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To Apply or Not to Apply? That is the Question of Intergovernmental Zoning

Jillian M. Nobis*

INTRODUCTION

Suppose the University of Rhode Island (URI), a public institution of Rhode Island and, therefore, a state entity, wanted to build a new library and research center in South Kingstown, Rhode Island. Now assume the land upon which URI seeks to build its new project is located in a district zoned for single-family use by South Kingstown. This means that URI's library and research center do not fit within that zoning district and, under South Kingstown's zoning ordinance, could not be built in the chosen location. The question that follows is: does URI, as a state entity, have to apply to South Kingstown's Zoning Board for a variance or special exception to get approval for its restricted project or does an alternate procedure, like simply bringing the action in court, exist?

In Rhode Island, there are unresolved questions regarding the procedures of intergovernmental zoning. The term, "intergovernmental" is defined as "existing or occurring between two or more governments or levels of government"¹ and "zoning" is "[t]he legislative division of a region, [especially] a municipality, into separate districts with different regulations within the

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1. *Intergovernmental*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/intergovernmental> (last updated Mar. 11, 2018).

districts for land use, building size, and the like.”² Intergovernmental zoning applies to the relationship between two government entities acting at different levels, like a state government and a local government, when a conflict of zoning arises.³ This concept encompasses issues which arise when one of the governments, typically the state or one of its entities, seeks to do something restricted from the local government’s zoning, meaning it wants to use the land for a purpose inconsistent with its zoning.⁴ A zoning plan typically comprises zoning districts that label each area allowed for use—for example, a section could be zoned for business use or single-family housing.⁵ Tension occurs when an entity seeks to build or use the land for something that does not conform to the zoning district. Intergovernmental zoning conflicts are an issue of restriction and control because the state government has power over the local government. However, very few jurisdictions give the state absolute immunity over the local government’s zoning ordinances.⁶ Under the doctrine of absolute immunity, the state and its entities have the power to disregard zoning ordinances and pursue projects that do not comply with local zoning ordinances.⁷ Rhode Island, however, is not a jurisdiction that recognizes absolute immunity for the state.⁸ Rhode Island adopted the balancing-of-interests test (the balancing test) to address issues of intergovernmental zoning arising in court.⁹ However, there is less guidance for what should happen prior to the issue coming before the court. In Rhode Island, it is unclear whether, prior to initiating legal action, the state entity—as the intruding entity—must first apply to the zoning board for a variance or special exception in pursuing its project. This Comment argues that the state entity should be required to apply to the local zoning board, just as any other citizen or private entity is required to do when seeking to pursue a

2. *Zoning*, BLACK’S LAW DICTIONARY (3d pocket ed. 2006).

3. See Gary D. Taylor & Mark A. Wyckoff, *Intergovernmental Zoning Conflicts over Public Facilities Siting: A Model Framework for Standard State Acts*, 41 URB. LAW. 653, 653–54 (2009).

4. See *id.*

5. *Zoning*, *supra* note 2.

6. See Taylor & Wyckoff, *supra* note 3, at 654–55.

7. See *id.*

8. See *id.* at 665 & n.56.

9. *Id.*

project that does not conform to a zoning ordinance.

This Comment proceeds as follows: Part I provides background information on intergovernmental zoning in Rhode Island and an explanation of the balancing test. Part II lays out the unresolved procedure in Rhode Island. Section A explains the varying approaches for how other jurisdictions handle what happens prior to litigation and application of the balancing test. Section B explains the significance of Rhode Island's statutory scheme regarding land use and planning and discusses the scheme's effect on the issue of intergovernmental zoning. Part III analyzes a recent Rhode Island case, *Town of Exeter v. State*, where the court addressed the issue of whether a state entity should be required to apply to the local zoning board and argues that the Rhode Island Superior Court was incorrect. Part IV argues that the state entity should be required to apply to the local zoning board and discusses policy considerations that support this argument. Finally, the Conclusion provides closing remarks on the issue of intergovernmental zoning.

