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Immunity of State and State Related Activities from Local Municipal Zoning Regulations: Florida Focus

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could be converted into a permit granting process encouraging persons to avoid seeking a permit at all.[116] Now the Corps may go directly to the United States attorney for enforcement. In appropriate cases, the Corps may recommend the removal of the unauthorized activity and the restoration of the area.[117] These measures will enable the Corps to more promptly and effectively protect the environment.

The important focus and impact of the Corps' new jurisdiction will be on the wetlands areas. These are now waters of the United States, to be regulated by the federal government. The lack of state programs to protect wetland areas and the necessity for coordinating control over ecological systems that do not follow state boundaries increases the need for federal intervention. Ironically, the Corps of Engineers, which has no history of environmental activism, has been given the prime role in this area. Arguably, this crucial task might have been better entrusted to the Environmental Protection Agency. If, however, the Corps of Engineers actually fulfills the letter and spirit of its new regulations, an important step in environmental protection will be made.

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IMMUNITY OF STATE AND STATE RELATED ACTIVITIES FROM LOCAL MUNICIPAL ZONING REGULATIONS: FLORIDA FOCUS

The power of municipalities to enact zoning ordinances has been recognized in recent years as a vital element in developing land use planning concepts.[1] Problems have arisen, however, when governmental bodies have ignored or challenged these zoning ordinances. When a state or a state agency has taken action inconsistent with local zoning ordinances over the objections of local government, the courts generally have upheld the state's right to carry out its activities without regard to the local zoning regulations.[2] The resulting state immunity from zoning has been extended to state agencies and departments,[3] local governmental units that are performing state functions,[4] and

116. Hoyer, *supra* note 104, at 35.

117. Corps of Engineers Reg. §209.120-(g)(12)(ii)(a)(1), 40 Fed. Reg. 31,330 (1975). Even under the Corps' permit granting authority under the Rivers and Harbors Act of 1899, a federal district court ordered restoration as a remedy for failure to obtain a permit. United States v. Joseph G. Moretti, Inc., 387 F. Supp. 1404 (S.D. Fla. 1974).

1. *See generally* Haar, *Regionalism and Realism in Land Use Planning*, 105 U. PA. L. REV. (1957).

2. *See generally* 2 R. ANDERSON, AMERICAN LAW OF ZONING §9.06, at 115, 117 (1968). "[A] public corporation or authority created by the state to carry out a function of the state is not bound by local zoning regulations." *See also* D. HAGMAN, URBAN PLANNANG AND LAND DEVELOPMENT CONTROL LAW §68, at 123, 124 (1971). *See also* Rutgers, The State Univ. v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972).

3. Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237, 113 A.2d 658 (1955).

4. Green County v. City of Monroe, 3 Wis. 2d 196, 87 N.W.2d 827 (1958).

other "arms of the state," including parties contracting to perform services for the state.[5] Consequently, a sizeable body of hornbook law asserts that the state and its agencies are not bound by zoning regulations when carrying out the functions of the state.[6]

Recently, however, some courts have indicated that they are not completely satisfied with this universal rule. These courts, faced with situations in which the state has defied a local ordinance, have applied a balancing-of-interests test to decide the individual case.[7] The use of this test suggests a trend toward treating state and local zoning conflicts in a more flexible and perhaps more equitable manner. This commentary will explore the past and present law in Florida regarding state and governmental immunity to local zoning. It will also consider the effect that the 1968 constitutional revisions,[8] the passage of the Municipal Home Rule Powers Act of 1973,[9] and a recent Florida supreme court decision[10] will have on this area of the law.

MUNICIPAL POWER TO ZONE

Prior to the passage of the 1968 constitution and the Municipal Home Rule Powers Act[11] in 1973 by the Florida Legislature, the legislative grant of zoning power to municipalities was found in the Zoning Enabling Act.[12] The power of the municipality to zone was not an inherent constitutional power but was asserted solely by virtue of the authority granted to the municipality by the state legislature.[13] Since the power of the municipality arose from a legislative enactment, the courts held that when the legislature

5. Unitarian Universalist Church v. Shorten, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup. Ct. 1970); Abbott House v. Village of Tarrytown, 34 App. Div. 2d 821, 312 N.Y.S.2d 841 (Sup. Ct. App. Div. 1970).

6. *See* R. ANDERSON, *supra* note 2, §9.06; D. HAGMAN, *supra* note 2, §68. *See also* 8 E. MCQUILLAN, MUNICIPAL CORPORATIONS §25.15 (1965).

7. Town of Oronoco v. City of Rochester, 293 Min. 468, 197 N.W.2d 426 (1972); Long Branch Div. of United Civic & Taxpayers Organization v. Cowan, 119 N.J. Super. 306, 291 A.2d 381, *cert. denied*, 62 N.J. 86, 299 A.2d 84 (1972); Rutgers, The State Univ. v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972).

8. FLA. CONST. art. VIII, §2(b) (1968). *See* text accompanying note 52 *infra*.

9. Municipal Home Powers Act, FLA. STAT. §166 (1975). Fla. Laws 1973, ch. 73-129, §1, repealed FLA. STAT. §166 (1971), Municipal Charter and Charter Amendments, which consisted of §166.01 to §166.17, and enacted a new Chapter 166, Municipalities, consisting of Parts I to IV, §166.011 to §166.411.

10. Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976).

