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The Judicial Role in Intergovernmental Land Use Disputes: The Case Against Balancing

Laurie Reynolds*

INTRODUCTION

In the exercise of its properly delegated powers, a state or local governmental unit frequently operates within the territorial jurisdiction of another governmental unit.¹ A city, for example, may choose a site in a rural portion of the county in which it is located as the place to operate a landfill.² A school district may want to locate a facility within an area not zoned by the city for school uses.³ Or a state agency may seek to es-

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1. In this Article the term "intergovernmental" refers only to intrastate intergovernmental conflicts. This Article does not consider the conflicts that arise when the federal government seeks to establish a use in contravention of local ordinances. For cases adopting the majority view that the federal government is immune from local regulations, see Township of Middletown v. N/E Regional Office, United States Postal Serv., 601 F. Supp. 125, 128 (D.N.J. 1985); Thanet Corp. v. Board of Adjustment, 103 N.J. Super. 65, 66-67, 250 A.2d 1, 2 (App. Div. 1969); Lane County v. Bessett, 46 Or. App. 319, 323-23, 612 P.2d 297, 302 (1980); Town of Coventry v. Glickman, 429 A.2d 440, 442 (R.I. 1981). The Article also does not consider whether a governmental unit should be subject to its own land use regulations. For cases holding that a governmental unit is bound by its own regulations, see Clark v. Town of Estes Park, 686 P.2d 777, 779 (Colo. 1984); Rich v. City of Englewood, 657 P.2d 961, 962-63 (Colo. Ct. App. 1982); Parkway Towers Condominium Ass'n v. Metropolitan Dade County, 295 So. 2d 295, 359-96 (Fla. 1974); Hunke v. Foote, 64 Idaho 391, 395, 373 P.2d 322, 323 (1962). For cases in which courts have exempted governmental units from their own ordinances, see Keiswetter v. City of Petoskey, 124 Mich. App. 590, 594-95, 335 N.W.2d 94, 96 (1983); Witzel v. Village of Brainard, 208 Neb. 321, 322 N.W.2d 723 (1981); McGrath v. City of Manchester, 113 N.H. 355, 357, 307 A.2d 830, 832 (1973); Kedroff v. Town of Springfield, 127 Vt. 624, 256 A.2d 457 (1969). See generally Wright, Intergovernmental Relations: An Analytical Overview, in URBAN POLITICS: PAST, PRESENT, AND FUTURE 275 (H. Hahn & C. Levine eds. 1980), for a discussion of various types of intergovernmental relationships.

2. See cases cited infra note 182.

tablish a residential treatment center for juvenile delinquents in an area of a city zoned only for single family residences.4

The potential for dispute between the two units is at its maximum when the intruding governmental unit (the "intruder") proposes a use perceived by the host government (the "host")5 as noxious, dangerous, or contrary to the health, safety, or welfare of its constituency. Frequently, the statutory delegation of extraterritorial land use rights does not indicate which governmental unit involved in the dispute has the superior right.6

These intergovernmental disputes raise several common and valid concerns. Granting an intruder immunity from the host's regulations may, for example, promote unilateral and irresponsible decision making by the intruder. In addition, an immune intruder might be insensitive to the host's concerns and unwilling to negotiate to minimize the negative effects of the proposed use. In contrast, granting a host control over the intruder's project may be unwise because of the host's narrower self-interest and the inadequacy of its decision making process to evaluate the broader or different public interest being served by the intruder. These concerns indicate that in some instances the intruder should be granted immunity, while in others the host should be granted control over the project.

From the early cases involving local opposition to the construction of highway systems,7 waterworks,8 and airports9 in vi-

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5. In this Article, the terms "intruder" and "host" designate, respectively, the governmental unit seeking to establish the disputed use inside another government's territorial borders, and the governmental unit asserting its territorial sovereignty over the proposed use. These terms embody no judgment about the relative merits of either governmental unit's position.

6. For examples of cases discussing specific statutory provisions that provide for either host control or intruder immunity, see infra note 142.

7. E.g., Town of Bloomfield v. New Jersey Highway Auth., 18 N.J. 237, 244-46, 113 A.2d 658, 662 (1955) (highway authority not subject to host town's zoning ordinances in constructing restaurants and filling stations for proper public use along a parkway project); State ex rel. Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 174-75, 107 N.E.2d 345, 350 (turnpike commission exempted from zoning ordinance where agency is vested with power of eminent domain), cert. denied, 344 U.S. 865 (1952).

8. E.g., Village of Larchmont v. Town of Mamaroneck, 239 N.Y. 551, 203 N.Y.S. 957, 957, 147 N.E. 191, 191 (1924) (host town enjoined from enforcing zoning ordinance where agency's waterworks building was held for public use). But see Taber v. City of Benton Harbor, 280 Mich. 522, 525-26, 274 N.W.
olation of local zoning ordinances, a variety of judicial rules emerged that generally granted the intruder immunity from host control. Intruder immunity resulted if the court determined that the intruder was exercising a governmental rather than proprietary function, if the intruder possessed the power of eminent domain over the disputed land, or if the intruder occupied the position of a superior sovereign in the court's view of the hierarchy of state and local governmental units.

By the early 1970s, however, these three traditional tests for governmental immunity had been vigorously criticized as unreasoned, inflexible, and incapable of dealing with the complexities of modern land use disputes. As a result, various state courts abandoned their prior adherence to the traditional immunity rules in favor of a more general and flexible balancing of interests test. Eschewing the mechanical application of the immunity label, these courts stressed the need for a better-reasoned approach to the question of which governmental interest should prevail in the particular factual situation. Commentators and courts alike heralded the new balancing test as more responsive to both governments' legitimate interests and better able to deal with the complexities of our highly urbanized society.

324, 325 (1937) (municipality operating waterworks system in proprietary capacity must comply with zoning ordinances).


10. See infra text accompanying notes 46-62.

11. See infra text accompanying notes 20-30.

12. See infra text accompanying notes 31-45.


14. See Johnston, Recent Cases in the Law on Intergovernmental Zoning Immunity: New Standards Designed to Maximize the Public Interests, 8 Urb. Law. 327 (1976) (balancing test encourages good faith reconciliation of adverse land use proposals, thereby discouraging litigation and maximizing use of expert opinion); Note, Governmental Immunity from Zoning, 22 B.C.L. Rev. 783 (1981) [hereinafter Note, Immunity from Zoning] (preferred balancing test in need of modification to include all factors relevant to maximizing public inter-
Perhaps because of its intuitive appeal and reasonable results, ten state courts have adopted the balancing test and several others intimated that they find the new approach preferable to the more rigid rules of absolute immunity. At the same time, however, one state supreme court recently re-

est); Comment, Balancing Interests to Determine Governmental Exemption from Zoning Laws, 1973 U. Ill. L.F. 125 [hereinafter Comment, Balancing Interests] (arguing that balancing test provides courts with flexibility that produces decisions in the public interest). The balancing test was praised as a test that allowed the intruder to proceed with its project, but not at the expense of the host's land use plans. For example, a balancing court might authorize the construction of a university dormitory in violation of local zoning, but only after the intruder displayed a sensitivity to local opposition and a willingness to minimize the negative impact of its proposed use. See Rutgers, State Univ. v. Piluso, 60 N.J. 142, 153-54, 286 A.2d 697, 703 (1972). Conversely, a balancing court might refuse to exempt an intruder from local zoning laws if the court determined that the enforcement of the host's regulations would not totally frustrate the intruder's legitimate attempt to exercise its powers. See, e.g., Brownfield v. State, 63 Ohio St. 2d 282, 286, 407 N.E.2d 1365, 1368 (1980). See also cases cited infra note 15.

15. Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610, 611 (Fla. 1976), aff'd 322 So. 2d 571 (Fla. Dist. Ct. App. 1976); Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 112, 576 P.2d 230, 238 (1978); Dearden v. City of Detroit, 403 Mich. 257, 264, 269 N.W.2d 139, 142 (1978); Town of Oronoco v. City of Rochester, 293 Minn. 468, 471, 197 N.W.2d 426, 429 (1972); Rutgers, State Univ. v. Piluso, 60 N.J. 142, 152-53, 286 A.2d 697, 702-03 (1972); City of Fargo v. Harwood Township, 256 N.W.2d 694, 698 (N.D. 1977); Brownfield v. State, 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1368 (1980); Independent School Dist. No. 89 v. City of Oklahoma City, 722 P.2d 1212, 1216 (Okla. 1986); Blackstone Park Improvement Ass'n v. State Bd. of Standards & Appeals, 448 A.2d 1233, 1240 (R.I. 1982); Lincoln County v. Johnson, 257 N.W.2d 453, 457 (S.D. 1977). Although the Kansas Forestry case is cited by courts, the Kansas Supreme Court has not adopted the appellate court's opinion in that case. In fact, it has specifically found the balancing test inapplicable to determine whether local building codes should apply to the intruder's project. State ex rel. Schneider v. City of Kansas City, 228 Kan. 25, 38, 612 P.2d 578, 587 (1980). The court reserved judgment on whether the balancing test was appropriate for resolution of intergovernmental zoning disputes. Id. In addition, the Michigan Supreme Court's decision in Dearden v. City of Detroit is listed here as a balancing test because the court itself describes its opinion as applying a test similar to the Piluso test. See 403 Mich. at 126 n.4, 269 N.W.2d at 142 n.4. The court did not, however, engage in a balancing of interests; its approach is discussed infra note 105.

versed its previous adoption of the balancing test and two other courts have expressly declined to adopt it. These courts have criticized the balancing test as nebulous and unpredictable and contend that it provides an incentive for litigation and appeals.

This Article examines the judicial role in intergovernmental land disputes. Part I evaluates the three traditional tests for governmental immunity and notes their advantages and disadvantages. Parts II and III then examine the more recent balancing test and analyze its strengths and weaknesses.

Drawing from the analyses in the first three Parts, Part IV first sets forth the Article's two proposals for limiting judicial involvement in intergovernmental disputes while at the same time encouraging intergovernmental cooperation: that the intruding governmental unit should always participate in the host government's procedures at both the administrative and legislative level; and that a rule allocating the land use right to one governmental unit or the other is preferable to balancing. The first proposal seeks to protect the governments' constituents from the dangers inherent in both irresponsible and unilateral decision making. This requirement reflects the belief that open participation in local procedures encourages rational decision making and minimizes the potential for litigation. In addition, the factual record made during the local hearing provides the needed evidentiary record for judicial review if a compromise does not result. The second proposal stimulates privately negotiated settlements and avoids unnecessary judicial involvement.

This Article's suggested approach is similar to the traditional intruder immunity tests in that it prefers a clear and definite rule that offers the parties a predetermined allocation of the land use right at issue. Part IV, therefore, also considers

19. In Conners v. New York State Ass'n of Retarded Children, 82 Misc. 2d 861, 370 N.Y.S.2d 474 (Sup. Ct. 1975), the court complained that the record contained no evidence about the rationale behind the intruder's choice of site or the land use impact of its proposal. Id. at 864-65, 370 N.Y.S.2d at 477-78. The unavailability of relevant evidence was due in part to the intruder's assertion of absolute immunity and its failure to seek host approval. Id. at 862-63, 370 N.Y.S.2d at 476.
the proper allocation of the land use right in the four contexts in which intergovernmental disputes arise: when the intruding government embraces the host government; when the host government embraces the intruding government; when the two governmental units are coterminous; and when the two governmental units are noncontiguous. Viewed from the perspective of these intergovernmental relationships, two major considerations become relevant to the choice between host control and intruder immunity. First, the political relationship that exists between the two units and the characteristics of their respective political processes will operate either to inhibit or stimulate each governmental unit's incentive to reach an acceptable compromise. Second, the scope of each unit's governmental powers and the constituents it represents is an important factor that changes with the context of the conflict. Based on a consideration of these two factors, the land use right should be granted to the unit with more incentive to respond to the other unit's legitimate needs and concerns. Applying this analysis to the four contexts described above, Part IV produces the following rules: if the intruder embraces the host or if the two units are coterminous, immunity should be granted to the intruder; if the host embraces the intruder or if the units are noncontiguous, however, the host should be granted the right of control.

Finally, the Article suggests that an arbitrary and capricious standard of judicial review that requires courts to consider the legislative mandates of both governmental units will best effectuate the resolution of the two conflicting legislative goals involved in the land use dispute.

I. AN EVALUATION OF THE TRADITIONAL RULES OF IMMUNITY

A. THE EMINENT DOMAIN TEST

Under the eminent domain theory of governmental immunity, when the intruder possesses the power of eminent domain, the host's zoning powers cannot apply to the intruder's proposed use. This theory is based on the concern that appli-

19a. For a discussion of the term "embraces," see infra note 164.
20. For examples of cases adopting the eminent domain test, see Mayor of Savannah v. Collins, 211 Ga. 191, 84 S.E.2d 454 (1954); State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960); City of Kirkwood v. City of Sunset Hills, 589 S.W.2d 31 (Mo. App. 1979); Seward County Bd. of Comm'rs v. City of Seward, 196 Neb. 266, 242 N.W.2d 849 (1976); State ex rel. Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, cert. denied, 344 U.S. 865 (1952); State
cation of the host's zoning ordinance in such cases could completely frustrate the intruder's attempts to exercise its legitimate, delegated powers of eminent domain within the host's territorial jurisdiction.21 Some of the courts adopting this rule have concluded that the eminent domain power "is inherently superior to the exercise of the zoning power."22 Other courts have found that the grant of extraterritorial condemnation power itself evidences a legislative intent to immunize the exercise of that power from host control.23 In addition, a few courts have reasoned that although zoning ordinances are based on the premise that private property rights must yield to the overriding general welfare served by zoning, this general rule has no application in the context of governmental uses of land because the intruder's use of public property for public purposes already presupposes the furtherance of the general welfare.24

Critics of the eminent domain test have argued that the test improperly permits the intruding governmental body to stymie the host's attempts to promote rational land use control and development.25 In addition, the rule decreases the intruder's incentive to negotiate: if the intruding government is assured of immunity, the critics claim, it may act irresponsibly

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22. Seward County Bd. of Comm'r's v. City of Seward, 196 Neb. 266, 274, 242 N.W.2d 849, 854 (1976); accord South Hill Sewer Dist. v. Pierce County, 22 Wash. App. 738, 591 P.2d 877 (1979). One explanation for this somewhat curious assertion was given by the court in City of Kirkwood v. City of Sunset Hills, 589 S.W.2d 31, 42 (Mo. Ct. App. 1979), when it noted that because the eminent domain power has its source in the state constitution it cannot be restricted by the zoning power, which does not have a constitutional origin. Because state police power is deemed inherent and because state constitutions are limits rather than grants of power, however, the relevance of the assertion is dubious. See, e.g., Oakland County Taxpayers' League v. Board of Supervisors, 355 Mich. 305, 323, 94 N.W.2d 875, 885 (1959) (constitution a limit on the exercise of legislative power). See also Village of Lucas v. Lucas Local School Dist., 2 Ohio St. 3d 13, 15, 442 N.E.2d 449, 451 (1982) (even constitutionally granted powers yield to statutorily granted powers if the legislative acts are of broader concern than the constitutionally granted local powers).
25. See, e.g., Note, Governmental Immunity, supra note 13, at 875-76.
and without concern for the landowners immediately affected by the proposed use. Concerned with this potential for abuse, one critic described the immunity conferred by the eminent domain test as a "license for irresponsible governments to run rough-shod over the interests of adjacent jurisdictions in the name of general welfare." 

