

ments,² including special districts and authorities, neighboring municipalities authorized to act extraterritorially, counties and townships, and agencies of state government. This layering inevitably produces intergovernmental conflict, most often between the various special-purpose governments and general-purpose municipalities, whose authority to some extent must be abridged whenever other governments are authorized to operate within their boundaries. In the absence of legislatively provided mechanisms for resolving such conflicts, the competing governments usually turn to the courts.

The tension inherent in such a scheme of overlapping and independent governments is particularly pronounced when special purpose districts are pitted against cities that have the broad authority of municipal home rule. On one hand, the growing number of special purpose governments³ are looked to as powerful tools in handling metropolitan and regional problems whose solution could be endangered by the parochialism often attributed to cities and their suburbs. On the other hand, increasing numbers of cities have been given home rule powers,⁴ as states recognize the need for broad, flexible authority in modern urban governments.⁵

largely concentrated in the nation's major urban areas. The 264 standard metropolitan statistical areas (SMSA's) contain 28.4% of the local governments, including 33.7% of the special districts. Thirty SMSA's contain at least 200 governmental units, with the Chicago area in the forefront with 1172. 5 U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF GOVERNMENTS: LOCAL GOVERNMENT IN METROPOLITAN AREAS 1-3 (1972) [hereinafter cited as LOCAL GOVERNMENT IN METROPOLITAN AREAS].

2. It is generally agreed that two governmental units cannot co-exist in the same area where their "jurisdiction, powers and privileges . . . are substantially co-extensive in scope and objective." *City of Aurora v. Aurora Sanitary Dist.*, 112 Colo. 406, 410, 149 P.2d 662, 664 (1944). Although this rule has not impeded the growth of overlapping jurisdictions, it serves to draw a distinction in incorporated areas between a single "general purpose" local government and all other governments which, in order to function within the area, must be organized to accomplish some specific objective. This second type of government will be referred to generally as "special governments." Cf. J. FORDHAM, LOCAL GOVERNMENT LAW 17 (1949) [hereinafter cited as FORDHAM]. The nature of various types of such special governments is discussed in the text at notes 27-34 *infra*.

3. The number of special districts in the United States increased by 6.4% during the 1967-1972 period, the largest increase of any type of local government. Due largely to consolidation, school districts decreased by 12.2% in the same period. LOCAL GOVERNMENT IN METROPOLITAN AREAS, *supra* note 1, at 1.

4. It is difficult to chart the progress of home rule as a force in local government law, as the concept lacks a precise, universally accepted definition. See text at notes 154-64 *infra*. However, 40 state constitutions now contain some sort of home rule provision, half of them adopted since 1953 although the concept is a century old. Vanlandingham, *Constitutional Municipal Home Rule Since the AMA(NLC) Model*, 17 WM. & MARY L. REV. 1,4 n.9 (1975).

5. Home rule is not universally praised. "It is one of those curious facts of history that

The implications of these diametrically opposing trends have yet to make any significant impact on the traditional doctrines governing inter-governmental conflicts, even though, as one writer has noted, "home rule changes the whole setting in which the problem of municipal-special district conflict arises."⁶

This Article will examine the effect of municipal home rule on the doctrines that have developed to resolve one particular type of inter-governmental conflict—the attempt of a municipality to enforce its land use and construction standards and restrictions on facilities within its boundaries operated or regulated by other governmental units. First, we shall present models of the types of conflicts that have reached the courts. Second, we shall review existing case law to show that most courts have been guided in their decisions by a conceptualization of municipal governments as protectors of private, parochial interests—a conceptualization that is markedly at odds with modern home rule policies. Finally, we shall argue that home rule municipalities are in a unique position to resolve the competing public interests at stake in these conflicts and that their efforts to do so should be recognized and encouraged by the courts.

I. AN OUTLINE OF THE PROBLEM

Three paradigmatic cases will be used to examine the problem. These cases have arisen with sufficient uniformity throughout the states to make feasible an attempt to isolate from the variety of factual situations and statutory language the underlying policies and assumptions that have guided the courts. The three types of cases are: (1) application of a municipal building code to an institutional facility of a special government, most commonly a school district; (2) application of a municipal zoning ordinance to the disruptive land use of a special government, such as an airport or sewage plant; and (3) application of a municipal ordinance of either type to a facility operated by a regulated industry, most commonly liquor retailers and public utilities.

Since the contending governments in all of these cases are creatures of the same state without inherent powers of their own,⁷ the intent of the

more and more communities are finally getting home rule at a time when urban problems are less and less susceptible of solution by one locality. In this situation home rule can be a barrier to progress." W. FISER, S. BROWN & J. GIBSON, *GOVERNMENT IN THE UNITED STATES* 404 (1967).

6. Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 586.

7. The theory that municipalities have an inherent right of self-government has received some support. *See, e.g., People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 95-110

legislature in apportioning between them the responsibility for the performance of governmental functions is determinative of which should prevail.⁸ Rarely, however, does the legislature make its intent clear. Thus, the decisions of the courts, although phrased in terms of legislative intent, have in effect developed common law rules governing the outcome of these cases. On examining the case law closely it becomes apparent that the courts have largely acted on the basic assumption that special governments should prevail because their functions are linked more closely to the interests of the state as a whole than are municipal ordinances. It is our thesis that this assumption is fundamentally inconsistent with the role of home rule municipal governments in modern state governmental structures.

Before turning to the case law, it is necessary to establish a basic analytical framework for examining these conflicts. We begin with the hypothetical question of whether a particular building proposed to be built within a municipality is to be constructed of stone or wood. We will assume first that the building will be built by a private business corporation and used for the manufacture of its products. Both the corporation and the municipal government are entities vested by the state with some authority over the question of what building material will be used. The corporation is concerned with the protection of what may be called "internal" interests—operating its business in the most efficient way possible. The municipality is concerned with protecting "external" interests—minimizing the risk of harm to the community caused by unsafe structures.⁹ Either entity may consider the interests protected by the other, but neither has any duty to do so. The limits of this discretion of each entity to disregard the other's interests in choosing a building material are questions of substantive law; the corporation must avoid tortious conduct and the municipality must enact only reasonable and necessary ordinances.

(1871); *Kern v. Arnold*, 100 Mont. 346, 49 P.2d 976 (1935). The overwhelming weight of authority is *contra*, however. See *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). See also note 18 *infra*.

8. This is true even where the legislature is restricted by a constitutional home rule provision. See text at notes 156-64 *infra*.

9. The distinction between internal and external interests is clearer if it is assumed that fire prevention is the only reason stone would be chosen over wood. Thus, although the interests of both entities coincide in wanting to prevent fires, the corporation's internal interests require it to weigh the probability of a fire causing costly damage to its business against the higher cost of stone, and it may properly decide a risk is acceptable. The municipality, on the other hand, must consider such external factors as the proximity of other buildings and the availability and cost of fire-fighting resources and it may decide that the same risk is unacceptable.

Assume the corporation makes the nontortious¹⁰ decision to construct the building of wood and the municipality enacts a reasonable ordinance requiring it to be built of stone. Both entities have acted within their discretion but their decisions are inconsistent. A court facing this case will not inquire into the propriety of either entity's determination, but will simply resolve the case in favor of the municipality on the universal, mechanically applied principle that public interests are superior to private interests.

If, however, in the same situation we assume the building is to be owned by a special government or a regulated industry, the internal¹¹ interests at stake are public, rather than private, and the court cannot apply the same mechanical formula. A rational resolution of the impasse requires the performance of a balancing function—to determine whether the public's interest in a safe stone building on the one hand or in an efficient wooden building on the other is more compelling. Courts, lacking the expertise and fact-finding capacity to evaluate effectively the strength of either public interest, are ill-equipped to perform this balancing function. Further, attempts to do so in individual cases would produce litigation and would foster instability in intergovernmental relations. The only practical alternative for the courts is to allocate the balancing function either to the special government or the municipality. Given that each government may be expected to defend one of the two competing interests more zealously than the other, the court must rely on two factors: first, whether the interest represented by one of the governments is inherently greater than that represented by the other; and second, whether one of the governments is more capable of performing the balancing function in an impartial manner. Ideally, perhaps, the court should focus on the characteristics of the particular governments. But each government shares general characteristics with others of its type, so that common characterizations have inevitably had a major influence on the development of case law.

10. In many jurisdictions, of course, the violation of a building code ordinance would itself be considered tortious. However, this rule is a corollary to the principle that the municipality's interests are superior to those of the corporation and does not relate to the range of the corporation's discretion in the absence of such a superior interest. Tort liability is attached to the violation of ordinances in order to further the public policy of compliance with the law. *See* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 190-92 (4th ed. 1971). "Nontortious" in this discussion means in the absence of a valid ordinance.

11. All public interests are external in the sense that they have an impact on the public welfare. However, the interests of the special government in this situation are internal insofar as they concern matters relating to efficient operation of the facility. This interest would be purely private if the facility were operated by a private enterprise. *See* note 9 *supra*.

The municipality attempting in these cases to enforce its ordinances is most commonly a municipal corporation,¹² a legal entity which the courts have historically viewed as having a curious dual nature. A corporation in general is a legal person, having perpetual existence, whose creation is authorized and regulated by the state.¹³ A private corporation is created by the voluntary assent of its members for private purposes,¹⁴ although the public interest may incidentally be promoted by its activities.¹⁵ A public corporation, on the other hand, is formed at the pleasure of the state and acts as an agent of the state, serving purely public interests.¹⁶ A municipal corporation is a type of public corporation but is understood to have many of the characteristics of private corporations.

A municipal corporation is created at the solicitation or by the consent of those within its territory and exists largely for the private advantage, interest and convenience of its citizens.¹⁷ The major legal consequence of this similarity to private corporations is Dillon's Rule—the doctrine that all powers of a municipal corporation must derive from explicit legislative grants and are to be construed strictly against the corporation.¹⁸ Although Dillon's Rule has been abolished as a rule of law in

12. In addition to municipal corporations, the "municipalities" involved in these cases include such entities as counties, townships and boroughs, which have historically been classed as geographic administrative subdivisions of the state government and whose primary importance has been the provision of basic governmental services in rural areas. Recently, however, such entities have been given the authority to perform a wide range of municipal functions, particularly in areas that have developed to the point of requiring a general-purpose municipal government but in which incorporation is undesirable for some reason. See Note, *The Urban County: A Study of New Approaches to Local Government in Metropolitan Areas*, 73 HARV. L. REV. 526, 527-28 (1960). In some states, such units have home rule status. *Id.* at 558-68; cf. Glauberman, *County Home Rule: An Urban Necessity*, 1 URBAN LAW. 170 (1969). Although traditionally these units were considered agencies of the state rather than semi-private corporations, the courts have in general regarded their interests as comparable to those of the municipal corporations they functionally resemble. Compare *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960), with *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896 (Mo. 1957). But see text at note 119 *infra*.

13. J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 30 (5th ed. 1911) [hereinafter cited as DILLON].

14. *Id.* § 91.

15. The privilege of incorporation is founded on the principle that the public interest will be served thereby. See *Ten Eyck v. Canal Co.*, 18 N.J.L. 200, 203 (Sup. Ct. 1841).

16. DILLON, *supra* note 13, at § 92.

17. See, e.g., *Board of Comm'rs v. Mighels*, 7 Ohio St. 110 (1857).

18. It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared

home rule jurisdictions,¹⁹ the historical concept of a municipal corporation as a promoter of private interests has resulted in a tradition of judicial suspicion of municipal actions²⁰ and a tendency to construe even home rule powers narrowly, at least where there is a potential conflict with state policy.²¹

The characterization of municipal corporations as private entities has never been strictly accurate because the state has traditionally delegated to municipalities powers which can only be wielded by a governmental entity charged with the protection of public interests. For example, the police power, on which building codes and zoning ordinances rest, is the inherent power of the sovereign to regulate the conduct of its citizens when necessary for the protection of the public good²² and may only be delegated to an agent of the state²³ acting in a governmental capacity.²⁴

This dual nature of municipal corporations has led to the development of a distinction between governmental and proprietary municipal functions. The courts have viewed the former as performed for the good of the state, and the latter for the private interests of the municipality's citizens.²⁵ Even when a municipality is acting in a governmental capacity, however, courts are likely to view it as acting partially as a private corporation. Thus, municipal actions to enforce police power ordinances are regarded as civil, or at most quasi-criminal.²⁶ In light of this

objects and purposes of the corporations,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

DILLON, *supra* note 13, at § 109 (emphasis in original).

19. See text at notes 153-55 *infra*.

20. See Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596, 1601-06 (1965) (arguing that a fear that majority interests in municipalities would oppress minority groups has been a major factor in forging the tradition of judicial distrust of municipal action); cf. *Spaulding v. Lowell*, 40 Mass. (23 Pick.) 71, 74 (1839). This belief is another facet of the theory that municipal governments are by nature inclined to defend their private interests against the public.

21. See notes 163-64 and accompanying text *infra*.

22. See generally 6 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.03 (3d ed. 1968) [hereinafter cited as MCQUILLIN].

23. *Id.* § 24.05.

24. *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504 (1847). Of course, private parties may be authorized to act as private attorneys general to enforce ordinances enacted pursuant to the police power. See, e.g., ILL. REV. STAT. ch. 24, § 11-13-15 (Smith-Hurd Supp. 1976).

25. See DILLON, *supra* note 13, at § 109. The distinction developed primarily to govern the question of municipal tort liability but has expanded into other contexts. See Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 21 VA. L. REV. 910, 923-38 (1936); cf. text at notes 93-98 *infra*.

26. See generally Platt, *An Odd Couple: The Criminal Sanction and the Municipal Ordinance*, 7 WILLAMETTE L.J. 43 (1971).

background, it is not surprising to find that courts have tended to view municipalities as likely to act to protect private interests and to act in a parochial manner.

Although a wide variety of "special governments" are involved in these cases, the most common²⁷ are the comparatively new class of governmental units called special districts and authorities.²⁸ No universal definition of special district is accepted, but it is generally agreed they are public entities that: (1) are distinct from divisions or agencies of the state government;²⁹ (2) have a corporate structure and powers in addition to any governmental powers they may be delegated; and (3) are organized to perform one or a limited number of governmental functions which are not being or cannot be performed by existing local governments.³⁰

Five reasons have been advanced for the creation of special districts.³¹ First, existing local governments may lack the legal authority to perform a needed function. Second, local governments' power to levy taxes or incur debt may be limited. Third, the governmental function may be performed most efficiently over a territory that does not coincide with any existing local government. Fourth, specialized agencies may be expected to have greater expertise and professionalism than ordinary local governments. And fifth, the performance of the function is believed to require independence from local government politics. These reasons as a whole are not flattering to municipal governments. Although some reasons for creating special districts reflect no discredit on municipalities,³² courts may tend to view functions entrusted to

27. Existing geographical subdivisions of the state, such as counties and townships, may be authorized to perform special governmental functions within the boundaries of the cities they contain for the same reasons special districts are created in areas containing existing municipalities. See Note, *The Urban County*, *supra* note 12, at 529-33. In addition, municipal corporations, particularly central cities in metropolitan areas, may be authorized to perform specific functions extraterritorially on behalf of the entire region. See note 103 *infra*. In such cases, the county or city is functionally a special government and will be treated as such in this discussion.