11. FLA. STAT. §166 (1975).

12. FLA. STAT. §176 (1971) was repealed by Fla. Laws 1973, ch. 73-129, §1, at 239. *See* FLA. STAT. §166 (1975).

13. Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So. 2d 439, 443 (Fla. 1959) (the exercise of zoning powers by municipalities is an exercise of the state police power delegated by the legislature). *See also* State v. Dade County, 142 So. 2d 79 (Fla. 1962); Dade County v. Young Democratic Club, 104 So. 2d 636 (Fla. 1958); Williams v. Town of Dunnellon, 125 Fla. 114, 169 So. 631, 637 (1936); Metropolis Pub. Co. v. City of Miami, 100 Fla. 784, 129 So. 913 (Fla. 1930); State *ex rel.* Helseth v. Du Bose, 99 Fla. 812, 128 So. 4 (1930); Abenkay Realty Corp. v. Dade County, 185 So. 2d 777, 780 (3d D.C.A. Fla. 1966).

passed an enactment relating to the same subject as a municipal zoning ordinance, the state legislation would be controlling.[14]

Accepting zoning as a delegated power, Florida courts approached cases in which conflict arose between governmental bodies by applying a number of traditional tests, tests that had been applied in other jurisdictions in cases in which municipalities attempted to oppose the breach of their zoning ordinances by the state, counties, or other townships.[15] Among the tests applied were the governmental-proprietary,[16] statutory guidance,[17] superior sovereign,[18] and eminent domain[19] tests. The newer test, balancing-of-interests,[20] was not applied to zoning disputes involving two governmental bodies until recent years,[21] although it has been suggested that this test was in reality used as early as 1930 by the Florida supreme court.[22]

THE GOVERNMENTAL-PROPRIETARY TEST

The governmental-proprietary distinction was used by the Florida supreme court in an early case in which a municipality violated its own zoning. In *Nichols Engineering & Research Corp. v. State ex rel. Knight*,[23] the court approved the City of Miami's plan to construct an incinerator on land within the city that was zoned for other purposes. The supreme court was persuaded that the city had taken the necessary steps to overcome objections to the facility. In subsequent cases *Nichols* was relied on by lower courts for the theory that "in the performance of a governmental activity a governmental entity is not subject to its own zoning restrictions."[24]

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14. *See* Texas Co. v. City of Tampa, 100 F.2d 347 (5th Cir. 1938). "It is not necessary to discuss and pass upon the validity of the . . . ordinances of the City of Tampa. They have been superseded by the Act of the Florida Legislature. That legislative enactment stands above them. It is paramount and controlling. . . ." *Id.* at 348.

15. Although the same tests were applied to contests involving different types of governmental bodies, the results were almost always the same in situations in which state activity was challenged by a lower governmental body. Decisions were usually in favor of the state.

16. A1A Mobile Home Park, Inc. v. Brevard County, 246 So. 2d 126 (4th D.C.A. Fla. 1971).

17. Rutgers, The State Univ. v. Piluso, 60 N.J. 142, 286 A.2d 679 (1972).

18. Aviation Services, Inc. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761 (1956).

19. State *ex rel.* Helsel v. Board of County Comm'rs, 37 Ohio Ops. 58, 79 N.E.2d 698 (1947).

20. Orange County v. City of Apopka, 299 So. 2d 652 (4th D.C.A. Fla. 1974).

21. *See generally* Note, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971).

22. State *ex rel.* Helseth v. Du Bose, 99 Fla. 812, 128 So. 4 (1930). See comments regarding the Helseth case in OP. ATT'Y GEN. FLA. 075-207 (1975). The suggestion that *Helseth* utilized a balancing test was advanced by the Second District Court of Appeal in City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (2d D.C.A. Fla. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

23. 59 So. 2d 874 (Fla. 1952).

24. A1A Mobile Home Park, Inc. v. Brevard County, 246 So. 2d 126, 131 (4th D.C.A. Fla. 1971). *See also* Metropolitan Dade County v. Parkway Towers Condominium Ass'n 281 So. 2d 68 (3d D.C.A. Fla. 1973); City of Treasure Island v. Decker, 174 So. 2d 756 (2d D.C.A. Fla. 1965). *But see* Parkway Towers Condominium Ass'n v. Metropolitan Dade

The position enunciated in *Nichols* has been applied by Florida appellate courts to varying fact situations. In one case[25] owners of a mobile home park, in an area zoned for general as distinguished from industrial use, unsuccessfully attempted to enjoin construction by the county of a sewage treatment plant adjacent to their property. The Fourth District Court of Appeal relied on *Nichols* for the premise that in the performance of a governmental activity the county should not be subject to its own zoning restrictions.[26] In a 1973 decision[27] Dade County was challenged by private property owners when it attempted to violate its own zoning restrictions by building a jail facility on property reserved for another use under a comprehensive zoning ordinance.[28] The Third District Court of Appeal recognized a right under common law and under Florida law for "a governmental entity to place a governmental facility without regard to a comprehensive zoning ordinance or its procedures."[29]

The governmental-proprietary test has been extended to situations in which one governing body seeks to violate the zoning of another entity. In *City of Treasure Island v. Decker*,[30] the Second District Court of Appeal applied this test in a situation involving a conflict between two co-equal governmental units, the cities of St. Petersburg and Treasure Island. The court ruled that a toll facility proposed by Treasure Island to be built within the territorial jurisdiction of St. Petersburg was a proprietary rather than a governmental function; therefore, Treasure Island was subject to the zoning of St. Petersburg.[31] The court noted that two legislative grants of power specifically con-

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County, 295 So. 2d 295 (Fla. 1974) (reh. denied) and comment on this opinion in OP. ATT'Y GEN. FLA. 075-170 (1975).

25. A1A Mobile Home Park, Inc. v. Brevard County, 246 So. 2d 126 (4th D.C.A. Fla. 1971).

26. *Id.* at 131. Judge Mager relied on supreme court decisions in Delaware and Vermont as well as on *Nichols*. *See* Register v. H. Burton Elliot, Inc., 229 A.2d 488 (Del. Super. Ct. 1967); Kedroff v. Town of Springfield, 127 Vt. 624, 256 A.2d 457 (1969).

27. Metropolitan Dade County v. Parkway Towers Condominium Ass'n, 281 So. 2d 68 (3d D.C.A. Fla. 1973).

28. *Id.* at 68.

29. *Id.* at 69. *See generally* 2 E. YOKELY, ZONING LAW AND PRACTICE *ch.* XXI (3d ed. 1965).

30. 174 So. 2d 756 (2d D.C.A. Fla. 1965).