I. INTERGOVERNMENTAL ZONING AND THE BALANCING TEST

Intergovernmental zoning issues arise when a state entity or agency proposes a project that does not conform to the zoning of the municipality where the project will occur. For example, if a state university sought to build student housing in an area zoned for single-family residential use, there would be an issue of intergovernmental zoning because a state entity is pursuing a project restricted by the local zoning ordinance.¹⁰ States have dealt with this issue in a few different ways: some have not required the state to comply with local zoning¹¹ and others have required a modified procedure for state entity zoning compliance.¹² The Rhode Island Supreme Court has adopted a modified procedure, the balancing test, when deciding whether the state is subject to zoning ordinances of local municipalities.¹³

10. See, e.g., *Rutgers, State Univ. v. Piluso*, 286 A.2d 697, 698 (N.J. 1972).

11. See *Taylor & Wyckoff*, *supra* note 3, at 661.

12. See *generally id.* at 661–73 (explaining various examples of modified procedures used for state entity zoning compliance).

13. *Blackstone Park Improvement Ass'n v. State Bd. of Standards & Appeals*, 448 A.2d 1233, 1240 (R.I. 1982).

Application of the balancing test occurs when a state entity seeks to do something restricted by the local municipality's zoning plan.¹⁴ Under the balancing test, the party, typically a municipality, seeks relief from the state's project and the court will grant relief if the balance tips in its favor.¹⁵ The balancing test requires that the court weigh the interests of the local government against those of the intruding government entity in light of the benefits and burdens of the proposed project.¹⁶ The court focuses its balancing test on the following five categories:

- (1) The nature and scope of the instrumentality seeking immunity;
- (2) The kind of function or land use involved;
- (3) The extent of the public interest to be served;
- (4) The effect local land-use regulation would have upon the enterprise concerned; and
- (5) The impact upon legitimate local interest.¹⁷

The court then rules in favor of the party whose interests outweigh the others in the balancing test.¹⁸ The goal of the balancing test is to protect the public and private interests of both the local government and the intruding entity.¹⁹ Intergovernmental zoning is specific to the tension between government entities.

The current balancing test employed by courts to resolve intergovernmental zoning issues was first adopted in Rhode Island by the Rhode Island Supreme Court in 1982.²⁰ In *Blackstone Park Improvement Ass'n v. State Board of Standards and Appeals*, the State of Rhode Island proposed an addition to the Donley Center, a state-owned and operated rehabilitation center situated in a residential neighborhood zoned for single families under Providence's comprehensive zoning plan.²¹ Since

14. *Id.*

15. *See id.*

16. *See id.*

17. *See* Rutgers, State Univ. v. Piluso, 286 A.2d 697, 702 (N.J. 1972).

18. *See id.*

19. Taylor & Wyckoff, *supra* note 3, at 664.

20. *Blackstone Park*, 448 A.2d at 1240.

21. *Id.* at 1234-35.

the state was seeking to place the Donley Center in a neighborhood zoned for single-family use, the Donley Center, a rehabilitation center, was a restricted use and impermissible in the particular zoning district.²² The state relied on the doctrine of absolute immunity in asserting that it was not required to comply with Providence's applicable zoning rules.²³ In opposition, the plaintiffs argued that the state did not have immunity and was subject to approval from the local zoning board.²⁴ The court in *Blackstone Park* held that there is no absolute immunity for state entities in Rhode Island, and that intergovernmental zoning issues should be resolved using the balancing test modeled after the test utilized in New Jersey.²⁵

The New Jersey Supreme Court established the balancing test in *Rutgers, State University v. Piluso*.²⁶ In *Rutgers*, the New Jersey Supreme Court noted that this issue of state entities versus municipalities on zoning matters was one that needed to be addressed not only in this case, but also on a broader spectrum of "intergovernmental land use regulation."²⁷ The Court reasoned that instead of granting immunity for all government entities in any situation, New Jersey courts should weigh the government interests on a case-by-case basis.²⁸ Based on this reasoning, the New Jersey Supreme Court balanced the interests of the two competing governments through five categories.²⁹ The Rhode Island Supreme Court applied this balancing test in *Blackstone Park*, reasoning that it is the "fairest method" to resolve an issue of intergovernmental zoning as "it is sensitive to the needs and

22. *Id.*

23. *Id.* at 1235.

24. *Id.* "The plaintiffs in this action consist of the Blackstone Park Improvement Association (the association), a nonbusiness corporation composed of residents living in the neighborhood surrounding the Donley Center, several individual property owners residing within 200 feet of the Donely [sic] Center facility, and the city of Providence." *Id.* at 1234.