28. H. CAPE, L. GRAVES & B. MICHAELS, *GOVERNMENT BY SPECIAL DISTRICTS* 2 (1969).

29. Independent school districts are sometimes considered agencies of the state because constitutional provisions made education a state responsibility and school districts are subject to the authority of a state education agency. See note 42 *infra*. In structure and purpose, however, they resemble special districts, and are considered by most writers to be a special class of special districts. See J. BOLLENS, *SPECIAL DISTRICT GOVERNMENTS IN THE UNITED STATES 179-227* (1959) [hereinafter cited as BOLLENS].

30. BOLLENS, *supra* note 29, at 1-2.

31. *Id.* at 6-15.

32. *Id.* at 11-13. For example, the large number of special districts in Illinois results primarily from the fact that until 1970 there was a constitutional limit on the amount of debt a local government could incur. ILL. CONST. OF 1870, art. 9, § 12 (superseded 1970).

special districts as those that municipalities are not competent to perform or that involve interests which transcend municipal boundaries and interests. This impression can lead, and has led, courts already accustomed to thinking of municipal governments as protectors of private, parochial interests to favor the interests of special districts. In addition, when the state expressly provides for a governmental unit to perform a specialized function, the courts tend to hold that the authority of other, unspecialized governments is preempted³³ to the extent it could interfere with the specialized government's performance of its primary function.

The other type of special government involved in these cases is the state agency. We will treat such agencies as functionally equivalent to special districts to the extent that they operate independently under a statutory delegation of authority to perform a specialized function within the jurisdiction of municipalities. It is apparent, however, that the tendency of the courts to view such agencies as representing a higher public interest than municipalities and as preempting the authority of all other governments over matters within their field of specialization is even stronger than in the case of special districts.

The single-function specialization of special governments has drawbacks as well as advantages that have not escaped criticism. Special districts fragment governmental authority and make coordination of policy difficult. As Dean Fordham has noted:

[T]he choice of the ad hoc agency to meet a particular situation is quite pragmatic, considered in a limited context. The trouble is that the over-all, long-range perspective, which relates special functions to the general interest and the broad objectives of government, is slighted.³⁴

This aspect of special governments, however, has not influenced the majority of courts in these cases. We shall return to it in arguing for a greater judicial recognition of the capacity of municipalities to perform the balancing function which is at stake in all of these cases.

33. The doctrine of "implied preemption," or "occupation of the field," varies from state to state but in general holds that when the legislature enacts legislation intended to comprehensively regulate an activity, municipal actions are precluded even where there is no actual conflict. See Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 744-47 (1959). The doctrine ordinarily applies to statutes or directives issued by administrative agencies having the force of law. It can be applied in any case involving a governmental unit furthering a specific state policy. See notes 49, 125, 128-29, 133-35 and accompanying text *infra*; cf. *Chugach Elec. Ass'n v. City of Anchorage*, 476 P.2d 115, 122 (Alaska 1970).

34. FORDHAM, *supra* note 2, at 34; see also BOLLENS, *supra* note 29, at 253, 255.

II. TRADITIONAL JUDICIAL SOLUTIONS

Although courts facing these cases have developed a wide variety of legal doctrines, two general theories pervade the cases decided in favor of special governments. These two theories, in turn reflect the two considerations relevant to the determination of which government is better suited to balance the competing public interests.³⁵ The first theory, which we shall call the "sovereign immunity" theory, characterizes the municipality as a "private" entity and the special government as an agent of the state, whose activities are immune from interference by municipalities. Casting the conflict in terms of public versus private interests thus provides a mechanical resolution in favor of the superior interest. This simplistic conceptualization of a conflict between two governments, each representing a different aspect of the public interest, is primarily characteristic of earlier cases. The second, or "implied exemption," theory exempts special governments from compliance with municipal ordinances by construing the special government's authority to construct a facility to include a responsibility to protect all public interests affected by the facility, including those ordinarily protected by the municipality. Insofar as this theory attempts to allocate the balancing function to the government better suited to weigh the competing interests, it is a more rational approach than the sovereign immunity theory. However, the selection of the special government as the governmental unit better able to balance competing interests is difficult to justify. Special governments are designed to deal with narrow, specialized problems and are ill-suited to consider adequately the many factors that go into the design of a modern municipal building code or land use plan. Upon examination, the reasons for assuming the special government to be better suited to balance the competing interests amount to nothing more than the same fear of municipal parochialism that underlies the sovereign immunity theory.

A minority of courts have held that the responsibility for designing building codes and land use plans that give due consideration to the public interest represented by special government facilities is properly a part of the municipal police power. These courts have laid a foundation

35. See text at notes 9-11 *supra*. These theories represent the authors' categorization of judicial approaches to these problems rather than doctrines expressly articulated by the courts. The theories are to some degree complementary and both may be present in the same case. See, e.g., *Hall v. City of Taft*, 47 Cal. 2d 177, 302 P.2d 574 (1956); *County of Los Angeles v. City of Los Angeles*, 212 Cal. App. 2d 160, 28 Cal. Rptr. 32 (Dist. Ct. App. 1963); note 60 *infra*.

for a theory of judicial resolution of these conflicts well suited to the protection of all competing public interests. We shall attempt to develop this theory more fully in Part III.

A. *The Application of Municipal Building Codes to Special Government Facilities*

The building code³⁶ cases are the most evenly divided between those favoring special governments and those favoring municipalities. The existence of judicial authority on both sides of the issue helps clarify the theories relied on by the courts. The earliest cases demonstrate the sovereign immunity approach, which can be traced back to the 1906 case of *Kentucky Institute for Education of the Blind v. City of Louisville*,³⁷ in which the court held that the institute need not comply with a city ordinance requiring all buildings of more than three stories to have external fire escapes. The court said: "[T]he state will not be presumed to have waived its right to regulate its own property, by ceding to the city the right generally to pass ordinances of a police nature"³⁸

Sixteen years later, another state court³⁹ more fully articulated the assumptions behind this approach:

Statutes in derogation of sovereignty, such as those conferring powers on corporations, are to be strictly construed in favor of the state, and are not permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect such object is clearly expressed⁴⁰

Two points should be noted about the sovereign immunity approach as expressed by these courts. First, the courts characterized the conflict as an attempt by the municipality to obstruct or interfere with the special government in the performance of its primary function, although there was no indication that the ordinances in question would have such an effect. Second, the courts drew on principles of corporation law. For

36. "Building codes" for the purpose of this discussion include sanitation and fire safety ordinances, and all other ordinances that regulate the manner of construction or maintenance of a facility rather than its location, even though such regulations may be part of a zoning ordinance. *See, e.g., School Dist. v. Zoning Bd. of Adjustment*, 417 Pa. 277, 207 A.2d 864 (1965) (off-street parking requirements); *City of Charleston v. Southeast Constr. Co.*, 134 W. Va. 666, 64 S.E.2d 676 (1950) (building height and set-back regulations).

37. 123 Ky. 767, 97 S.W. 402 (1906).

38. *Id.* at 774, 97 S.W. at 404.

39. *New Jersey Interstate Bridge & Tunnel Comm'n v. Jersey City*, 93 N.J. Eq. 550, 118 A. 264 (Ch. 1922).

40. *Id.* at 553, 118 A. at 266; *see also Springfield Twp. v. New Jersey State Highway Dep't*, 91 N.J. Super. 567, 221 A.2d 766 (L. Div. 1966).

example, the Kentucky court referred to the police power as "ceded" to the city rather than delegated. This characterization is clearly derived from the historical conception of municipal corporations as largely private entities.⁴¹ Special governments, on the other hand, are created by the legislature for the accomplishment of specific purposes and could easily be viewed as agents of the state.⁴² This characterization allowed the courts to draw a clear line between a state agent representing public interests and an essentially private party. By requiring specific legislative authorization before a municipal corporation could "interfere" with a special government,⁴³ the courts had at least found a test that was easy to apply.

The problem with the sovereign immunity test is that it can just as easily be reversed. The powers a special government wields in constructing a facility closely resemble those of a private corporation. Moreover, it is just as easy to conceptualize these cases as attempts by a special government to interfere with a municipality's exercise of the police power as it is to view them as a municipality interfering with the special government. Thus some courts have viewed special governments as "quasi-corporations"⁴⁴ and their authority as "no different as

41. See text at notes 17-21 *supra*.

42. In general, the mere fact that the legislature had created the special government for the accomplishment of some specific purpose was sufficient to characterize it as an agent of the state. Since many of these cases involved school districts, the courts could rely on constitutional provisions making education a responsibility of the state. See, e.g., *City of Bloomfield v. Davis County Community School Dist.*, 254 Iowa 900, 904, 119 N.W.2d 909, 912 (1963); *Salt Lake City v. Board of Educ.*, 52 Utah 540, 546, 175 P. 654, 656 (1918). Other factors invoked by the courts included direct state funding of the special government and appointment of its governing board, *Kentucky Inst. v. City of Louisville*, 123 Ky. 767, 772, 97 S.W. 402, 403 (1906), and the fact that the facility in question was part of a statewide system of such facilities. *Board of Regents v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399 (1960); *New Jersey Interstate Bridge & Tunnel Comm'n v. Jersey City*, 93 N.J. Eq. 550, 118 A. 264 (Ch. 1922). But see *Parking Auth. v. City of Trenton*, 40 N.J. 251, 256, 191 A.2d 289, 291 (1963). Compare with these cases the courts' search for characteristics identifying state agents in zoning cases. See text at notes 92-110 *infra*.

43. These courts focused entirely on the enabling acts of the municipalities, regarding them as "statutes in derogation of sovereignty." See text at note 40 *supra*; *City of Atlanta v. State*, 181 Ga. 346, 348, 182 S.E. 184, 185 (1935); *City of Milwaukee v. McGregor*, 140 Wis. 35, 37, 121 N.W. 642, 642-43 (1909). Consequently, language in enabling acts for special governments or in contracts signed by such governments to the effect that facilities were to be constructed in accordance with valid local ordinances was dismissed as inapplicable since ordinances are not valid insofar as they purport to bind the state. *Kaveny v. Board of Comm'rs*, 69 N.J. Super. 94, 97, 173 A.2d 536, 537-38 (L. Div. 1961); *City of Charleston v. Southeast Constr. Co.*, 134 W. Va. 666, 676-77, 64 S.E.2d 676, 681-82 (1950); cf. *Jewish Consumptives' Relief Soc'y v. Town of Woodbury*, 230 App. Div. 228, 238, 243 N.Y.S. 686, 697 (1930), *aff'd*, 256 N.Y. 619, 177 N.E. 165 (1931). *Contra*, *Watson Constr. Co. v. City of St. Paul*, 260 Minn. 166, 109 N.W. 2d 332 (1961).

44. *Pasadena School Dist. v. City of Pasadena*, 166 Cal. 7, 11, 134 P. 985, 986 (1913).

a power from what is possessed . . . by private corporations, as far as . . . the right to erect structures . . . is concerned."⁴⁵ The municipal police power, on the other hand, was "a high governmental prerogative . . . of the State, which is exercised by the . . . agent of the State."⁴⁶

These attempts to force intergovernmental conflicts into the mold of public interest versus private interest,⁴⁷ however, were short-lived. The courts apparently soon realized that a conflict between two governments each charged with protecting the public interest could not be resolved by labeling one of their activities "corporate" or "private." Courts then began to develop the implied exemption approach, which focused on the delegation of authority to the special government. Such governments are customarily granted all powers necessary and convenient for the accomplishment of their tasks. To some courts, this authority included the power to set construction standards ordinarily embraced by the municipal police power.⁴⁸ Thus, if a city had the authority to set building standards for all buildings, but a school district was authorized to supervise construction of school buildings, the courts held that the school district's authority created an exception to the city's by applying the canon that specific statutes create exceptions to general statutes.⁴⁹ Some courts advanced policy justifications for this construction. They argued that since special governments, like any governmental agency, have a duty to conform their activities to the public interest, supervision by municipalities was unnecessary,⁵⁰ and that the public

45. *Id.*

46. *Town Comm'rs v. County Comm'rs*, 199 Md. 653, 658, 87 A.2d 599, 602 (1952).

47. *See* text at notes 9-11 *supra*.

48. The building code of Jersey City was of course enacted subject to the power of the state to modify or annul it at any time. And the state, in the act creating the bridge and tunnel commission and clothing it . . . with all the powers appropriate and necessary for the performance of such duties, without any limitation as to municipal control, overrode that code

New Jersey Interstate Bridge & Tunnel Comm'n v. Jersey City, 93 N.J. Eq. 550, 553, 118 A. 264, 265-66 (Ch. 1922). *See also* *City of Milwaukee v. McGregor*, 140 Wis. 35, 37, 121 N.W. 642 (1909). Both these cases also invoked the sovereign immunity theory. *See* notes 42-43 *supra*.

49. *Board of Educ. v. City of West Chicago*, 55 Ill. App. 2d 401, 404, 205 N.E.2d 63, 65 (1965). This approach is closely analogous to the doctrine of implied preemption. *See* note 33 *supra*. Occasionally these courts employed preemption directly by finding a conflict between the special government's enabling act and the building code ordinance. *See, e.g., City of Charleston v. Southeast Constr. Co.*, 134 W. Va. 666, 676-77, 64 S.E.2d 676, 681-82 (1950). But the preemption doctrine figures most strongly in cases involving the regulatory power of a state education agency. *See* text at notes 58-62 *infra*.

50. The court in *Board of Regents v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399 (1960), said:

There is nothing to suggest that the Board will supervise the University's construction

interest represented by special governments' facilities might be unduly restricted by ordinances designed to apply to private activities.⁵¹ In other words, the courts considered the special government better suited than the municipality to perform the balancing function.

This approach is troublesome in that it confuses the function of self-regulation, which is performed by any entity that constructs facilities and looks to its internal interests, with the uniform regulation designed to protect external interests through the police power.⁵² The reasoning of the courts seems to be either that the managers of special governments are universally more competent to protect the external interests of the community or that the nebulous duty to protect the public interest imposed on special governments is a sufficient check on actions harmful to that interest.

Neither argument seems compelling, and in fact many courts have interpreted virtually identical special government enabling acts not to imply an exception to municipalities' power to set building standards. To these courts, the public interest required that municipalities not be divested of their police power function of setting construction standards for buildings within their territory unless there was an adequate substitute for that function. The earliest cases required that the special government itself be delegated the police power, apparently on the theory that the police power carried with it the responsibility to see that all activities within its scope, including those of the government delegated the power, conformed with the public interest.⁵³ It is apparent, however,

program with less concern for the public welfare than would the City It is therefore unnecessary for us to consider or enumerate the judicial and other remedies available to insure that the Board, or any other state or municipal agency, performs its duties in a manner consistent with the welfare of the people of this State.

Id. at 312, 356 P.2d at 407. An analogous question has been litigated in zoning cases. See notes 91, 145-47, 168-69 and accompanying text *infra*.