31. The court based its decision on State *ex rel.* Helseth v. Du Bose, 99 Fla. 812, 128 So. 4 (1930), and Nichols Eng'r & Research Corp. v. State *ex rel.* Knight, 59 So. 2d 874 (Fla. 1952). It noted that "the rule stated was not actually presented for decision in those cases, nevertheless, we believe that they point to that rule. . . . [It] appears to us to be the correct rule because it permits each governmental unit to perform its functions without serious interference from the other." *Id.* at 759. The court in Orange County v. City of Apopka, 299 So. 2d 652 (4th D.C.A. Fla. 1974), interpreted *Helseth* differently and stated that *Helseth* was the basis for its abandoning the governmental-proprietary distinction. *Id.* at 655. The *Orange County* court noted that: "[It] is worthy to note that the court [in *Helseth*] did not simply brush the city's zoning ordinance aside as being inapplicable on the ground that the county proposed to exercise a governmental function in building a jail. It held the county subject to the city's zoning ordinance but struck down the zoning restriction as the restriction applied to this particular use based upon the surrounding facts and circumstances of the case." *Id.* at 655.

flicted[32] and that a legislative solution was needed; the court unsuccessfully sought legislative guidance to resolve this conflict.

THE EMINENT DOMAIN TEST

Another rationale that has been used by courts to support governmental immunity to local zoning regulations is the eminent domain theory, which asserts that any state or local government, or state agency, or public utility possessing the power of eminent domain is immune to local zoning regulations.[33] This theory involves a presumption that the power of eminent domain is superior to the police power of zoning.[34] Florida courts have generally applied either the sovereignty or governmental-proprietary analysis rather than this theory.

In 1974 the Attorney General of Florida discussed eminent domain and zoning in an opinion dealing with a municipality's proposed use of its power of eminent domain to acquire extraterritorial land for a public park.[35] Because the city charter granted such power, acquisition was considered permissible under the Municipal Home Rule Powers Act[36] and under article VIII, section 2(c) of the constitution.[37] However, the Attorney General suggested that

32. The City of Treasure Island owned and operated the toll facility pursuant to legislatively delegated authority. The City of St. Petersburg derived the power to zone from the Zoning Enabling Act, Fla. Laws 1939, ch. 19,539, §1, at 1248, and the city charter. The authority of Treasure Island to operate the toll facility did not exempt the facility from the zoning of St. Petersburg; conversely, the zoning authority of St. Petersburg did not grant specific authority to regulate the Treasure Island toll facility.

33. R. ANDERSON, *supra* note 2, §9.06, at 119.

34. *Id. See also* Mayor of Savannah v. Collins, 211 Ga. 191, 84 S.E.2d 454 (1954) (land obtained through condemnation and the power of eminent domain for a city fire station was not subject to city zoning restrictions); Aviation Servs., Inc. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761 (1955); State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345 (1952), *cert. denied*, 344 U.S. 865 (1952); State *ex rel.* Helsel v. Board of County Comm'rs, 37 Ohio Ops. 58, 79 N.E.2d 698 (1947), *aff'd*, 83 Ohio App. 388, 78 N.E.2d 694 (1948) (village zoning was inapplicable to county land that was located within a village when the village acquired the land by the power of eminent domain for the purpose of building an airport).

But see Porter v. Southwestern Pub. Serv. Co., 489 S.W.2d 361 (Tex. Civ. App. 1972) (power of eminent domain is not usurped by a requirement that zoning standards be upheld). The *Porter* court noted that: "Eminent domain involves the deprivation of the right of the property owner to keep his property when it is needed for public use. Zoning regulations, derived from the police powers, deprive the property owner of the use of his property contrary to standards promulgated for the health, safety and welfare of the public generally. Both powers are inherent in state government and may be delegated for appropriate purposes. Neither power is an unbridled one; in short, there must not be an abuse of power." *Id.* at 363.

35. See OP. ATT'Y GEN. FLA. 074-357 (1974): "§166.021(3)(a), F.S., of the Municipal Home Rule Powers Act which stipulates that municipalities may not legislate concerning the subjects of 'annexation, merger, and *exercise of extraterritorial power*, which require general or special law pursuant to §2(c), Art. VIII of the state constitution.' . . . Consistent with these constitutional and statutory provisions, therefore, a municipality may exercise extraterritorially the power of eminent domain only if authorized to do so by general or special law." (emphasis original).

36. FLA. STAT. §166 (1975).

37. FLA. CONST. art. VIII, §2(c) (1968).

the decision in *Orange County v. City of Apopka*,[38] which adopted the balancing-of-interests test, should be considered by the city of Maitland when choosing an extraterritorial park location.[39]

LEGISLATIVE INTENT — STATUTORY GUIDANCE

Courts in some jurisdictions have rejected traditional rules such as the governmental-proprietary test in favor of an examination of legislative intent.[40] When state entities have disregarded local zoning regulations, courts have examined the legislative intent with respect to the particular agency or function involved.[41] When there is a finding by the court that the legislature intended a particular agency to have immunity from local zoning control, immunity is often recognized.

Courts using this test ultimately make a value judgment after evaluating considerations such as "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."[42]

Courts that have used the legislative intent test have denounced total governmental immunity.[43] However, some have apparently conceded a form of qualified immunity to the state and its agencies. Courts have found immunity to exist solely by virtue of the legislative creation of and delegation of power

38. 299 So. 2d 652 (4th D.C.A. Fla. 1974).

39. OP. ATT'Y GEN. FLA. 074-357 (1974). The Attorney General noted that under the *Orange County* case one governmental unit is bound by the zoning regulations of another.

40. *See* City of Newark v. University of Del., 304 A.2d 347 (Ch. Del. 1973); Long Branch Div. of United Civic & Taxpayers Organization v. Cowan, 119 N.J. Super. 306, 291 A.2d 381, *cert. denied*, 62 N.J. 86, 299 A.2d 84 (1972); Rutgers, The State Univ. v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972); Washington Township v. Village of Ridgewood, 26 N.J. 578, 141 A.2d 308 (1958); Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237, 113 A.2d 658 (1955).