Although this parade of horribles does seem to be a possible result of the application of the eminent domain test, little evidence in the case law suggests that these dire predictions have become a reality. Implicit in many of the decisions granting the intruder immunity under the eminent domain test has been the requirement that the intruder act responsibly and with sensitivity to the host's land use plan and local concerns. Some of the courts applying the eminent domain test have specifically noted that the host should be afforded some protection against the potential for arbitrary and capricious actions by the intruder. In addition, the reported cases upholding intruder immunity under the eminent domain test give no hint of irresponsible or arbitrary decision making on the part of the intruder.

It is true, however, that a blanket grant of immunity, one free from the requirement that the intruder respond in good faith to host concerns, imposes no judicially created incentive for negotiation and compromise. To the extent that nonjudicial factors are ineffective in producing intergovernmental cooperation, courts should require negotiation between the parties. Thus, the crucial flaw in the eminent domain test lies not so much in the results that have been obtained, but rather in the fact that it fails to protect against unilateral decision making by the intruder.

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26. Id.
30. Even in the absence of judicially or legislatively mandated intergovernmental cooperation, such cooperation is nevertheless extensive. See R. BISH & V. OSTROM, UNDERSTANDING URBAN GOVERNMENT 68 (1973) and studies cited therein. In addition, as Bish and Ostrom note, rational individuals will search out negotiated solutions if only because they are less expensive than adjudicated solutions and, also, because these governmental units must
B. THE SUPERIOR SOVEREIGN TEST

The second judicial rule for deciding between host control and intruder immunity requires courts to rank the competing governmental units within a hierarchy of state sovereignty. This superior sovereign test grants immunity to the intruder if the intruder is ranked the "higher" sovereign of the two.\textsuperscript{31} Under this rule, immunity has been granted to state agencies seeking exemptions from local regulation\textsuperscript{32} and to counties resisting the application of city or village zoning to county property.\textsuperscript{33} If the intruder does not occupy a superior rank, the court will resort to rules of statutory construction to determine whether host control is appropriate in a given case.\textsuperscript{34}

Commentators have uniformly denounced the application of the superior sovereign test. The major defects cited include the test's lack of safeguards against irresponsibility,\textsuperscript{35} the practical difficulties inherent in developing a system of sovereign coexist on a daily basis. \textit{Id.} at 67-68. \textit{See also} Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610, 612 n.3 (Fla. 1976) (public interest served by requiring that state agencies seek local approval of proposed nonconforming use because zoning appeals are less expensive and more expeditious alternative to litigation).

\textsuperscript{31} In Aviation Servs., Inc. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761 (1956), the court described the rule: "Where the immunity from local zoning regulation is claimed by any agency or authority which occupies a superior position in the governmental hierarchy, the presumption is that such immunity was intended in the absence of express statutory language to the contrary." \textit{Id.} at 282, 119 A.2d at 765. Although the New Jersey court expressly repudiated this rule in Rutgers, State Univ. v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972), vestiges of the superior sovereignty rationale survive. In the Piluso decision itself, for example, the court noted that, in general, the state and its agencies will be immune from local regulation. \textit{Id.} at 153, 286 A.2d at 703. For a discussion of the Piluso decision, see infra text accompanying notes 68-74.


\textsuperscript{35} Johnston, supra note 14, at 332.
ranking, the inconsistencies in the test's application, the inability of the test to deal with conflicts between governmental units of equal rank, and the test's failure to recognize that all units of local government are "equally 'agents of the state.'" Critics note further that the superior sovereign test neither recognizes that a government's superior ranking does not guarantee that government's superior land use planning ability nor ensures that the superior intruder's project furthers a greater social utility. Recognizing the myriad problems with the test, courts have rejected it as simplistic and lacking in reasoned analysis.

The criticisms of the superior sovereign test all relate to its major weakness: it fails to protect the host from unilateral and irresponsible decision making. Although a state agency, for example, may adopt extensive safety procedures and engage in a lengthy study of the potential impact of its action during the site selection process, the absence of the local host's input on issues of land use control may cause the surrounding properties and the health, safety, and welfare of the host's constituency to suffer. Implicit in the decisions that continue to apply the superior sovereign test, however, is the countervailing concern that the superior sovereign, with a broader mission or more general constituency within the state, should not be subject to the whims of a local decision maker in pursuing its govern-

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36. See infra note 57 and accompanying text.
37. See infra note 55 and accompanying text.
38. Note, Immunity from Zoning, supra note 14, at 790; Comment, Balancing Interests, supra note 14, at 128.
39. Note, Governmental Immunity, supra note 13, at 877.
40. Note, Immunity from Zoning, supra note 14, at 791; Note, Governmental Immunity, supra note 13, at 878.
42. See, e.g., Mayor of Baltimore v. State, 281 Md. 217, 221, 378 A.2d 1326, 1328 (Md. Ct. App. 1977) (interagency committee reviewed substantial number of possible sites for state correctional institution before making final recommendation); Appelbaum v. St. Louis County, 451 S.W.2d 107, 108 (Mo. 1970) (consulting engineers' study determined most appropriate size and location for proposed facility); In re Suntide Inn Motel, Oklahoma City, 563 P.2d 125, 127 (Okla. 1977) (state corrections department conducted extensive site selection procedure).
43. See City of Temple Terrace, 322 So. 2d at 578-79 (noting that "[t]he decision of a person administering an outlying function of a state agency with respect to the site where this function should be performed is not necessarily any better than the decision of the local authority on the subject of land use.").
mental tasks. The superior sovereign test thus embodies the presumption that because a greater public good is being served by a state highway project than by a local zoning ordinance, for example, the intruder should be free from local control. Unfortunately, the courts adopting this rule erroneously equate the importance of the project with the need to spare the intruder the inconvenience of responding to and accommodating the legitimate concerns of the host. Recognizing the importance of host input in the decision making process would, however, go a long way toward answering the criticisms directed at the superior sovereign test.44

Notwithstanding all its shortcomings, the superior sovereign test correctly recognizes that the identity of the disputing governmental units is a relevant consideration in allocating the land use right. Unfortunately, the test focuses on an abstract hierarchy of state sovereignty rather than on an assessment of the relationship between the two units themselves. An examination of that intergovernmental relationship reveals important facts about the ability of the host's decision making bodies to accommodate the competing interests and helps to assess the likelihood that the host's legitimate concerns will prompt cooperation and compromise by the intruder. A consideration of these facts in turn suggests the proper choice between intruder immunity and host control in those instances in which the host government has failed to give its approval for the intruder's project.45

C. THE GOVERNMENTAL FUNCTION TEST

The third traditional immunity test, which turns on whether the intruder was exercising a governmental rather than proprietary function,46 developed as a judicial response to the breadth of the first two immunity rules. Some courts originally used this theory as a way to limit the intruder's immunity from host control by holding that only governmental functions were entitled to immunity.47 On that basis, for example, courts have classified municipally owned waterworks48 and waste dis-

44. See infra text accompanying notes 147-62.
45. See infra text accompanying notes 165-216.
48. E.g., Baltis v. Village of Westchester, 3 Ill. 2d 388, 405, 121 N.E.2d 495,
posal facilities as proprietary functions and thus subject to host control. In contrast, courts have held that prisons, courthouse facilities, and firehouses constitute immune governmental functions.

Dissatisfaction with the governmental versus proprietary test in zoning immunity cases parallels the widespread criticism of the test in other areas of law. Inconsistent decisions are perhaps the inevitable result of applying such a nebulous concept to the continually evolving role of government. Although a number of state courts continue to apply the rule,


53. More than one of the three traditional tests for immunity may be applied within the same state. Compare, e.g., City of Kirkwood v. City of Sunset Hills, 589 S.W.2d 31, 38-40 (Mo. Ct. App. 1979) (applying eminent domain test to hold Sunset Hills zoning ordinance inapplicable to property acquired by Kirkwood within Sunset Hills for a public swimming pool) with City of Vinita Park v. Girls Sheltercare, Inc., 664 S.W.2d 256, 262 (Mo. Ct. App. 1984) (immunizing the county from city zoning ordinances when engaged in the exercise of a governmental function). For a listing of numerous cases applying the governmental-proprietary test, see South Hill Sewer Dist. v. Pierce County, 22 Wash. App. 738, 742, 591 P.2d 877, 880 (1979).

54. In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the Court rejected a similar standard in the context of the tenth amendment, noting its unwieldiness and difficulty of application. Id. at 539. See also, Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 22 VA. L. REV. 910 (1936) (criticizing the standard's application to tort law).


56. E.g., City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962); Nehrbas v. Incorporated Village of Lloyd Harbor, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957). For some courts, the governmental label appears to serve mainly as a buttress for another basis of decision. See, e.g., City of New Orleans v. State, 364 So. 2d 1020, 1023 (La. 1978); City Comm'r's v. Conservation Comm'n, 380 Mass. 706, 711, 713, 405 N.E.2d 637, 639, 641 (1980);
many others have persuasively argued for abandoning it, noting its difficulty of application and suggesting that the distinction between governmental and proprietary functions is illusory.\textsuperscript{57} In connection with the latter problem, one court has suggested that the increasing governmental involvement in many new areas may lead to the conclusion that all lawful municipal functions should receive the immunity label of governmental.\textsuperscript{58}

Although criticism of the governmental function test inevitably focuses on the test’s grant of unguided and unprincipled discretion to the court, that same feature seems to account for its once widespread popularity.\textsuperscript{59} That is, the test allows courts to consider factors such as the intruder’s need for the project and the project’s potential negative impact.\textsuperscript{60} A conclusion that the intruder’s project was governmental, therefore, reflected the court’s decision that the project was too important to the general welfare to be subjected to local host control.\textsuperscript{61} Whatever its original justification, however, application of the test either operates to obscure the court’s real analysis or results in application of a label whose relevance to the real dispute is dubious at best.

The widespread criticism of the three immunity tests has persuasively revealed their many defects and has been instrumental in the gradual decline in their use. The tests share the


\textsuperscript{58} Oswald v. Westchester County Park Comm’n, 234 N.Y.S.2d 465, 467-68 (Sup. Ct. 1962), aff’d, 18 A.D.2d 1139, 239 N.Y.S.2d 862 (1963). Interestingly, this court applies the governmental function test despite its recognition that the distinction between governmental and proprietary functions is less than clear. See id. at 468-69.

\textsuperscript{59} The test has been characterized as the majority or plurality rule. See Johnston, supra note 14, at 328 & n.5.

\textsuperscript{60} See Note, Governmental Immunity, supra note 13, at 871-74.

\textsuperscript{61} See Kedroff v. Town of Springfield, 127 Vt. 624, 256 A.2d 457 (1969) and the discussion of that case in Note, Governmental Immunity, supra note 13, at 873-74. See also Comment, Balancing Interests, supra note 14, at 133. The Supreme Court of Arizona adopted this approach, holding that an intruder’s proposed sewage disposal plant was an immune governmental project, characterizing it as a “stark necessity.” City of Scottsdale v. Municipal Court, 90 Ariz. 393, 398, 368 P.2d 637, 640 (1962).
same basic characteristic: the application of conclusory labels that do not reflect the relevant factors involved in an intergovernmental dispute. In addition, the tests dichotomize the decision in any given case as a choice between unbridled intruder immunity and absolute host control. In doing so, the tests fail to facilitate the compromise that could be achieved between the two conflicting yet legitimate assertions of governmental power by simply requiring the intruder to request host approval for the project. Moreover, the traditional tests ignore the relevance of the relationship between the governmental units and the powerful extrajudicial incentives for compromise and cooperation.62

II. JUDICIAL REACTION TO THE TRADITIONAL IMMUNITY TESTS

In Rutgers, The State University v. Piluso63 and Town of Oronoco v. City of Rochester,64 the New Jersey and Minnesota Supreme Courts rejected the traditional immunity tests and established a new balancing of interests test. These contemporaneous yet apparently independent holdings65 form the touchstone of the current trends in intergovernmental immunity disputes. Since their adoption in the early 1970s, at least twelve other state courts have considered the new balancing tests. While some of those courts have adopted the new test in its entirety, other courts have adopted only parts of the holdings. In addition, several courts have suggested significant modifications to the original balancing test.66

A. THE PURE BALANCING TEST

1. Rutgers, The State University v. Piluso

In 1969, Rutgers, the state university of New Jersey, was experiencing a severe housing shortage. In an attempt to alleviate the shortage, the university planned to build several hundred student apartment units on land it owned in the township

62. See infra text accompanying notes 134-36.
63. 60 N.J. 142, 286 A.2d 697 (1972).
64. 293 Minn. 468, 197 N.W.2d 426 (1972).
65. Piluso was decided three months before Oronoco. The New Jersey court relied on Note, Governmental Immunity, supra note 13. 60 N.J. at 150, 286 A.2d at 701. The Minnesota court cited a different legal commentator advocating the balancing approach. Oronoco, 293 Minn. at 471 n.5, 197 N.W.2d at 429 n.5 (citing Note, Municipal Power to Regulate Building Construction and Land Use by Other State Agencies, 49 MINN. L. REV. 284 (1964)).
of Piscataway. Rutgers had, however, already built the maximum number of dormitory units permissible under the Piscataway zoning ordinance. After the university failed in its attempts to obtain first a building permit and later a variance from the township’s board of adjustment, it filed suit in state court asserting immunity from the township’s zoning ordinance.

The New Jersey Supreme Court upheld the trial court’s decision granting immunity to the university. In the course of its decision, the court criticized the traditional immunity tests’ application of “absolute,” “ritualistic,” and “simplistic” labels and asserted that the issue of intergovernmental immunity requires “reasoned adjudication of the critical question of which governmental interest should prevail in the particular relationship or factual situation.”

