Municipal Power To Regulate Building
Construction and Land Use by
Other State Agencies

The power of municipalities to enforce their local regu-
lations such as building codes and zoning ordinances
against state agencies operating within their boundaries
has recently been questioned in the courts of a substan-
tial number of states. A vast majority of these courts
have held the agencies exempt from municipal regula-
tion by applying a number of rather mechanical doctrines.
The author of this Note examines these doctrines
and compares them with a suggested alternative ap-
proach based upon a “balancing of interests.” He con-
cludes that little justification exists for either the criteria
used or the results reached in applying these currently
favored doctrines, and that in the absence of statute
conflicts arising in this area ought instead to be resolved
by balancing competing state and municipal interests.

INTRODUCTION

[A] point that is difficult to understand is why . . . these [state agencies]
should be able to come in in total ignorance of the desires of a local
community and establish a state building . . . . All the rest of the com-
munity has to obey the laws, but here is a select group that can totally
ignore [them] and . . . do as they see fit.¹

The occupation of the same territory by a multiplicity of local
governmental units creates intergovernmental conflicts which
until recently have attracted little attention.² One of the bitterest
involves the applicability of municipal police regulations such as
building codes, licensing requirements, and zoning or sanitation
ordinances to other governmental agencies operating within the

¹. Transcript of Proceedings Before the California Legislative Assembly
Interim Committee on Municipal and County Government—Implications of
the Hall v. City of Taft Decision 40 (1958) [hereinafter cited as Hall Legis-
lative Transcript] (testimony of Allan Grimes, city attorney, Modesto, Cali-
ifornia).

². See Kneier, The Use of the Police Power by Local Governments and
Some Problems of Intergovernmental Relations, 8 J. Pub. L. 109 (1959). In
1957 there were 3,047 counties, 17,167 municipalities, 17,214 townships,
50,453 school districts, and 14,423 special districts in the United States. Ibid.
municiplaty. Since municipalities, school districts, counties, and townships are subdivisions of the state and typically draw their limited powers from state statute, the legislature controls the distribution of functions to each. Few conflicts arise where legislative grants of power explicitly define jurisdictional boundaries. However, clear demarcation is atypical—the grants usually are either silent on the subject, or confer overlapping and apparently inconsistent powers. Thus inadequate legislation has recently led to a rash of litigation arising from the attempts of municipalities to enforce their zoning ordinances and building codes against other state agencies, and of the agencies to obtain immunity to these regulations.

The courts have employed a variety of rather mechanical standards to determine which of these competing interests should prevail. Moreover, they have treated regulation of building construction and zoning differently. With respect to the former, a slight majority of jurisdictions considering the question have exempted state agencies from municipal regulation under the doctrine of "sovereign immunity," while a substantial minority


5. See, e.g., the North Carolina zoning enabling act which provides that "all of the provisions of this article are hereby made applicable to the erection and construction of building by the State of North Carolina and its political subdivisions." N.C. Gen. Stat. § 160-181.1 (1964). See also the Oregon zoning statute which authorizes the city council "by ordinance [to] regulate . . . the several classes of public and semipublic buildings . . . ." Ors. Rev. Stat. § 227.230 (1965).

6. See Board of Regents of Univs. v. City of Tempe, 88 Ariz. 299, 356 P.2d 399 (1960); Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956) (alternative holding); County of Los Angeles v. City of Los Angeles, 212 Cal. App. 2d 106, 28 Cal. Rptr. 28 (1963); Kentucky Institution for Educ. of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 405 (1906); Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237, 119 A.2d 653 (1956); Kaveny v. Board of Comm'rs, 69 N.J. Super. 176, 173 A.2d 638 (L. 1961); New Jersey Interstate Bridge & Tunnel Comm'n v. Jersey City, 93 N.J. Eq. 559, 118 Atl. 264 (Ch. 1923); Salt Lake City v. Board of Educ., 52 Utah 540, 175 Pac. 654 (1918); City of Charleston v. Southeastern Constr. Co., 184 W. Va. 666.
have reached the opposite result. Through a presumption favoring the pre-eminence of local "police power." Zoning conflicts, on the other hand, have typically been resolved in terms of a governmental-proprietary dichotomy or by certain implications derived from the power of eminent domain, either of which results in immunity in most cases.

Little justification exists for the mechanical conceptualism embodied in these rules. Consequently, this Note is designed to develop the thesis that the satisfactory resolution of inter-jurisdictional conflicts in this area requires an accommodation of competing interests. In so doing the currently favored doctrines will be analyzed and compared with the suggested balancing approach. Since intergovernmental conflicts have almost invariably arisen in the context of either building construction regulation or zoning, this Note is devoted to those areas.

I. BUILDING CONSTRUCTION REGULATION

A. THE SOVEREIGN IMMUNITY DOCTRINE

The concept of sovereign immunity currently constitutes the basis for automatically exempting "state agencies" from city building construction regulations. This doctrine was articulated 64 S.E.2d 676 (1950); City of Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642 (1909).

7. See Lavender v. City of Rogers, 232 Ark. 673, 339 S.W.2d 598 (1960) (by implication); Cook County v. City of Chicago, 311 Ill. 294, 142 N.E. 512 (1924); Cedar Rapids Community School Dist. v. City of Cedar Rapids, 232 Iowa 205, 106 N.W.2d 655 (1960); Smith v. Board of Educ., 359 Mo. 264, 221 S.W.2d 203 (1949); Kansas City v. School Dist., 356 Mo. 364, 201 S.W.2d 930 (1947); Kansas City v. Fee, 174 Mo. App. 501, 160 S.W. 537 (1913); Board of Health v. Charles Simkin & Sons, 10 N.J. Super. 301, 76 A.2d 802 (County Ct. 1950); Port Arthur Independent School Dist. v. City of Groves, 376 S.W.2d 890 (Tex. 1964).