41. *See* Rutgers, The State Univ. v. Piluso, 60 N.J. 142, 286 A.2d 697, 702 (1972). The New Jersey supreme court considered the claim by Rutgers University that, as a public university maintained for the benefit of the people of the state, the university was exempted from the zoning ordinances of the Township of Piscataway. The court decided the case in favor of the university but rejected the traditional rule that "a public corporation or authority created by the state to carry out a function of the state is not bound by local zoning regulations." *Id.* at 701. The decision was based on a finding that the university, as an instrumentality of the state performing an essential governmental function for the benefit of the people, was backed by a legislature that "would not intend that its growth and development should be subject to restriction and control by local land use regulation." *Id.* at 703. The court noted that this finding would generally be true in all cases involving state functions and agencies; but the court noted that this did not mean that there is complete state immunity nor that if immunity is found, it is "completely unbridled." Even if there is immunity, "it should not be exercised in an unreasonable fashion so as to arbitrarily override all important legitimate local interests." *Id.* at 703. Instead, the instrumentality challenging the zoning was to consult with local authorities "and sympathetically listen and give . . . consideration to local objections, problems and suggestions in order to minimize the conflict as much as possible." *Id.* at 703.

42. *Id.* at 702.

43. *See* cases cited note 40 *supra*.

to the instrumentality and have qualified it by requiring the governmental body to discuss its plans with local authorities so as to keep conflicts to a minimum.[44]

SUPERIOR SOVEREIGN TEST — HOME RULE

Florida courts have not placed substantial importance on the legislative intent test as such. However, use of the superior sovereign test in Florida has for many years resulted in similar opinions that the state is immune to local zoning regulations. When immunity is found in states using the legislative intent test, the rationale is that the legislature intended the state to be immune.[45] Under the superior sovereign doctrine, courts have taken the approach that agencies of a governmental body occupying a superior position in the governmental heirarchy are presumed to be immune to zoning regulations of inferior governmental bodies absent express statutory language to the contrary.[46] The validity of this test in light of the passage of municipal home rule legislation[47] and the 1968 constitution was challenged in a recent Florida case.[48] The Second District Court of Appeal rejected the superior

44. *See* Long Branch Div. of United Civic & Taxpayers Organization v. Cowan, 119 N.J. Super. 306, 291 A.2d 381 (1972), *cert. denied*, 62 N.J. 86, 299 A.2d 84 (1972). Local citizens sought to enjoin the State Department of Health from establishing a residential drug rehabilitation center in a residentially zoned neighborhood. The court held that the department had statutory authority from the legislature to own and operate such a center. Therefore, the "[l]egislature intended to cloak the department with immunity from . . . local control." *Id.* at 309. Following the *Rutgers* decision, the court noted that even when such immunity is found from legislative intent, the immunity is to be exercised in a reasonable fashion so as not to override all legitimate local interests. The case was remanded for hearing as to whether the department had acted unreasonably or arbitrarily in selecting the challenged site. *See also* City of Newark v. University of Del., 304 A.2d 347, 349 (Ch. Del. 1973). The Delaware court held that the broad statutory grant of power to the University of Delaware clearly indicated that the legislature intended that all control of university land development and use would be within the exclusive authority of the board of trustees of the university. Thus, the university was immune from the zoning of Newark. This immunity was absolute unless the city could show that it had been exercised in an unreasonable or arbitrary manner.

45. While the legislative intent test on its face seems to provide an equitable opportunity to both parties in a governmental zoning dispute, operation of that test in the New Jersey courts invariably has resulted in decisions favoring the state. This outcome is similar to the results arising from application of the "superior sovereign" test. *See* Rutgers, The State Univ. v. Piluso, 60 N.J. 142, 286 A.2d 697, 702 (1972). The court stated that: "In only one case has this court held that the Legislature did not intend immunity. That is Township Committee of Township of Denville v. Board of Educ. of Vocational School in County of Morris, 59 N.J. 143 n.5, 279 A.2d 842 n.5 (1971). There a majority of the court found that a county vocational school was subject to the use limitations of a municipal zoning ordinance by reason of the legislative intent to that effect derived from an amendment to the zoning enabling act . . . ."

46. *See* City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (2d D.C.A. Fla. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976). *See also* Aviation Servs., Inc. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761 (1956). *See also* Note, *supra* note 21, at 878.

47. FLA. STAT. §166 (1975).

48. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (2d D.C.A. Fla. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

sovereign analysis in favor of a balancing-of-interests test that evaluates considerations similar to those incorporated into the statutory guidance test.

In *City of Temple Terrace v. Hillsborough Association for Retarded Citizens, Inc.*,[49] the Second District Court of Appeal observed that under the Zoning Enabling Act[50] and the former Florida constitution the power to zone was delegated by the state to municipalities. Thus, the state was the grantor of power and a superior sovereign.[51] At the same time, the court suggested that under article VIII, section 2(b) of the revised 1968 constitution there is a direct constitutional grant of power to municipalities[52] that makes the application of the superior sovereign test obsolete.[53]

Two Florida supreme court decisions helped to clarify the scope of municipal powers under the 1968 constitution and the Municipal Home Rule Powers Act. In *City of Miami Beach v. Fleetwood Hotel, Inc.*,[54] the validity of a Miami rent control ordinance was challenged.[55] The court ruled that the ordinance was invalid and interpreted article VIII, section 2 of the constitution very narrowly, stating that although "this new provision does change the old rule of the 1885 Constitution respecting delegated powers of municipalities, it still limits municipal powers to the performance of

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49. 322 So. 2d 571 (2d D.C.A. Fla. 1975).