Surveying its prior holdings in the area, the court rejected the traditional immunity labels and concluded that courts should consider at least five factors when confronted with an intergovernmental immunity controversy: “the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests.” The court emphasized, however, that no single factor would necessarily control and that no precise formula could be established. Applying its newly formulated test to the facts of Piluso, the court concluded that the university was entitled to immunity from Pis-

67. *Piluso*, 60 N.J. at 146-47, 286 A.2d at 699. Specifically, the ordinance purported to limit only the number of units for married students and their families. *Id.* As the court explained, the township hoped that this type of ordinance would stem the growth of housing that would normally have high numbers of children and a low tax base. *Id.*

68. For the trial court’s decision, see 113 N.J. Super. 65, 272 A.2d 573 (1972). The township’s appeal was certified directly to the supreme court. *Piluso*, 60 N.J. at 144, 286 A.2d at 698.

69. 60 N.J. at 150, 286 A.2d at 701.

70. *Id.*


72. 60 N.J. at 153, 286 A.2d at 702.
cataway's zoning ordinance. As the state university, Rutgers was performing "an essential governmental function for the benefit of all the people of the state."73 The court reasoned that the legislature did not intend to give local municipalities control over the growth and development of this endeavor, or for that matter, over any other state project.74

In formulating its new balancing test, however, the Piluso court included an important caveat. Stressing the need for intergovernmental cooperation, the court cautioned against the unbridled and arbitrary exercise of immunity in disregard of legitimate local interests. At the least, the court urged, the invading governmental unit should consult with local authorities and attempt to minimize host concerns.75 Convinced that Rutgers had in fact acted reasonably in response to local opposition, the Piluso court found that authorizing Rutgers's building project in contravention of Piscataway's zoning ordinance would not thwart any legitimate land use concerns.76

The New Jersey court explicitly characterized its new test as the proper means for determining legislative intent with respect to the particular intruding agency or other governmental unit.77 In reality, however, the test applies only in those situations in which it is impossible to ascertain honestly the relevant legislative intent. In fact, the Piluso court made its decision without regard to any explicit statutory guidance. The court simply weighed the strength of each unit's claims and the relative public interests involved. In the court's own words, the choice between intruder immunity and host control depended on a "value judgment reached on an overall evaluation."

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73. Id. at 153, 286 A.2d at 703. The court expressed its total disapproval of the township's "astonishing" argument that the university should build more classrooms rather than more dormitories. These important policy decisions are exclusively within the competence of the educational authorities. Id. at 150, 286 A.2d at 701.
74. Id. at 153, 286 A.2d at 703. The court noted that "all state functions and agencies" will generally be immune from local land use regulation. Id.
75. Id. at 153-54, 286 A.2d at 703.
76. Id. at 154, 286 A.2d at 703. The court recognized that Piscataway's opposition to the project was based on its fear of incurring the additional cost of educating increased numbers of new children brought in by the housing construction. Id. It concluded, however, that this fiscal interest was not a legitimate land use concern. Id. New Jersey has vigorously denounced fiscal zoning as an impermissible exercise of the police power. See Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, appeal dismissed and cert. denied, 423 U.S. 808 (1975).
77. Piluso, 60 N.J. at 152, 286 A.2d at 702.
78. Id.
Thus, despite the Piluso court’s assertions to the contrary, the Piluso test is nothing more than a pure balancing test based on an overall subjective judicial assessment of the particular controversy at issue.79

In applying its new test, the Piluso court undertook a de novo review of the evidence presented in the case. This level of review was presumably related to the fact that the balancing test fails to require that the intruding governmental unit participate in the host’s decision making procedures. Although Rutgers did apply for a variance in this case, the Piluso court did not review the township’s decision to deny the request. Instead, the court independently evaluated the merits of Rutgers’s claims and its showing of good faith in consulting with local officials.

Thus, the New Jersey rule focuses on preventing irresponsible intruder decision making; it does not, however, attack the possible negative effects of unilateral decision making with equal fervor. A recent lower court opinion illustrates the problem. In Pemberton Township v. State,80 the Superior Court of New Jersey, Appellate Division, reversed the trial court’s holding that had encouraged the State Department of Corrections to seek a variance in its plan to locate a group home for juvenile delinquents in a residential area of Pemberton Township.81 The trial court had insisted that the host objectors be given a significant opportunity to voice their concerns so that the intruder would either accommodate those concerns or, in the alternative, give valid reasons for ignoring them.82 The appellate court disagreed, noting the state’s deliberate decision making process and its independent assessment of community objections.83 Unfortunately, the appellate court overlooked the trial court’s concern that the state, no matter how reasonable, was

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82. Id.

83. As the court noted, the Department routinely operated with “a finely tuned sensitivity to local sentiment, at least partially self-protective because of the perception that a community-based program cannot succeed in the face of substantial community hostility.” 178 N.J. Super. at 351-52, 429 A.2d at 363.
making unilateral decisions on the implementation of the project.

2. *Town of Oronoco v. City of Rochester*

In a decision issued three months after *Piluso*, the Minnesota Supreme Court adopted a similar balancing test in *Town of Oronoco v. City of Rochester*.

The controversy in *Oronoco* involved a county's refusal to grant a special use permit to a city that sought to build a solid waste disposal system on land it owned within the county. Without reviewing the trial court's decision to overturn the local board of adjustment's denial of a special use permit, the *Oronoco* court held that the city of Rochester should be immune from the county's zoning ordinances.

Like the New Jersey Supreme Court in *Piluso*, the *Oronoco* court refused to require intruder participation in local procedures, choosing instead to engage in its own de novo balancing. Recognizing that the "pungent realities of urban sprawl and overpopulation" have made land use controls more vital than ever, the court nevertheless cautioned against "the danger in too readily assuming enlightenment where none in fact may exist in the implementation of a particular local zoning policy." Turning to the case at hand, the court stressed the city's urgent need for a new waste disposal site and noted that the state pollution control agency, which is responsible for dealing with local environmental concerns, had granted the city a permit to construct the facility at the county site. On the basis of these two facts, the *Oronoco* court concluded that the balance should be struck in favor of intruder immunity and thus exempted the city of Rochester from the county's zoning ordinances.

Paralleling the *Piluso* example further, the *Oronoco* court attempted to fashion a rule that guarantees responsible decision making by intruding governmental units. Unlike the *Piluso* court, however, the *Oronoco* court did not stress the necessity for intergovernmental cooperation at the local level. Rather,

84. 293 Minn. 468, 197 N.W.2d 426 (1972).
85. Id. at 472, 197 N.W.2d at 429.
86. For criticisms of the *Piluso* balancing test, see supra text accompanying notes 77-83.
87. 293 Minn. at 471, 197 N.W.2d at 429.
88. Id.
89. Id. at 472, 197 N.W.2d at 429.
90. Although it is true that state agencies are charged with enforcing the
it expressed confidence that the state pollution control agency had adequately responded to all legitimate host concerns.\footnote{91}

B. Judicial Responses to the Balancing Test

1. The Legislative Intent Test

Recently, in Commonwealth Department of General Services v. Ogontz Area Neighbors Association,\footnote{92} the Pennsylvania Supreme Court rejected the balancing test in favor of what it found to be a more concrete and specific rule of statutory construction.\footnote{93} Specifically, the court held that when the legisla-

state's environmental policy, it is not necessarily the case that an agency will consider site-specific concerns such as traffic flow, aesthetic considerations and safety, and the preservation of natural resources. See, e.g., Shupack v. Manasquan River Regional Sewerage Auth., 194 N.J. Super. 199, 204, 476 A.2d 816, 819 (App. Div. 1984); Lincoln County v. Johnson, 257 N.W.2d 453, 456 (S.D. 1977). These concerns can best be addressed by requiring intruder participation in local land use procedures. Such a requirement would sensitize the intruder to the peculiar local concerns in each case and would force the intruder to deal with those concerns as a responsible unit of government. See infra notes 129-36 and accompanying text.

91. Oronoco, 293 Minn. at 472, 197 N.W.2d at 429. Only the Supreme Courts of Oklahoma and Rhode Island have adopted the pure balancing test. See Independent School Dist. No. 89 v. City of Oklahoma City, 722 P.2d 1212, 1216 (Okla. 1985); Blackstone Park Improvement Ass'n v. State Bd. of Standards & Appeals, 448 A.2d 1233, 1239-40 (R.I. 1982). In Blackstone Park, the Rhode Island Supreme Court held that the State Department of Labor's proposed rehabilitation center for injured workers was immune from Providence's zoning ordinance. Applying the balancing test to determine where the "broader public interest" lay, id. at 1239, the court made three basic findings. First, it concluded that the state's provision of vital rehabilitative therapy was paramount to the city's interests and to the concerns of the small group of affected property owners. Second, the court noted that the state had made reasonable efforts to accommodate local needs, even though the state agency had not requested local zoning approval. And third, because of the presence of similar uses in the area, the court concluded that the state's proposal would not constitute "the antithesis of sound land use for its specific site." Id. A review of the three justifications offered in support of its decision to grant immunity reveals that Blackstone Park suffers from the shortcomings inherent in the pure balancing test. First, it required the court to choose one governmental interest as superior to another. Second, it concluded that evidence of reasonable intruder decision making was sufficient to override the host's attempts to become involved in the implementation of the state agency's basic policy decision. Finally, it required the court, rather than the relevant local authorities, to make the initial assessment of the land use impact of the proposed project.


93. The court concluded that the balancing test it had previously adopted constituted an objectionable "ad hoc judicial legislation of authority to the governmental unit which, in the circumstances, seems to have the most compelling case." Id. at 626, 483 A.2d at 454.
ture did not reveal its intent as to which governmental unit should prevail in an intergovernmental zoning dispute, the relevant rule of statutory construction required that the court weigh the consequences of granting intruder immunity against the consequences of favoring host control. Under this test, the statutory interpretation that maximizes the exercise of both admittedly legitimate powers should be favored by the court.94

The Ogontz case involved a municipal zoning ordinance that excluded a proposed state facility for the mentally handicapped from a residential district. Stressing its duty to effectuate legislative intent, the Ogontz court first reviewed its previous applications of the balancing test; the court found the holdings in these cases to be inconsistent. In one case, the court had held that the delegation of power to school districts to acquire land evidenced a "'precise and specific'"95 legislative intent to grant school district immunity from host zoning. In contrast, another case held that a similar grant of land acquisition power to the Bureau of Corrections did not reflect a legislative intent to immunize the intruding state agency.96 Comparing the relevant legislative provisions in those two cases, the Ogontz court concluded that the different results reflected different judicial balancings of the equities involved, rather than a difference in legislative intent.97

Uncomfortable with the application of a balancing test that "has nothing to do with legislative intent"98 and that leads to "uncertain results at every level,"99 the Ogontz court announced a return to the task of determining legislative intent.

94. Id. at 628, 483 A.2d at 455.
95. Id. at 627, 483 A.2d at 454 (quoting Pemberton Appeal, 434 Pa. 249, 256, 252 A.2d 597, 600 (1969)).
96. Id. In Pemberton Appeal, 434 Pa. 249, 252 A.2d 597 (1969), the relevant statutory provision granted the school district the power to "locate, determine, acquire, and if necessary condemn, all real estate deemed necessary for schools." Id. at 256, 252 A.2d at 600. In comparison, the legislation involved in City of Pittsburgh v. Commonwealth, 468 Pa. 174, 360 A.2d 607 (1976), delegated to the Bureau of Corrections the power "to establish . . . such prisoner pre-release centers at such locations throughout the Commonwealth as it may deem necessary."
97. Ogontz, 505 Pa. at 627, 483 A.2d at 454. Somewhat incongruously, the court noted that it did not disagree with the result reached in the two cases. Id. If the goal is to ascertain legislative intent, and if the legislative intent was indistinguishable in the two cases, it is unclear how the court would have reached the same results by applying its newly announced test of legislative intent.
98. Id. at 627, 483 A.2d at 455.
99. Id. at 626, 483 A.2d at 454.
With the Pennsylvania Statutory Construction Act as its guide, the court held that when the legislative intent is ambiguous, intent must be determined by considering the consequences of a particular statutory interpretation.

Applying the rule to the case before it, the court decided that only one of the two possible resolutions of the conflict would give effect to both legislative mandates; that is, the delegation of the municipal power to zone and the grant of agency power to establish mental health facilities. Granting intruder immunity would frustrate the city’s zoning scheme; application of the city’s zoning ordinance, however, would only force the state to exercise its power at another site. Applying its newly formulated rule, the court concluded that granting host control to the city would better reflect the legislative mandates of both statutes. Unfortunately, the court did not consider whether the state had valid reasons for choosing the disputed site over allegedly suitable alternative sites.

The Pennsylvania court’s legislative intent test attempts to maximize the implementation of two conflicting, delegated powers. The Ogontz court assumed that its holding would not prevent the state agency from establishing mental health facilities, but would merely require the state to address the host’s legitimate concerns. In this respect, the Ogontz test is indistinguishable from the balancing test’s focus on the specific exercise of the intruder’s power in the context of the host’s municipal regulations. The Ogontz test differs from the pure balancing test, however, in its assumption that, so long as the host does not try to exclude an intruder’s project entirely, the courts will allow the host’s regulations to apply.