8. The term "police power" has been used in a variety of different contexts. For the purposes of this Note, police power signifies the source of all municipal authority to enact ordinances for the general welfare of its inhabitants. It initially resides with the state legislatures, but has been conferred on local governmental units by express delegation in most states. Since the power is delegated, the city may exercise it only within the limitations of the grant. See generally 6 McQuillin, op. cit. supra note 4, §§ 84.01–47.

9. See text accompanying notes 41 & 55 infra.


11. School construction: Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956) [overruling Pasadena School Dist. v. City of Pasadena, 166 Cal. 7, 134 Pac. 985 (1913)]; Kentucky Institution for Educ. of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402 (1906); Board of Educ. v. City of St. Louis, 267 Mo. 565, 184 S.W. 975 (1916); Kaveny v. Board of Commrs, 69
in the leading case of *Hall v. City of Taft*, where a municipal building code was held inapplicable to school construction:3

School districts are agencies of the state for the local operation of the state school system...

... When it engages in such sovereign activities as the construction and maintenance of its buildings... it is not subject to local regulation unless the Constitution says it is or the Legislature has consented to such regulation.

Thus, immunity arises under this theory where (1) a state agency (2) performs a sovereign function (3) without statutory consent to be regulated locally. Since the existence of state agency and sovereign function are generally assumed with little discussion,


Building codes are legal provisions which regulate the materials and methods used in the construction, repair, and alteration of building structures. Usually such codes regulate a wide variety of subject matter including height, wall thickness, fireproofing, vent pipe construction, electrical installation, safety devices, light, and ventilation. Closely related to building codes are fire limit laws, set-back ordinances, and health codes. See generally Rhyne, *Survey of the Law of Building Codes* (1960).

12. 47 Cal. 2d 177, 302 P.2d 574 (1956).

13. Plaintiff-contractor refused to obtain a building permit requiring a $300 fee and submission to defendant city's building ordinance. Defendant halted plaintiff's construction activity and sought to enforce the penal and civil provisions of the building code. The court based its decision on the alternative grounds of sovereign immunity and state preemption of the field through the exhaustive provisions of the Education Code. In holding that the building contractor need not secure the permit or remit the fee, the court followed *In re Means*, 14 Cal. 2d 254, 93 P.2d 105 (1939). That case established that a state civil service plumber was immune from a city licensing ordinance since to hold otherwise would permit the city to add to the requirements for state employment and restrict the rights of the sovereign.

14. 47 Cal. 2d at 177, 183, 302 P.2d at 577, 578.
the statutory consent requirement is ordinarily determinative in applying this doctrine. The requisite “consent” generally is not found unless the grant of power to the state agency specifically subordinates the agency to municipal regulation, or the grant of municipal power expressly authorizes control of state building construction. Since explicit provisions are rare, the usual result of applying the immunity doctrine is to prohibit local regulation without inquiring into the intensity of the competing interests.

The immunity doctrine is merely a canon of statutory construction—a State will be presumed not to have conferred upon its municipalities the power to regulate other state agencies absent clear manifestation of a legislative intention to do so. The presumption of immunity is apparently premised on the view that municipalities have but minimal interest in the building programs of other state agencies, and that the successful and efficient execution of these programs in accordance with state-wide standards requires unfettered state control. Yet this rationale begs the fundamental questions at issue: (1) the extent to which the

Co. v. City of St. Paul, 260 Minn. 166, 109 N.W.2d 382 (1961) (waiver found in state contract requiring builder to comply with permit ordinance).

16. CAL. GOV'T CODE § 53091 provides that “each local agency shall comply with all applicable building ordinances ... of the county or city in which the territory of the local agency is situated.” CAL. GOV'T CODE § 53090 defines local agency as not including “the State, a city, a county ...” Cf. N.C. GEN. STAT. § 116-131.1 (1964); ORE. REV. STAT. § 227.250 (1963). See also Modesto Irr. Dist. v. City of Modesto, supra note 15; Watson Constr. Co. v. City of St. Paul, supra note 15.

17. See Kentucky Institution for Educ. of Blind v. City of Louisville, 128 Ky. 767, 774-75, 97 S.W. 402, 404 (1906). See also Davidson County v. Harmon, 200 Tenn. 575, 581-85, 299 S.W.2d 777, 779-81 (1956).

18. See Hall v. City of Taft, 47 Cal. 2d 177, 181, 309 P.2d 574, 577 (1956); In re Means, 14 Cal. 2d 254, 259, 93 P.2d 105, 108 (1939); City of Atlanta v. State, 181 Ga. 346, 348, 182 S.E. 184, 185 (1935); City of Milwaukee v. McGregor, 149 Wis. 35, 37, 121 N.W. 642 (1909). In Salt Lake City v. Board of Educ., 52 Utah 540, 549-50, 175 Pac. 654, 657 (1918), the court asserted that the city possessed no significant interest in school fire prevention since “every one knows” that schools are not located in business districts or densely populated areas. Apparently the danger to pupils within the building did not justify “stringent regulations.”