51. In *Salt Lake City v. Board of Educ.*, 53 Utah 540, 549-52, 175 P. 654, 657-58 (1918), the court in holding that the school district need not comply with the city's fire prevention code took judicial notice of the fact that temporary school buildings are commonly located on large lots so the danger of fire spreading is slight.

52. See note 9 *supra*.

53. In *County of Cook v. City of Chicago*, 311 Ill. 234, 142 N.E. 512 (1924), the court required the county to comply with the city's building code in constructing a courthouse. The court said: "There is no delegation of police power to . . . counties . . . and it would seem clear, therefore, that by delegations of the police power to cities . . . the legislature intended that the exercise of that power over the property and inhabitants within the limits of the city . . . should be by that municipality" *Id.* at 242, 142 N.E. at 514. The court disposed of the county's sovereign immunity argument by holding that "the county is [not] a part of the State in the exercise of the police power." *Id.* at 247, 142 N.E. at 516. Since the county was clearly not asserting the right to exercise the police power in the ordinary sense, the court's reasoning must have been that for the county to set its own standards would in effect be an exercise of the police power over itself. Thus the court had

that delegation of the police power is neither the logical nor the customary way for a legislature to impose on a special government the duty to conduct its affairs in accordance with the public welfare.⁵⁴ The courts accordingly began to inquire into whether the special government had been specifically charged with responsibility for overseeing activities that would normally be within the cognizance of the municipal police power. In the leading case of *Kansas City v. School District*,⁵⁵ the Supreme Court of Missouri held that the city was authorized to inspect the heating plant owned by the school district. The court said:

The State . . . can exercise its powers or delegate and apportion them to and between its agencies as it desires. . . . Since the State itself has taken no precautionary measures, and City has been vested with the regulatory and supervisory responsibilities of the exercise of the police power, and School District (having no police power) has not been expressly and specifically given full duty to attend to these responsibilities, we think the Legislature is content in the thought [that] the measures to be taken are within the police power vested in City.⁵⁶

The courts that applied this analysis placed excessive reliance on the terms of the legislative delegation of authority to special governments to construct facilities and found legislative intent where there almost certainly was none.⁵⁷ Nevertheless, these courts identified—and reject-

clearly identified the function at stake, although its manner of stating the conflict was clumsy. Cf. *Cedar Rapids Community School Dist. v. City of Cedar Rapids*, 252 Iowa 205, 211-12, 106 N.W.2d 655, 659 (1960); *Town Comm'rs, v. County Comm'rs*, 199 Md. 653, 87 A.2d 599 (1952); *Kansas City v. Fee*, 174 Mo. App. 501, 504, 160 S.W. 537, 538 (1916).

54. See *Salt Lake City v. Board of Educ.*, 52 Utah 540, 547, 75 P. 654, 656 (1918), in which the court, in holding the board immune, pointed out that a school district had no need for the police power in order to regulate its affairs. The lack of police power in special governments is still invoked in some modern cases to emphasize the limited nature of the function they are authorized to perform. See *Village of Blaine v. Independent School Dist. No. 12*, 272 Minn. 343, 354-56, 138 N.W.2d 32, 41 (1965); *Community Fire Protection Dist. v. Board of Educ.*, 315 S.W.2d 873, 877 (Mo. App. 1958).

55. 356 Mo. 364, 201 S.W.2d 930 (1947).

56. *Id.* at 368, 370, 201 S.W.2d at 932, 934. Although the court made reference to the school district's lack of the police power, it relied primarily on construction of the district's enabling act. In a series of cases dealing with city power over school districts beginning with *Kansas City v. Fee*, 174 Mo. App. 501, 160 S.W. 537 (1913), the Missouri courts have required specific delegations of supervisory authority in school enabling statutes to authorize the schools to operate without municipal supervision. Compare *Board of Educ. v. City of St. Louis*, 267 Mo. 356, 184 S.W. 975 (1916), with *Smith v. Board of Educ.*, 359 Mo. 264, 221 S.W.2d 203 (1949).

57. The word "supervise" is not a talisman, and legislatures may authorize a special government to "supervise" the construction or maintenance of a facility without meaning any more than that the government should see that the job gets done, not that it is authorized to substitute its own judgment for the expertise of municipalities in setting standards that will protect the external interests of the community. Thus some courts have

ed—the basic misconception underlying the implied exemption theory. They refused to infer from the mere fact that the legislature had created a special government that it intended that government to assume the responsibility of performing governmental functions for which it was unlikely to have any expertise or concern. Rather these courts assumed that the responsibility of establishing construction standards that would take into account the needs of governmental facilities would remain with the municipalities, unless there was some indication that the special government was capable of exercising that function. This theory has gained increasing acceptance in recent cases involving school districts subject to the authority of a state education agency.

The courts have held that municipal governments retain the authority to regulate the construction of school buildings unless the state has provided for an agency other than the school district itself to set construction standards. In the landmark case *Hall v. City of Taft*⁵⁸ the California supreme court overturned an earlier decision holding a school district subject to a municipal building code⁵⁹ partly on the ground that the legislature had in the interim enacted a comprehensive system for regulating school construction,⁶⁰ preempting the power of local governments.⁶¹ Courts following *Hall* have pointed out that a state educational

held that the fact that a special government is authorized to supervise a facility is insufficient to divest municipalities of their police power. *Compare Board of Health v. Charles Simkins & Sons*, 10 N.J. Super. 301, 76 A.2d 302 (Union County Ct. 1936), *with In re Means*, 14 Cal. 2d 254, 93 P.2d 105 (1939). *See also Southwest Del. County Municipal Auth. v. Township of Aston*, 413 Pa. 526, 198 A.2d 867 (1964) (error to consider evidence of adequacy of school's sewage facilities in suit to require it to hook up to municipal sewer line).

58. 47 Cal. 2d 177, 302 P.2d 574 (1956).

59. *Pasadena School Dist. v. City of Pasadena*, 166 Cal. 7, 134 P. 985 (1913).

60. The court also overruled *Pasadena* on a sovereign immunity theory, holding that education was a state rather than local function and therefore beyond the scope of the city's home rule police power. 47 Cal. 2d at 183, 302 P.2d at 578. *See text at notes 154-65 infra.* The California courts have interpreted *Hall* as establishing two distinct tests for special government immunity: sovereign immunity and preemption. *City of Los Angeles v. County of Los Angeles*, 212 Cal. App. 2d 160, 28 Cal. Rptr. 32 (Dist. Ct. App. 1963). Other courts have usually read *Hall* as a straight preemption case, however. *See note 71 infra.*

61. The California courts have developed an extensive implied preemption doctrine in cases involving conflicts between ordinances and statutes generally. *See Comment, The California Preemption Doctrine: Expanding the Regulatory Power of Local Governments*, 8 U. SAN FRANCISCO L. REV. 728, 730-37 (1974). In a recent case, the court of appeals limited the scope of *Hall* by holding that a circus leasing land from a state university was not immune from municipal regulation. *Board of Trustees v. City of Los Angeles*, 49 Cal. App. 3d 45, 122 Cal. Rptr. 361 (Ct. App. 1975). The court noted that the state's authorization of the creation of a campus security force was not the "comprehensive" delegation of the police power needed to oust the city. *Id.* at 50-51, 122 Cal. Rptr. at 364-65. *See note 53*

agency presumably has greater expertise in matters related to school buildings than municipal governments and are less likely to subordinate educational interests to compliance with an overly restrictive building code. As one court noted:

The State Board of Education is a body well adapted after study to fix the standards which should be followed. It is noted that the standards are to be fixed by an arm of the executive branch of the state government, not by the local board. The State Board has an interest in fixing the highest standard consistent with realistic costs.⁶²

Other courts, while agreeing that a state education agency could replace the municipal police power in the regulation of school construction standards, have looked more closely at whether the agency actually provided an adequate substitute.⁶³ In *Port Arthur Independent School District v. City of Groves*,⁶⁴ the school district had statutory authority to "superintend the construction of school buildings and to maintain and control the . . . schools . . . to the exclusion of every other authority, except . . . the State Superintendent of Public Instruction and the State Board of Education . . ." ⁶⁵ Nonetheless, the Texas supreme court held the city's building code applicable, using a three step analysis. First, the court drew a distinction between the internal and external interests represented by a school building. The court pointed out that the school district's exclusive authority applied only to internal matters of educational policy and that a building code designed to regulate the external effects of a school building did not "usurp the authority of the . . . district in the realm of educating . . . any more than it usurps the

and accompanying text *supra*. *Hall* itself has been partially overruled by CAL. GOV'T CODE §§ 53091-95 (Deering 1974), which permit a school district to vote to disregard a municipal ordinance. See Comment, *supra*, at 743-47. This system at least provides a mechanism for school districts to consider municipal interests and a means for judicial review. See text at notes 168-69 *infra*.

62. *Kaveny v. Board of Comm'rs*, 69 N.J. Super. 94, 102, 173 A.2d 536, 541 (L. Div. 1961). Compare *Board of Educ. v. City of West Chicago*, 55 Ill. App. 2d 401, 205 N.E.2d 63 (1965), with *City of Chicago v. Board of Educ.*, 246 Ill. App. 405 (1927).

63. *Lavender v. City of Rogers*, 232 Ark. 673, 339 S.W.2d 598 (1960); *Corder v. City of Milford*, 57 Del. 150, 196 A.2d 406 (1963); *Cedar Rapids Community School Dist. v. City of Cedar Rapids*, 252 Iowa 205, 106 N.W.2d 655 (1960); *Port Arthur Independent School Dist. v. City of Groves*, 376 S.W.2d 330 (Tex. 1964). These cases make it clear that *Hall* does not stand for the proposition that a school district is exempted from municipal regulation simply because it is subject to the jurisdiction of a state agency. To take an extreme example, a state agency created to issue revenue bonds to finance the construction of schools would be unlikely to have greater expertise in construction standards than a municipality. See notes 71, 73 *infra*.

64. 376 S.W.2d 330 (Tex. 1964).

65. *Id.* at 331.

control . . . of private corporations over their property and affairs”⁶⁶ Second, the court found that the state board, which could theoretically perform the function of balancing the public interest in safe buildings against the public interest in an efficiently run school system, had been given no specific authority to promulgate building standards and had not done so.⁶⁷ Finally, the court set forth a rationale for preferring the city to the school district for the performance of the balancing function. It emphasized the primary role of municipalities in the state’s building regulation scheme and the likelihood that school districts, lacking expertise in the area of building codes, would be “inconsiderate of the city’s peculiar problems of health and safety,” leaving an effective “hiatus in regulation necessary for the health and safety of the community.”⁶⁸

The courts adopting the *Port Arthur* approach have emphasized the fact that school districts, which are authorized to perform only educational functions,⁶⁹ are poorly suited to weigh the public interest in an efficient education system against the public interest in adequate construction standards.⁷⁰ In considering whether a state education agency, rather than the municipality, is the appropriate agency to strike the balance, the courts have considered such factors as whether the agency had actually promulgated standards⁷¹ and whether in other areas the

66. *Id.* at 334.

67. *Id.* at 334-35.

68. *Id.*

69. The *Port Arthur* court’s statement that the city’s building code did not invade “the realm of educating,” 376 S.W.2d at 334, has been developed by other courts into a distinction between “educational” and “building code” matters, with authority over only the former being vested in school districts. *See, e.g., Cedar Rapids Community School Dist. v. City of Cedar Rapids*, 252 Iowa 205, 212, 106 N.W.2d 655, 659 (1960). This distinction is parallel to the distinction between internal and external interests. *See* notes 9-11 and accompanying text *supra*.

70. In *School Dist. v. Zoning Bd. of Adjustment*, 417 Pa. 277, 287, 207 A.2d 864, 870 (1965), the court adopted the *Port Arthur* court’s “hiatus in regulation” approach. The court noted that the construction plans of all school districts except first class districts, which are located in major cities, were specifically required to have state approval. *Id.* at 285, 207 A.2d at 868. The court reasoned that the legislature recognized the complexity of regulatory problems in the cities that were served by first class districts and left them to the expertise of such cities. In a later case, the court strongly hinted that this holding would be limited to first class districts. *Pemberton Appeal*, 434 Pa. 249, 253-54, 252 A.2d 597, 599-600 (1969).

71. In all of these cases, the courts have distinguished *Hall* on the grounds that their state education agency had not occupied the field of school building regulation as in California. *See* notes 58-62 and accompanying text *supra*. In *Corder v. City of Milford*, 57 Del. 150, 157, 196 A.2d 406, 409 (1963), the court stated that while the state board had authority to regulate school construction standards, until it did so comprehensively the

schools had been subject to local regulation, since this would indicate a legislative intent that the authority of the state agency was not all-inclusive.⁷² Assuming that the courts following *Hall* are correct in considering building standards set by state education agencies to be adequate substitutes for municipal building codes,⁷³ the common features of the *Hall* and *Port Arthur* approaches indicate a general consensus of authority that municipal governments are the appropriate entities to balance the public interests involved in building code cases unless the state designates another agency that can be expected to consider both competing public interests.

The school district cases, however, are the easy cases. The courts, recognizing that special governments are in general poorly equipped to consider the public interests protected by building codes, can leave the establishment of construction standards to the expertise of municipalities with confidence that the standards adopted will not seriously hamper special governments in their activities.⁷⁴ Moreover, *Hall*

city's building code would be given effect. *Cf. County of Union v. Benesch*, 98 N.J. Super. 167, 236 A.2d 409 (L. Div. 1967), *rev'd in part on other grounds*, 103 N.J. Super. 119, 246 A.2d 728 (App. Div. 1968).

72. *Compare Lavender v. City of Rogers*, 232 Ark. 673, 339 S.W.2d 598 (1960), with *County of Los Angeles v. City of Los Angeles*, 212 Cal. App. 2d 160, 28 Cal. Rptr. 32 (Dist. Ct. App. 1963).

73. The fact that a state agency is authorized to set construction standards does not mean it will do so with full consideration for municipal interests, particularly when it is a specialized agency concerned primarily with furthering the development of the state school system. In a sense, the *Hall-Port Arthur* approach to these cases merely transforms them into conflicts between municipalities and state regulatory agencies. *See text at notes 125-47 infra*. In the case of school construction standards, the interest of the state education agency in safe school buildings is probably close enough to that of the municipality that no very serious threat to the public interest will result. *See note 74 infra*. However, in cases involving a sharp dispute between school district and a municipality, the *Hall* approach would leave the function of balancing the public interests to an agency that cares very little about the municipality's interest. For what appears to be a fairly clear case of a school district abusing its *Hall* immunity although its action was subject to state agency approval *see Town of Atherton v. Superior Court*, 159 Cal. App. 2d 417, 324 P.2d 328 (Dist. Ct. App. 1958). *See note 85 infra*.