100. See 1 PA. CONS. STAT. ANN. § 1921(c)(6) (Purdon Supp. 1986).
101. 505 Pa. at 627, 483 A.2d at 455.
102. Id. at 628, 483 A.2d at 455.
103. See e.g., City of Pittsburgh v. Commonwealth, 468 Pa. 174, 190, 360 A.2d 607, 615 (Eagen, J., dissenting) ("[Z]oning boards have no expertise in determining locations which will aid in the rehabilitation process, particularly at such a crucial stage as readjustment to a free environment.").
104. See Johnston, supra note 14, at 332, 335-340.
105. 505 Pa. at 628, 483 A.2d at 455. See also Borough of Tunkhannock v. County of Wyoming, 507 A.2d 438 (Pa. Commw. Ct. 1986), in which the court exempted the county’s proposed reconstruction of a prison in violation of the host borough’s zoning ordinance, noting that application of the zoning ordinance would force the county to build on another site, at a much greater cost to taxpayers. Compare, Township of Middleton v. County of Delaware, — Pa. —, 511 A.2d 811 (1986) in which the Pennsylvania Supreme Court held a township zoning ordinance inapplicable to a county’s plan to construct a waste-to-energy plant on the premises of a county geriatric center. Concluding that
As the Ogontz case illustrates, the application of the legislative intent test depends more on whether the host’s intent is to exclude the intruder or whether it is merely to condition the intruder’s exercise of power than it does on a court’s determination that the legislature intended to immunize the intruder or, conversely, to grant host control. Dichotomizing the issue and presenting it as a choice between those two absolutes, however, makes the goal of intergovernmental cooperation and compromise difficult to attain.106

In sum, the legislative intent test correctly assumes that the legislature expected the intruding governmental unit to exercise its delegated power within the territorial jurisdiction of another government. The test conditions the exercise of host control on a showing that the intruder’s project will not be completely thwarted. By focusing on the host’s posture in the particular case, the test also properly reflects the presumed legislative desire for host accommodation of the intruder’s project. Because it does not mandate intruder participation in host procedures, however, the test does not go far enough toward maximizing intergovernmental negotiation. Moreover, the test becomes inadequate in those cases in which legislative intent is indecipherable, negotiations have failed, and both governments

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106. For examples of courts’ continued polarization of the issue by characterizing it as an either-or choice between immunity and host control, compare City of Livonia v. Department of Social Servs., 423 Mich. 466, 378 N.W.2d 402 (1985) (statute authorizing adult foster homes construed as exempting the homes from the host community’s zoning, thus eliminating the need to participate in the local host government’s zoning procedures) with Cody Park Ass’n v. Royal Oak School Dist., 116 Mich. App. 103, 321 N.W.2d 855 (1982) (school district subject to host control). As this Article will suggest, intruder participation in local proceedings should always result; requiring it only in cases where the court reaches a conclusion of nonimmunity may have the negative result of focusing the original negotiations between the conflicting governmental units on the debate between immunity and host control, rather than on how best to protect both units’ interests. See infra text accompanying notes 147-62.
assert reasonable arguments. At that point, the legislative intent test requires a resort to balancing.\(^{107}\)

2. The "Presumption of Host Control" Test

A plurality of the courts that have rejected the three traditional tests in favor of the Piluso-Oronoco pure balancing approach have modified that test to such an extent that application of the balancing label is strained at best. A review of the rules adopted by the courts of Florida,\(^{108}\) South Dakota,\(^{109}\) North Dakota,\(^{110}\) Kansas,\(^{111}\) and Ohio\(^ {112}\) reveals that these courts share the pure balancing test's criticism of the three traditional tests. These courts point to the inflexibility of the mechanistic rules that typically led to intruder immunity; like the Piluso and Oronoco courts, they note that the increasing complexity of urban society requires attention to the host's land use concerns to ensure more responsible decision making.

\(^{107}\) See, e.g., Pennsylvania Bureau of Corrections v. Board of Standards & Appeals, — Pa. Commw. —, 509 A.2d 970 (1986), in which the court had to rule on the applicability of the city's fire regulations to the State Bureau of Corrections' proposed renovation and expansion of a state penitentiary. The city's fire code would require a sprinkler head in each cell; the bureau claimed, however, that the sprinkler system would be inappropriate and potentially dangerous, noting the inmates could set the system off, razor blades could be hidden in the sprinkler heads, and the inmates could use the system to commit suicide by hanging. The court's holding that the state bureau was entitled to a variance involved a balancing of hardships and legitimate governmental interests.

\(^{108}\) See Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976). In this case, the Florida Supreme Court adopted the court of appeals' opinion, 322 So. 2d 571, 578 (Fla. Dist. Ct. App. 1975), as its own. 332 So. 2d at 612.


\(^{112}\) See Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365, 1367 (1980).
by the intruder. Unlike the pure balancers, however, these courts have insisted that the intruder participate in local host proceedings. They cite various justifications for this absolute requirement. One court noted that the local administrative resolution of conflict is more expeditious and less expensive than adjudicated solutions. Another court expressed the belief that utilization of a local forum would maximize harmony between governmental units. Still another saw the requirement as the best way to ensure that the intruder would consider the impact of its project on the host's legitimate land use concerns. By requiring participation in the relevant local procedures, the new rule forces the intruding government to respond to local concerns. It also ensures host participation, not in the intruder's fundamental policy decisions, but in the implementation of those policies. As a result, the rule maximizes the likelihood of accommodation and compromise between the two units, while at the same time it minimizes the potential for unilateral decisions by the intruder.

A review of the decisions that require the intruder to seek local approval for its projects as the first step in intergovernmental conflicts, the Illinois Supreme Court recently has recognized that "the means for achieving cooperation between independent units of government having competing interests or overlapping responsibilities cannot be reduced to a rigid mathematical formula." Wilmette Park Dist. v. Village of Wilmette, 112 Ill. 2d 6, —, 490 N.E.2d 1282, 1286-87 (1986). In Wilmette, the court refused to decide the merits of the park district's claim of immunity from local zoning; rather, it ordered the park district to participate in a special use hearing before the relevant local body. The court also noted that judicial review would be available to hear the park district's complaints of arbitrary or discriminatory village action. Id. at —, 490 N.E.2d at 1287. Thus, it seems that Illinois has actually, though not expressly, joined with those courts that have adopted a presumption of host control.

Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 322 So. 2d 610, 612 n.3 (Fla. 1976), aff'd 322 So. 2d 571 (Fla. Dist. Ct. App. 1975). The court of appeals' decision in the Hillsborough case stopped short of imposing an absolute requirement of intruder participation in the host's process. The court raised the possibility that in some instances the state may be convinced of the overriding public need for its proposed project and validly exempt itself from local proceedings. 322 So. 2d at 579. The court of appeals also warned, however, that "under normal circumstances" the intruder should seek permission for its project from the proper local authorities. Id. Likewise, the Florida Supreme Court firmly insisted on the desirability of airing the conflict in a local host forum. 332 So. 2d at 613. See also Pal-Mar Water Management Dist. v. Martin County, 777 So. 2d 752, 754 (Fla. Dist. Ct. App. 1980) (suggesting that the intruder should apply to the host for an exception to or change in zoning regulations).

Brownfield, 63 Ohio St. 2d at 286, 407 N.E.2d at 1368.
ment disputes resolution reveals at least two different formulations of the proper judicial role in that process. According to one line of cases, a court reviewing the intruder's failed attempt to obtain local approval should engage in its own general balancing of all interests involved. These courts apply the Piluso-Oronoco rule of balancing, but only after host proceedings at the local level have failed to result in agreement. Adopting this approach, the Ohio Supreme Court defined the appropriate judicial role as being "to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens."\textsuperscript{118}

Although the requirement of mandatory intruder participation in local proceedings has numerous advantages,\textsuperscript{119} defining the judicial role as that of a general balancer on a case by case basis suffers the shortcomings noted earlier in this Article.\textsuperscript{120} Perhaps because of a shared uneasiness with the balancing test, a second group of courts has defined the judicial role more narrowly. These courts retain the requirement of mandatory intruder participation in local proceedings but also require that an intruder unable to win host approval must bear the burden of establishing that the host's refusal to grant approval was arbitrary.\textsuperscript{121} Implicit in this additional requirement is the decision to favor host control over intruder immunity. Unless exercised arbitrarily, the host's zoning power will take precedence over the intruder's proposal in cases of failed negotiations. Allocation of the land use right in this way is superior to the general balancing test, because it provides predictability and certainty of judicial decision,\textsuperscript{122} and maximizes the incentive of the parties to negotiate.\textsuperscript{123} As the Article will suggest,

\begin{itemize}
\item \textsuperscript{117} See Brownfield, 63 Ohio St. 2d at 286-87, 407 N.E.2d at 1388; Lincoln County v. Johnson, 257 N.W.2d 453, 458 (S.D. 1977).
\item \textsuperscript{118} Brownfield, 63 Ohio St. 2d at 285, 407 N.E.2d at 1387.
\item \textsuperscript{119} See infra text accompanying notes 147-62.
\item \textsuperscript{120} See supra text accompanying notes 77-79.
\item \textsuperscript{123} When coupled with the requirement of intruder participation in host proceedings, the rule focuses the parties' negotiations on the goals of accommodation and compromise rather than on disputes dichotomizing the issue as an either-or choice between immunity and host control.
\end{itemize}
however, the land use right should not be granted automatically to the host.\textsuperscript{124} Rather, a preferable rule would allocate the right of host control or intruder immunity on the basis of the political relationship between the two governmental units and the extrajudicial factors that affect the efficacy of their respective decision making processes.

III. RETHINKING BALANCING\textsuperscript{125}

The appeal of the balancing test seems to be the prospect it offers courts as an attractive alternative to old categories and labels that have become meaningless and inflexible. Balancing, claim its supporters, is modern, flexible, and produces equitable and reasoned results.\textsuperscript{126} And, in fact, a review of the cases applying the balancing test bears out the truth of many of those claims. Balancing courts deny immunity if the intruder's decision making process was irresponsible.\textsuperscript{127} Immunity is also denied if the intruder was unable to articulate plausible justifications for seeking an exemption from the host's regulations.\textsuperscript{128} At the same time, however, the balancing test suffers from a number of serious countervailing shortcomings that appear to have gone unnoticed by the test's enthusiasts.\textsuperscript{129}

\textsuperscript{124} See infra text accompanying notes 165-216.

\textsuperscript{125} This section also considers the weaknesses in the other judicial reactions to the traditional immunity tests, namely, the legislative intent test, see supra text accompanying notes 92-107, and the presumption of host control test, see supra text accompanying notes 108-24.

\textsuperscript{126} See Johnston, supra note 14; Note, Immunity from Zoning, supra note 14; Note, Governmental Immunity, supra note 13. For decisions that adopt this position, see supra note 15.

\textsuperscript{127} See, e.g., City of Fargo v. Harwood Township, 256 N.W.2d 694, 699 (N.D. 1977) (no immunity where intruder took no formal action to study alternative sites and waste disposal methods).


\textsuperscript{129} At least three courts have expressly rejected the balancing test in the resolution of intergovernmental conflicts: Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Comm'n, 252 Ga. 484, 490, 314 S.E.2d 218, 223 ("We reject the balancing-of-interests test, because it suffers too severely from its admitted flaws, i.e., it is too nebulous and judicially unmanageable."). appeal dismissed, 469 U.S. 802 (1984); Seward County Bd. of Comm'nrs v. City of Seward, 196 Neb. 266, 276, 242 N.W.2d 849, 855 (1976) (noting the balancing test's "lack of guidelines" and "increased difficulties of application"); Commonwealth Dep't of Gen. Servs. v. Ogontz Area Neighbors Ass'n, 505 Pa. 614, 627, 483 A.2d 448, 454 (1984) ("Whatever the virtue there may be
On a practical level, a state court's decision to adopt the balancing test may have several negative effects on the intergovernmental conflict resolution process itself. First, it potentially misdirects the original contacts between the two governmental units by encouraging them to argue the merits of immunity and host control. In essence, the balancing test holds out the hope that the assertion of an uncompromising stance of complete immunity or absolute host control may ultimately be successful. To some extent, then, it provides a disincentive for negotiated compromise at the local level.

Two recent lower court cases illustrate this problem. In *Pal-Mar Water Management District v. Martin County*, 130 a water management district sought to excavate canals and ditches on lands located within the host county. The district did not seek county permits, nor did it discuss its plan with county officials. As the appellate court noted, "Pal-Mar was apparently so convinced that it was exempt from the permit requirements it chose to proceed without resort to local authorities." 131 After balancing the interests, the court found no reason to exempt the intruder and permanently enjoined the water district from proceeding with its excavation plans until it obtained the necessary county permits. Similarly, in *Shupack v. Manasquan River Regional Sewerage Authority*, 132 a New Jersey township sued to stop the construction of a sewerage pumping station begun by the regional sewerage authority without township approval. Noting the legitimate local concerns embodied in the township's site plan approval and building permit requirements, 133 the appellate court reversed the lower court's holding of intruder immunity and ordered the sewerage authority to seek the necessary township permits. 134

In contrast to the balancing test, which might uphold an intruder's decision to exempt itself from local proceedings, a clear rule requiring intruder participation in local host proceedings would supplement the incentives for intergovernmental com-

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131. Id. at 755.
133. Id. at 204, 476 A.2d at 819 (The purposes of the township's ordinances are "to preserve natural resources on a construction site, ensure safe and efficient traffic flow, promote aesthetic considerations and safety, conserve energy and ensure essential services to residents and occupants.").
134. Id.
promise and cooperation. Public officials have many reasons to seek an alternative to the adjudication of intergovernmental conflicts. The most obvious reason is the high cost of litigation in terms of both time and money. Moreover, local officials realize that their relationship with the intruding government is a permanent one that requires frequent contact. Courts should therefore require that the intruding governmental unit always seek local approval. In the likely event that host approval is granted on terms satisfactory to the intruder, litigation will be avoided and important local concerns will be protected.

A second, related flaw in the balancing test is that it may actually increase the volume of litigation. For example, application of the test may require two rounds of litigation: first, to determine whether the balance should be struck in favor of host control or intruder immunity; and second, to consider whether the party who received the right in the first round of litigation has exercised it properly. In addition, the test may operate as an incentive for litigation and appeal by holding out to the losing party the hope that the next court will balance differently than the previous one. Because the result of a balancing test is always indeterminate until the jurisdiction's highest court has issued its opinion, the test fosters uncertainty, which in turn fosters litigation. In fact, intergovernmental litigation in jurisdictions adopting a balancing approach has frequently produced a series of court opinions expressing opposite conclusions about the proper balance to be struck in a particu-

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135. For an excellent summary of the powerful incentives for intergovernmental cooperation, see R. BISH & V. OSTROM, supra note 30, at 66-68.

136. In Shupack, for instance, the court noted that the township categorically disclaimed any desire to interfere with or prohibit the water district's project. Rather, the township's goal in asserting the applicability of its ordinance was to ensure that the water district implement its project in a way that would minimize the negative effects for township residents. 194 N.J. Super. at 205, 476 A.2d at 819.

137. See, e.g., City of Fargo v. Harwood Township, 255 N.W.2d 694 (N.D. 1977). In City of Fargo the court held that the city was not exempt from township zoning regulations in its proposed construction of a sanitary landfill but noted that the court could later be called on to determine whether the township exercised its host control in an arbitrary manner. Id. at 700.

lar case. Of course, inconsistent results at different stages in the judicial process are not a sufficient reason to reject a balancing test, which by definition requires difficult line drawing and subjective evaluation of all relevant facts. If, however, a definite rule could predict the proper balance to be struck in a given case, it would replace the nebulous subjectivity of the balancing test with desirable certainty and predictability.

A third shortcoming of the balancing test is its propensity for involving the court in the original land use decision. In deciding whether to exempt an intruder from host control, courts adopting the balancing test must consider the effects of the project on local land use concerns. In doing so, these courts assume the roles of the local administrative and legislative bodies, but act without the local decision maker's familiarity with local conditions.

A fourth practical problem inherent in the pure balancing test is that, while it does guard against irresponsible decision making by the intruder, it fails to protect vigorously the host from the negative effects of unilateral decision making. A balancing court may decide, for example, that the overriding public interest being served by the intruder's project compels the conclusion of intruder immunity. So long as the intruder refrains from arbitrarily trampling on valid local concerns, it will remain immune from the application of host regulation. Such an approach unnecessarily polarizes the issue. The presence of an overriding public interest does not render host input and participation in the implementation of the project inappropriate. Again, a rule requiring intruder involvement in local


140. See, e.g., Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 114, 576 P.2d 230, 239 (1978) ("It seems to us that, on balance, the initial decision on reasonableness in this case can be made more expeditiously and with greater discernment by the local zoning authority—here the county."). It was precisely this concern that prompted some courts to adopt the additional requirement that the intruding governmental unit participate in the host's land use proceedings and attempt to receive local authorization for its project.