25. *Id.* at 1239-40.

26. 286 A.2d 697, 702 (N.J. 1972).

27. *Id.* at 698.

28. *See id.* at 701, 703.

29. *Id.* at 702. These five categories are: "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." *Id.*

concerns of the competing governmental entities, potentially affected property owners, local residents, and the public as a whole and takes into consideration all of the salient factors that may properly influence the result.”³⁰

There are two situations in which zoning rules do not apply in Rhode Island: one statutory and the other common law.³¹ First, zoning ordinances do not apply to state or local low-rate housing projects.³² Second, local municipalities may exempt themselves from the restrictions of their own zoning rules by providing for an exemption in the zoning ordinance so long as the exemption only applies to buildings or uses of its governmental functions, a service only the government performs, such as building or expanding a fire station.³³ Alternatively, local municipalities may not exempt themselves from their own zoning rules when the exemption applies to their proprietary functions, which, for example are things that can be performed by private corporations or individuals or something not uniquely governmental.³⁴ In addition, the Rhode Island General Assembly, along with the Rhode Island Department of Administration, has created a statutory scheme regarding local municipalities zoning in relation to their comprehensive plans and the State Guide Plan; however, the effect of the statutory scheme on the balancing test is unclear.³⁵

II. PRIOR TO APPLYING THE BALANCING TEST

The issue is whether the state should apply to the local zoning board for a variance or special-use permit as their first step to avoid the municipality filing suit in court when an intergovernmental zoning dispute arises. Previously in Rhode Island, intergovernmental zoning disputes began with notification to the municipality of the state’s proposed project without the

30. *Blackstone Park*, 448 A.2d at 1240.

31. ROLAND F. CHASE, RHODE ISLAND ZONING HANDBOOK 67–68 (3d ed. 2016).

32. 45 R.I. GEN. LAWS § 45-25-21 (2009).

33. CHASE, *supra* note 31, at 68. *See, e.g.*, *Buckhout v. City of Newport*, 27 A.2d 317, 320 (R.I. 1942) (“There can be no question that a city is acting in its governmental capacity when it purchases and uses land within the improvements thereon for fire protection purposes.”).

34. *Nunes v. Town of Bristol*, 232 A.2d 775, 780 (R.I. 1967).

35. *See infra* Part III.

state entity having ever applied to the local zoning board for a variance or special exception.³⁶ The Supreme Court of Rhode Island has never addressed the issue of what should happen *before* the balancing test is applied. That is, it merely adopted the balancing test without addressing how it impacts actions at the zoning board level.³⁷

As it currently stands, intergovernmental zoning begins with a tension between the state and a municipality when the state seeks to begin a project that does not conform to local zoning. Typically, the state notifies the municipality of the project it is pursuing, by letter or some form of correspondence. Then, absent the parties reaching a compromise, the municipality sues the state for pursuing a project restricted by the zoning ordinance. The court then applies the balancing test to determine which party has a greater interest, and based on their decision, the project either goes forward or is stopped. However, there is currently no guidance for the process between when the initial tension over zoning restrictions arises and applying the balancing test in court. In Rhode Island, on the issue of intergovernmental zoning, “[t]he Supreme Court has expressly left open the question whether the issue of state agency immunity must first be presented to the local zoning board for its determination [in claiming a variance or special exception] before raising it in court.”³⁸ Further, Rhode Island zoning law requires that a non-state entity seeking to do something restricted by the zoning ordinance first apply to the

36. See, e.g., *Town of Smithfield v. Fanning*, 602 A.2d 939, 940 (R.I. 1992) (noting that the defendant made no application for a special exception); *Town of Exeter v. State*, No. PC 2017-1549, slip op. at 1 (R.I. Super. Dec. 15, 2017) (“Plaintiffs filed the instant action seeking to enjoin the Defendant from proceeding with a proposed development plan without first following the procedures and substance of their respective Town’s land use ordinances.”).