50. Fla. Laws 1939, ch. 19, 539, §1, at 1248.

51. *See* FLA. CONST. art. 8, §2(b) (1968). The commentary to this provision in 26A FLA. STAT. ANN. at 292, states that: "The provisions in this subsection were new with the Revision Commission proposal, but the 1885 Constitution granted the power to the legislature to prescribe the jurisdiction and powers of municipalities by law in Article VIII, Section 8." The apparent difference is that under the new language, all municipalities have governmental, corporate, and proprietary powers unless provided otherwise by law, whereas under the 1885 Constitution, municipalities had only those powers expressly granted by law.

52. FLA. CONST. art. VIII §2(b) (1968) states that: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective."

The comparable provision in the 1885 Florida constitution, by contrast, was art. VIII, §8, which stated that: "The Legislature shall have power to establish, and to abolish, municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. When any municipality shall be abolished, provision shall be made for the protection of its creditors."

For a detailed discussion of the revisions in the 1968 constitution, see Sparkman, *The History and Status of Local Government Powers in Florida*, 25 U. FLA. L. REV. 271, 288, 289 (1973). *See also* Note, *Municipal and County Ordinances: Looming Difficulties Under Florida's New Judicial Article*, 26 U. FLA. L. REV. 255 (1974).

53. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (2d D.C.A. Fla. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

54. 261 So. 2d 801 (Fla. 1972).

55. The lower court had declared the ordinance invalid on grounds that the City of Miami had no power to enact such an ordinance, that the ordinance was an unlawful delegation of legislative authority by the city council to one administrator, and that it conflicted with Florida state law, specifically the Florida Landlord-Tenant Act. FLA. STAT. §§83.04, 83.20 (1973).

municipal functions."[56] Since the charter of Miami Beach did not authorize the city to enact such ordinances, the city had no such power.

In 1973, following the *Fleetwood* decision, the Florida legislature enacted the Municipal Home Rule Powers Act.[57] Recognizing that zoning power was directly derived from the constitution,[58] the legislature also repealed the Zoning Enabling Act.

Interpreting this new statute,[59] the Florida supreme court in *City of Miami Beach v. Forte Towers, Inc.*[60] was once again faced with a Miami Beach rent control ordinance. The Circuit Court of Dade County had held the ordinance unconstitutional, noting that the city had no power to enact such legislation. It had also ruled that part of the Home Rule Powers Act[61] was unconstitutional. The supreme court reversed in a per curiam opinion. Concurring specially, Justice Dekle stated that the enactment of the Home Rule Powers Act changed the result of their earlier decision in *Fleetwood*. The purpose of this act was a broad grant of power to municipalities in implementation of the provisions of article VIII, section 2(b) of the constitution and was not a "mere delegation of the police power,"[62] which would not include the power to enact rent control ordinances.

The unanimous reversal in *Forte Towers* and Justice Dekle's opinion leave little doubt that Florida municipalities now possess broad constitutional powers independent of the state, except when specific legislation indicates otherwise. Thus, the superior sovereign test is inapplicable in resolving zoning conflicts because of the change in power allocation between state and local governments.

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56. City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801, 803 (Fla. 1972) (emphasis original). Justice Roberts declared that powers of a municipality should be interpreted and construed in reference to the purposes of the municipality and that when reasonable doubt arises as to whether a municipality possesses a specific power, this doubt should be resolved against the city. "Local governments have not been given omnipotence by home rule provisions or by Article VIII, Section 2 of the 1968 Florida Constitution." *Id.* at 804. Stating that the new constitutional provision had been misinterpreted by the court, Justice Ervin dissented and argued that art. VIII, §2(b) of the new constitution placed only two limitations on the enactment of ordinances by municipalities. Those limitations were that the ordinance involve a municipal function and that there be no contrary or superseding legislation. *Id.* at 808.

57. FLA. STAT. §§166.011-.411 (1975).

58. The Municipal Home Rule Powers Act placed several restrictions on legislative powers of the municipalities. Section 166.021(3)(b) states that municipalities may enact legislation concerning any matter on which the state may enact legislation except for any subject that is expressly prohibited by the constitution; §166.021(3)(c) excepts any subject expressly preempted in favor of state or county government by the constitution or by general law; and §166.021(3)(d) exempts from the powers of municipalities any subject preempted in favor of a county pursuant to a county charter adopted under the constitution.

59. FLA. STAT. 166.021 (1975).

60. 305 So. 2d 764, 766 (Fla. 1974).

61. FLA. STAT. §166.021 (1975).

62. City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, 766 n.1 (Fla. 1974).

BALANCING-OF-INTERESTS TEST — HOME RULE

Two recent Florida cases anticipated the decision in *Temple Terrace*[63] when they side-stepped the traditional tests and adopted the balancing-of-interests test. These cases dealt with conflict between three cities and a county zoning authority[64] and a dispute between a town and the county in which it is located.[65]

The earliest case, *Orange County v. City of Apopka*,[66] involved three municipalities[67] seeking a declaratory judgment that the cities were entitled to use land that they had acquired outside their municipal boundaries for airport purposes without being subject to the zoning of Orange County. Reversing a lower court decision granting the cities the requested immunity, the Fourth District Court of Appeal criticized the lower court's use of the governmental-proprietary test. Even though that test seemed to be the established law of Florida in cases in which a governmental unit violates its own zoning regulations,[68] the court refused to apply it in a situation in which one governmental unit proposes to use property owned by it but located within the jurisdiction of another unit.[69]

The court felt that the proper approach, absent express legislative immunity from zoning, was for the intruding governmental unit to apply to the host government's zoning authority for a special exception or a change in zoning, whichever is appropriate. If such application is denied, the government seeking relief can appeal to the host government's board of county commissioners and then to the circuit court for a trial de novo.[70] Both the court and the zoning board would balance the competing public and private interests essential to an equitable resolution of the conflict.[71] Specific elements to be included in the balancing process are the type of function involved, the applicant's legislative grant of authority, the public need for the facility intended, the existing land use scheme, alternative locations for the facility in less restrictive zoning areas, alternative methods for providing the needed improvement, and the detriment to the adjoining land owners.[72] The court

63. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (2d D.C.A. Fla. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

64. Orange County v. City of Apopka, 299 So. 2d 652 (4th D.C.A. Fla. 1974).

65. Palm Beach County v. Town of Palm Beach, 310 So. 2d 384 (4th D.C.A. Fla. 1975).

66. 299 So. 2d 652 (4th D.C.A. Fla. 1974).