141. E.g., Farrell v. Zoning Bd. of Adjustment, 193 N.J. Super. 554, 475 A.2d 94 (Law Div. 1984). But compare Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976), in which the court noted with approval the state's extensive consultation and negotiation with local officials and responsiveness to local concerns. Id. at 220, 364 A.2d at 1000. Unfortunately, however, the court failed to adopt a requirement that the intruder always make application to the relevant local zoning board. See infra text accompanying notes 147-62.
proceedings would force the intruder to take account of the importance of the host's concerns.

Finally, and perhaps most importantly, a balancing test is an inadequate tool for allocating legal rights between two governmental units, each of which is attempting to exercise properly delegated state power and each of which is furthering an express state policy.\footnote{142} Although balancing may be appropriate or even required when a court assumes, for instance, the task of protecting individual rights from the excesses of government,\footnote{143}...
judicial balancing in the case of intergovernmental conflict requires a court to make the legislative decision of choosing one public policy over another equally valid public policy. In practice, such judicial balancing has frequently resulted in a decision in favor of the governmental unit with a larger constituency, thus recalling the superior sovereign test's assumption that the project of a superior governmental unit furthers a broader public interest. It is not for courts, however, to pick and choose between valid public purposes.

(Stevens, J., concurring and dissenting) ("'corrosive precedents' have left us without firm principles on which to decide these cases"); Meek v. Pittenger, 421 U.S. 349, 391 (1975) (Rehnquist, J., concurring and dissenting) (Court has abandoned traditional analysis); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 820-21 (1973) (White, J., dissenting) (Court's decision inconsistent with prior decisions); Buchanan, Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents, 15 Hous. L. Rev. 783, 784 (1978) (documenting the Court's inconsistent decisions in governmental aid to sectarian school cases); Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 15 (1978) (discussing the Court's irrelevant and inconsistent use of the Constitution), may be justified by the need for the court to intervene to protect not only the rights of the individual litigants and the important policies of the governmental litigant, but to draw the contours of the general role of government in relationship to first amendment freedoms. No such compelling reasons exist in the case of intergovernmental conflict, where both parties are asserting the right to exercise validly delegated sovereign power.

144. See supra text accompanying notes 31-45.

145. See, e.g., Rutgers, State Univ. v. Piluso, 60 N.J. 142, 153, 286 A.2d 697, 703 (1972) ("With regard to a state university... there can be little doubt that, as an instrumentality of the state performing an essential governmental function for the benefit of all the people of the state, the legislature would not intend that its growth and development should be subject to restriction or control by local land use regulation. Indeed, such will generally be true in the case of all state functions."); Blackstone Park Improvement Ass'n v. State Bd. of Standards & Appeals, 448 A.2d 1232, 1240 (R.I. 1982) (broad public interest of state project paramount to interests of local residents). In fact, one court expressly defined the balancing test in those terms: "We believe the correct approach in these cases where conflicting interests of governmental entities appear would be in each instance to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens," Brownfield v. State, 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980). Also, nonbalancing courts have cited Piluso with approval for the proposition that the state is generally immune from local regulation. See In re Suntide Inn Motel, 563 P.2d 125, 127 (Okla. 1977).

IV. THE JUDICIAL ROLE IN INTERGOVERNMENTAL CONFLICT

A. THE REQUIREMENT OF INTRUDER PARTICIPATION IN HOST PROCEEDINGS

The problem facing courts in intergovernmental land use disputes is how best to reconcile the conflicting exercise of two legitimate governmental powers. Intruder projects usually promote important legislative goals. At the same time, local land use regulations reflect the important state concern that land be developed in a way that is beneficial to its citizens' health, safety, and welfare. Courts deciding these cases must assume that the legislature intended that both legislative policies could be effectuated without interjurisdictional warfare.

As noted above, governmental units respond to many powerful extrajudicial incentives for intergovernmental cooperation. Courts should thus adopt a rule that will encourage this nonadjudicative process. Unfortunately, a rule that characterizes the controversy as a choice between the extremes of host control or intruder immunity does little to encourage the desired result. Compromise would be encouraged, however, by a rule that categorically required the intruding governmental unit to participate in good faith in all relevant local proceedings, just as if the intruder were a private party.

147. See supra text accompanying notes 135-36. Also, see R. BISH & V. OSTROM, supra note 30, at 68 n.20 for reference to several studies of widespread intergovernmental cooperation.


149. To some extent, the rationale for this requirement parallels the underpinnings of the rule of exhaustion of administrative remedies in the zoning context. See, e.g., Johnson County Memorial Gardens, Inc. v. City of Overland Park, 239 Kan. 221, —, 718 P.2d 1302, 1307 (1986); Cushing v. Smith, 457 A.2d 816, 821 (Me. 1983); Bailey v. Montana Dep't of Health & Envtl. Sciences, — Mont. —, 664 P.2d 325, 327 (1983); Hatch v. Utah County Planning Dep't, 685 P.2d 550, 551 (Utah 1984); Board of Supervisors v. Market Inns, Inc., 228 Va. 82, 86-87, 319 S.E.2d 737, 739-40 (1984). In DeCarlo v. Town of W. Miami, 49 So. 2d 596, 596-97 (Fla. 1950), the court discussed the practical advantages of the exhaustion rule, noting that the zoning board's findings are relevant to an ultimate judicial determination of rights. In addition, the local officials should have the opportunity to correct the ordinance's asserted deficiencies or, in the alternative, state their reasons for not doing so. Id. See also Orion Corp. v. State, 693 P.2d 1389, 1378 (Wash. 1985) (discussing the reasons for the exhaustion rule); Note, Exhausting Administrative and Legislative Remedies in Zoning Cases, 48 TULANE L. REV. 665 (1974) (discussing the rule and its exceptions). The common result of the application of this rule will be to require the intruder to seek local permits and zoning approval. Although the
The benefits of this approach are several. First, it recognizes that conflict is not inherently destructive. If channeled properly, conflict will educate the intruding governmental unit, which may not be aware of the consequences its actions will have. At the same time, structured conflict may assuage the host’s collective uneasiness about, or distrust of, the unknown. In essence, formal procedures will force both participants to articulate reasons, suggest alternatives, and respond to concerns voiced by the other. All too frequently, the reported cases involve situations in which the intruder has not participated in local proceedings, and has thus bypassed an opportunity for amicable conflict resolution.

Second, intruder participation in the host’s procedures should be required even when it can be shown that the intruder engaged in a reasoned decision making process and consulted informally with local authorities. Even if, for example, a state

Supreme Court of Kansas has suggested that disputes over permit compliance should be treated differently than zoning conflicts, see State ex. rel. Schneider v. City of Kansas City, 228 Kan. 25, 38, 612 P.2d 573, 587 (1980), no other court seems to have made that distinction. In fact, the Ohio Supreme Court in City of E. Cleveland v. Board of County Comm’rs, 69 Ohio St. 2d 23, 27-29, 430 N.E.2d 456, 459-61 (1982), explicitly applied its balancing test to require intruder adherence to both types of local regulations.

150. R. BISH & V. OSTROM, supra note 30, at 66. In addition, courts have recognized the value of those proceedings as an effective means for fleshing out the facts upon which subsequent judicial review can be based. E.g., Wilmette Park Dist. v. Village of Wilmette, 134 Ill. App. 3d 657, 663, 480 N.E.2d 1249, 1253 (1985), aff’d, 112 Ill. 2d 6, 490 N.E.2d 1282 (1986).

151. See, e.g., In re Suntide Inn Motel, 563 P.2d 125, 129 (Okla. 1977), in which the concurrence suggested that the host city had displayed “collective emotionally tainted judgment.” Id. Unfortunately, the court used that reason as one of the bases for granting intruder immunity rather than suggesting that it revealed the need for dialogue and airing of views.

152. In many of the intergovernmental conflict cases, the intruder proceeded unilaterally. For a representative few of those numerous cases, see Hillsborough Ass’n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610, 612 (Fla. 1976); Pal-Mar Water Management Dist. v. Martin County, 377 So. 2d 752, 754 (Fla. Dist. Ct. App. 1980); Orange County v. City of Apopka, 299 So. 2d 652, 653 (Fla. Dist. Ct. App. 1974); Wilmette Park Dist. v. Village of Wilmette, 112 Ill. 2d 6, ___, 490 N.E.2d 1282, 1284 (1986); City of Des Plaines v. Metropolitan Sanitary Dist., 48 Ill. 2d 11, 12, 268 N.E.2d 428, 429 (1971); Brown v. Kansas Forestry, Fish & Game Comm’n, 2 Kan. App. 102, 103, 576 P.2d 230, 231 (1978); Seward County Bd. of Comm’rs v. City of Seward, 196 Neb. 266, 269, 242 N.W.2d 849, 851 (1976); Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980); Lincoln County v. Johnson, 257 N.W.2d 453, 454 (S.D. 1977); Blackstone Park Improvement Ass’n v. State Bd. of Standards & Appeals, 448 A.2d 1233 (R.I. 1982). Presumably, some, if not many, of these cases would have resulted in accord if the intruder had participated in proceedings at the host level.
agency engages in a detailed site selection process,\textsuperscript{153} it may not
discover aspects of its project that would be of concern to local residents.\textsuperscript{154} Local bodies such as the planning commission or zoning board of appeals are familiar with unique local conditions and are experienced in considering the impact of different land use projects. Moreover, local notice procedures will ensure that those most immediately affected by the proposed use will become aware of it and have an opportunity to voice their opinions. Although the representative officials of both governmental units may be able to agree on the details of the intruder’s proposal, a compromise reached without the input of the citizens most immediately affected by the project could easily overlook many legitimate site-specific concerns.\textsuperscript{155} Overall, the potential for delay and duplication in the implementation of the intruder’s project is outweighed by the benefits produced by ensuring that a forum for constructive conflict will maximize the protection of both governments’ legitimate concerns.\textsuperscript{156}


\textsuperscript{155} In Robinson v. Indianola Municipal Separate School Dist., 467 So. 2d 911 (Miss. 1985), the city failed to adhere to its notification procedures when the school district proposed construction of a facility that would violate local off-street parking requirements. As a result, the planning commission’s decision to approve the proposal was made without important neighbor input and testimony as to the specific negative effects the proposal would entail. Id. at 913, 916-17.

\textsuperscript{156} In Note, \textit{Immunity from Zoning}, supra note 14, at 809-10, the author suggests that requiring the intruder always to seek local approval would diminish the public benefit. The author argues that the local procedures may be duplicative and cause delay. Accord Town of Onondaga v. Central School Dist., 56 Misc. 2d 26, 28-29, 287 N.Y.S.2d 581, 585 (Sup. Ct. 1968) (holding township ordinances inapplicable to school district in part because court concluded that approval of project by State Department of Education would ensure protection of health, safety, and welfare of host community). Even a responsible intruder, however, may not be sensitive to local concerns. See cases cited \textit{supra} note 154. Moreover, the delay required to reach a judicial determination of whether the alternative procedures adequately protected the local interest would be much greater than requiring concurrent local proceedings. Perhaps more fundamental, however, is the obvious benefit derived from allowing the
Third, this approach has the advantage of narrowing the issues of conflict and thus reducing the role of the court when no intergovernmental agreement is reached. Participation in local proceedings will limit judicial review to the specific disputed regulatory provisions identified during those proceedings. Unlike other governmental immunity tests, then, this rule encourages maximum dispute resolution at a nonadjudicative level and calls on the judiciary only in those instances in which agreement has not been reached.

Finally, a rule that requires intruder participation in local proceedings recognizes that the need for host input and the need for the protection of host concerns do not decrease as the public need for the intruder’s project becomes greater. Although the host government may be powerless to override the intruder’s decision to undertake a particular project, it is still uniquely qualified to participate in the implementation of those policy choices. This rule therefore stresses the need for an active partnership between the two governmental units and forces them to meet in the forum most likely to result in compromise and cooperation.157

A comparison between two cases illustrates the benefits of a categorical rule requiring the intruder to seek approval from host authorities. In *In re Suntide Inn Motel,*158 the Oklahoma Supreme Court held that the State Department of Corrections did not have to present its proposal for a community treatment facility to the city planning commission. Because the state had engaged in an extensive site selection process159 and because local officials who customarily deal with land use concerns to provide their input into the implementation of the project. Finally, in the case of a large statewide project such as a highway system, which will require explicit statutory authorization and funding, it is not unreasonable to expect the legislature to exempt the project from local proceedings if it sees fit.

157. Although a regional or statewide body might be a superior decision maker in intergovernmental disputes, see, e.g., Haar, *Regionalism and Realism in Land Use Planning,* 105 U. Pa. L. Rev. 515 (1957), it is not an inherently preferable forum for the airing of views and exchange of criticism and ideas between the two units. The rule proposed in this Article, moreover, does not require a decision maker at the administrative level; rather, it attempts to force the governmental units to negotiate and will review cases of failed compromise by adopting the rules explained in text accompanying notes 164-216 infra.


159. *Suntide Inn,* 563 P.2d at 127.
the center furthered an important state concern, the court deemed city zoning approval unnecessary and unwise. Concluding that the legislature could not have intended to allow city officials to prevent the state from opening its facility, the court rejected the city's claim that the state should submit the proposal to the planning commission. By equating the submission of the project to the local commission with a grant of local power to exclude the use, the court adopted the unfortunate dichotomy between total immunity and total host control.

In contrast, a recent New Jersey appellate decision refused to exempt a regional sewerage authority from seeking local site plan approval of its proposed pumping station. By noting that the town's request was not to assert local control in a way that would interfere with the purposes of the project or prohibit its construction, the court recognized the unique purposes furthered by the local planning ordinance involved: "to preserve natural resources on a construction site, ensure safe and efficient traffic flow, promote aesthetic considerations and safety, conserve energy and ensure essential services to residents and occupants." As illustrated by this case, a rule requiring good faith intruder participation in local land use procedures would maximize the incentive for intergovernmental cooperation and would recognize that host input, not host control, is the goal of that requirement.