19. In Board of Regents of the Univs. v. City of Tempe, 88 Ariz. 299, 311, 356 P.2d 399, 406-07 (1960), the court reasoned that

... the powers, duties and responsibilities assigned and delegated to a state agency performing a governmental function must be exercised free of control or supervision by a municipality within whose corporate limits the state agency must act ... A central, unified agency, responsible to State officials rather than to the officials of each municipality ... is essential to the efficient and orderly administration of a system of higher education ...
successful performance of a particular "sovereign activity" requires uniform state control unaffected by municipal regulation, and (2) the magnitude of municipal interest in the manner in which a particular agency program is pursued. Moreover, it errs in assuming a hierarchy among governmental units in which bodies such as school districts and counties are "agents of the state," and thereby cloaked with state sovereignty, while municipal corporations are something less. This assumption is indefensible. Since the municipality also derives its powers from legislation it should have an equal claim to pre-eminence. Thus, the immunity doctrine reasonably supports a conclusion that the municipality, as well as the other governmental unit involved, is an immunized "state agency." It would seem that resolution of conflicts over the application of municipal building regulations ought to depend in each case upon whether the factors favoring the uniform, central regulation of a particular sovereign activity outweigh those which favor giving effect to the local regulation involved. Thus, emphasis should be placed upon the relative availability and efficiencies of state and local regulatory machinery, and the extent to which compliance with the city's requirements will prejudice the other agency's programs and vice versa. For example, vesting complete control of school construction in state-wide agencies may

See also Salt Lake City v. Board of Educ., supra note 18, in which the court said that exclusive state regulation of school building construction was essential to control costs so that school authorities could effectively plan and allocate facilities with limited tax resources. 52 Utah at 550, 175 Pac. at 657-58.

The determination of those activities which are sovereign and therefore immune is inherently difficult. Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 92 Va. L. Rev. 910, 915-17 (1956). The assertion that public school construction is a "sovereign" activity only postpones the inevitable inquiry into the meaning of "school construction" for this purpose. See Salt Lake City v. Board of Educ., supra note 18, in which an ordinance requiring the use of fireproof material in constructing public buildings was held an invalid interference with a sovereign activity, while a similar ordinance requiring the installation of fire alarms or a firephone system was upheld.


22. Arguably the immunity doctrine does make possible a definitive delineation of jurisdictional boundaries and thereby restricts future litigation. It is doubtful, however, that intergovernmental harmony necessarily results. But see Kaveny v. Board of Comm'rs, 71 N.J. Super. 244, 247, 176 A.2d 802, 804 (App. Div. 1961), holding the inspection provisions of a building code inapplicable to school construction: "To permit Montclair . . . to graft its own building code onto the legislative requirements would be to introduce a potential element of discord and confusion into an area where the public
well contribute to the furtherance of equal educational opportunities, adequate financial planning, and a uniformly high level of safety. However, to the extent that this is true, it is because school construction is typically the subject of comprehensive state regulation by agencies possessing considerable competence in dealing with the specialized problems inherent in school construction. Nevertheless, this example does not justify the broad, interest is today so strong . . . .” See also Board of Regents of Univs. v. City of Tempe, 88 Ariz. 299, 310 n.1, 356 P.2d 399, 406 n.1 (1960), 109 U. Pa. L. Rev. 903, 907 & n.20 (1961).

23. It has been suggested that even where the desirability of maintaining minimum standards favors a central control exempt from local interference, local jurisdictions should be empowered to enforce ordinances setting higher standards, i.e., to impose supplemental regulation. To the extent that a state agency could not foresee in advance every need of each municipality the suggestion is not without merit. However, insofar as local supplementary regulations appreciably increase costs, the state’s interest in controlling the allocation and use of its financial resources should prevail. See 6 Calif. Assembly Interim Comm. on Municipal and County Government, Problems of Local Government Resulting From the Hall v. City of Taft Case Decision, No. 8, at 13-14 (1959).

24. A number of state legislatures have reached this conclusion. See, e.g., Ala. Code tit. 55, § 367(8) (1958), vesting authority in the state building commission to promulgate and enforce minimum standards of construction for all “schoolhouses,” and Ala. Code tit. 55, § 367(11) (1958), prohibiting counties and municipalities from applying their building codes to public schoolhouses. See also Cal. Gov’t Code § 53891, which broadly immunizes school districts acting under the State Contract Act from county and city building ordinances. (Pursuant to the State Contract Act, Cal. Gov’t Code §§ 14250-424, school districts almost always operate under the act.)

The legislative history of the California provisions reveals that the primary considerations underlying the immunization of school districts from municipal building regulations were (1) the extensive and rigid state control of school construction, (2) the need for statewide uniformity “in order to attain a high level of safety,” and (3) the antiquity of more than two-thirds of the municipal codes in the State. However, the principal witnesses also revealed a pronounced reluctance to extend immunity to state agencies other than school districts. The level of state control was cited as the factor distinguishing school construction from the activities of other state agencies. Accordingly, the principal witnesses recommended that immunity be granted only to school districts. 6 Calif. Assembly Interim Comm. on Municipal and County Government, op. cit. supra note 23; Hall Legislative Transcript 40.

25. See Kaveny v. Board of Comm’rs, 71 N.J. Super. 244, 245, 176 A.2d 802, 803-04 (App. Div. 1961); New Jersey Interstate Bridge & Tunnel Comm’n v. Jersey City, 93 N.J. Eq. 550, 555-56, 118 Atl. 264, 267 (Ch. 1922); cf. 109 U. Pa. L. Rev. 903, 907 n.19 (1961), arguing that the arbitrary nature of the sovereign immunity doctrine is not offensive in an area such as standards for school construction, which involves only a choice between agencies of presumptively equal competence.

Moreover, the existence of antiquated local building codes may justify subordinating them to effective state regulation. See, e.g., 6 Calif. Assembly
indiscriminate sweep of the immunity doctrine. Insofar as the
document immunizes a number of other agencies from local regu-
lation for which the state provides no alternative, it creates areas
of completely unregulated building construction activity. Even
where state regulation exists, it may be relatively ineffective in
comparison with the municipal regulation which it pre-empted.