74. *See School Dist. v. Zoning Bd. of Appeals*, 417 Pa. 277, 284, 207 A.2d 864, 868 (1969), in which the court specified that a municipal ordinance which "assumes the proportions of a financial prohibition" would not be permitted. Similar cases sometimes appear to be more concerned with the financial aspects of building regulation than with the standards set. *See County of Union v. Benesch*, 98 N.J. Super. 167, 236 A.2d 409 (L. Div. 1967), *rev'd in part on other grounds*, 103 N.J. Super. 119, 246 A.2d 728 (App. Div. 1968); *Kaveny v. Board of Comm'rs*, 69 N.J. Super. 94, 173 A.2d 536 (L. Div. 1961). Although some early sovereign immunity cases held that the payment of inspection fees or of money for municipal-ordered improvements would be a misuse of appropriated funds or a tax on the government, *see Kentucky Inst. v. City of Louisville*, 123 Ky. 767, 773, 97 S.W. 402, 403 (1906), this aspect of the conflict does not appear to have had much impact on the later

and its progeny stand as reminders to the courts deciding school district cases that a legislature dissatisfied with the balance struck by municipalities can always delegate the responsibility to an existing state agency. Thus the courts do not need to face the more difficult questions raised by a conflict that may be so severe as to threaten the special government's effective performance of its primary function. The next group of cases presents such conflicts.

B. *The Application of Municipal Zoning Ordinances to Disruptive Special Government Land Uses*

The basic question raised by the zoning cases is analogous to that raised by the building code cases examined in the preceding section: whether the special government's authority to acquire land and construct facilities or the municipal government's police power⁷⁵ embraces the function of weighing the public interest in the operation of a facility at a particular location against the interest of protecting the community against damaging land uses and promoting the orderly development of the community. Although the courts often invoke the same general doctrines in zoning cases as in building code cases,⁷⁶ the unique factors involved in zoning cases have resulted in the development of a distinct body of case law,⁷⁷ virtually all of it unfavorable to municipal governments. An examination of these factors in terms of the considerations relevant to the allocation of the interest-balancing function will provide some insight into the policy assumptions underlying the decisions.

development of the case law, and courts holding that a municipality could regulate a special government facility usually also allow it to charge an inspection or permit fee. *See Kansas City v. School Dist.*, 356 Mo. 364, 370, 201 S.W.2d 930, 934 (1947). One writer has suggested that the willingness of cities to waive inspection fees in return for compliance with building codes is a major source of out-of-court compromises in this area. Kneier, *The Use of the Police Power by Local Governments and Some Problems of Intergovernmental Relations*, 8 J. PUB. LAW 109, 111 (1959); cf. *City of Charleston v. Board of Educ.*, ___ W. Va. ___, 209 S.E.2d 55 (1974).

75. Zoning has been recognized as a legitimate use of the police power since the landmark Supreme Court case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

76. *Compare Town of Bloomfield v. New Jersey Highway Auth.*, 18 N.J. 237, 113 A.2d 658 (1955), with *New Jersey Interstate Bridge & Tunnel Comm'n v. Jersey City*, 93 N.J. Eq. 550, 118 A. 264 (Ch. 1922).

77. In general, courts have not explicitly recognized that different doctrines govern building code and zoning cases, but have been more inclined to find in favor of special governments in the latter. *But see School Dist. v. Zoning Bd. of Adjustment*, 417 Pa. 277, 207 A.2d 864 (1965), in which the court affirmed the power of the city to impose off-street parking requirements on the school district but expressed doubts as to whether the city could zone out school from an area altogether. *Id.* at 289-90, 207 A.2d at 871. The court subsequently held that schools could not be zoned out. *Pemberton Appeal*, 434 Pa. 249, 252 A.2d 597 (1969).

The most important characteristic of zoning cases is that competing public interests involved are much stronger, and much harder to reconcile, than those in building code cases. While in the building code cases both governments were basically interested in the safe construction and maintenance of facilities and neither had standards likely to cause substantial harm to the other,⁷⁸ zoning cases involve conflicts over the location of facilities that are difficult to locate anywhere and impossible to locate without causing considerable damage to residents of whatever area is chosen as the site. The facilities most commonly involved⁷⁹ are airports,⁸⁰ garbage and sewage treatment plants,⁸¹ prisons,⁸² highways⁸³ and water towers.⁸⁴ A special government attempting to establish such a facility may decide that the only feasible site is in an area that the municipality considers totally unsuitable. The courts, forced to allocate the function of weighing the competing public interests involved without legislative or administrative⁸⁵ guidance, face the realization that

78. See note 74 *supra*.

79. School buildings, which dominated the building code cases, are largely absent from zoning cases, probably because they are generally not seen as offensive to residential neighborhoods. *But see* *Town of Atherton v. Superior Court*, 159 Cal. App. 2d 417, 324 P.2d 328 (Dist. Ct. App. 1958) (school to be used by residents of neighboring community); *City of Bloomfield v. Davis County Community School Dist.*, 254 Iowa 900, 119 N.W.2d 909 (1963) (school bus fuel tank); *Rutgers Univ. v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972) (dormitories); *Pemberton Appeal*, 434 Pa. 249, 252 A.2d 597 (1960); note 85 *infra*.

80. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940); *Village of Schiller Park v. City of Chicago*, 26 Ill. 2d 278, 186 N.E.2d 343 (1962); *In re Petition of City of Detroit*, 308 Mich. 480, 14 N.W.2d 140 (1944); *Aviation Serv., Inc. v. Board of Adjustment*, 20 N.J. 275, 119 A.2d 761 (1956); *Village of Blue Ash v. City of Cincinnati*, 173 Ohio St. 345, 182 N.E.2d 557 (1962).

81. *Jefferson County v. City of Birmingham*, 256 Ala. 436, 55 So. 2d 196 (1951); *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962); *City of Des Plaines v. Metropolitan Sanitary Dist.*, 48 Ill. 2d 11, 268 N.E.2d 428 (1971); *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960).

82. *City of Richmond v. Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958); *Green County v. City of Monroe*, 3 Wis. 2d 196, 87 N.W.2d 827 (1958).

83. *Village on the Hill, Inc. v. Massachusetts Turnpike Auth.*, 348 Mass. 107, 202 N.E.2d 602 (1964), *cert. denied*, 380 U.S. 955 (1966); *Town of Bloomfield v. New Jersey Highway Auth.*, 18 N.J. 237, 113 A.2d 658 (1955).

84. *Township of Washington v. Village of Ridgewood*, 26 N.J. 578, 141 A.2d 308 (1958); *Wallerstein v. Westchester Joint Water Works No. 1*, 166 Misc. 34, 1 N.Y.S.2d 111 (Sup. Ct. 1937); *Wilkesburg-Penn Joint Water Auth. v. Borough of Churchill*, 417 Pa. 93, 207 A.2d 905 (1965).

85. Zoning cases involving facilities which are subject to regulation by a state agency are usually decided by the *Hall* approach. See text at notes 58-62 *supra*. Besides cases involving state school boards, see *Town of Atherton v. Superior Court*, 159 Cal. App. 2d 417, 324 P.2d 328 (Dist. Ct. App. 1958); *Board of Educ. v. Houghton*, 181 Minn. 576, 233 N.W. 834 (1930); *Pemberton Appeal*, 434 Pa. 249, 252 A.2d 597 (1969), there are cases involving garbage disposal facilities subject to regulation by the state pollution agency, see

whichever government is assigned the balancing function may perform it in a way that will severely hamper the other in its activities. In such a situation, the traditional view of municipalities as protectors of private, parochial interests will often be persuasive.

Moreover, in zoning cases the courts are likely to look with suspicion on municipalities' motives. Since zoning has become widespread, the courts have grappled with the problem of preventing municipalities from shielding themselves from the problems and developmental needs of the surrounding area.⁸⁶ Most of the zoning cases concern facilities of importance to regions larger than the municipalities involved. In seeking to enforce its own land use policies against a facility of regional significance, especially when the effect is to totally exclude the facility from its territory,⁸⁷ the municipality is cast in a particularly parochial

O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972); Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N.W.2d 426 (1972). The dangers of delegating the interest balancing function in such cases to a state agency that may be concerned with only one set of public interests, see text at notes 125-47 *infra*, has led the American Law Institute to recommend the establishment of state- and regional-level land use planning boards to handle such situations. AMERICAN LAW INSTITUTE MODEL LAND DEVELOPMENT CODE §§ 7-201, -203, -301, -303 (Proposed Official Draft 1975); see Dunham, *Regional and State Land Policy in a Home Rule Setting*, in SOUTHWESTERN LEGAL FOUNDATION, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 83, 89-94 (1975). The states that have enacted legislation covering this problem, however, have delegated the authority to one of the two contending governments. See, e.g., CAL. GOV'T CODE §§ 53091-95 (Deering 1974); IND. CODE § 18-7-2-36 (Burns 1974); ORE. REV. STAT. § 227.230 (Supp. 1974).

86. In *Euclid* itself, see note 75 *supra*, the Court was faced with the argument that the village of Euclid was no more than a suburb of Cleveland and should not be permitted to shield itself from the urban problems which accompany the growth of a city. The Court recognized that situations might arise in which the municipal zoning power would yield to wide considerations of regional growth and needs, 272 U.S. at 391-97, but the courts have had great difficulty in finding workable solutions to the problem. See Dunham, *Regional and State Land Policy in a Home Rule Setting*, *supra* note 85, at 89. The classic discussion of regional factors in zoning is Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957). See also Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107, 115-21. A recent decision of the New Jersey supreme court, *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), illustrates the difficulties involved in a municipality's attempt to exclude certain facilities in a racially discriminatory manner. The United States Supreme Court's brief discussion of the rights of outlying communities in a metropolitan area in holding that the federal courts may compel a housing agency to establish scattered-site low income housing seems likely to add more fuel to the fire. *Hills v. Gautreaux*, 96 S. Ct. 1538 (1976). For municipalities seeking to establish the applicability of their zoning ordinances to special governments' facilities the message is clear: they must take into account the regional impact of such facilities and may not enjoy the benefits but avoid the burdens of regional facilities. See text at notes 169-76 *infra*.

87. See *In re* Petition of City of Detroit, 308 Mich. 480, 14 N.W.2d 140 (1944) (municipality's ordinance flatly excluded airports). A series of cases involving the power of central cities in a metropolitan area to establish airports outside their borders, discussed at notes 102-07 *infra*, has raised this problem when smaller municipalities have attempted to

light.⁸⁸ This becomes more pronounced if, in given cases, zoning laws are viewed as devices to protect the private interests of the influential landowners.⁸⁹ It is not surprising that the vast majority of the courts has considered the interests of the special government to be more important than those of the municipality and the special government to be more likely to make a decision that will better protect the public interest.

The influence of this factor has left the zoning conflicts case law in a state of arrested development. The sovereign immunity theory, on which the earliest cases were decided,⁹⁰ has retained more influence in zoning than in building code cases. More importantly, the courts recognizing the public interest in land use regulation have usually assigned the responsibility of balancing that interest against the other interests affected by construction of a special government's facility to the special government itself,⁹¹ in marked contrast to the most recent building code

exclude the airports. Many of the cases have raised the question of whether the central city could condemn land in neighboring municipalities at all, an issue which threatened to put more severe burdens on the establishment of the facilities in question than the requirement that they satisfy zoning ordinances.

88. "The context presents a classic case of conflict between a municipality acting parochially and a broader range governmental entity seeking to locate a concededly needed . . . facility to serve the entire county." *Township Comm. v. Board of Educ.*, 59 N.J. 143, 152, 279 A.2d 842, 847 (1971) (Hall, J., dissenting).

89. Thus, where the municipality and special government are able to agree on a site and variance or special use permit is granted and challenged by a private landowner, the courts invariably approve the chosen site, but may go further and hold the special government immune. *See State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960). *Contra*, *Heft v. Zoning Bd. of Appeals*, 31 Ill. 2d 266, 271, 201 N.E.2d 364, 367 (1964) (holding later characterized as dictum by the Illinois supreme court; *see* note 108 *infra*).

90. The zoning cases are on the whole of more recent vintage than the building code cases. They were decided after the period in which the sovereign immunity theory dominated those cases. *See* text at notes 37-46 *supra*. However, many of the early cases relied upon the building code sovereign immunity doctrine, citing cases from the *Kentucky Institute* era as authority. *See Green County v. City of Monroe*, 3 Wis. 2d 196, 200-01, 87 N.W.2d 827, 829-30 (1958).

91. That the special government is in fact required to consider the interests protected by land use regulations is implied by frequent dicta that judicial relief is available to landowners injured by unreasonable location decisions. *See City of Des Plaines v. Metropolitan Sanitary Dist.*, 48 Ill. 2d 11, 14, 268 N.E.2d 428, 430 (1971). The New Jersey courts have actually awarded such relief, holding that a special government must give consideration to a municipality's land use plan. *Township of Washington v. Village of Ridgewood*, 26 N.J. 578, 141 A.2d 308 (1958). *See also Long Branch Div. v. Cowan*, 119 N.J. Super. 306, 291 A.2d 381 (App. Div.), *cert. denied*, 62 N.J. 86, 299 A.2d 84 (1972); *Township of Scotch Plains v. Town of Westfield*, 83 N.J. Super. 323, 341, 199 A.2d 673, 682 (L. Div. 1964) (test is "whether a reasonable alternative, more in conformity with the general zoning plan, was arbitrarily rejected"). Ordinarily such relief would only be available if the facility would be enjoined as a nuisance, and the balancing of interests test makes it difficult to establish a governmental facility serving the public interest to be a nuisance. *But see Lauderdale County Bd. of Educ. v. Alexander*, 269 Ala. 79, 110 So. 2d

cases. If these courts had followed the lead of the building code cases and held that municipalities have a duty to develop land use plans that take into account all of an area's needs—including its need for disruptive special government facilities—they would be able to focus their attention on the problem of insuring that municipalities perform that duty properly. Instead, the courts have expended their energies in efforts to find a convincing rationale to justify their assignment of an important governmental function to governments that are plainly not well suited to perform it. A tangle of confusing and unrealistic doctrines, and the unanimous condemnation of the commentators,⁹² have been their only rewards.

The earliest judicial response to the zoning conflicts problem was to adopt the rule that a government is liable only for torts committed in the performance of proprietary, and not governmental, functions. The rule has been applied in private actions for property damage caused by a municipality's violation of its own zoning ordinances,⁹³ and these cases were interpreted to establish a general rule that governments performing governmental functions were exempt from compliance with zoning ordinances entirely.⁹⁴ Since the governmental-proprietary distinction was designed to apply to conflicts between a government and a private

911 (1959); Comment, *The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses*, 19 SYRACUSE L. REV. 698, 712 (1968).

92. See generally Kneier, *The Use of the Police Power by Local Governments and Some Problems of Intergovernmental Relations*, supra note 74; Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971); Note, *Municipal Power to Regulate Building Construction and Land Use by Other State Agencies*, 49 MINN. L. REV. 284 (1964); Comment, *The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses*, supra note 91; Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEXAS L. REV. 316 (1961); Comment, *Balancing Interests to Determine Governmental Exemption from Zoning Laws*, 1973 U. ILL. L.F. 125.