B. CHOOSING BETWEEN HOST CONTROL AND INTRUDER IMMUNITY

If a court adopts the rule proposed above, the litigated intergovernmental disputes will no longer involve assertions of absolute intruder immunity or total host control. They will instead be limited to those instances in which attempts to com-

160. Id. at 128.
162. Id. at 204, 476 A.2d at 819. See also Village of Camillus v. West Side Gymnastics School, 109 Misc. 2d 609, 440 N.Y.S.2d 822 (Sup. Ct. 1981). In Camillus the town unsuccessfully sought to compel the school district to apply for a variance to legitimize the leasing of unoccupied school buildings for noneducational purposes. The village wanted not to control the school district, but to provide its input into the decision of which tenants would be appropriate for the neighborhood. Because the incentives for intergovernmental cooperation are at their highest when the two districts are coterminous, see infra text accompanying notes 191-201, a holding requiring the school district to seek a variance would not be likely to undercut or thwart the effectiveness of that unit of government.
promise have failed, either because of the bad faith or arbitrariness of one party or because of the irreconcilable conflicts between two legitimate governmental concerns.

At that point, this Article proposes that a predetermined allocation of the land use right is superior to a case by case application of a general balancing rule. Moreover, this Article proposes that the right be given to the governmental unit that is more likely to maximize the public welfare because it has a greater institutional incentive to accommodate the other. Although it may generally be true that the decision to grant the right to one party over the other will not affect their negotiated agreement, the allocation suggested here reflects the belief that as the political relationship between the governmental units changes, so does the likelihood that a particular host or intruder will be flexible and responsive to the other’s concerns and needs. The rule proposed takes into account the relevant political processes involved in the dispute as well as the political relationship between the two governmental units. Thus, it removes the courts from the role of choosing between two legitimate public interests, while adding predictability of result for the governmental units involved. The following section considers the four contexts in which these failed attempts at compromise may arise and suggests a proper allocation of the land use right for each.

1. Intruder Embraces Host

The most frequent disputes involve a host unit that is embraced by the intruding unit. Within this category, the most common disputes are between a city host and a state intruder, or a city host and a county intruder. Two aspects

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163. A fifth logical possibility, that of intersecting and only partially overlapping units, arises only very infrequently. See, e.g., Community Fire Protection Dist. v. Board of Educ., 315 S.W.2d 873 (Mo. App. 1958). In that case, a fire district embracing fifteen municipalities sought to impose its regulations on a school district that was only partially within its jurisdiction. Id. at 874. This situation most closely reflects the realities of the intruder-host relationship that arises when the governmental units are not contiguous. See infra text accompanying notes 208-16.

164. The term “embrace” is used to describe a governmental unit whose constituency and territorial jurisdiction encompass the entirety of the constituency and jurisdiction of another discrete governmental unit.

165. For a few recent representative cases, see City of New Orleans v. State, 364 So. 2d 1020 (La. 1978); Mayor of Baltimore v. State, 281 Md. 217, 378 A.2d 1326 (1977); Dearden v. City of Detroit, 403 Mich. 257, 269 N.W.2d 139 (1978); Region 10 Client Management, Inc. v. Town of Hampstead, 120 N.H. 885, 424 A.2d 207 (1980); City of Portsmouth v. John T. Clark & Son, Inc., 117
of this intruder-host relationship are particularly relevant to the resolution attempt. The first aspect relates to the constituencies represented by the respective governmental units; the second involves the effectiveness of the political process as an incentive for accommodation. Taken together, these factors persuasively support a rule of intruder immunity.

With regard to the constituencies represented by the governmental units in this type of dispute, it is clear that the intruder is furthering the health, safety, and welfare of a group including but greater than the host's constituency. Thus, the use proposed by the intruder will benefit a group that is more broadly based than the host's constituency, but includes all members of the host's constituency as well. The importance of this difference in constituency lies not in the notion of which governmental unit is superior, but rather in the light it sheds on the relative position of each unit vis-à-vis the other. Because all constituents of the host are also constituents of the intruder, the intruder has presumably considered the health, safety, and welfare of the host in reaching its decision on the proposed project. The Supreme Court of Rhode Island took note of this fact


166. For recent examples of intergovernmental disputes in this context, see County Comm'rs v. Conservation Comm'n, 380 Mass. 706, 405 N.E.2d 637 (1980); City of Vinita Park v. Girls Sheltercare, Inc., 664 S.W.2d 259 (Mo. Ct. App. 1984); Mental Health Ass'n v. City of Elizabeth, 180 N.J. Super. 304, 434 A.2d 685 (Law Div. 1981); City of Fargo v. Harwood Township, 255 N.W.2d 694 (N.D. 1977); City of East Cleveland v. Board of County Comm'rs, 69 Ohio St. 2d 23, 430 N.E.2d 456 (Ohio 1982); City of Gallatin v. Cherokee County, 477 Pa. 574, 385 A.2d 344 (1978); City of East Cleveland v. Board of County Comm'rs, 69 Ohio St. 2d 23, 430 N.E.2d 456 (Ohio 1982); City of Gallatin v. Cherokee County, 615 S.W.2d 321 (Tex. Ct. App. 1981). Other possible examples of the same type of host-intruder relationship include, but are not limited to: a city host and a regional district intruder, e.g., City of Des Plaines v. Metropolitan Sanitary Dist., 48 Ill. 2d 11, 268 N.E.2d 428 (1971); a township host and county intruder, e.g., Town of Ringle v. County of Marathon, 104 Wis. 2d 297, 311 N.W.2d 595 (1981); county host and state intruder, e.g., Davidson County v. Harmon, 200 Tenn. 575, 292 S.W.2d 777 (1956); township host and state intruder, e.g., Township of S. Fayette v. Commonwealth, 477 Pa. 574, 385 A.2d 344 (1978); township host and a county-wide special district intruder, e.g., Institution Dist. v. Township of Middletown, 450 Pa. 282, 299 A.2d 599 (1973).

167. The superior sovereign test uses the relative rankings in a governmental hierarchy as the dispositive factor in determining between host control and intruder immunity. See supra text accompanying notes 31-45. As discussed here, the relevant consideration is the comparison between the constituencies served by the two units.
in Blackstone Park Improvement Association v. State Board of Standards and Appeals, when it decided that the state's proposed rehabilitative center for injured workers throughout the state was "of vital importance not only to workers and their families but also to the general public welfare and the state's economy." Similarly, in Rutgers, The State University v. Piluso, the New Jersey Supreme Court described the state university system as "an essential governmental function for the benefit of all the people of the state.

This characteristic of the intruder-host relationship suggests that the intruder has an incentive to act with the interests of the host in mind and would be responsive to legitimate host concerns.

Although the intruder typically has a great incentive to accommodate its host, the host in this context may have little or none of the same incentive for compromise. Frequently, the group most directly served by the intruder's proposed project will not be host constituents. It is likely that the intruder's project is intended to benefit not only the intruder's constituents who live within the host unit, but also constituents from any other location within the intruder's territorial jurisdiction. Only a small segment of the host population will typically benefit from intruder projects such as residential or educational centers for the handicapped, community treatment or pre-
release centers for convicts,\textsuperscript{174} or residential centers for drug addicts,\textsuperscript{175} The host may therefore see little reason for the project to be located within its borders. The result is a decrease in the host's incentive to accommodate the intruder.

Also related to the issue of constituency is the fact that the governmental mission of the host is limited to the health, safety, and welfare concerns of its own constituents. The host has little if any incentive to seek independently to further the welfare of individuals beyond its borders. It may therefore be unrealistic to expect a host government to approve enthusiastically of the types of projects frequently proposed by the "embracing" intruder.\textsuperscript{176} A more realistic evaluation would allow the host to work with the intruder to make the implementation of the project as palatable as possible for host constituents.

The incentive of the intruder to accommodate the host is also maximized by the operation of certain political pressures in these types of disputes. When the intruder participates in the host's land use proceedings, the objectors at those hearings will by definition be constituents of the intruder. The intruder, then, has good reason to listen to any objections that may be aired and attempt to accommodate them.\textsuperscript{177} There will, how-


\textsuperscript{176} In Town of Bedford v. Village of Mount Kisco, 33 N.Y.2d 178, 306 N.E.2d 155, 351 N.Y.S.2d 129 (1973), the New York Court of Appeals upheld a zoning ordinance passed by the Village of Mount Kisco against a neighboring municipality's challenge. In dissent, Judge Breitel criticized the majority for having considered the rationality of the disputed zoning ordinance solely from the perspective of Mount Kisco's own land use plan, while ignoring the tremendous impact the ordinance would have on its neighbor. Judge Breitel emphasized the neighbor's extremely limited input into Mount Kisco's legislative process and advocated regional action to avoid "the pitfall of idiosyncratic municipal action." \textit{Id.} at 192, 306 N.E.2d at 162, 351 N.Y.S.2d at 139. For perhaps the best known, yet less than totally successful, attempt to force local governments to legislate for the benefit of a larger constituency, see Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

\textsuperscript{177} Of course, just because the intruder finally proceeds with a plan that elicited vigorous opposition from host objectors does not mean that it ignored
ever, be little political pressure on host decision makers to accommodate the intruders. None of the host's decision makers represent the intruder, except to the extent that they are also members of the intruder's constituency. Moreover, because it is likely that the intruder's project will benefit only a small segment of the host's constituency, its supporters, even if they are host constituents, are unlikely to exert much political pressure on the host.

The political accountability factor thus also suggests that the intruder is more likely than the host to make compromises that reflect the other governmental unit's interests. Moreover, unlike some other contexts discussed below, this particular host-intruder relationship does not reflect an attempt by the intruder to avoid the political fallout of developing a potentially undesirable project by pushing the project off onto a constituency other than its own. When the intruder embraces the host, the proposed project is necessarily located not only within the host's borders, but within the intruder's borders as well. In sum, these considerations support a rule that would grant intruder immunity when the host unit is embraced by the intruding unit. As proposed above, the intruder should be required to participate in good faith in the host's local proceedings. If these proceedings fail to result in host approval, however, the intruder should nevertheless be allowed to proceed with the project, leaving the burden on the host to challenge the intruder's actions as arbitrary.

2. Host Embraces Intruder

The second most frequent context for intergovernmental land use disputes involves an intruding unit that is embraced by its host. The intruding unit in this context forms part of the territorial and political jurisdiction of the host but is itself a separate governmental unit. Typical of this second type of host-intruder relationship are those cases in which a city seeks that opposition, failed to accommodate it as best it could, or otherwise acted arbitrarily. See Berger v. State, 71 N.J. 206, 220, 364 A.2d 993, 1000 (1976).

178. In Johnston, supra note 14, the author argues that immunity allows the intruder to "easily side-step volatile political issues by locating necessary but unpleasant services in adjacent jurisdictions." Id. at 331. Although this incentive may be present in some situations, such as when the host and intruder are noncontiguous units or when the host embraces the intruder, see infra text accompanying notes 187-89 & 213-16, it is certainly not a motivating factor when the intruding governmental unit encompasses the host and is by definition locating the use within its own borders.

179. See supra notes 147-62 and accompanying text.
to use land outside its municipal limits but within the territory of its county. 180 In recent years, as increasing county land use regulation 181 has paralleled the growing public awareness of the environmental hazards associated with certain land uses, cases of this type have frequently involved a city's attempt to locate a waste disposal facility at a county site over county objection. 182

An analysis of this particular host-intruder relationship will reveal the differences between this type of dispute and the previously discussed dispute that involves an intruder that embraces the host. 183 In this second context, it is the intruder that has the lesser incentive to accommodate legitimate host concerns. The more appropriate result in this case, therefore, is to grant the land use right to the host. Unless the intruder can establish that the host's actions were arbitrary, host denial of necessary permits should prevent the intruder from proceeding with its project.

Several aspects of this type of host-intruder relationship operate both to minimize the intruder's incentive to compromise and at the same time to encourage the host to act in an accommodating manner. First, because all of the intruder's constituents are also constituents of the host, the host has the responsibility to act in furtherance of the health, safety, and welfare of the intruder's inhabitants. The host's accountability to the intruder's constituents also is ensured by the fact that the host's governing bodies include members of the intruder's

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180. For a few recent representative cases, see Seward County Bd. of Comm'rs v. City of Seward, 196 Neb. 266, 242 N.W.2d 849 (1976); City of Fargo v. Harwood Township, 256 N.W.2d 694 (N.D. 1977); Board of County Supervisors v. City of Roanoke, 220 Va. 195, 257 S.E.2d 781 (1979); Nelson v. Department of Natural Resources, 96 Wis. 2d 730, 292 N.W.2d 655 (1980). Other less frequently occurring examples of situations involving a host that embraces its intruder could include township host and city intruder, e.g., In re City of Detroit, 308 Mich. 480, 14 N.W.2d 140 (1944); City of Fargo v. Harwood Township, 256 N.W.2d 694 (N.D. 1977), county host and township intruder, or county host and special district intruder.


182. E.g., 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); St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo. 1962); State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960); South Hill Sewer Dist. v. Pierce County, 22 Wash. App. 738, 591 P.2d 877 (1979).

183. See supra text accompanying notes 165-79.
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constituency.\textsuperscript{184} When coupled with the fact that the host has the responsibility to act in furtherance of the health, safety, and welfare of the intruder's constituency, this direct political representation on the host's governing bodies greatly enhances the likelihood that the host will strive to accommodate the intruder's proposal.

Conversely, the intruding governmental unit has several disincentives for negotiation. In terms of its political function as well as in terms of direct political accountability, the intruder is less likely than the host to be accommodating. As a constituent element of the host, the intruder's governing bodies do not represent the same broader constituency as the host government. The intruder is therefore more likely to focus on its narrower self interest and to be less responsive to the objections raised by the broader-based host. In addition, because the objectors to the project will not be constituents of the intruder, the efficacy of political pressure is greatly reduced. In this context, then, the host has greater incentive to accommodate and negotiate than the intruder. The burden of failed compromise should therefore be placed on the intruder in this situation.

Other features of this particular host-intruder relationship argue in favor of allocating the land use right to the host when the intruder has failed to obtain local approval. First, the intruder's proposed use may or may not benefit anyone other than its own constituents. For example, a city sewage treatment plant located in the county may service only the needs of city inhabitants.\textsuperscript{185} In such a case, the host's incentive to accommodate the intruder stems solely from its position as a government whose jurisdiction encompasses the intruder's constituents. A city airport, in contrast, will provide direct and indirect benefits to county inhabitants outside the city.\textsuperscript{186} In

\textsuperscript{184} See C. Antieau, Local Government Law: County Law § 32.07 (1966). For an example of a situation in which the host's governing body will include members of the intruder's constituency, see ILL. ANN. STAT. ch. 34, para. 832, 833 (Smith-Hurd Supp. 1986).