67. The municipalities in the case were the cities of Apopka, Ocoee, and Winter Garden.

68. *See* Jefferson Nat'l Bank v. City of Miami Beach, 267 So. 2d 100 (3d D.C.A. Fla. 1972).

69. Orange County v. City of Apopka, 299 So. 2d 652 (4th D.C.A. Fla. 1974). In the court's view, it seemed anomalous for one governmental unit charged with specific responsibilities, such as housing, airports, or sewerage, "to enter another governmental unit and unilaterally decide to locate one of its governmental facilities anywhere it may choose. One can envision rather absurd results in the wake of such a rule." *Id.* at 654.

70. FLA. STAT. §163.250 (1975).

71. Orange County v. City of Apopka, 299 So. 2d 652, 655 (4th D.C.A. Fla. 1974).

72. *Id.* These factors are almost identical to those suggested by the New Jersey supreme court in Rutgers, The State Univ. v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972), for the legislative intent test.

relied heavily on a Minnesota supreme court case[73] and on an early Florida supreme court case, *State ex rel. Helseth v. Du Bose.*[74]

In the second case, *Palm Beach County v. Town of Palm Beach,*[75] the Fourth District followed its prior decision in *Orange County* and reasserted that:

> [The] general proposition of law . . . [is] that one governmental unit is bound by the zoning regulations of another governmental unit where one governmental unit seeks to utilize property within the geographical limits of a different governmental unit without regard to the so called governmental-proprietary distinction; in resolving conflicts between different governmental units the balancing-of-competing interests test is to be applied.[76]

The conflict in *Palm Beach* had arisen because the city refused to allow the

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73. Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N.W.2d 426 (1972). The contest in Minnesota was between a city and the township and county within which the city was located. The city had been denied a special exception permit to operate a solid waste system on land located in an agricultural district. The Minnesota supreme court rejected both the governmental-proprietary test and the eminent domain test and chose instead to follow a trend toward limiting governmental freedom from zoning regulation. "We decline to adopt in Minnesota the general rule of governmental exemption from zoning regulation. Therefore, we adopt a balancing-of-public-interests test for the resolution of conflicts which arise between . . . governmental agencies. . . . This is preferable to adherence to a less flexible 'general rule' based simply on the form of the opposing parties rather than the substance of their conflict." *Id.* at 471. After balancing the interests in the case, the court held the city was exempt from the county zoning ordinance. One of the factors weighed by the court was approval of the facility by a state agency, the Minnesota Pollution Control Agency.

74. 99 Fla. 812, 128 So. 4, 7 (1930).

The controversy in *Helseth* was between the City of Vero Beach and Indian River County. The county desired to build a jail on property it owned within the city but was barred from doing this by city zoning. The lower court refused to issue a writ of mandamus ordering the city to grant the permit. The Florida supreme court reversed on grounds that the zoning ordinance as applied to the particular lands in question was being exercised in an arbitrary and unreasonable manner. The *Helseth* opinion stated that generally the right of an owner to devote his land to any legitimate use is a property interest within the terms of the constitution. Unnecessary and unreasonable restrictions on the use of land may not be imposed under the guise of the police power. Furthermore, the court said that the rule applies to individuals as well as to the public. Since the rule was made for the protection of property rights in a situation involving one public instrumentality invoking zoning against another, the place of vestiture of title was immaterial.

The court in *Orange County* indicated that the significant point of the *Helseth* case was that the Florida supreme court "did not simply brush the city's zoning ordinance aside" on the ground that the county proposed to build a jail through the exercise of its governmental function. Instead, the court in *Helseth* struck down the restrictions based solely on the facts of the case, which showed the desired use to be reasonable. *See* Orange County v. City of Apopka, 299 So. 2d 652, 655 (4th D.C.A. Fla. 1974). Interestingly enough. *Helseth* was also cited as authority for the governmental-proprietary function analysis. *See* Nichols Eng'r & Research Corp. v. State *ex rel.* Knight, 59 So. 2d 874 (Fla. 1952); A1A Mobile Home Park, Inc. v. Brevard County, 246 So. 2d 126 (4th D.C.A. Fla. 1971); City of Treasure Island v. Decker, 174 So. 2d 756 (2d D.C.A. Fla. 1965).

75. 310 So. 2d 384 (4th D.C.A. Fla. 1975).

76. *Id.* at 385.

county to use commercially zoned property located within city limits for a recreational facility. While the opinion declared that the county was bound by the city ordinance, it suggested that city zoning authorities should favorably consider the county application for an exception since the requested use was more appropriate than the use for which it was zoned.

Temple Terrace: BALANCING TEST APPROVED BY THE SUPREME COURT

City of Temple Terrace v. Hillsborough Association for Retarded Citizens[77] is an important recent Florida case that has advanced and clarified Florida law in respect to intergovernmental zoning conflicts.[78] The Second District Court of Appeal considered a violation by the Hillsborough Association for Retarded Citizens of the City of Temple Terrace residential zoning ordinance. Under contract with the Division of Retardation of the Department of Health and Rehabilitative Services, the Association had purchased and was operating a short term residence center for retarded citizens, primarily children, without having obtained a zoning variance from the city. The city and several private residents sought to enjoin the operation of the center. The trial court ruled that even though the use of the facility was in violation of the city single family residential zoning ordinance, the ordinance could not be enforced against the center because the Association "stood in the shoes of the State of Florida"[79] and thus was not subject to municipal zoning ordinances.

The appellate court reversed and remanded, finding that the trial court had incorrectly applied the superior sovereign test. Recognizing that the trial court decision was well reasoned and supported by ample authority, the court nevertheless stated that it preferred to follow the approach of the Fourth District Court of Appeal in *Orange County* in which the balancing-of-interests test was emphasized as the proper method for deciding such cases.