Not only is the sovereign immunity doctrine analytically un-
tenable, but it yields desirable results only where overriding con-
siderations of uniformity, central control, and fundamental state
interests would compel a similar solution. This approach, arbi-
trarily ignoring the underlying competing considerations, provides
at best an unsatisfactory answer to a problem that ought to be
resolved by a fair balancing of interests.

B. The Police Power Approach

An ever-increasing number of decisions in this area have held
that a municipality is authorized to regulate another state
agency’s building construction activities within its territorial
limits where the power to do so has not been expressly withdrawn
by the legislature. The jurisdictions adopting this rule have sub-

INTERIM COMM. ON MUNICIPAL AND COUNTY GOVERNMENT, op. cit. supra note 23, at 12, where testimony revealed that only 30% of California municipalities
possessed adequate codes.

26. See, e.g., In re Means, 14 Cal. 2d 254, 93 P.2d 105 (1939), where the
municipality was denied the right to enforce a licensing ordinance against a
state-employed plumber, notwithstanding a total absence of state regulation
of plumbing standards.

27. In 6 CALIF. ASSEMBLY INTERIM COMM. ON MUNICIPAL AND COUNTY
GOVERNMENT, op. cit. supra note 23, at 9–12, concern was voiced that the
sovereign immunity doctrine had precluded school districts from a substantial
amount of desirable local building inspection assistance in the more populous
metropolitan areas. Testimony also revealed that the state division of archi-
tecture, charged with the inspection responsibility, was too understaffed to
carry out a similar quality of detailed electrical and mechanical inspection.
It is significant to note that pursuant to the recommendations of the principal
witnesses to (1) limit the immunity doctrine to school construction, (2) em-
power municipalities to enforce reasonable supplemental construction regula-
tions, (3) provide for state delegation of their inspection function to local
jurisdictions having adequate inspection facilities, and (4) authorize school
districts to require contractors to obtain municipal building permits, the
legislature enacted CAL. GOV’T CODE §§ 53090–92, providing for the limited
application of local building codes and the power to delegate inspection res-
sponsibilities to local jurisdictions.

28. See Lavender v. City of Rogers, 232 Ark. 673, 339 S.W.2d 598 (1960)
(contractor for school district must obtain permit); Cook County v. City of
Chicago, 311 Ill. 624, 145 N.E. 512 (1924) (county jail construction); Cedar
Rapids Community School Dist. v. City of Cedar Rapids, 259 Iowa 205, 106
stituted for the presumption of sovereign immunity— the contrary presumption that the legislature intended municipal police power to reach the other state agencies as well as private parties. These decisions have held that unless municipal power to regulate other state agencies is withdrawn expressly or by implication from specific grants of power to the other agencies, it is effective as to all building construction within the municipality if exercised reasonably—that is, so as not to interfere unduly with the state agency's performance of its responsibilities. Since express

N.W.2d 655 (1960) (school plumbing and heating); Smith v. Board of Educ., 359 Mo. 264, 221 S.W.2d 903 (1949) (school restaurant subject to city sanitation laws); Kansas City v. School Dist., 256 Mo. 364, 201 S.W.2d 930 (1947) (city may collect boiler inspection fee); Kansas City v. Fee, 174 Mo. App. 501, 160 S.W. 537 (1913) (school janitor must obtain city license); Board of Health v. Charles Simkin & Sons, 10 N.J. Super. 301, 76 A.2d 302 (County Ct. 1950) (master plumber on school project subject to city license law); Port Arthur Independent School Dist. v. City of Groves, 376 S.W.2d 330 (Tex. 1964) (school district must obtain permit and comply with local building code); cf. Community Fire Protection Dist. v. Board of Educ., 315 S.W.2d 873 (Mo. App. 1958) (school district must obtain permit to construct). Rhyne, *Survey of the Law of Building Codes* 55 (1960), asserts that these cases are "well reasoned."

29. One of the most forceful rejections of sovereign immunity appears in Kansas City v. Fee, 174 Mo. App. 501, 505–11, 160 S.W. 537, 558–40 (1913), where the court said:

To say that the board, in order to be left wholly free to carry on its work of education, must . . . be absolutely free from all matters of purely police regulation is to say that the board cannot attend to the work of education unless it is allowed to violate . . . such regulations. The absurdity of such a statement is its own refutation . . .

. . . Under [the school board's] view of the case the school district, merely because it is a quasi political entity of itself, is supreme in its control over its real estate, and is not subject to any [city] regulations . . . . [The result of such theory would be to create little separate and independent kingdoms within the city where the sovereignty given to it by the state could not operate . . .

30. Cf. Cal. Gov'n Cons. § 33080, in which the State, cities, counties and certain rapid transit districts are exempted from municipal and county building codes and zoning ordinances.

31. The Missouri courts have frequently held that portions of the municipal police power have been withdrawn through a specific legislative grant to another state agency. See Board of Educ. v. City of St. Louis, 267 Mo. 286, 362–63, 184 S.W. 975, 976–77 (1916); Community Fire Protection Dist. v. Board of Educ., 315 S.W.2d 873, 877 (Mo. App. 1958); Wellston Fire Protection Dist. v. State Bank & Trust Co., 282 S.W.2d 171, 174–76 (Mo. App. 1955).