93. Although zoning ordinances that exempt the enacting government are generally considered permissible, see *City of Cincinnati v. Wegehof*, 119 Ohio St. 136, 162 N.E. 389 (1928), a person who acquires land in reliance on a zoning plan that does not exempt the government has a right to not have the value of his land damaged by proximity to a proprietary facility. *Baltis v. Village of Westchester*, 3 Ill. 2d 388, 121 N.E.2d 495 (1954). See also *Nichols Eng'r & Research Corp. v. State ex rel. Knight*, 59 So. 2d 874 (Fla. 1952); *Hunke v. Foote*, 84 Idaho 391, 373 P.2d 322 (1962); *Taber v. City of Benton Harbor*, 280 Mich. 522, 274 N.W. 324 (1937); *Nehrbas v. Incorporated Village*, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957); *O'Brien v. Town of Greenburgh*, 239 App. Div. 555, 268 N.Y.S. 173 (1933), *aff'd mem.*, 266 N.Y. 582, 195 N.E. 210 (1935); *McKinney v. City of High Point*, 237 N.C. 66, 74 S.E.2d 440 (1953).

94. See, e.g., *Lauderdale County Bd. of Educ. v. Alexander*, 269 Ala. 79, 110 So. 2d 911 (1959); *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962); *City of Treasure Island v. Decker*, 174 So. 2d 756 (Fla. Dist. Ct. App. 1965); *City of Bloomfield v. Davis County Community School Dist.*, 254 Iowa 900, 119 N.W.2d 909 (1963); *Wallerstein v. Westchester Joint Water Works No. 1*, 166 Misc. 34, 1 N.Y.S.2d 111 (Sup. Ct. 1937).

citizen, its use in these intergovernmental conflicts clearly implies that the courts regarded the interests represented by municipalities as analogous to those of private citizens. However, it appears from the opinions that the courts were not overly concerned with the implications of this theory but merely seized on the rule as a convenient means for freeing special governments from local restrictions. The distinction proved an awkward tool for this purpose, however, as it had developed in its original torts context largely to limit, rather than expand, governmental immunity. The courts were forced to give "governmental" an expansive scope by defining it to include any function performed for the general public welfare⁹⁵ and to distinguish precedents that held functions to be proprietary if they might have been performed by a private corporation.⁹⁶ This problem, along with a general dissatisfaction with the entire governmental-proprietary concept,⁹⁷ has led to the virtual abandonment of this approach.⁹⁸

A second approach taken by several courts was adoption of the theory that a special government exercising its eminent domain power is exempt from zoning ordinances.⁹⁹ Some courts asserted that since eminent domain is an inherent power of the state and superior to private property interests, a special government wielding such power need not

95. Only one case has been located denying immunity in an intergovernmental conflict situation squarely on the ground that the function involved was proprietary. *City of Treasure Island v. Decker*, 174 So. 2d 756 (Fla. Dist. Ct. App. 1965). *But cf.* *Jefferson County v. City of Birmingham*, 256 Ala. 436, 55 So. 2d 196 (1951) (discussed in note 114 *infra*).

96. This was particularly troublesome in cases involving special governments created to provide water and sewage services on a regional level, since such activities had often been held proprietary for the purposes of tort immunity. The courts were forced to distinguish between "governmental" for purposes of torts and "governmental" for purposes of zoning, which rendered the test useless except as it provided a convenient label for functions too important to be impeded by zoning. The New York supreme court's opinion in *Wallerstein v. Westchester Joint Water Works No. 1*, 166 Misc. 34, 1 N.Y.S.2d 111 (Sup. Ct. 1937), in which it painstakingly plodded through a morass of precedent dealing with the status of municipal water works in various legal contexts, illustrates the futility of trying to resolve these cases by the application of labels.

97. See Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936).

98. Three states have explicitly rejected the distinction in intergovernmental conflicts situations: Minnesota (*Town of Oronoco v. City of Rochester*, 293 Minn. 468, 197 N.W.2d 426 (1972)), Missouri (*State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (1962)) and New Jersey (*Township of Washington v. Village of Ridgewood*, 26 N.J. 578, 141 A.2d 308 (1958)). It still surfaces occasionally in cases involving a government's violation of its own ordinance. *City of Las Vegas v. Cragin Indus., Inc.*, 86 Nev. 933, 478 P.2d 585 (1970); *Kedroff v. Town of Springfield*, 127 Vt. 624, 256 A.2d 457 (1969).

99. See Annot., 61 A.L.R.2d 970, 978-79 (1961).

comply with zoning ordinances.¹⁰⁰ This approach clearly relied on a sovereign immunity theory. It regarded zoning as a power given municipal corporations for the protection of their citizens' private interests and ignored the fact that the police power, no less than eminent domain, is an inherent power of the state delegated to municipalities for the performance of governmental functions and the protection of public interests.¹⁰¹

Other courts have also focused on eminent domain while employing a more sophisticated implied exemption analysis.¹⁰² These courts have viewed the grant of eminent domain power as a delegation of the authority of the state to make land use decisions insofar as they affect the facility in question, thus creating an exception to the power of general governments to make such decisions in respect to all other land uses. This theory was established primarily in a line of cases dealing with cities authorized to establish airports outside of city limits.¹⁰³ The courts relied on the grant of eminent domain power combined with the

100. *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962); *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960); *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896 (Mo. 1957); *State ex rel. Helsel v. Board of County Comm'rs*, 37 Ohio Op. 58, 79 N.E.2d 698 (C.P. 1947), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948). *Cf. Mayor of Savannah v. Collins*, 211 Ga. 191, 84 S.E.2d 454 (1954). *City of Scottsdale* illustrates judicial reluctance to become involved in the merits of intergovernmental conflicts. After the city of Scottsdale had purchased unincorporated land for the construction of a sewage treatment plant, the city of Tempe annexed it and zoned it for highest residential use, for which it was clearly unsuited. Rather than find Tempe's ordinance unreasonable, however, the court promulgated a general rule of immunity relying on eminent domain and the governmental-proprietary distinction in a remarkably unclear opinion.

101. *See State ex rel. Helsel v. Board of Comm'rs*, 37 Ohio Op. 58, 61, 79 N.E.2d 698, 704 (C.P. 1947), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948) ("eminent domain cannot be limited by restrictive covenants in deed or by zoning ordinances of municipalities"). In response to an argument that the zoning ordinance rested on a home rule charter power, the court stated without citation of authority that zoning comprehended power only over privately owned land. 37 Ohio Op. at 62, 79 N.E.2d at 705; *cf. State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960); *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896 (Mo. 1957) (governmental land uses excluded from scope of municipal police power by *eiusdem generis*). *But cf. St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962). This approach reflects the sovereign immunity doctrine that statutes are construed not to apply to acts of the state, already seen in early building code cases. *See note 43 supra*.

102. At least one court adopting this theory specifically rejected the sovereign immunity approach, stating that there was no reason to consider one local government superior to another. *Aviation Serv., Inc. v. Board of Adjustment*, 20 N.J. 275, 282, 119 A.2d 761, 765 (1956).

103. *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940); *Village of Schiller Park v. City of Chicago*, 26 Ill. 2d 278, 186 N.E.2d 343 (1962); *In re Petition of City of Detroit*, 308 Mich. 480, 14 N.W.2d 140 (1944); *Aviation Serv., Inc. v. Board of Adjustment*, 20 N.J. 275, 119 A.2d 761 (1956).

lack of any restrictions on where that power could be exercised.¹⁰⁴ As one court reasoned:

The statute is clear in authorizing the taking for airport purposes of "any land either within or outside" the municipality. No exception is expressed for land within some other municipality The intent is evident to encourage and facilitate the establishment of airports, and to delegate broad authority in determining the . . . location of land to be taken¹⁰⁵

The difficulty with this analysis is that both eminent domain and zoning are delegated powers which comprehend some authority over land use. The specific function of zoning, however, is to regulate individual land uses so they conform to the overall needs of a community. The function of eminent domain, on the other hand, is to facilitate the accomplishment of public purposes by overriding private interests. The approach of these courts, then, is reduced to little more than an assertion that special governments should be free from restriction by municipal governments that represent local interests¹⁰⁶ because their activities are important enough to the state to warrant a delegation of eminent domain power.¹⁰⁷

In recent cases, several courts have responded to the unsatisfactory analysis underlying the governmental function and eminent domain approaches by rejecting them as mechanical and unrealistic. These courts have instead adopted what may be called a "state interest" rationale. They reason that when a special government has been authorized to perform a function of importance to the state, the legislature is assumed to have intended that it be immune from local regulation. Some courts simply assert that the location of facilities is such an important function that it is inherently within the sphere of authority of a special government,¹⁰⁸ but ignore the fact that protection of the public

104. A similar approach is used by courts that find a special government's specific authority to locate facilities implies the power to do so free from municipal regulation. See *Applebaum v. St. Louis County*, 451 S.W.2d 107, 112-13 (Mo. 1970); *Pemberton Appeal*, 434 Pa. 249, 255-56, 252 A.2d 597, 600 (1969); note 115 *infra*.

105. *Village of Schiller Park v. City of Chicago*, 26 Ill. 2d 278, 280, 186 N.E.2d 343, 344 (1962).

106. See note 87 *supra*.

107. The court in *Howard v. City of Atlanta*, 190 Ga. 730, 10 S.E.2d 190 (1940), split over the question of whether Atlanta had been authorized to construct an airport to benefit its own or the state's commerce. See also the discussion of the importance of airports to modern commerce in *Aviation Serv., Inc. v. Board of Adjustment*, 20 N.J. 275, 280-81, 119 A.2d 761, 764 (1956).

108. In *City of Des Plaines v. Metropolitan Sanitary Dist.*, 48 Ill. 2d 11, 268 N.E.2d 428 (1971), the court held that to make the district subject to zoning restrictions would "relegate the authority of the district to that of a private land owner and . . . thereby

welfare from the improper location of facilities is an equally important function to municipalities. Other courts, recognizing the latter interest, have purported to adopt the balancing of interests approach urged by commentators.¹⁰⁹ The analysis of the courts, however, becomes an examination of the important state interest served by the special government, from which is inferred legislative intent to override lesser local interests.¹¹⁰

These cases demonstrate how little zoning conflict doctrine has progressed since the straight sovereign immunity theory of *Kentucky Institute*. Judicial reliance upon legislative intent as the controlling factor in these cases is mechanical and evasive. This entire body of case law has

frustrate the purpose of the [district's enabling act]." *Id.* at 14, 268 N.E.2d at 430. The *Des Plaines* court invoked the district's power of eminent domain, and relied on its prior decision in *Decatur Park Dist. v. Becker*, 368 Ill. 442, 17 N.E.2d 40 (1938), which held that immunizing the district would give each government's authority "effect in their respective fields of operation." *Id.* at 447, 17 N.E.2d at 43. The *Decatur* court was concerned with the fact that the city's zoning ordinance did not provide for parks in residential areas. In *Heft v. Zoning Bd. of Appeals*, 31 Ill. 2d 266, 201 N.E.2d 364 (1964), the court held that a zoning ordinance did apply to a special government in a case in which the two governments had agreed on a site, which was subsequently challenged by a neighboring landowner. The *Des Plaines* court's reliance on *Decatur* and its questionable characterization of *Heft* as dictum indicate that it was primarily concerned with the purpose of the statute, which would be frustrated if the city unreasonably refused to allow the establishment of the facility. Such an unreasonable refusal could be reviewed by the courts, but no mechanism was readily apparent for reviewing an unreasonable action by the district. 48 Ill. 2d at 15-16, 168 N.E.2d at 431 (Goldenhersh, J., dissenting); *cf.* *Reber v. South Lakewood Sanitation Dist.*, 147 Colo. 70, 362 P.2d 877 (1961) (zoning ordinance had no provision for sewage facilities). The courts have also been quick to imply a grant of immunity when a special government is authorized to build highways, where the disruptive potential of parochial zoning is high. *See Village on the Hill, Inc. v. Massachusetts Turnpike Auth.*, 348 Mass. 107, 202 N.E.2d 602 (1964), *cert. denied*, 380 U.S. 955 (1966); *City of Medford v. Marinucci Bros.*, 344 Mass. 50, 181 N.E.2d 584 (1962); *cf.* *Town of Bloomfield v. New Jersey Highway Authority*, 18 N.J. 237, 113 A.2d 658 (1955); *Union Bldg. & Constr. Corp. v. Borough of Totowa*, 98 N.J. Super. 446, 237 A.2d 637 (L. Div. 1968).

109. *See* note 92 *supra*. For a thorough discussion of the relevant factors in such a test see Note, *Governmental Immunity from Local Zoning Ordinances*, *supra* note 92, at 883-86.

110. *See* *Town of Oronoco v. City of Rochester*, 293 Minn. 468, 197 N.W.2d 426 (1972); *Rutgers Univ. v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972); *Long Branch Div. v. Cowan*, 119 N.J. Super. 306, 291 A.2d 381 (App. Div. 1972). The *Rutgers* court set forth five factors to be weighed, including (1) the nature of the special government, (2) the type of facility involved, (3) the impact of the zoning ordinance on the special government, (4) the potential harm represented by the facility, and (5) the public interest to be served by it. 60 N.J. at 153, 286 A.2d at 702. However, the court found that the legislature had intended *Rutgers* to be completely immune from zoning, not just immune in the construction of the facility involved. As one commentator has pointed out, "If the court really utilized the factors it listed, there would have to be a new balancing each time *Rutgers* proposed to violate a zoning law." Comment, *Balancing Interests to Determine Governmental Exemption from Zoning Laws*, *supra* note 92, at 137 n.81.

arisen precisely because legislative intent is so unclear. The theory that the legislature intends to immunize a special government from zoning whenever it empowers the special government to perform a function "on behalf of the state" is of no more aid to the courts in identifying the government most capable of balancing the competing public interests than the notion that state agents are inherently superior to municipal corporations. Ultimately, both are based on the same conceptualization of municipalities as parochial defenders of private interests. The result is that authority to make land use decisions within a single community is fragmented among several independent governments and no single one is able to perform the coordination and oversight functions necessary to successful comprehensive planning.¹¹¹

A handful of zoning conflicts cases that have been resolved in favor of municipalities show that such a solution is not required by the courts' function allocation dilemma.¹¹² These opinions have followed the analysis established by the building code cases decided in favor of municipalities.¹¹³ The important governmental function performed by the police power has been stressed and the special government's authority to construct facilities has been construed narrowly,¹¹⁴ with the result that there is no implied authority to displace the supervisory function of the police power.¹¹⁵ This analysis, while gaining ascendancy in building

111. See Note, *Governmental Immunity from Local Zoning Ordinances*, *supra* note 92, at 876.

112. *Jefferson County v. City of Birmingham*, 256 Ala. 436, 55 So. 2d 196 (1951); *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962); *Village of Blue Ash v. City of Cincinnati*, 173 Ohio St. 345, 182 N.E.2d 557 (1962); *Wilkinsburg-Penn Joint Water Auth. v. Borough of Churchill*, 417 Pa. 93, 207 A.2d 905 (1965); *City of Plano v. City of Allen*, 395 S.W.2d 927 (Tex. Civ. App. 1965); *City of Richmond v. Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958). See also *Township Comm. v. Board of Educ.*, 59 N.J. 143, 279 A.2d 842 (1971).