Although the Second District court in *Temple Terrace* noted that no appellate court in Florida had squarely passed on the question presented in the case, there had been previous discussion of the issue. The Attorney General in August 1974 addressed himself to questions similar to those involved in *Temple Terrace.* The first issue was whether the Department of Health and Rehabilitative Services is subject to local zoning ordinances. In answering this question, Attorney General Shevin noted that previous opinions from his office had upheld consistently the traditional notion that:

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77. 322 So. 2d 571 (2d D.C.A. Fla. 1975), *aff'd,* 332 So. 2d 610 (Fla. 1976).

78. On November 21, 1975, the Second District Court of Appeal refused motions by the Department of Health and Rehabilitative Services and the Attorney General for permission to file amicus curiae briefs and certified the case to the Supreme Court of Florida as involving a question of great public interest. The Supreme Court of Florida heard oral argument on February 12, 1976, and allowed both the Attorney General of Florida and the Department of Health and Rehabilitative Services to file briefs as friends of the court. Subsequent to oral argument, the School Board of Orange County was also granted leave to file a brief as amicus curiae. Interview with Robert G. Gibbons, attorney for City of Temple Terrace, telephone conversation.

79. *Id.* at 3.

> [T]he police power of a municipality or county respecting matters such as zoning, building codes, the sale or use of alcoholic beverages, licensing or other regulatory ordinances and the like, cannot be enforced against the state — its agencies and its property — in the absence of an act of the state legislature manifesting a legislative intent to waive the state's immunity from such regulation. . . .[80]

The authorities referred to for this statement were those mentioned at the outset of this commentary.[81] Mr. Shevin noted that no Florida appellate case had been found that was precedent for the inquiry presented — whether private property, as distinguished from state owned property on which a state function or agency is operating, is subject to local zoning restrictions. He apparently ignored the emerging trend in the appellate courts in such cases as *Orange County*, *Palm Beach County*, and *Parkway Towers Condominium*.

The second issue considered by Mr. Shevin was whether property leased by a state agency for purposes of fulfilling its statutory responsibilities is subject to local zoning ordinances. In response Mr. Shevin stated that while no appellate court decision in the state had answered the question, a circuit court[82] had considered a similar factual situation and had dismissed the action on grounds that "the use of land for the carrying out of a governmental function is not bound by local zoning laws."[83] Following the reasoning of the circuit court, the Attorney General stated that:

> [I]n the absence of an act of the legislature manifesting a legislative intent to waive the state's immunity from local zoning regulations municipalities may not regulate private property so as to preclude the performance of a governmental function thereon by a state agency which has leased such property.[84]

The opinion was qualified with the comment that since no specific case had been decided on this matter, the state and its agencies should seek to act reasonably in any given situation. The Attorney General then cited a law review article that had advocated the balancing-of-interests test.[85]

The Florida supreme court affirmed the decision of the Second District Court of Appeal in *Temple Terrace*[86] and adopted that court's opinion as

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80. OP. ATT'Y GEN. FLA. 074-237 (1974).

81. *Id.* The authorities referred to by Attorney General Shevin were "62 C.J.S. *Municipal Corporations* §157, p. 319; 101 C.J.S. *Zoning* §135, p. 893; 8 MCQUILLIN MUNICIPAL CORPORATIONS §25.15, p. 45; Annotation, 61 A.L.R.2d 970-992; City of Bloomfield v. Davis County Community School District, 119 N.W.2d 909, 911 (Iowa 1963), and authorities cited therein . . . ."

82. OP. ATT'Y GEN. FLA. 074-237 (1974). The case mentioned by Attorney General Shevin was Mathias v. Mills, an unreported case, referred to as No. 69-10068 (Cir. Ct. Duval County Mar. 24, 1970).

83. *Id.* Florida cases cited by the Duval County Circuit Court were City of Treasure Island v. Decker, 174 So. 2d 756 (2d D.C.A. Fla. 1965), and Nichols Eng'r & Research Corp. v. State *ex rel.* Knight, 59 So. 2d 874 (Fla. 1952).

84. OP. ATT'Y GEN. FLA. 074-237 (1974).

85. See Note, *supra* note 21. There was no discussion on Mr. Shevin's opinion of municipal home rule legislation or its relevancy to the problem.

86. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (2d D.C.A. Fla. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

its own.[87] The court noted an ancillary benefit that would result from the adoption of the Second District Court's opinion:[88] the requirement that state agencies seek local approval for nonconforming uses would result in the handling of disputes through administrative means (such as zoning appeals), rather than through court litigation. "It serves the public's benefit to resolve these controversies in a way which does not mandate the most expensive and least expeditious way of settling inter-governmental disputes."[89]

One point of law that had not been considered in the opinion below was the applicability of *Dickinson v. City of Tallahassee*,[90] which had been adopted after the district court opinion in *Temple Terrace* was filed. The court distinguished the instant case from *Dickinson* because the power of the municipality to zone is expressly derived from the Florida constitution[91] by way of the Municipal Home Rule Powers Act,[92] whereas the power of municipalities to impose a utility tax on the state is not conferred either by the constitution or by statute.[93]

Concluding its affirmance of the *Temple Terrace* decision, the supreme court noted that in future cases when zoning conflicts between intergovernmental bodies arise, administrative proceedings are to be exhausted before the parties take the matter to the courts. Although the courts will be available "to review the balance struck in administrative proceedings,"[94] the balancing-of-interests process is to take place primarily at the administrative level.[95]

The final footnote to the opinion[96] contains a significant quote from petitioner's brief. "[T]he State of Florida possesses the power to exempt itself from local zoning ordinances."[97] This reference to a portion of the Florida constitution is a crucial element of the opinion. Article VIII, section 2(b)[98] states that municipalities "may exercise any power for municipal purposes *except as otherwise provided by law.*"[99] It is clear that the decision and the

87. Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610, 612 (Fla. 1976). The court referred to the district court's opinion as a "craftsmanlike product which has fully explored the issues and their legal effects." *Id.*

88. *Id.* at 612 n.3.