37. See *Blackstone Park Improvement Ass’n v. State Bd. of Standards and Appeals*, 448 A.2d 1233, 1240 (R.I. 1982).

38. CHASE, *supra* note 31, at 68. The Rhode Island Supreme Court again failed to clarify the issue of whether a state entity must first apply to the local zoning board in *Town of Smithfield v. Fanning*, 602 A.2d 939 (R.I. 1992). *Id.* at 68 n.22. There, the parties interpreted *Blackstone Park* differently “concerning whether in future cases a state agency should be required to submit to municipal ordinance procedures prior to raising the issue of immunity.” *Fanning*, 602 A.2d at 942. Still, because the town asked the trial justice to apply the balancing test rather than raising this issue in the lower court, the Rhode Island Supreme Court declined to address it. *Id.*

local zoning board for a variance³⁹ or special-use permit, if applicable.⁴⁰ But what about state entities?

A. Application, Consultation & Litigation—The Varying Approaches

The majority of cases which utilize the balancing test are very specific in mandating a process for a government agency to go before a local zoning board before review by the court.⁴¹ Some jurisdictions, such as Indiana and Florida, require that the government entity seeking land use must submit its project plan for zoning approval to the host community.⁴² The Supreme Court of Indiana takes a two-tier approach to the balancing of the interests test for the issue of intergovernmental zoning.⁴³ In tier one, the court determines whether the government entity has absolute immunity and, if there is no absolute immunity for the state entity as determined by statute or case law, then the intruding entity, the state, needs to seek approval for its project

39. See 45 R.I. GEN. LAWS § 45-24-41(a) (Supp. | 2017).

40. See 45 R.I. GEN. LAWS § 45-24-42(a) (Supp. | 2017).

41. See generally *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc.*, 322 So. 2d 571, 579 (Fla. Dist. Ct. App. 1975) (“[U]nder normal circumstances one would expect the agency to first approach the appropriate governing body with a view toward seeking a change in the applicable zoning or otherwise obtaining the proper approvals necessary to permit the proposed use.”) *aff'd*, 332 So. 2d 610 (Fla. 1976); *Orange County v. City of Apopka*, 299 So. 2d 652, 655 (Fla. Dist. Ct. App. 1974) (“In the absence of express legislative immunity from zoning, the intruding governmental unit should apply to the host governmental unit’s zoning authority for a special exception or for a change in zoning, whichever is appropriate. The zoning authority is then in a position to consider and weigh the applicant’s need for the use in question and its effect upon the host unit’s zoning plan, neighboring property, environmental impact, and the myriad other relevant factors. If the applicant is dissatisfied with the decision of the zoning authority, it is entitled . . . to a judicial determination de novo wherein the circuit court can balance the competing public and private interests essential to an equitable resolution of the conflict.”); *City of Crown Point v. Lake County*, 510 N.E.2d 684, 690–91 (Ind. 1987) (“When a zoning authority has denied an intruding government’s request for approval of a given land use, an appeal can lie to the courts, which will balance the interests to determine which must prevail.”).

42. Taylor & Wyckoff, *supra* note 3, at 668 & n.74.

43. *City of Crown Point*, 510 N.E.2d at 689; 4 ARDEN H. RATHKOPF ET AL., THE LAW OF ZONING AND PLANNING § 76:6 (West 2012) (a leading source on zoning and planning which points to *City of Crown Point* as the proper application of the balancing test).

from the zoning board.⁴⁴ In Rhode Island, *Blackstone Park* clarified that the state does not have absolute immunity to pursue whichever project it chooses despite restrictive zoning ordinances.⁴⁵ If the state entity does not have absolute immunity, like in Rhode Island, the Court of Appeals of Indiana concluded that the state entity should seek approval of its plan from the local governing entity.⁴⁶ Then, if the zoning board denies the state entity approval, the second tier provides for judicial review and the application of the balancing test in court.⁴⁷

Based on this reasoning, prior to judicial review and the application of the balancing test, Rhode Island government entities should apply to the local municipality's zoning board to seek a variance or special-use permit for their restricted use. This procedural step has been repeatedly utilized in an array of cases where the general conclusion is that the government entity should attempt to comply with local zoning before the issue is reviewed in court.⁴⁸ For example, the Supreme Court of Illinois held that a park district must apply for a special use permit from the host municipality prior to seeking review before the court,⁴⁹ and the Florida District Court of Appeal similarly concluded that "[i]n the absence of express legislative immunity from zoning, the

44. *City of Crown Point*, 510 N.E.2d at 689.