32. Among the factors going to reasonableness are the extent to which the legislature has generally occupied the field and the relative availability and adequacy of state and local regulatory facilities. See, e.g., Cedar Rapids Community School Dist. v. City of Cedar Rapids, 252 Iowa 205, 207–08,
withdrawal is rare the police power approach tends to accommodate municipal regulation, just as the immunity doctrine favors state interests.

This approach appears to be analytically sound and helpful. By treating the municipality and other state agencies as state subdivisions of equal status, it avoids the artificial hierarchy of agencies imposed by the immunity doctrine. And the presumption that municipal police power controls, rebuttable only on a showing that it has been withdrawn or exercised unreasonably, seems justifiable. The police power is regarded as one of the most fundamental and least limitable of governmental powers, based upon the overriding necessity for public self-protection. In exercising it municipalities have broad authority to safeguard the health, safety, morals, and general welfare of their inhabitants by reasonable regulations. Building codes are designed to achieve these ends through the close regulation of minimum standards for new construction. Since other state agencies charged with narrower statutory responsibilities may not be reliable self-regulators in this area of intense local interest, it may reasonably be inferred in the absence of express statutory provision that these agencies were not intended to pre-empt the municipal police power. Since 210–11, 106 N.W.2d 655, 658–69 (1960); Smith v. Board of Educ., 359 Mo. 264, 267–68, 221 S.W.2d 903, 904–05 (1949); Kansas City v. School Dist., 356 Mo. 364, 369–70, 291 S.W.2d 930, 933–34 (1947); Community Fire Protection Dist. v. Board of Educ., supra note 31, at 874–75; Port Arthur Independent School Dist. v. City of Groves, 376 S.W.2d 330, 333 (Tex. 1964). Some courts have also considered the magnitude of conflicting state and local interests in the particular activity sought to be regulated. See, e.g., Kansas City v. School Dist., supra at 370–71, 291 S.W.2d at 934; Kansas City v. Fee, 174 Mo. App. 501, 506–07, 511, 160 S.W. 537, 538–39 (1913); Board of Health v. Charles Simkin & Sons, 10 N.J. Super. 301, 302–03, 76 A.2d 302, 303–04 (County Ct. 1950); City of Groves v. Port Arthur Independent School Dist., 366 S.W.2d 849, 852 (Tex. Civ. App. 1963), aff'd, 376 S.W.2d 330 (Tex. 1964).


34. 6 McQuillen, op. cit. supra note 4, §§ 24.09–10.

35. Id. §§ 24.33, .52.

36. A state agency will doubtless erect a generally “safe” building whether or not it is locally regulated, since its officials presumably care for the welfare of all citizens. Yet safety in general terms is not at stake. Building codes require specific materials and methods. Since the agency usually has a limited budget, compliance with exacting code standards may be sacrificed to considerations of economy. Insofar as a city's engineers and architects have determined that only certain materials and methods are safe enough to cope with particular fire dangers in their city, installation of lower quality materials becomes “unsafe.” Safety is thus a matter of degree and a modern code is presumptively the most authoritative source of what is safe for the city which promulgates it.
municipal regulations which interfere unduly with the performance of agency functions are unenforceable, the minority approach effectively accommodates both the state interest in the promotion of statewide matters and the municipal interest in regulating matters of legitimate local concern.

II. ZONING

Pursuant to constitutional or legislative authorization, virtually all American municipalities, and many counties and townships, have enacted zoning ordinances to eliminate the evils inherent in haphazard urban development. However, realization of this objective may be frustrated even where the ordinance is held valid if another state agency is exempted from its application.

A vast majority of courts hold the zoning ordinance inapplicable to the state and its agents in reliance either on a theory of limited immunity, or on one of complete immunity conferred via the grant...
of eminent domain power.\textsuperscript{49} Critical examination is required to
determine whether application of either theory provides an ade-
quate, justifiable resolution of conflicting interests.

A. \textsc{Limited Immunity}

The currently prevailing view is that state agencies are entitled
to immunity from municipal zoning regulations, in the absence
of consent to be governed by them, where the proposed use con-
stitutes a "governmental" rather than a "proprietary" function.\textsuperscript{41}
Governmental functions are those required by legislative mandate
and involving a direct benefit to the general public, while an
activity conferring private advantages pursuant to permissive

\textsuperscript{40} See 1 \textsc{anteau}, \textit{op. cit. supra} note 4, § 7.11; 8 \textsc{Mcquillen}, \textit{op. cit.
 supra} note 4, § 25.15; 1 \textsc{Rathkoff}, \textsc{The Law of Zoning and Planning} ch.
31 (1962).

A number of cases, rejecting the favored theories, have resolved the juris-
dictional conflict through statutory construction. In \textit{Town of Sheridan v.
Valley Sanitation Dist.}, 137 Colo. 315, 324 P.2d 1088 (1958), and Application
the courts found express language in the statutory grants to the agencies
which conditioned exemption, in the Colorado case, on the zoning city's con-
sent to the proposed location and, in the New Jersey case, on a showing of
reasonable necessity. Other courts have construed less specific jurisdictional
grants as conferring exemption from otherwise applicable zoning restrictions.
\textit{But see DeGaynor v. Board of Trustees}, 363 Mich. 423, 109 N.W.2d 777
(1961); \textit{City of Richmond v. Board of Supervisors}, 199 Va. 679, 101 S.E.2d
641 (1958). Governmental units have also been immunized by the existence
of an express exemption in the zoning ordinance. See, e.g., \textit{Lees v. Sampson