113. See text at notes 53-57, 63-72 *supra*.

114. One court has labeled the special government's power as corporate. *City of Richmond v. Board of Supervisors*, 199 Va. 679, 686, 101 S.E.2d 641, 646 (1958). See text at notes 44-46 *supra*. Most courts, however, have not spoken in terms of the governmental-proprietary function distinction in these cases at all. Although the Supreme Court of Alabama's opinion in *Jefferson County v. City of Birmingham*, 256 Ala. 436, 55 So. 2d 196 (1951), has been read to adopt a governmental-proprietary test on the basis of a cryptic opinion on rehearing, its original holding is better reasoned and clearly preferable. "[T]he city is exercising a governmental power—the police power Therefore the contention that the [county] may ignore the zoning ordinance . . . because it, too, is exercising a governmental power is without merit." *Id.* at 440, 55 So. 2d at 199. See also *City of Plano v. City of Allen*, 395 S.W.2d 927, 928 (Tex. Civ. App. 1965) (special government's activity expressly labeled governmental).

115. It should be noted, however, that both *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962), and *Wilkinsburg-Penn Joint Water Auth. v. Borough of Churchill*, 417 Pa. 931, 207 A.2d 905 (1965), have been undercut by subsequent decisions

code cases, has not persuaded most courts in zoning cases because of the fear that unchecked municipal parochialism will severely handicap special governments.

Two factors help explain why a few courts have not succumbed to this fear. First, in some cases the municipal police power was based on a constitutional grant of home rule, giving those governments a strong basis for the assertion that they were performing vital governmental functions.¹¹⁶ Several courts, however, have ruled against municipalities despite this factor,¹¹⁷ and it seems clear that home rule does not automatically confer on a city power over other governments.¹¹⁸

A second factor is that these cases involved factual situations that emphasized the municipality's ability to consider all the competing public interests involved and the special government's tendency to take a one-sided view of the conflict. In two cases,¹¹⁹ the zoning authorities were counties that, while having jurisdiction over all possible sites for the special government's facility, did not appear to be attempting to exclude it altogether. In fact, the counties had designated specific areas in which such facilities could be located.

A third case stressed the fact that the zoning government not only had the ability to weigh all relevant public interests, but also its own public

distinguishing them partly on the ground that the special governments involved were not specially authorized to "locate" facilities. See *Applebaum v. St. Louis County*, 451 S.W.2d 107, 113 (Mo. 1970); *Pemberton Appeal*, 434 Pa. 249, 255-56, 252 A.2d 597, 600 (1969); text at notes 102-07 *supra*.

116. In *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962), the court distinguished cases holding special governments immune from zoning partly on the ground that the county's police power derived from constitutional home rule. However, the wording of Missouri's zoning enabling act is unusually narrow, see note 101 *supra*, so that the case is dubious authority for the proposition that a general government's status as a home rule power is in itself a basis for reversing the immunity doctrine. In two other cases, however, the courts relied heavily on the zoning government's home rule status in holding against the special government in factual situations very close to those which have led most other jurisdictions to adopt the opposite position. The facts in *Village of Blue Ash v. City of Cincinnati*, 173 Ohio St. 345, 182 N.E.2d 557 (1962), are almost identical to those in the airport cases discussed at notes 102-07 *supra*. Compare *City of Plano v. City of Allen*, 395 S.W.2d 927 (Tex. Civ. App. 1965), with *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962). See also *Jefferson County v. City of Birmingham*, 256 Ala. 436, 440, 55 So. 2d 196, 199 (1951) (statute delegated the "full measure of the state's police power" to the city).

117. See, e.g., *City of Des Plaines v. Metropolitan Sanitary Dist.*, 59 Ill. 2d 29, 319 N.E.2d 9 (1974); *State ex rel. Helsel v. Board of County Comm'rs*, 37 Ohio Op. 58, 62, 79 N.E.2d 698, 705 (C.P. 1947), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694, *appeal dismissed*, 149 Ohio St. 583, 79 N.E.2d 911 (1948).

118. See text at notes 156-65 *infra*.

119. *St. Louis County v. City of Manchester*, 360 S.W.2d 638, 640 (Mo. 1962); *City of Richmond v. Board of Supervisors*, 199 Va. 679, 680, 101 S.E.2d 641, 642 (1958).

interest in doing so. In *Wilksburg-Penn Joint Water Authority v. Borough of Churchill*,¹²⁰ the water authority contended that its statutory grant of "exclusive power to determine its services" empowered it to erect a water tower in an area zoned by the borough for residential use. The court noted that although the authority had the responsibility for providing water to the area, the borough had the responsibility for developing a comprehensive land development plan that would allow adequate facilities for the provision of water.¹²¹ The court dismissed the argument that the zoning power of the borough was inconsistent with the authority's "exclusive power." It held that such power must be exercised "within the framework of other applicable law"¹²² Finally, the court pointed out that the authority was under no obligation to make its decisions "with due regard to the comprehensive objectives of zoning"; therefore, "the objectives of both statutes [the enabling acts of the authority and the borough] can be secured only if the Authority's land is subject to the Borough's zoning power."¹²³

The net result of the *Wilksburg-Penn* analysis is an allocation of governmental functions radically different from that found in decisions guided by the mistrust of municipal governments. Instead of dividing the responsibility for land use planning among several governments according to the nature of land use in question, one government is made primarily responsible, based on the presumption that it is better able to weigh the competing needs of the community. Special governments, concerned with a limited public interest, are thus required to work within the framework established by the municipal government and are unable to subordinate all other public interests to the one with which they are primarily concerned.¹²⁴

C. *The Application of Municipal Ordinances to Facilities Operated by Regulated Industries*

The final group of cases concerns facilities operated by private enterprises regulated by independent regulatory agencies. These cases generally involve zoning ordinances and raise the problem of sharply conflict-

120. 417 Pa. 93, 207 A.2d 905 (1965).

121. *Id.* at 103, 207 A.2d at 910.

122. *Id.* at 101, 207 A.2d at 909.

123. *Id.* at 103, 207 A.2d at 910.

124. The court in *St. Louis County v. City of Manchester*, 360 S.W.2d 638, 640 (Mo. 1962), pointed out that the special government did not allege the zoning ordinance to be arbitrary or unreasonable. *See also* *Township Comm. v. Board of Educ.*, 59 N.J. 143, 279 A.2d 842 (1971) (remanded for determination of reasonableness of zoning ordinance); note 169 *infra*.

ing public interests discussed in the preceding section. But for the most part, courts have not been forced to rely on the tangle of doctrines developed in zoning cases involving special governments that operate facilities themselves. Instead, they have found an easier route. When a state legislature creates a regulatory agency, it specifically vests that agency with police power to restrict the activities of the regulated industry for the public welfare. Although it may be unclear how far the agency's authority extends, municipalities are deliberately divested of the power to regulate the industry to the extent of the agency's authority. Moreover, it is clear that the legislature has acted on the policy that the welfare of the state requires regulation at the state rather than municipal level. Thus, when an agency is empowered to regulate all aspects of an industry, many courts simply hold that municipal authority over the placement and construction of the industry's facility is preempted.¹²⁵ Viewed in terms of an allocation of the interest balancing function, this approach reflects a judicial perception that a regulatory agency is best able to weigh all public interests, internal and external, affected by the industry's activities.

On the other hand, the fact that the function of the special government in these cases is regulatory rather than proprietary increases the danger of a gap in regulation. A special government operating a facility may be under a duty to conduct its activities with regard to the interests of the community in which it is located. To some extent this duty compensates for the loss of the municipality's police power. But a private industry is under no such duty, other than that imposed by tort law. Thus, when municipalities are divested of their power to protect the public welfare from the external effects of facilities operated by regulated industries and the state regulatory agency is unwilling or unable to provide a substitute, important public interests may be unprotected.

Courts which do not accept the theory that the state's creation of a regulatory agency preempts any municipal authority over the regulated industry¹²⁶ are confronted with function allocation problems analogous to those discussed in the preceding sections. Regulatory agencies seek

125. The discussion of these cases will be limited to considering the judicial attitudes towards allocating the function of balancing competing public interests. The case law is analyzed in more detail in Note, *Application of Local Zoning Ordinances to State-Controlled Public Utilities and Licensees: A Study in Preemption*, 1965 WASH. U.L.Q. 195 [hereinafter cited as Note, *Application of Local Zoning Ordinances*].

126. The courts may be unable to rely on preemption because the power to regulate the industry in a manner "not inconsistent" with the state agency's regulations has been reserved to the municipality by statute. See Note, *Application of Local Zoning Ordinances*, *supra* note 125, at 200-07.

to promote safe and efficient operation of the industries they regulate and the uniform availability of service at reasonable prices. These are the same internal interests which concern a special government that provides the service itself. The problem of allocating the function of balancing these interests against the external interests of the municipality is the same as in the cases discussed earlier. But the factors the court considers in making such an allocation are more often balanced in favor of regulatory agencies than in the case of special governments acting in a proprietary role. Even when a court does not find all municipal authority over an industry to be preempted, the fact that the agency is explicitly regulatory in function and acts on behalf of the state as a whole has led most courts to conclude that the regulatory agency is better suited than the municipality to perform the balancing function¹²⁷ and acts on behalf of a superior public interest.

1. Liquor Control Board Cases

When a state liquor board issues a license to sell liquor, it may be unclear precisely what function it is performing. At a minimum, the board determines that the licensee possesses the character and qualifications necessary to insure that it will dispense a potentially dangerous drug in a manner consistent with the public safety. The standards applied in such a determination are uniform for all liquor licensees, wherever located. Whether the board also performs the function of determining what restrictions should be placed on the liquor industry within a particular community, such as permissible locations and operating hours, may be less clear. Many courts have held that the state has occupied the field solely because the liquor board is authorized to regulate "all aspects" of the industry.¹²⁸ But there is some judicial authority for the proposition that a zoning ordinance "is a geographical restriction as to place of sale and use of liquor, not an invasion of the state's general regulations."¹²⁹

127. See note 33 *supra*.

128. See, e.g., *Staley v. Village of Winston-Salem*, 258 N.C. 244, 128 S.E.2d 604 (1962); *Spisak v. Village of Solon*, 68 Ohio App. 290, 39 N.E.2d 531 (1941); *In re* Petition of *Hilovsky*, 379 Pa. 118, 108 A.2d 705 (1954). Where the liquor board's enabling act specifically provides for the regulation of location, a finding of preemption is particularly likely. See *Salt Lake County v. Liquor Control Comm'n*, 11 Utah 2d 235, 357 P.2d 488 (1960).

129. *Floresta, Inc. v. City Council*, 190 Cal. App. 2d 599, 607, 12 Cal. Rptr. 182, 186 (Dist. Ct. App. 1961). See also *Jon-Mar Co. v. City of Anaheim*, 201 Cal. App. 2d 832, 20 Cal. Rptr. 350 (Dist. Ct. App. 1962). Both cases involved a statute which provided that

To the extent that the zoning authority is not preempted, the problem of allocating the balancing function remains. In the case of liquor sales, the first question must be whether there is any internal public interest involved, any public interest in promoting efficient liquor sales. If the state agency's function is viewed only as placing restrictions on the operation of the liquor industry, there is no conflict between the agency and municipalities that would require the performance of a balancing function.¹³⁰ A large number of courts, however, have found such a conflict by interpreting restrictive municipal ordinances to interfere with a right conferred by the state board to sell liquor.¹³¹ Where the operation of a particular retailer advances a state policy—for example, to promote competition among retailers or to permit sale of liquor in all communities¹³²—there may be actual conflict. To many courts, however, the mere fact that the licensee is licensed establishes the conflict. Those courts have spoken in terms of municipal attempts to “veto,” “abrogate” or “set at naught” the agency's determination that a particular vendor should be licensed. By assuming that the state has an interest in seeing that every vendor it licenses actually sells liquor, the courts force a conflict that could require a balancing of the public interest in, for example, competition against the public interest in protecting a community from the external effects of liquor stores. Such a conflict is then resolved on straight sovereign immunity principles.

2. Public Utility Cases

There is a clear public interest in protecting the internal interests of licensees must comply with valid zoning ordinances. The question presented was whether a zoning ordinance directed specifically at liquor sales was valid. By upholding the ordinance, the courts recognized the distinction between regulation of the internal and external aspects of the liquor industry.

130. See *Clyde Hess Distrib. Co. v. Bonneville County*, 69 Idaho 505, 210 P.2d 798 (1949); *State ex rel. Hewlett v. Womach*, 355 Mo. 486, 196 S.W.2d 809 (1946); *Phelps, Inc. v. City of Hastings*, 152 Neb. 651, 42 N.W.2d 300 (1950); cf. *Illinois Liquor Control Comm'n v. City of Joliet*, 26 Ill. App. 3d 27, 324 N.E.2d 453 (1975).

131. See *Staley v. City of Winston-Salem*, 258 N.C. 244, 249, 128 S.E.2d 604, 608 (1962); *Square Deal Coal Haulers v. City of Cleveland*, 86 Ohio L. Abs. 83, 89, 176 N.E.2d 348, 351 (C.P. 1961). These cases often also invoke an occupation of the field preemption theory as an alternate ground. Where the municipality is expressly reserved the right to regulate liquor sales consistent with state law, the courts have held that the authority does not extend to denying a liquor licensee the right to do business through a zoning ordinance, *State ex rel. Haverback v. Thomson*, 134 Conn. 288, 57 A.2d 259 (1948), or to deny a city license for any reason other than refusal to pay the license fee, *Brackman's, Inc. v. City of Huntingdon*, 126 W. Va. 21, 27 S.E.2d 71 (1943).

132. See *Campbell v. City of Hueytown*, 289 Ala. 388, 391, 268 So. 2d 3, 5 (1972). In *Spisak v. Village of Solon*, 68 Ohio App. 290, 39 N.E.2d 531 (1941), the court interpreted the ordinance as an attempt to circumvent the state's referendum procedure for communities to choose whether to be wet or dry.

public utilities, such as the distribution of services and setting of rates. These are generally considered the province of public utility commissions. Municipalities that have sought to regulate such matters on the basis of their historical prerogative to franchise utilities have invariably lost on preemption grounds.¹³³ Many courts have held that the protection of the public welfare from the harmful placement and construction of utility facilities is within the exclusive jurisdiction of the utilities commission,¹³⁴ and in some states the commission is expressly given authority over zoning matters.¹³⁵ Utilities commissions, however, are primarily concerned with the efficient operation of the industry they regulate and are unlikely to be particularly zealous in protecting the external interests of municipalities. As one commentator has noted, such commissions are generally "already committed to one side of the problem. . . . [T]he public interest may require [that] the cheapest

133. See, e.g., *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514 (1959); *People ex rel. Public Util. Comm'n v. Mountain States Tel. & Tel. Co.*, 125 Colo. 167, 243 P.2d 397 (1952); *New Haven Water Co. v. City of New Haven*, 152 Conn. 563, 210 A.2d 449 (1965); *Duke Power Co. v. Blue Ridge Elec. Membership Corp.*, 253 N.C. 596, 117 S.E.2d 812 (1961); cf. *City of Cape Girardeau v. St. Louis—S.F. Ry.*, 305 Mo. 590, 267 S.W. 601 (1924) (utilities commission has power to relieve railroad of obligation in franchise agreement). But see *Homer Elec. Ass'n v. City of Kenai*, 423 P.2d 285 (Alaska 1967); *City of Geneseo v. Illinois N. Util. Co.*, 378 Ill. 506, 39 N.E.2d 26 (1941) (city may opt to provide own electrical services despite ruling of public utilities commission). In some jurisdictions, courts have found on the basis of statutory language or constitutional provisions that municipalities retain the power to set rates within the city limits. See *State ex rel. Guste v. Council of City of New Orleans*, — La. —, 309 So. 2d 290 (1975); *Public Serv. Comm'n v. City of Williston*, 160 N.W.2d 534 (N.D. 1968). Critics have argued that allowing independent municipalities to set rates for different segments of an integrated statewide utilities system is unworkable. Compare *City of Alvin v. Southwestern Bell Tel. Co.*, 517 S.W.2d 689 (Tex. Civ. App. 1974), with *City of Nassau Bay v. Nassau Bay Tel. Co.*, 517 S.W.2d 613 (Tex. Civ. App. 1974). See generally Fulda, *Telephone Regulation in Texas: Should Regulation by Cities Be Replaced By a State Commission?*, 45 TEXAS L. REV. 611 (1967).