89. *Id.*

90. 325 So. 2d 1 (Fla. 1975). The *Dickinson* case considered the issue of whether the state is exempted from a municipal utility tax. The City of Tallahassee had imposed an ordinance taxing purchases of water, gas, and electricity made within city limits. The federal government and churches were exempted by the law, but the state was not. The Florida supreme court held that the state is immune from such a tax because the Florida constitution did not waive the sovereign immunity of the state to taxation and because the statute at issue did not confer power to impose such a tax on the state.

91. FLA. CONST. art. VIII, §2(b) (1968).

92. FLA. STAT. §166 (1975).

93. Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976).

94. *Id.* at 613 n.5.

95. *Id.* at 613.

96. *Id.*

97. *Id.*

98. FLA. CONST. art. VIII, §2(b) (1968).

99. *Id.* (emphasis added).

Florida constitution[100] leave room for the state legislature to provide in certain specific instances for governmental agencies to have immunity from local zoning.[101]

A rejection of total governmental immunity and an adoption of the balancing-of-interests approach has also received support from the American Law Institute.[102] The Institute Report notes that:

> If governmental land use is immunized from regulation by local governments, governmental agencies may exercise their powers inconsistently with a local government's regulatory scheme and thereby seriously undermine its planning objectives. Yet, to subject governmental land use to regulation by the local government, as a means of removing the threat to local policies posed by the inability to regulate, involves an equally serious threat to realization of the objectives of the other governmental agencies, objectives which frequently involve the welfare of persons to whom the local government is not politically responsible and to whose needs it is inadequately responsive.[103]

After weighing the two conflicting considerations in its report, the Institute rejected the governmental-proprietary and sovereignty doctrines and departed from most current state court decisions to adopt the following policy:

> Unless exempted by statute, governmental development is subject to regulation by local governments in the exercise of the powers conferred upon the latter by the Code. The resulting subordination of the objectives of governmental agencies proposing development to the land use policies of local governments rests upon the theory that local governments alone have been charged with responsibility for the general welfare within their territorial limits and accordingly, that they alone have the broad perspective necessary for establishing priorities among the competing interests.[104]

The Institute recognized that serious problems can arise in situations in which a governmental agency proposes development benefiting a segment of the public other than the residents of the local government. To prevent complete unresponsiveness by the local government in such situations, the Institute suggested procedural means by which governmental agencies could obtain relief from regulations of local governments that were inconsistent with state policies.[105]

CONCLUSION

The law in Florida, and in other areas of the country, has in recent years been unsettled in the area of governmental immunity to zoning. In the past,

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100. FLA. CONST. art. VIII, §2(b) (1968).

101. Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610, 613 (Fla. 1976).

102. ALI, A MODEL LAND DEVELOPMENT CODE §12-201 (Proposed Official Draft 1975).

103. *Id.* at 554.

104. *Id.* at 555.

105. *Id.* §§7-301, 7-304, 7-502.

when courts applied the traditional tests to cases involving governmental violation of zoning, the decisions invariably upheld governmental immunity. The recent appellate court decisions in *Orange County, Palm Beach County,* and *Temple Terrace,* and the Florida supreme court affirmance and adoption of *Temple Terrace* indicate that the pendulum in Florida has swung in a new direction. The Supreme Court of Florida obliquely gave its support to this trend as early as 1974 when it stated in a special per curiam opinion in the *Parkway Towers Condominium*[106] case that its future view in such cases would be that unless expressly exempted, a county is subject to its own zoning regulations.[107]

This is a desirable change. Adoption of the balancing-of-interests approach does not mean that the power of the state will be totally superceded by local zoning regulation. *Temple Terrace* does not dictate total and complete abrogation of state immunity, but it does require that local regulations be recognized, evaluated, and studied by the state and its agencies before they unilaterally undertake activity contrary to local zoning law.

Under the balancing test, the state should focus on the existing pattern of land use in the area, the effect of the activity on the area, the possible alternative locations available, and the nature of the public need of the activity. If the state can demonstrate to the local zoning board that the choice of location is well considered from many points of view, it should still be entitled to a zoning exception. The judicial process of appeal for zoning requirements should safeguard the state interest;[108] moreover, the legislature can further protect the state[109] by passing specific legislative direc-

106. Parkway Towers Condominium Ass'n v. Metropolitan Dade County, 295 So. 2d 295 (Fla. 1974).

107. OP. ATT'Y GEN. FLA. 075-170 (1975).

108. *See* FLA. STAT. §163.250 (1975).

109. FLA. STAT. §166.021(3)(c) (1975) mandates that through specific legislation a governmental body or activity may be "expressly preempted to the state." Even though under the 1968 constitution and the Municipal Home Rule Powers Act zoning is an independent power of the municipality, §166.021(3)(c) indicates that proper legislation by the state for permissible activities will not be frustrated by local restrictions.

See also Board of Appeals v. Housing Appeals Comm., Mass. , 294 N.E.2d 393 (1973). In this case the Massachusetts supreme court considered a challenge by two community housing corporations to the restrictive zoning regulations of the communities of Hanover and Concord, Massachusetts. The corporations claimed that zoning criteria such as minimum lot size and setback requirements made construction of low and moderate income housing impossible. Both zoning boards asserted that under the Massachusetts Home Rule Amendment the municipal power to zone was totally independent of state government; therefore, state legislation could not override their decisions. The housing boards claimed that the state legislature in passing the Low and Moderate Income Housing Act under which they operated superceded the local zoning power.

The Massachusetts supreme court noted that "the zoning power is one of a city's or town's independent municipal powers. . . ." However, the court emphasized that: "[M]unicipalities can pass zoning ordinances or by-laws as an exercise of their independent police powers but these powers cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature. . . . The adoption of the Home Rule Amendment has not altered the Legislature's supreme power in zoning matters as long as the Legislature acts in accordance with §8." *See also* Comment,