\textsuperscript{185} E.g., O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972); St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo. 1962). This compartmentalized and somewhat myopic view of local government's functions has recently been giving way to increased efforts at intergovernmental agreements to establish one site for the use of several units of government. See, e.g., City of Des Plaines v. Metropolitan Sanitary Dist., 48 Ill. 2d 11, 268 N.E.2d 428 (1971); Shupack v. Manasquan River Regional Sewerage Auth., 194 N.J. Super. 199, 476 A.2d 816 (App. Div. 1984). See generally R. Bish & V. Ostrom, supra note 30, for an excellent discussion of how the level of governmental service units should be determined.

\textsuperscript{186} See, e.g., Orange County v. City of Apopka, 299 So. 2d 652 (Fla. Dist.
this case, the host’s incentive to participate willingly in the implementation of the intruder’s proposal is further increased because host constituents who are not residents of the intruding unit will also benefit from the project.

Another factor that weighs in favor of host control in these types of disputes relates to the possibility that the intruder’s choice of an extraterritorial site may reflect an attempt to push an undesirable form of land use outside of its borders and thus avoid heated objection from its own constituents. As one court noted, “one city is less likely to be scrupulous about the location of its potentially offensive governmental activities in another city than ‘at home’ within its own boundaries.” For this reason, host control would increase the likelihood that the intruder’s proposed site was the result of rational decision making instead of political shrewdness.

3. Intruder Cotermious with Host

In the third possible context for intergovernmental disputes, the two governmental units are cotermious. This situation describes the relationship between a large number of special districts and the governments they serve. Most of

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187. See Johnston, supra note 14, at 331-32.
188. Orange County v. City of Apopka, 299 So. 2d 652, 654 (Fla. Dist. Ct. App. 1974). In reality, most attempts to locate unpopular land use projects are a result of the unavailability of land within the intruder’s jurisdiction. Airports and landfills are examples of uses for which a populated city may simply have no remaining available land. See supra notes 182 & 186.
189. One final consideration is a purely practical one. For the host that may have numerous potential intruders within its own territorial limits, a rule that would require it to bear the burden of challenging the intruder’s immunity after failed attempts to compromise at the local level could be extremely onerous. For example, St. Louis County in Missouri has approximately 100 incorporated cities within its borders. St. Louis County v. City of Manchester, 390 S.W.2d 638, 642 (Mo. 1962). By placing the burden on the frustrated intruder, however, the courts will preserve the integrity of the host’s zoning plan unless the host’s refusal to accommodate the intruder was arbitrary.
190. Many special districts, however, encompass more than one municipality. See, e.g., City of Orlando v. School Bd., 362 So. 2d 694 (Fla. Dist. Ct. App. 1978); City of Des Plaines v. Metropolitan Sanitary Dist., 48 Ill. 2d 11, 268 N.E.2d 428 (1971); Township Comm. v. Board of Educ., 59 N.J. 143, 279 A.2d 842 (1971); City of Heath v. Licking County Regional Airport Auth., 16 Ohio...
the reported cases in this area involve disputes between a school district and its host municipality; the total number of cases between coterminous units of local government is, however, small.

The relative paucity of litigation between coterminous units of local government is not surprising. Indeed, it is in this context that the incentive to negotiate is at its maximum and is equal for each unit. Both groups must act in furtherance of the health, safety, and welfare of the same constituents; thus, all legitimate action taken by the intruding special district will by definition provide a benefit to the health, safety, and welfare of the host’s constituency. The affected citizens and objectors

Misc. 69, 237 N.E.2d 173 (C.P. Ct. 1967); Austin Indep. School Dist. v. City of Sunset Valley, 502 S.W.2d 670 (Tex. 1973). Thus, they fit into the classification of a host that embraces its intruder. See supra text accompanying notes 180-89.


193. Compare this situation with the case of a regional district seeking to locate a large sports center for all its students. Residents of the chosen locale may believe they are being unfairly burdened by a use that will benefit many nonresidents. In City of Sunset Valley v. Austin Indep. School Dist., 488 S.W.2d 519 (Tex. Civ. App.), rev’d, 502 S.W.2d 670 (1973), for example, a large school district that contained 18 junior and senior high schools proposed to build a football stadium to seat 15,000 persons, a large field house, an athletic
will be constituents of both units and will probably exert a similar amount of political pressure on each governmental unit.\textsuperscript{194} Moreover, because the two units serve an identical constituency, they will be in continuous contact with each other. The frequent interaction between the two governments will insure that they exercise their discretion reasonably and in a way that will maximize the benefit to their common constituency.\textsuperscript{195}

The likelihood of achieving amicable resolutions in these cases is high. Few of the adjudicated disputes between coterminous governmental units reveal situations in which the district has unsuccessfully sought host approval and subsequently challenged the host's denial.\textsuperscript{196} The cases more frequently involve preemptory suits brought to challenge\textsuperscript{197} or to assert\textsuperscript{198} the appliance and a school bus facility. The location chosen was a site in a small town of 250 individuals.

\textsuperscript{194} That is, the objectors will represent the same percentage of the host's constituency as of the intruder's. Compare this situation with the case of regional districts, where objectors from a particular municipality will be a much smaller fraction of the district's total constituency than they will be of the host municipality. Thus, concerned citizens are more likely to impose effective political pressure for compromise in the former situation than in the latter.

\textsuperscript{195} See Orleans Parish School Bd. v. City of New Orleans, 468 So. 2d 709, 712 (La. Ct. App. 1985). In a recent opinion stressing the need for lower courts to seek "intergovernmental cooperation," the Illinois Supreme Court pointed to the 75 years of extensive cooperation between a park district and its host municipality and expressed confidence that the parties would resolve their differences "on a cooperative basis, all to the benefit of the community which both government units serve." Wilmette Park Dist. v. Village of Wilmette, 112 Ill. 2d 6, - , 490 N.E.2d 1282, 1287 (1986). In this case, the court ruled that the park district must apply to the local zoning board for a special use permit. The district proposed to install newer, more intensive lights on a field and had refused to seek local approval. Id. at - , 490 N.E.2d at 1284-85. Thus, the Illinois court seems to have adopted the rule proposed above that would require intruder participation in host proceedings. See supra text accompanying notes 147-62.

\textsuperscript{196} See, e.g., School Dist. v. Zoning Bd. of Adjustment, 417 Pa. 277, 278, 207 A.2d 864, 865 (1965) (school district challenged city's denial of zoning variance for proposed school). In Board of Educ. v. City of St. Louis, 267 Mo. 356, 358-59, 184 S.W. 975, 975 (1916), it appears that the city would not have granted approval even if the school district had sought the necessary permits.

\textsuperscript{197} For cases in which the district filed suit to challenge the host's assertion that the district would have to obtain local approval before proceeding with its project, see, e.g., Cedar Rapids Community School Dist. v. City of Cedar Rapids, 252 Iowa 205, 106 N.W.2d 655 (1960); Orleans Parish School Bd. v. City of New Orleans, 468 So. 2d 709 (La. Ct. App. 1985); Board of Educ. v. City of Buffalo, 32 A.D.2d 98, 302 N.Y.S.2d 71 (1969); Independent School Dist. No. 89 v. City of Oklahoma City, 722 P.2d 1212 (Okla. 1986).

\textsuperscript{198} For cases in which the municipality filed suit to challenge the intruder's assertion of immunity from local control, see, e.g., Cody Park Ass'n v. Royal Oak School Dist., 116 Mich. App. 103, 321 N.W.2d 855 (1983); Smith v.
plicability of local law. The requirement of intruder participation in local proceedings would eliminate these types of disputes and would limit judicial involvement to situations in which the available local forum has not produced a result satisfactory to both units.

In those instances in which the special district has unsuccessfully sought the approval of its coterminous host, courts should grant the intruder immunity and thus place the burden to challenge the intruder's actions as arbitrary on the host government. Although the governmental units in this relationship have equal incentives for compromise, several additional factors argue for a rule that would allocate the land use right to the intruder. First, because the sole function of the intruder in such cases is to provide the service that is the subject of the dispute, the host government will probably have little or no experience with the type of project in question. This lack of expertise may make the host less likely to believe that a compromise is warranted for a particular project. Second, because this type of intruder project benefits solely the host's constituents, the possibility that an intruding governmental unit will benefit a constituency other than the host's at the host's expense is essentially eliminated. Nor does the intruding special district have a desire to push off undesirable projects, because the use is being proposed within the intruder's own territorial limits. Taken together, these facts provide a rational basis for allocating the land use right to the intruder in this context.


199. See supra text accompanying notes 190-95. In this regard, the coterminous host-intruder relationship is unlike both the case in which the intruder embraces the host and has greater incentive to negotiate, see supra text accompanying notes 165-79, and in which the host embraces the intruder and has greater incentive to negotiate, see supra text accompanying notes 180-82.

200. In this regard, the host will be in much the same position as the host that is embraced by the intruder. In that context, the intruder's proposed projects are frequently specialized and are needed by a small segment of a constituency larger than, but including, the host. See supra text accompanying notes 167-75.

201. Thus, it is quite unlike the situation in City of Sunset Valley v. Austin Indep. School Dist., in which a regional school district proposed to build a football stadium to seat 15,000 persons in a small town with a population of 250. 488 S.W.2d 519 (Tex. Civ. App.), rev'd, 502 S.W.2d 670 (1973).
4. Noncontiguous Governmental Units

The fourth type of intergovernmental land use dispute occurs when the intruder and host are noncontiguous governmental units. This type of litigation typically involves one municipality seeking to use land within the borders of another municipality or within the jurisdiction of a county other than its own. Although state statutes may theoretically give local governments an unlimited ability to exercise land use rights outside their borders, practical considerations usually will limit the intruder’s exercise of such power to land relatively close to the intruder’s territorial limits. A local government seeking to acquire a site for a municipal swimming pool, for example, will not provide much benefit to its constituents if the land is too far from their homes. Similarly, cost considerations will frequently make distant sites much less attractive than those closer to home. Perhaps as a result of these practical limits on the scope of extraterritorial power, the reported cases involving a noncontiguous intruder-host relationship are few.

In contrast to the coterminous intergovernmental disputes discussed above, in which the incentive to negotiate is at its maximum for both parties, conflicts between noncontiguous governmental units create few of the institutional political pressures that operate to further compromise and accord. In fact, both the host and the intruding governmental units have several reasons not to cooperate. Unlike the parties in the cate-


203. See, e.g., State ex rel. City of Gower v. Gee, 573 S.W.2d 107 (Mo. Ct. App. 1978); Lincoln County v. Johnson, 257 N.W.2d 453 (S.D. 1977). When a municipality uses land within its own county, the intruder-host relationship falls into the category of host embraces intruder, which involves a very different set of extrajudicial incentives for compromise. See supra text accompanying notes 180-89.

204. See, e.g., ILL. ANN. STAT. ch. 24, para. 11-139-12 (Smith-Hurd Supp. 1986).


206. For example, transportation costs associated with a landfill operation will make distance a relevant factor.

207. See supra text accompanying notes 190-201.

208. Of course, several important extrajudicial incentives for nonadjudicated conflict resolution are present in all intergovernmental land use disputes. See supra text accompanying notes 135-36. The incentives deriving from the political relationship itself, however, are absent in the case of noncontiguous host-intruder relationships.
gories discussed above, in which the disincentives of one governmental unit were offset by countervailing incentives to negotiate on the part of the other unit, neither party in a land use dispute between noncontiguous governmental units is subjected to political pressures to accommodate the other.

From the host's perspective, and in terms of its incentive to accommodate the intruding governmental unit, the situation is much like the cases involving an intruder that embraces the host.\textsuperscript{209} The host's constituents will derive no benefit from the proposed use and the host's governing bodies have no political obligation to act in furtherance of the health, safety, and welfare of the intruder's constituency. The host may therefore be unsympathetic to the intruder's need for the project. Similarly, the intruder's political relationship with its host is unlikely to exert any effective political pressure on the host to cooperate and compromise. In this regard, the intruder's position is very similar to the position of the intruder in cases in which the host embraces the intruder.\textsuperscript{210} The intruder has no political responsibility toward host constituents; rather, it seeks only to benefit its own distinct constituency. Moreover, objectors to the intruder's proposals will not be constituents of the intruder, thus reducing the effectiveness of the political check as an incentive for responsible intruder behavior.

Unlike the intruder-host relationships discussed above, in which allocation of the land use right reflected the parties' respective incentives to negotiate, in this situation the extrajudicial incentives are at their lowest. The choice between immunity and host control in this context, then, must depend on a different set of considerations. Several factors point in favor of granting host control over the intruder's project when intruder participation in local proceedings has not resulted in host approval.

First, to some extent, the allocation of the land use right may have an effect on the intruder's initial choice of site. That is, if the intruder knows that, in the case of failed negotiations, it will have to establish the arbitrariness of its host if it remains within its own county but not if it goes to another county, that factor may be a relevant consideration in the intruder's decision making process. As discussed above, granting the host control when the intruder exercises extraterritorial power within a governmental unit that embraces it maximizes the incentive of

\textsuperscript{209} See supra text accompanying notes 165-79.

\textsuperscript{210} See supra text accompanying notes 180-89.
both parties to compromise.211 Granting the right to the intruder when the two units are non-contiguous may therefore increase the intruder's incentive to select a site within the borders of the noncontiguous host unit. The intruder would thus be provided with an irrelevant incentive to select one site over the other. Granting host control over the noncontiguous intruder, however, would maximize the likelihood that the use will be located at the most appropriate site.

Second, allocation of the right to one governmental unit involves a concomitant allocation of the burden to the other unit to challenge the arbitrariness of the right's exercise. Placing that burden on the host in this context would typically require the host to obtain information to which it has no easy access. Evidence relating to the availability of alternative sites212 or to the decision making process used by an intruding governmental unit may be difficult if not impossible for the host to obtain. The intruder, in contrast, will have become familiar with the host's entire decision making process and will thus have all available evidence relating to the arbitrariness of that proceeding and its result.

Finally, because the noncontiguous intruder proposes to develop a project in a jurisdiction to which it owes no political allegiance and because the undesirable effects of such a project will not affect the noncontiguous intruder, it is not unfair to limit the exercise of that power to those instances in which host approval is given or, alternatively, in which the intruder can establish that host approval was arbitrarily denied. This situation presents the greatest potential for an intruder to abuse the land use right by 'pushing off' an unpopular project on a noncontiguous host.213 Because such projects are often unpopular and involve environmental hazards,214 the intruder may be tempted to select a site that is located within the jurisdiction of a government with which it has no direct political relationship. For example, the city that seeks to locate a landfill site in a portion of its own county will face more effective polit-

211. See supra text accompanying notes 180-89.
212. See Comment, Balancing Interests, supra note 14, at 135 n.72.
213. See Johnston, supra note 14, at 331-32.
ical pressure than a city that selects a site that is located in another county. In the former situation, the continuous contact and ongoing close political relationship between the two units will facilitate accommodation and compromise. When the city goes outside its own county, however, the incentives for compromise disappear. Granting the host control when the noncontiguous intruder has failed to obtain the necessary approval should diminish the likelihood that the intruder will act in disregard of the host's legitimate concerns.