134. *Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480 (Mo. 1973); *In re Public Serv. Elec. & Gas Co.*, 35 N.J. 358, 173 A.2d 233 (1961); *Commonwealth v. Delaware & Hudson Ry.*, 19 Pa. Cmwlth. 59, 339 A.2d 155 (1975); *City of So. Burlington v. Vermont Elec. Power Co.*, 133 Vt. 438, 344 A.2d 19 (1975).

135. Utilities commissions are sometimes authorized to overrule municipal zoning decisions or grant exemptions from zoning. See Note, *Application of Local Zoning Ordinances*, *supra* note 125, at 203 n.18. In reviewing the decisions of commissions in such cases, the courts have emphasized the state's interest in efficient service, finding it to be superior to the interests of municipalities. See *Jennings v. Connecticut Power & Light Co.*, 140 Conn. 650, 103 A.2d 535 (1954); *New York Cent. R.R. v. Department of Pub. Util.*, 347 Mass. 586, 199 N.E.2d 319 (1964); *Town of Wenham v. Department of Pub. Util.*, 333 Mass. 15, 127 N.E.2d 791 (1955). But see *In re Monmouth Consol. Water Co.*, 47 N.J. 251, 220 A.2d 189 (1966). See also Note, *Application of Local Zoning Ordinances*, *supra* note 125, at 205-07.

provision of . . . utility services not be obtained."¹³⁶ Thus the application of municipal ordinances to public utility facilities presents a conflict of two compelling public interests,¹³⁷ requiring the performance of a balancing function.

The courts, however, have followed the sovereign immunity approach that was demonstrated in the liquor board cases. They have characterized municipal ordinances restricting the location or operation of utility facilities as attempts to promote local interests by frustrating the commission's efforts to protect the interests of the state. One court, in finding a utility immune from municipal regulation, has stated that "[a] municipality cannot by ordinance impose upon a public utility essential to the welfare of the people, conditions of operation or maintenance of its property, which would confiscate or destroy its power to serve the public,"¹³⁸ even though no finding of confiscation or destruction was made.

This conceptualization of state interest versus local interest has been particularly strong in cases dealing with the power of a municipality over power lines passing through its territory. The courts have been almost unanimous in holding that municipalities have no such power, in each case stressing the danger of the municipality impeding the uniform development of statewide power systems. As one court said:

Local authorities not only are ill-equipped to comprehend the needs of the public beyond their jurisdictions, but . . . if they had the power to regulate, necessarily would exercise that power with an eye toward the local situation and not with the best interests of the public at large as the point of reference.¹³⁹

136. Dunham, *Regional and State Land Policy in a Home Rule Setting*, *supra* note 85, at 93-94.

137. If, however, the municipality uses its police power to prevent the operation of a utility in an area altogether for the purpose of subverting the commission's determination that the utility should serve that area, the case does not present conflicting public interests, but a disagreement between two governments over which should protect the same interest. *See* *Chugach Elec. Ass'n v. City of Anchorage*, 476 P.2d 115, 122-23 (Alaska 1970).

138. *City of Doraville v. Southern Ry.*, 227 Ga. 504, 511, 181 S.E.2d 346, 351 (1971); *cf. Gulf, C. & S.F. Ry. v. White*, 281 S.W.2d 441 (Tex. Civ. App. 1955). Even where the power to zone utilities is expressly reserved to the municipalities, the courts tend to view any ordinance that could interfere with a utility's operation as an attempt to annul the commission's decision to issue a certificate of public convenience and necessity. *See City of So. Burlington v. Vermont Elec. Power Co.*, 133 Vt. 438, 444-46, 344 A.2d 19, 23-24 (1975); *cf. Jennings v. Connecticut Light & Power Co.*, 140 Conn. 650, 103 A.2d 535 (1954); note 135 *supra*.

139. *Duquesne Light Co. v. Upper St. Clair Twp.*, 377 Pa. 323, 336, 105 A.2d 287, 293 (1954). *See also Consolidated Edison v. Village of Briarcliff Manor*, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct. 1955); *Long Island Lighting Co. v. Village of Old Brookville*, 190

This approach has also been followed when the municipality has attempted to require power lines to be placed underground.¹⁴⁰

Although the public interest that the courts seek to protect in these cases is undoubtedly a compelling one, the insistence of the courts in classifying two public interests as respectively state and local and their assumption that municipalities are always narrow-minded and parochial represents the sovereign immunity theory at its most simplistic. It leaves no room for consideration of the reasonableness of a particular municipality's attempt to protect what may be an equally compelling interest.¹⁴¹ A more rational approach is illustrated by two cases in the Supreme Court of Appeals of Virginia arising out of a dispute between the Southern Railway Company and the City of Richmond over whether a tract of land was better suited for use as a park or a switchyard. In the first,¹⁴² the court reversed the ruling of the state corporation commission that the railroad need not comply with the city ordinance. The court held that the state had specifically delegated the important governmental function of regulating land uses to the city, and consequently the commission's "duty of supervising . . . all transportation companies . . . in matters relating to the performance of their public duties" did not include the function of land use regulation.¹⁴³ The court thus rejected the idea that the commission was inherently better suited than the city to balance the interests involved in a railroad's land use or that the internal interests were inherently more important than the external interests involved.

In the second case¹⁴⁴ the court demonstrated how judicial review of zoning ordinances can be used to insure that a municipality properly

Misc. 797, 72 N.Y.S.2d 718 (Sup. Ct. 1947), *aff'd mem.*, 298 N.Y. 569, 81 N.E.2d 104, 77 N.Y.S.2d 143 (1948).

140. *Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480 (Mo. 1973); *In re Public Serv. Elec. & Gas Co.*, 35 N.J. 358, 173 A.2d 233 (1961); *Duquesne Light Co. v. Borough of Monroeville*, 449 Pa. 573, 298 A.2d 252 (1972); *cf. Maun v. United States*, 347 F.2d 970 (9th Cir. 1965). *Contra*, *City of Las Vegas v. Cragin Indus., Inc.*, 86 Nev. 993, 478 P.2d 585 (1970); *State ex rel. Cleveland Elec. Illuminating Co. v. City of Euclid*, 169 Ohio St. 476, 159 N.E.2d 756, *aff'd on rehearing*, 170 Ohio St. 45, 162 N.E.2d 125 (1959), *appeal dismissed*, 362 U.S. 457 (1960) (subsequently overruled by legislature). *See generally Miller, Electric Transmission Lines—To Bury, Not to Praise*, 12 VILL. L. REV. 497 (1967).

141. In fact, one court specifically found the zoning ordinance in question to be reasonable before holding it invalid because of its potential for disruption of electrical service. *Consolidated Edison v. Village of Briarcliff Manor*, 208 Misc. 295, 298-99, 301, 144 N.Y.S.2d 379, 383, 385 (Sup. Ct. 1955).

142. *City of Richmond v. Southern Ry.*, 203 Va. 220, 123 S.E.2d 641 (1962).

143. *Id.* at 224-25, 123 S.E.2d at 644-45; *cf. Porter v. Southwestern Pub. Serv. Co.*, 489 S.W.2d 361 (Tex. Civ. App. 1972).

144. *Southern Ry. v. City of Richmond*, 205 Va. 699, 139 S.E.2d 82 (1964).

consider all relevant interests in applying its ordinances to a utility. The court upheld the ordinance as reasonable, relying on two grounds. First, the railroad could not demonstrate that the operation of the switchyard would result in a substantial public benefit or was necessary for the railroad to comply with an order of the commission.¹⁴⁵ Second, the municipal ordinance was an integral part of a comprehensive land use plan and had not been enacted just to apply to the railroad.¹⁴⁶

3. Local Regulatory Conflicts

A final group of cases confirms the conclusion that judicial apprehension of municipal parochialism forms the basis for the case law in this area. These cases involve regulatory special governments operating on the local, rather than state, level. The question posed is whether, by vesting a local special government with some authority over an activity normally within the jurisdiction of a municipality, the legislature has divested the municipality of all authority over that activity.¹⁴⁷ This, as we have seen, has typically been the result in cases involving statewide special governments, and some courts have reached the same result in these local cases.¹⁴⁸ Most courts, however, have held that the municipality is only divested of so much of its authority as is necessary to enable the special government to perform its primary function. For example, one court, after holding that a fire protection district's authority divested a city of the power to set construction standards designed to prevent fire,¹⁴⁹ went on to hold that the city could continue to set standards directed toward other ends.¹⁵⁰

Similarly, municipalities have been allowed to regulate wrecked car disposal,¹⁵¹ building contractors¹⁵² and cab drivers,¹⁵³ although each was

145. *Id.* at 705-06, 139 S.E.2d at 86-87.

146. *Id.* at 707-08, 139 S.E.2d at 88.

147. A municipality and a special district clearly cannot both exercise the police power over the same activity for the same purpose. *See, e.g., State ex rel. Meyer v. County Court*, 213 Or. 643, 326 P.2d 116 (1958).

148. *See, e.g., Hill v. Borough of Collingswood*, 9 N.J. 369, 88 A.2d 506 (1952).

149. *Wellston Fire Protection Dist. v. State Bank & Trust Co.*, 282 S.W.2d 171 (Mo. App. 1955).

150. *Id.*; *cf. South Park Comm'rs v. Chicago City Ry.*, 286 Ill. 504, 122 N.E. 89 (1919); *City of Galveston v. Galveston County*, 159 S.W.2d 976 (Tex. Civ. App. 1942).

151. *Highway 100 Wreckers, Inc. v. City of West Allis*, 6 Wis. 2d 637, 96 N.W.2d 85 (1959).

152. *Concrete Contractors' Ass'n v. Village of La Grange Park*, 14 Ill. 2d 65, 150 N.E.2d 783 (1958).

153. *Courtesy Cab Co. v. Johnson*, 10 Wis. 2d 426, 103 N.W.2d 17 (1960).

subject to regulation by local special governments, on the grounds that the ordinances were directly related to the municipalities protection of the public welfare and did not significantly impair the special governments' activities. The undesirability of a gap in regulatory authority in the absence of a state interest in uniform statewide regulation seems to be the key factor in these cases. If the courts would abandon the simplistic notion that the activities of a state agency are inherently more important than those of a local government, they would be able to bring the same analysis to bear on the problems of interest balancing in cases involving state agencies.

III. A SUGGESTED HOME RULE APPROACH

It is apparent from our review of the case law on intergovernmental conflicts that the courts have largely failed to resolve the problem of allocating the function of balancing competing public interests in a manner that insures both interests will be protected. In cases involving the applicability of municipal building codes to facilities of special governments, the courts following *Hall* and *Port Arthur* indicate a general consensus that municipalities have the authority to regulate construction standards of such facilities, with due consideration for the public interests they represent, unless the state provides an adequate substitute for such regulation. But in situations such as the applicability of municipal zoning ordinances to facilities of a special government or regulated industry, in which conflicts are likely to be more heated and threats to competing interests more severe, most courts have resolved the question on the basis of the unwarranted assumption that municipal governments are little more than a special class of private corporations, with interests inherently less important and with perspectives inherently more parochial than those of any other government. The widespread adoption of municipal home rule provides an opportunity to reexamine the assumptions that underlie the rule of special government immunity.

Home rule does not denote a fixed concept. The legal consequences that follow the delegation of home rule power necessarily vary with the constitution, legislation and judicial interpretation within each home rule jurisdiction.¹⁵⁴ However, two general characteristics of a home rule system are fairly universal. First, home rule identifies an area of governmental concern, generally termed "local affairs," that is of primary

¹⁵⁴ The lack of agreement as to what constitutes home rule has caused one commentator to suggest that it may be simply any legal change which strengthens the position of the city in relation to the state. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 U.C.L.A. L. REV. 671, 674 (1973).

concern to local governments. Secondly, home rule abrogates Dillon's Rule¹⁵⁵ so that municipalities need not seek legislative approval to act when powers are not specifically enumerated. The major difficulty in the administration of any home rule system is setting the outer limits of municipal authority. Two distinct approaches to this problem have been developed, each emphasizing one of the two general characteristics.

The earliest home rule systems were based on the "imperium in imperio" model,¹⁵⁶ which granted municipalities authority over all local affairs to the exclusion of the state legislature.¹⁵⁷ The primary purpose of this approach was to protect municipalities from the abuses of state legislatures. A parallel development was the constitutional prohibition of special or local legislation directed at a single municipality.¹⁵⁸ By denying state legislatures any authority over local affairs, this system left to the courts the determination of the boundary between the legislative and municipal authority. Invariably, the scope of local affairs was narrowly construed whenever the courts perceived conflict with state policy.¹⁵⁹

More recent home rule systems follow the "legislative supremacy" approach,¹⁶⁰ best illustrated by the model constitutional provision introduced in 1953 by the American Municipal Association.¹⁶¹ This model emphasizes the authority of municipalities to act without specific legislative authorization rather than the delegation of exclusive power over local affairs. The primary purpose of the legislative supremacy model is to escape from the problem of restrictive judicial construction by giving municipalities broad plenary authority over matters relating to local affairs unless restricted by the legislature.¹⁶² Although the theory

155. See note 18 *supra*.

156. The term originated with Justice Brewer in *St. Louis v. Western Union Tel. Co.*, 149 U.S. 465, 468 (1893).

157. Schwartz, *The Logic of Home Rule and the Private Law Exception*, *supra* note 154, at 676; Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 286 (1968).

158. Sandalow, *The Limits of Municipal Power under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 648-49 (1964).

159. *Id.* at 661-68. Although it is frequently asserted that the courts tended to place a narrow construction on "local affairs" per se, Professor Sandalow argues convincingly that the cases construing local affairs involved conflicts between home rule and other public policies.

160. Schwartz, *The Logic of Home Rule and the Private Law Exception*, *supra* note 154, at 676; Vanlandingham, *Municipal Home Rule in the United States*, *supra* note 157, at 286.

161. AMERICAN MUNICIPAL ASSOCIATION [NATIONAL LEAGUE OF CITIES], MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (1953).

162. Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, *supra* note 4, at 7.

contemplates that legislatures will act specifically and explicitly when limiting home rule powers, many courts have persisted in using local affairs as a limiting concept¹⁶³ to strike down ordinances that conflict with perceived state policy, although not with the express words of a statute.¹⁶⁴

This judicial policy of preventing home rule municipalities from interfering with state interests, regardless of which home rule model is adopted, makes it clear that the mere invocation of home rule will not allow municipalities to escape from the rule of special government immunity which, as has been demonstrated, is based on the premise that the activities of special governments are more closely linked to the interests of the state. In fact, in the cases in which municipalities have relied on home rule status, the courts have been indifferent to the source of the municipal police power.¹⁶⁵

163. *Id.* at 11-12.

164. Two state supreme courts have refused to require specific legislative language to limit home rule authority in cases involving conflicts of the type discussed in this article. *Chugach Elec. Ass'n v. City of Anchorage*, 476 P.2d 115 (Alaska 1970); *City of Des Plaines v. Metropolitan Sanitary Dist.*, 59 Ill. 2d 29, 319 N.E.2d 9 (1974). The *Chugach* court specifically adopted the local affairs-state affairs distinction even though Alaska has a legislative supremacy home rule system. 476 P.2d at 122. The decision, and judicial use of the local affairs limitation on home rule in general, is extensively criticized in Sharp, *Home Rule in Alaska: A Clash Between the Constitution and the Court*, 3 U.C.L.A.-ALASKA L. REV. 1 (1973).

165. See notes 117, 164 *supra*; *Hall v. City of Taft*, 47 Cal. 2d 177, 302 P.2d 574 (1956); *Town of Atherton v. Superior Court*, 159 Cal. App. 2d 417, 324 P.2d 328 (Dist Ct. App. 1958); *Board of Educ. v. Houghton*, 181 Minn. 576, 233 N.W. 834 (1930). *But see* note 116 *supra*. Once it is conceded that the legislature can empower a special district to act within a home rule municipality's jurisdiction for the benefit of the state, courts have no difficulty in finding that the legislature may also immunize that government from municipal interference. See *Municipality of Metropolitan Seattle v. City of Seattle*, 57 Wash. 2d 446, 357 P.2d 863 (1960). *But see* *Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs*, 149 Colo. 284, 369 P.2d 67 (1962).

In regulatory agency cases, the state's interest in uniform regulation is so clear that courts have been virtually unanimous in finding that home rule power does not apply to regulated industries, unless power over utilities is enumerated in the home rule grant. See note 133 *supra*. As the Ohio supreme court said in upholding a statute restricting the power of municipalities to require the utility lines to be buried against an argument that the statute invaded municipal home rule powers:

In the early days of the production of electric power the individual electric company served an individual municipality and was subject to local control. . . . Today . . . a single electric company serves large areas and many municipalities. The transmission of electrical energy is now of general concern, and it is in the paramount interest of the state to . . . see that such transmission is not impeded by local regulation.

Cleveland Elec. Illuminating Co. v. City of Painesville, 15 Ohio St. 2d 125, 129-30, 239 N.E.2d 75, 78 (1968). *But see* *Illinois Liquor Control Comm'n v. City of Joliet*, 26 Ill. App. 3d 27, 324 N.E.2d 453 (1975). See generally Vauble, *Of Concern to Painesville—or Only to the State: Home Rule in the Context of Utilities Regulation*, 33 OHIO ST. L.J. 257 (1972). See also *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514

Although home rule municipalities may not as a matter of constitutional right be able to assert the power to regulate the facilities of special governments, the policies inherent in a state's decision to delegate home rule power to its municipalities are persuasive rebuttals to the past assumptions made by the courts. We have attempted to show that analysis of intergovernmental conflicts of this type in terms of the powers delegated to the contending governments has been unsatisfactory, because resolution of the conflicts requires the performance of a governmental function that the legislature has neglected to delegate. The courts, lacking the capacity to perform the function themselves on a case-by-case basis, must allocate the function to one of the contending governments. They should be guided by the policies and objectives of the state's governmental structure.¹⁶⁶ In a home rule state, these considerations warrant at least a presumption that home rule municipalities are best suited to balance the public interests.

The first result of home rule is finally to lay to rest the sovereign immunity theory. It is no longer possible to characterize the interests of one government as inherently greater than those of another. Home rule represents a policy decision by the people of the state that the interests of municipalities are vital to the welfare of the state as a whole, so vital that the municipalities are directly vested with an inherent power of sovereignty—the police power—in order to protect those interests. Home rule thus represents an explicit repudiation of both Dillon's Rule and the judicial conceptualization of municipal corporations as private entities. Although the legislature is still empowered to subordinate municipal interests to more compelling state interests, courts should not infer such subordination from the mere creation of a special government.

Since the courts no longer have any justification for resolving these conflicts on the basis of inherent superiority of interest, they must look to the relative capacity of the two governments to weigh the competing public interests. Thus, the second result of home rule should be to establish the presumption that the municipality is more likely to have the flexibility of authority and breadth of vision to protect all aspects of the public interest. Special governments are by nature limited in scope and generally lack the knowledge and the interest to gauge the secondary effects of their activities on the interests of other governments.¹⁶⁷ In

(1959); *People ex rel. Public Util. Comm'n v. Mountain States Tel & Tel. Co.*, 125 Colo. 167, 243 P.2d 397 (1952).

166. See text at notes 11-12 *supra*.

167. BOLLENS, *supra* note 29, at 253, 255; FORDHAM, *supra* note 2, at 34; Dunham, *Regional and State Land Policy in a Home Rule Setting*, *supra* note 85, at 93.

many cases, the directors of special governments hold office by appointment and are not politically accountable to the communities whose interests they affect. Moreover, the decisions of proprietary special governments to build a facility in a certain way at a certain location are often made in a managerial setting, which inhibits input from affected citizens and judicial review.¹⁶⁸

Municipalities, on the other hand, whether home rule or not, are more likely to be concerned with all the public interests at stake, since the facility involved will ordinarily provide service for the municipality's citizens. To whatever extent the facility does benefit the community, the municipality is politically accountable to the citizens whose interests will be affected. Further, the courts are accustomed to reviewing the ordinances of municipalities for reasonableness.¹⁶⁹

The crucial advantage of home rule municipalities, however, is that they are in a position to recognize that the interest balancing function is one that the legislature has not provided for and to adapt their ordinances and enforcement mechanisms to accomplish that function.¹⁷⁰ The abrogation of Dillon's Rule gives home rule municipalities the flexibility required to deal with complex modern urban problems that are not encompassed by specific legislative delegations of authority.

168. BOLLENS, *supra* note 29, at 38-41.

169. In the area of zoning, which gives rise to the sharpest conflicts, the courts have frequently asserted and exercised the authority to review specific ordinances and applications on a reasonableness standard. *See generally* J. METZENBAUM, *LAW OF ZONING* ch. XI-e-2 (2d ed. 1955). By contrast, the courts are not accustomed to reviewing the reasonableness of a government's decision to use a particular tract for a public use. *See* 11 McQUILLIN, *supra* note 22, § 32.25, at 325-26. *But see* note 91 *supra*. In fact, there is a considerable body of case law holding zoning ordinances unreasonable if they fail to take into consideration the public interest represented by various private uses, primarily churches and private schools. *See, e.g.,* Board of Zoning Appeals v. Independent Congregation of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954); State *ex rel.* Roman Catholic Bishop v. Hill, 59 Nev. 231, 90 P.2d 217 (1939); Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956); Brandeis School v. Village of Lawrence, 18 Misc. 2d 550, 184 N.Y.S.2d 687 (Sup. Ct. 1959). *See generally* Note, *Zoning Against the Public Interest: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720 (1962). The reasonableness test could be adapted to review zoning ordinances that unduly hamper the activities of special governments. *See* American Univ. v. Prentiss, 113 F. Supp. 389 (D.D.C. 1953); City of Des Plaines v. Metropolitan Sanitary Dist., 48 Ill. 2d 11, 16, 268 N.E.2d 428, 431 (1971) (Goldenhersh, J., dissenting). *See generally* Bruff, *Judicial Review in Local Government Law: A Reappraisal*, 60 MINN L. REV. 669 (1976).

170. Zoning and building code enabling acts may prescribe detailed procedural requirements that make it impossible for non-home rule municipalities to adjust to meet the unique problems presented by governmental facilities. Such procedures, incorporated in a statute intended to confer rather than restrict powers, should not be binding on home rule municipalities. *See* Nelson v. City of Seattle, 64 Wash. 2d 862, 395 P.2d 82 (1964); *cf.* Peters v. City of Springfield, 57 Ill. 2d 142, 311 N.E.2d 107 (1974).

The problem of balancing the interests involved in the construction and operation of a special government facility is just such a complex problem. Therefore home rule municipalities have a broad mandate to develop techniques to deal with the problem. The methods a municipality might consider include:

1. Amending the statements of scope and purpose, if any, of zoning plans and building codes to include the purpose of integrating necessary facilities of special governments¹⁷¹ into the community and making such ordinances by their terms specifically applicable to such facilities;

2. For building codes,¹⁷² authorizing appropriate officials to waive requirements that would unduly hamper the operation of governmental facilities where the public welfare permits, and providing a mechanism whereby another government's own building code, particularly one promulgated on a statewide basis, can be substituted for the municipal code insofar as it substantially meets special needs of the community;

3. For zoning ordinances, providing areas in which common types of special government facilities may be located, and setting guidelines for the granting of variances¹⁷³ for such facilities. One approach might be to refer all proposals for the construction of special government facilities to the city plan commission, whose staff could work with the government involved to find an optimal location.¹⁷⁴ If the zoning board itself

171. In general, these recommendations are equally appropriate for facilities operated by special governments and those regulated by state agencies, since in either case the problem is the same—taking into account the public's interest in the efficient operation of the facility in determining what restrictions must be put on its operation. In practice, it may be easier to establish a cooperative relationship with a special government located in the same region as the municipality; presumably, those governments share a greater commonality of interest than exists between a state agency and a municipality. However, to the extent the courts will presume a municipal ordinance to be applicable to facilities operated by regulated industries as well as to those operated directly by special governments, they will encourage the agencies to work with municipalities to reduce conflicts.

172. Cf. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM 11-20 (1966).

173. Variances and spot zoning are considered valid uses of the zoning power when the purpose is to accommodate a facility affected with a public interest. See *Higbee v. Chicago, B. & Q.R.R.*, 235 Wis. 91, 292 N.W. 320 (1940); Platt, *Valid Spot Zoning: A Creative Tool for Flexibility of Land Use*, 48 ORE. L. REV. 245, 257-58 (1969); Note, *Zoning and the Expanding Public Utility*, 13 SYRACUSE L. REV. 581, 583-86 (1962).

174. Some states provide for a similar procedure but the conclusions of the plan commission are not binding on the special government. See, e.g., ILL. REV. STAT. ch. 24, § 11-12-4.1 (Smith-Hurd Supp. 1976). In such a situation it would be necessary for the municipality to argue that the legislature, by requiring special governments to consult with plan commissions, did not intend to immunize them from the operation of land use ordinances designed by home rule municipalities specifically to accommodate their special public interests.

then refused to approve the location, a reviewing court would have a substantial basis from which to determine if the refusal was reasonable;

4. Providing for expedited appeals from all decisions of municipal officers and agencies that adversely affect special government facilities, with efforts to obtain the participation of the affected government. In some cases, when a special district's jurisdiction substantially overlaps a large municipality, it may be desirable to enter into agreements establishing joint appeals boards or arbitration systems;¹⁷⁵

5. Inviting other governments that are likely to be affected by the location of special government facilities to participate in the drafting of building codes and land use plans; and

6. Insuring that all final decisions affecting special governments are made in open hearings, with written decisions based on written records in order to facilitate judicial review.¹⁷⁶

These suggestions are, of course, directed toward the prevention, rather than judicial resolution, of intergovernmental conflicts. In any case, the resolution of intergovernmental conflict by some kind of political accommodation process is preferable to judicial resolution, regardless of the approach taken by the courts.

The courts can, however, play a crucial role in bringing about the adoption of such a system. When faced with a case involving one of the situations discussed in this Article, a court should begin by presuming the municipal ordinance to be valid. Upon a showing by the special government that its activities are likely to be substantially hampered by the ordinance, the court should then examine the reasonableness of the ordinance, focusing primarily on the efforts made by the municipality to determine and fairly evaluate the public interest represented by the special government. By refusing to grant blanket immunity to special governments and by judging municipal ordinances on the strength of the balancing mechanism that supports them, the courts will encourage both types of governments to cooperate in the resolution of intergovernmental conflict and will provide a basis for judicial decision that recognizes and protects all the divergent public interests. Only when reasonable efforts of both governments have failed to produce a resolution should

175. See generally ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, A HANDBOOK FOR INTERLOCAL AGREEMENTS AND CONTRACTS (1967). Although a municipality cannot contract away its authority to use the police power, the degree of compliance by contending governments with the terms of agreements of this type would be persuasive evidence of the reasonableness of their actions.

176. See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 4.18, 16.05 (Supp. 1970).

courts themselves balance the interests involved. In this event, they should focus on the facts of the case, rather than sweepingly declare either government to be inherently superior.

CONCLUSION

The conflicts discussed in this Article are the product of a basic structural flaw in a governmental system that fosters a multiplicity of independent agencies to protect various public interests without providing any mechanism to balance such interests when they conflict. This flaw perhaps could be remedied by major revision in state governmental structure. One possibility is widespread merger of special purpose governments into general purpose municipalities.¹⁷⁷ A second is the creation of agencies specifically designed to balance the competing interests, such as the American Law Institute's proposed state and regional land use planning boards.¹⁷⁸ Such revisions would, of course, create their own problems and, in any event, would do nothing to resolve present conflicts.

In the absence of major structural reforms, the competing governmental units themselves have an opportunity to develop formal balancing mechanisms. The courts will play a primary role in determining whether such mechanisms are successful. If the courts continue to rely on simplistic assumptions about either class of governments, there will be no incentive for local governments to develop such mechanisms. Traditionally, courts have assumed that special purpose governments are protectors of a superior public interest and better suited than municipalities to balance competing interests. We have shown that to be, in general, fallacious. Further, it is apparent that simply reversing the assumptions to find municipalities inherently superior would be equally unsatisfactory, for in the final analysis the public welfare protected by the municipal police power is just one of the competing public interests.

While not inherently superior to special purpose governments, municipalities—particularly those with home rule powers—have the democratic base, political responsiveness and the broad and flexible authority necessary to develop effective mechanisms for resolution of intergovernmental conflict. In this regard, home rule municipalities are

177. Many states currently provide mechanisms for such mergers. *See generally* Note, *Problems Created by Municipal Annexation of Special District Territory*, 1967 WASH. U.L.Q. 560.

178. *See* note 85 *supra*.

superior to special purpose governments. If the courts would recognize and reward attempts to develop this capacity, we believe it presents the best opportunity, short of major structural reform, to resolve the problems created by a multiplicity of local governments.

NOTES