\textsuperscript{41} See, e.g., \textit{Lauderdale County Bd. of Educ. v. Alexander}, 299 Ala.
79, 110 So. 2d 911 (1959) (operation of county bus barn, governmental); \textit{Jefferson
County v. City of Birmingham}, 266 Ala. 485, 55 So. 2d 196 (1951) (operation
of sewage disposal plant, proprietary); \textit{Alabama Alcoholic Beverage Control
Bd. v. City of Birmingham}, 238 Ala. 402, 44 So. 2d 593 (1950) (liquor sales,
governmental); \textit{County of Los Angeles v. City of Los Angeles}, 212 Cal. App. 2d
109, 28 Cal. Rptr. 32 (1963) (construction of county buildings inside city,
governmental); \textit{City of Bloomfield v. Davis County Community School Dist.},
254 Iowa 900, 119 N.W.2d 900 (1963) (location of bulk gasoline tank, govern-
mental); \textit{City of Medford v. Marinucci Bros.}, 244 Mass. 50, 131 N.E.2d
594 (1962) (erection of hoppers incidental to interstate highway construction,
governmental); \textit{Davidson County v. Harmon}, 200 Tenn. 575, 292 S.W.2d 777
(1956) (construction of hospital, governmental); \textit{Salt Lake County v. Liquor
Control Comm'n}, 11 Utah 2d 235, 357 P.2d 488 (1960) (liquor store, govern-
mental); \textit{City of Charleston v. Southeastern Constr. Co.}, 134 W. Va. 666, 64
S.E.2d 676 (1950) (state office building construction, governmental); \textit{Green
County v. City of Monroe}, 3 Wis. 2d 196, 87 N.W.2d 827 (1958) (jail, govern-
mental).
legislation is proprietary.\textsuperscript{42} Thus, the placement of a county jail,\textsuperscript{43} a bulk gasoline tank,\textsuperscript{44} or a hospital building\textsuperscript{45} is a governmental function, while the operation of a county sewage disposal plant is proprietary.\textsuperscript{46}

One difficulty with the governmental-proprietary distinction is that its vagueness makes it virtually impossible to apply.\textsuperscript{47} But aside from this, the criteria to be used in applying it are of questionable validity. It is true that they reflect an apparently reasonable assumption as to probable legislative intent—that in the absence of clear expression to the contrary municipalities are not empowered to thwart the state or its agencies in performing a duty required by statute, but that when such agencies voluntarily


\textsuperscript{43} Green County v. City of Monroe, 3 Wis. 2d 196, 87 N.W.2d 827 (1958).

\textsuperscript{44} City of Bloomfield v. Davis County Community School Dist., 254 Iowa 900, 139 N.W.2d 909 (1963).

\textsuperscript{45} E.g., Jefferson County v. Harmon, 200 Tenn. 575, 292 S.W.2d 777 (1956).

\textsuperscript{46} For example, one jurisdiction has been unable to decide whether refuse collection is a governmental or a proprietary function. See O'Brien v. Town of Greenburgh, 239 App. Div. 555, 268 N.Y. Supp. 173 (1933), aff'd, 266 N.Y. 583, 195 N.E. 210 (1935) (proprietary); Hewlett v. Town of Hempstead, 2 Misc. 2d 945, 183 N.Y.S.2d 690 (Sup. Ct.), aff'd, 1 App. Div. 2d 954, 150 N.Y.S.2d 922 (1954) (governmental). There is also considerable disagreement among jurisdictions. See Baltis v. Village of Westchester, 3 Ill. 2d 388, 121 N.E.2d 496 (1954) (water storage facilities, proprietary); McKinney v. City of High Point, 237 N.C. 66, 74 S.E.2d 440 (1953) (water storage, governmental). A few cases persuasively reject the test. See State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960), in which the court asserted that "the [inter-jurisdictional issue] . . . will be answered by ascertaining the legislative intent . . . and is not to be resolved simply by applying the 'governmental vs. proprietary' test." Id. at 887. See also Township of Washington v. Village of Ridgewood, 26 N.J. 578, 141 A.2d 308 (1958) (distinction illusory: all authorized functions are performed as a government, not as entrepreneur); City of Richmond v. Board of Supervisors, 199 Va. 679, 101 S.E.2d 641 (1958); Seasongood, \textit{Municipal Corporations: Objections to the Governmental or Proprietary Test}, 29 Va. L. Rev. 619 (1943). A factor that may mitigate the difficulties inherent in making the distinction is recent authority which implies that the statutory designation of a function as either governmental or proprietary determines its classification for zoning purposes. See Nichols Eng'r & Research Corp. v. State, 59 So. 2d 874 (Fla. 1952) (construction of incinerator, governmental). However a classification for tort purposes is not binding in zoning situations. See Jefferson County v. City of Birmingham, 256 Ala. 436, 55 So. 2d 196 (1951).
exercise their private rights as corporate bodies seeking gain, they should be subject to the same restrictions as private corporations conducting similar business.48 However this assumption may be too broad. It seems reasonable to infer that the legislature never intended to permit the frustration of functions required of state agencies by statute. But, to conclude that it intended to preclude the application of zoning regulations to every governmental function of a state agency is to assume the conclusion that performance of governmental functions would otherwise be significantly obstructed in each case. Moreover, since municipalities are also state agencies performing a governmental function (zoning), the governmental-proprietary analysis is as reversible in favor of the municipalities as is its counterpart in building code cases, the sovereign immunity doctrine.49

These factors seem to require a balancing of conflicting interests. From a municipality’s viewpoint, the uncontrolled placement of a prison or sewage disposal plant in a residential area obviously tends to damage it aesthetically and thus to diminish property values and tax revenue. The result of such an invasion is to impair the municipality’s capacity to plan and administer effectively its future development. On the other hand, if state agencies are bound by zoning restrictions, they may experience great difficulty in locating necessary but unwanted facilities in reasonably desirable areas.50

Legislative guidelines for balancing these conflicting interests may be available. In conferring broad zoning power, the legislature has implicitly recognized a fundamental local interest in


49. See text accompanying note 21 supra. While a few of the building code cases utilize a governmental-proprietary analysis, e.g., City of Charleston v. Southeastern Constr. Co., 134 W. Va. 666, 64 S.E.2d 676 (1950), most do not consider the distinction. Building regulation is generally assumed to be a “sovereign” or “governmental” function. See, e.g., Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956).