C. JUDICIAL REVIEW

The approach suggested above is based on several assumptions. First, requiring an intruder to participate in good faith in host proceedings will minimize intergovernmental conflict by providing the parties with a local forum in which to air differences and to achieve compromise. Second, in cases of failed negotiations a rule allocating the right of host control or intruder immunity is preferable to balancing because it encourages negotiation over litigation by establishing predictability of result. Third, judicial allocation of the land use right should reflect the extrajudicial political incentives for compromise.

Although this approach minimizes litigation and encourages nonadjudicated solutions to intergovernmental disputes, judicial review is still necessary to provide a check against arbitrary exercises of host control and intruder immunity.

Over the years, the need for judicial review of intergovern-

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215. For example, many of the county's decision makers will be residents of the city. See supra text accompanying notes 180-89.

216. In contrast, the arguments in favor of placing the burden on the host are less compelling. First, one could claim that because the uses are frequently unpopular but nevertheless a "stark necessity," City of Scottsdale v. Municipal Court, 90 Ariz. 393, 398, 368 P.2d 637, 640 (1962), the court should presume the legitimacy of the intruder's proposal and force the host to show that the intruder's decisions were arbitrary. This Article, however, has already discussed the intruder's countervailing incentive to locate unpopular uses beyond its borders. See supra text accompanying notes 213-15. Second, because state agencies are often involved in the site selection of many of these uses, see, e.g., Lincoln County v. Johnson, 257 N.W.2d 453, 454 (S.D. 1977), one could argue that the additional check of placing the burden on the intruder is unnecessary. Even if state involvement in site selection is extensive, however, the state agency may have neither the mandate nor the familiarity with local conditions to consider the host's particular concerns. See supra text accompanying notes 153-56.

217. See supra text accompanying notes 147-62.

218. See supra text accompanying notes 125-46.

219. See supra text accompanying notes 165-216.
mental disputes has varied depending on the immunity test applied; the courts, however, have always recognized the judicial function of providing relief from arbitrary governmental decision making. Courts that apply the traditional tests of intruder immunity, with their limited scope of judicial review, have frequently extended protection against the arbitrary exercise of intruder immunity or host control. For courts adopting a balancing test, however, judicial involvement has been much greater. Judicial review is available not only to make the initial choice between intruder immunity and host control but also to ensure subsequently that the intruder immunity or host control is not exercised in an arbitrary fashion. Unfortunately, the courts have provided little guidance on how to apply the arbitrary and capricious standard to intergovernmental disputes.

What constitutes arbitrary and capricious conduct in the context of land use litigation is, however, well established and fairly uniform. A leading commentator has provided a useful definition: "fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, or given to making decisions thus; decisive but unreasoned." Another commentator has stated that the most telling characteristic of arbitrary governmental action with regard to land use is a government's failure to give legitimate reasons for its decision. Thus, courts will invalidate governmental land use decisions that appear to have no basis in applicable law or that do not reflect

225. 7 P. ROHAN, ZONING AND LAND USE CONTROLS § 52.05[3] (1986).
rational decision making. Properly applied, the arbitrary and capricious standard allows only a limited review of the procedures followed in the decision making process. It does not allow the court to substitute its judgment for that of the governmental unit.

Although the meaning of the arbitrary and capricious standard is directly transferable from the land use cases to cases involving intergovernmental disputes, the context in which it is applied introduces a new twist. Under this standard, the courts cannot limit their review to a determination whether, solely from the perspective of the governmental unit exercising the land use right, the power was arbitrarily exercised. Rather, the courts must recognize that the legitimacy of governmental power in this context depends, not solely on its adherence to its own legislative mandate, but also on its recognition and accommodation of the legislative mandate conferring power on the opposing governmental unit.

1. Arbitrary and Capricious Host Control

Courts applying the arbitrary and capricious standard to review a challenge to host control must recognize that the intruder is a governmental unit exercising properly delegated legislative powers of the state and furthering an explicit state policy. Thus, the court must also consider whether the host's

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228. In the context of administrative rulemaking procedures the Supreme Court recently provided this helpful description of arbitrary and capricious activity: "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

229. In some instances, the courts will have to consider whether the intruder is even a proper party to claim governmental immunity. Although one commentator has suggested application of ordinary principles of agency law, Johnston, supra note 14, at 330 n.19, that standard is insufficient. In a Florida case, for example, a nonprofit association contracted with the state to provide residential care for the mentally retarded. The association unsuccessfully sought immunity from local zoning. The appellate court noted that the state was not even aware of the litigation until after the appellate court's opinion was issued. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571, 579-80 (Fla. Dist. Ct. App. 1975) (on petition for rehearing), aff'd, 332 So. 2d 610 (Fla. 1978). Because nongovernmental users of land are not subject to the political check, and because of the numerous groups
actions were arbitrary when measured against the backdrop of the intruder's legislative mandate. In such a case, application of host control to prohibit an intruder's proposed use merely because the host disliked the use or found it offensive would directly contravene a legislative determination that the proposed use was in furtherance of the public interest.

In City of Santa Clara v. Santa Clara Unified School District, for example, the host government refused to give its approval to a school district's choice of location for a continuation high school. The school district had requested a special use permit from the city and had agreed to comply with the planning commission's imposition of certain conditions related to landscaping, construction, and parking. The school district subsequently met with the city's architectural control committee and agreed to additional modifications of its plan. The city council denied the district's application, and the district sued. In its opinion the court noted that the school district's choice and agencies receiving governmental funding, the court should grant immunity only to those users that show sufficient essential indicia of a governmental unit. On that basis, for example, a nonprofit corporation that contracts with the state to carry out a state project will ordinarily not qualify for governmental immunity. Relevant factors would include: who had control over personnel; sources of funding; and whether the user had been granted any governmental powers, such as eminent domain. For a discussion and application of the test, see Township of Washington v. Central Bergen Community Mental Health Center, 156 N.J. Super. 388, 406-09, 383 A.2d 1194, 1203 (Law Div. 1978). See also Penobscot Area Housing Dev. Corp. v. City of Brewer, 434 A.2d 14, 19-20 (Me. 1981) (nonprofit corporations serving the state interest will not be granted immunity from local zoning regulations unless substantial and continuing state involvement is established). But see Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Comm'n, 252 Ga. 484, 490-91, 314 S.E.2d 218, 224 (Gregory, J., dissenting) (asserting that a private, state funded association should receive the immunity to which the state would be entitled if it were operating the group home), appeal dismissed, 469 U.S. 802 (1984).


231. Thus, the reviewing court cannot limit its review to a determination whether the host government's enforcement of its regulation was arbitrary in terms of its own zoning scheme. Were the inquiry so limited, enforcement of the host's zoning ordinance to exclude landfills from its borders, for example, would not necessarily constitute arbitrary action. See, e.g., County of Cook v. John Sexton Contractors Co., 75 Ill. 2d 494, 508-09, 389 N.E.2d 553, 557 (1979).

was "reasoned and considered" and that the district had engaged in a careful site selection process. The court's consideration of the dispute was not limited to a determination of whether the council's action was arbitrary within the context of its own land use plan. The court recognized that the arbitrariness of the city council's action in this case stemmed not from the application of its own zoning plan to the proposed use, but rather from its failure to recognize that the legislature had delegated the power to develop such projects to the school district. In sum, judicial review of an intruder's claim of arbitrary host action must also recognize that the legislature, by granting the intruder the power to act within the host's territorial jurisdiction, has implicitly imposed on the host a duty to apply its own laws in a way that will further the welfare of the intruder's constituents as well as its own.

2. Arbitrary and Capricious Intruder Immunity

Application of the arbitrary and capricious standard to a host's challenge to intruder immunity will also require the court to broaden the context within which arbitrary conduct is to be judged. Courts cannot limit their review to an evaluation of the intruder's decision making process in isolation. The judicial analysis must also evaluate the intruder's exercise of power within the context of the host's regulatory scheme, which was similarly enacted pursuant to a valid delegation of power from the state.

If, for example, a host can establish that the intruder refused to consider the host's zoning scheme or made no effort to reevaluate its plan after hearing local objection, the intruder's actions should be invalidated as arbitrary. On that basis, for example, a reviewing court would strike as arbitrary an im-

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233. Id. at 159, 99 Cal. Rptr. at 218. The California appellate court also noted that the evidence revealed that the council's opposition "was based on [nothing] other than a blanket disapproval of the concept of a continuation high school." Id. at 160, 99 Cal. Rptr. at 218.

234. For a similar approach to an intergovernmental land use dispute, see Board of Zoning Appeals v. School City of Mishawaka, 127 Ind. App. 683, 690-93, 145 N.E.2d 302, 305-07 (1957). In Mishawaka, the court reversed the city's denial of a variance requested by the school district to enable it to build an addition to its high school. Id. at 690-94, 145 N.E.2d at 305-07. The court concluded that the city's action did not adequately respond to the school district's statutory duty "to establish schools and provide suitable equipment for their operation." Id. at 690, 145 N.E.2d at 305.

mune intruder's decision to provide only a few parking spaces for a project when the relevant parking ordinance would require approximately five times as many places, and when the intruder did not respond to the objections expressed by numerous concerned citizens. This action is arbitrary because it reflects solely the intruder's own interest in expansion and disregards the host's regulatory scheme and the host's legitimate concerns about the negative impact of the use. Thus, judicial review will protect the host not only from irresponsible intruder decisions, but also from unilateral exercises of immunity.


Consider the following scenario: a state agency responsible for prisons proposes to build a new facility at a particular location. Application of the community's fire code would require a sprinkler head in each inmate's cell. The state argues that the cost of installation would be enormous and that having the sprinklers would actually pose a danger. The state notes that sprinklers can be vandalized or set off to distract guards and that, by providing an attachment for a noose, they will facilitate prisoner suicide. The city counters that the city has the duty of providing fire protection, not only for the prison population and its staff, but for the entire community as well. The only way to live up to that duty and to prevent unnecessary deaths in fires, it argues, is to apply its standards.

In a jurisdiction applying the balancing test, the state may or may not choose to present its case to the relevant local authorities in a formal host proceeding. Assuming it does not, and that it asserts intruder immunity from host regulation, a

236. In Robinson v. Indianola Municipal Separate School Dist., 467 So. 2d 911 (Miss. 1985), the school district planned to include 93 parking spaces in its proposed construction of a large gymnasium. Applicable parking regulations would have required between 375 and 500 spaces. Although the district had received the approval of the local planning commission, the local proceeding had not adhered to public notice and hearing requirements. Id. at 916-17. Thus, the school district had never considered local objections to its proposal. See also School Dist. of Philadelphia v. Zoning Bd. of Adjustment, 417 Pa. 277, 207 A.2d 864 (1965) (school district made no attempt to modify plans to observe local zoning ordinances). Cf. Rutgers, State Univ. v. Piluso, 60 N.J. 142, 153-54, 286 A.2d 697, 703 (1972) (refusal to consider local interests can constitute arbitrary action).

balancing court reviewing a dispute over the applicability of the city's fire code would weight the interests sought to be furthered by both sides. First, the court would have to decide whether the intruding state agency should have sought local approval. Its decision would depend on which of the two governmental purposes, both of which are undeniably valid and persuasive, it found more compelling. No matter which result the court concludes is appropriate, however, judicial involvement in the dispute is not necessarily at an end. The balancing court may later be called on to determine whether the host control or intruder immunity was properly exercised.238

In a jurisdiction adopting the approach proposed in this Article, the state would first petition the host for approval. At that stage, institutional political pressures may operate to produce a negotiated result. If they did not, the approach suggested here would grant intruder immunity for two main reasons: first, the political relationship between the two units has already operated to give the intruding state agency more incentive than the host city to seek accommodation and to respond to legitimate host concerns; second, a comparison of the two units' governmental purposes suggests that the balance be struck here to allocate the right to the intruder.239

Application of the approach suggested here has several advantages over the balancing test. First, it requires the governmental units to seek compromise;240 the balancing test may encourage inflexible assertions of intruder immunity or host control.241 Second, it puts the primary burden of harmonizing the apparent conflict between two assertions of legitimate governmental power on the conflicting units themselves and in the forum most appropriate for the airing of all legitimate concerns. And third, it removes from the judicial role the task of

238. In some instances balancing courts have concluded that host law was applicable while reminding the parties that the court would prevent arbitrary exercise of host control. See supra note 137. A rule requiring intruder participation in local proceedings, however, removes that first round of disputes from the courts. See supra notes 147-62 and accompanying text.

239. In these facts the intruder embraces the host. See supra text accompanying notes 165-79.

240. Of course, private lawsuits can challenge the compromise between the two governments as itself being arbitrary and capricious. See, e.g., Evans v. Just Open Gov't, 242 Ga. 834, 251 S.E.2d 546 (1979); Clement v. Chicago Park Dist., 96 Ill. 2d 26, 449 N.E.2d 81 (1983); Robinson v. Indianola Municipal Separate School Dist., 467 So. 2d 911 (Miss. 1985); State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960).

241. See supra text accompanying notes 129-36.
favoring one legitimate public purpose over the other. In its place it establishes a rule for allocating the right of host control or intruder immunity according to the political relationship between the units, in response to their respective extrajudicial incentives for compromise, and in recognition of the governmental purposes served by both units.

V. CONCLUSION

Intergovernmental land use disputes are the inevitable result of expanding governmental powers, increased awareness of environmental hazards and the need for government control to ensure orderly development and use of land, and diminishing available locations for unpopular but necessary governmental uses. A balancing approach to intergovernmental disputes has proved unsuccessful because it engenders uncertainty and unpredictability and improperly involves the court in choosing between valid governmental objectives.

A rule that allocates the land use right to one government, however, recognizes the imperative of intergovernmental cooperation and compromise and reflects the belief that the governmental units themselves, rather than the courts, are capable of mutually accommodating their conflicting interests in most situations. This approach allows the ultimate land use decision to depend on the political relationship between the two competing governmental units and on the respective extrajudicial incentives each governmental unit has for compromise and rational decision making. In addition, the approach provides predictability of results, and relegates judicial involvement to a very limited and well-defined task in those cases in which the conflicting governmental units are unable to resolve their differences in a nonadjudicative forum. Finally, an application of the arbitrary and capricious standard that requires a court to determine arbitrariness by considering the legislative mandates of both governmental units will best effectuate a resolution of two conflicting legislative policies.

242. Because application of the rule will bring predictable and certain results, the legislature will more easily be able to determine whether corrective action is necessary. In addition, this rule has the advantage of forcing the legislature to make the difficult policy choices involved in choosing one public interest over another.