50. See 6 CALIF. ASSEMBLY INTERIM COMM. ON MUNICIPAL AND COUNTY GOVERNMENT, op. cit. supra note 23, at 19, where Deputy Attorney General Perry testified that the Director of Education requested the Attorney General to appear in Town of Atherton v. Superior Court, 159 Cal. App. 2d 417, 334 P.2d 328 (1958), and argue that if a city or county could regulate placement of public schools by zoning, they could exclude all schools from within their respective urban areas. See also the testimony of William Siegal, representing the County Supervisors Association of California, who noted that prior to Hall v. City of Taft, supra note 49, the metropolitan counties were “having particular difficulty locating certain types of undesirable and unwanted facilities such as [jails] . . . .” 6 CALIF. ASSEMBLY INTERIM COMM. ON MUNICIPAL AND COUNTY GOVERNMENT, op. cit. supra note 23, at 19.
Thus, to the extent that an effective zoning system requires unqualified municipal jurisdiction, the zoning ordinance should govern the activities of other state agencies absent an express withdrawal of municipal jurisdiction. While the other agencies are typically charged with relatively narrow statutory responsibilities, municipalities invariably bear responsibility for a wide variety of interests. For example, while it is doubtful that school authorities consider the city's zoning interests when locating a school, it is likely that a municipality gives broad-minded consideration to the question of school location in enacting a comprehensive zoning scheme. Since it is reasonable to presume that the legislature intended a balanced viewpoint to control in cases of conflict, it would seem that an agency's power to conduct a state function is not a license to disregard local zoning restrictions, but authorization to operate in accordance with them. This construction, when accompanied by the power of the state agency, like any private landowner, to challenge an unreasonable ordinance or seek its amendment, accommodates municipal interests without unduly interfering with agency performance of statutory responsibilities. Furthermore, since the legislature has failed to deal explicitly with this area, it seems justifiable to place upon it the burden of reversing a reasonable presumption as to what its intent would be.

**B. COMPLETE OR EMINENT DOMAIN IMMUNITY**

There is authority for the proposition that state agencies possessing the right to condemn property under a power of eminent domain are by virtue of that fact, exempt from zoning regul-


52. See 6 Calif. Assembly Interim Comm. on Municipal and County Government, supra note 23, at 16, where counsel for the League of California Cities characterized state agency immunity as "a license to frustrate city planning and zoning efforts and depress property values." He asserted that without "power to control all land uses, [the cities] cannot effectively control any . . . Planning and zoning can be effective only if done by a single body within a given area, and to diffuse the authority . . . is to prevent its successful use." Ibid.


In each case the significant consideration is the right to condemn and not whether the property in question was in fact condemned. Most courts passing on the question hold that the only limitation on the power of eminent domain and the immunity conferred by its possession is that the property be used for a proper public purpose. While the cases contain little analysis, immunity usually seems to be predicated on an assumption that the power of eminent domain necessarily embraces the power to use as well as to take. It is reasoned that if zoning restrictions were applicable, the zoning municipality could limit the public uses for the furtherance of which the legislature purposely conferred the

55. See City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962) (city sewage plant, located extra-territorially, immune from zoning of situs city); Reber v. South Lakewood Sanitation Dist., 147 Colo. 70, 382 P.2d 877 (1963) (county ordinance inapplicable to sanitation district); Decatur Park Dist. v. Becker, 368 Ill. 442, 14 N.E.2d 490 (1938) (park district not subject to city ordinance); St. Louis Union Trust Co. v. Ferriss, 304 S.W.2d 896 (Mo. 1957) (school district not subject to city zoning); Aviation Services v. Board of Adjustment, 30 N.J. 275, 119 A.2d 761 (1960) (municipal airport exempt from township ordinance); Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 257, 113 A.2d 658 (1955) (highway authority exempt from town zoning ordinance); St. Louis Union Trust Co. v. Ferriss, 304 S.W.2d 896 (Mo. 1957) (by implication); Decatur Park Dist. v. Becker, 368 Ill. 442, 14 N.E.2d 490 (1938); State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960) (sewage disposal plant exempt from county zoning); State ex rel. St. Louis Union Trust Co. v. Ferriss, 304 S.W.2d 896 (Mo. 1957) (park district not subject to city zoning); Aviation Services v. Board of Adjustment, 30 N.J. 275, 119 A.2d 761 (1960) (municipal airport exempt from township ordinance); Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237, 113 A.2d 658 (1955) (highway authority exempt from town zoning ordinance); St. Louis Union Trust Co. v. Ferriss, 304 S.W.2d 896 (Mo. 1957) (by implication); Decatur Park Dist. v. Becker, 368 Ill. 442, 14 N.E.2d 490 (1938); State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960) (by implication); Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 257, 113 A.2d 658 (1960); State ex rel. Helsel v. Board of Comm’rs, 37 Ohio Op. 58, 79 N.E.2d 694 (1949) (county airport not subject to city zoning plan). But see St. Louis County v. City of Manchester, 306 S.W.2d 638 (Mo. 1956) (city sewage plant subject to county zoning ordinance).

56. E.g., City of Scottsdale v. Municipal Court, supra note 55; Mayor of Savannah v. Collins, 211 Ga. 191, 84 S.E.2d 454 (1954).

57. See, e.g., City of Scottsdale v. Municipal Court, supra note 55 (by implication); Decatur Park Dist. v. Becker, 368 Ill. 442, 14 N.E.2d 490 (1938); State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960); St. Louis Union Trust Co. v. Ferriss, 304 S.W.2d 896 (Mo. 1957) (by implication); Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 257, 113 A.2d 658 (1960); State ex rel. Helsel v. Board of Comm’rs, 37 Ohio Op. 58, 79 N.E.2d 694 (1949) (county airport not subject to city zoning plan). Many of these courts expressly reject a governmental-proprietary limitation which would allow exemption for an agency exercising eminent domain only if its function were governmental. See, e.g., State ex rel. Askew v. Kopp, supra; Township of Washington v. Village of Ridgewood, 26 N.J. 578, 141 A.2d 308 (1958). But see City of Scottsdale v. Municipal Court, supra note 55, at 399, 368 P.2d at 640 (dissenting opinion) and Township of Washington v. Village of Ridgewood, supra at 586, 141 A.2d at 312 (dissenting opinion) where it was strenuously argued that the power of eminent domain should not create immunity per se absent the performance of a governmental function.
power of eminent domain. However, to infer from possession of the power of eminent domain that the legislature intended to permit unfettered condemnation and use is as unwarranted as the inference that the legislature intended to preclude all local regulation of “governmental” functions.

CONCLUSION

The problems considered in this Note can best be resolved by explicit legislative definition of jurisdictional boundaries. However, absent such treatment it would seem that the courts should attempt to balance the conflicting interests rather than to resolve inter-jurisdictional conflicts through the mechanical application of questionable presumptions which fail to take account of the existence and magnitude of these interests. Whether the conflict involves smoke abatement, the placement of parking meters, or any other subject as to which state agencies may oppose city regulation, the interests at stake on each side are similar. The city invariably seeks enforcement of its ordinances to protect its inhabitants’ health, safety and welfare, while the agency desires immunity to facilitate the performance of its statutory responsibilities. Balancing these interests in any particular case primarily requires an examination of their relative intensities. To the extent that local regulation of an activity is vital to the promotion of municipal objectives more fundamental than those served by exempting it, the local regulation should prevail. In determining relative intensities of interests, the degree to which municipal

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58. For the most forceful expression of this reasoning, see State ex rel. Helsel v. Board of Comm’rs, supra note 57. See also State ex rel. Askew v. Kopp, supra note 57; Aviation Servs. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761 (1956).

59. See, e.g., Ala. Code tit. 55, §§ 367(8), (11) (1958), explained supra note 24; N.C. Gen. Stat. § 160-131.1 (1964), which makes local zoning regulations applicable to the erection and construction of buildings by the State and its agencies; Ore. Rev. Stat. § 227.230 (1983), authorizing city regulation of public buildings; Cal. Gov’t Code §§ 53090-91, requiring state agency compliance with local building and zoning ordinances, but for all practical purposes immunizing school districts from both; and the U.S. Dept. of Commerce Advisory Comm. on Zoning, State Standard Zoning Enabling Act § 9 (Rev. ed. 1926), establishing the pre-eminence of local zoning ordinances. Indiana recently enacted legislation, held constitutional in Mogilner v. Metropolitan Plan. Comm’n, 236 Ind. 298, 140 N.E.2d 220 (1957), which in effect creates a rebuttable presumption that any state agency activity inconsistent with a municipality’s comprehensive zoning plan is not in the public interest. This solution appears to be highly desirable insofar as it recognizes fundamental local zoning interests while protecting whatever overriding state interests are found to exist. Ind. Ann. Stat. § 53-936 (1964).
regulation will interfere with the performance of the agency’s functions should be considered. Another consideration is whether the activity in question requires uniform, central control, or permits local individualized attention. Also pertinent would be the relative availability and effectiveness of state and local regulatory machinery. Regardless of the difficulties inherent in a balancing approach, the formulation of judicial decisions on the basis of an examination of all the relevant considerations would at least produce presumptively fairer results, as well as encourage cooperation and negotiation between the competing governmental units.

60. See Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643, 683 (1964), suggesting a balancing approach as the “most likely approach to achieving an appropriate solution.” However, it is also noted that as to some issues, the courts have little competence to balance competing interests. Ibid.

Courts faced with a jurisdictional conflict case may extract helpful balancing guidance from the few state legislatures that have enacted statutory solutions, despite an apparent lack of agreement among these states as to which agencies are to be regulated and to what extent. Of those state legislatures which appear to have considered the application of zoning ordinances to local state activity, whatever consensus exists definitely favors municipal zoning interests. This trend is diametrically opposed to the prevailing judicial majority. See, e.g., N.C. Gen. Stat. § 160-181.1 (1964) and Ore. Rev. Stat. § 227.230 (1963), discussed in note 59 supra, which authorize the application of local zoning regulations to state or public buildings. And see Ind. Ann. Stat. § 53-936 (1964), discussed in note 59 supra, which establishes a rebuttable presumption favoring the application of zoning laws in all cases, as well as Cal. Gov’t Code §§ 53091–94, which requires uniform compliance with local zoning law, with only limited exceptions, notably counties and school districts. As to the application of municipal building codes, the Alabama solution, discussed in note 24 supra, bars all local regulation of state buildings and schoolhouses, whereas the California provisions, while appearing to allow some local regulation, effectively limit its scope so as to bar local control over any significant state construction activity.