45. See *Blackstone Park Improvement Ass'n v. State Bd. of Standards and Appeals*, 448 A.2d 1233, 1237-40 (R.I. 1982).

46. *City of Crown Point*, 510 N.E.2d at 689.

47. See *id.*

48. *Taylor & Wyckoff*, *supra* note 3, at 668; see generally *City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc.*, 322 So. 2d 571, 579 (Fla. Dist. Ct. App. 1975); *Orange County v. City of Apopka*, 299 So. 2d 652, 655 (Fla. Dist. Ct. App. 1974); *Wilmette Park Dist. v. Village of Wilmette*, 490 N.E.2d 1282, 1287 (Ill. 1986) ("[S]o long as the village zoning ordinance is established and administered reasonably, and legal recourse is available if this is not the case, will the parties be well served by their participation in a special use hearing."); *Brown v. Kan. Forestry, Fish & Game Comm'n*, 576 P.2d 230, 239 (Kan. Ct. App. 1978) ("[T]he initial decision on reasonableness in this case can be made more expeditiously and with greater discernment by the local zoning authority If rezoning is arbitrarily denied, that decision can be reviewed by the courts at the commission's behest through normal channels."); *Lincoln County v. Johnson*, 257 N.W.2d 453, 457-58 (S.D. 1977) ("If the proposed use is nonconforming the intruding unit should apply to the host unit's zoning authority for a specific exception or for a change in zoning If the intruding unit is dissatisfied with the decision of the host zoning authority it may seek appropriate judicial review.").

49. *Wilmette Park Dist.*, 490 N.E.2d at 1286-87.

intruding governmental unit should apply to the host governmental unit's zoning authority for a special exception or for a change in zoning, whichever is appropriate."⁵⁰

Some jurisdictions, however, seem to suggest that mere consultation with the local zoning board, rather than the state submitting a formal application, is what should be required.⁵¹ For example, in *Rutgers*, an issue of intergovernmental zoning arose as to whether Rutgers University, a state university seeking to expand its student housing, was subject to the zoning ordinance of Piscataway Township, Middlesex County.⁵² The New Jersey Supreme Court suggested that the state should consult with the local municipality; however, they failed to define whether that consultation should be merely notifying the local municipality of the proposed plan or consulting by way of application to the local zoning board.⁵³ The court approached the issue in the following way:

[A]t the very least, even if the proposed action of the immune governmental instrumentality does not reach the unreasonable stage for any sufficient reason, the instrumentality ought to consult with the local authorities and sympathetically listen and give every consideration to local objections, problems, and suggestions in order to minimize the conflict as much as possible.⁵⁴

The New Jersey Supreme Court does not expand on the process of consultation; rather it suggests that, at the bare minimum, "consultation" should occur in terms of intergovernmental zoning.⁵⁵ While this case casts consultation in a positive light, under the facts of the case, the University had sought a variance and building permits from the City before being

50. *Orange County v. Apopka*, 299 So. 2d 652, 655 (Fla. Dist. Ct. App. 1974).

51. *See, e.g., Rutgers, State Univ. v. Piluso*, 286 A.2d 697, 703 (N.J. 1972); *City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107, 112 (Mo. Ct. App. 2000).

52. *Rutgers*, 286 A.2d at 698–99.

53. *See id.* at 703.

54. *Id.*

55. *See id.*

denied and, when they were denied, brought the issue to court.⁵⁶ Therefore, because the University actually applied to the zoning board, this case seems to favor the more formal process of application to the zoning board rather than just mere consultation.⁵⁷ Furthermore, there are no cases that lay out a procedure for “consultation,” whereas the cases that favor application to the governing zoning board are more specific, allowing the inference to be drawn that courts favor application to the zoning board.

Alternatively, Missouri views intergovernmental zoning as an issue to be brought before the court rather than requiring consultation or application.⁵⁸ In *City of Bridgeton v. City of St. Louis*, St. Louis planned to expand the airport it owned in Bridgeton into an area that is not zoned for an airport.⁵⁹ Bridgeton argued that St. Louis must either seek approval from the zoning board for expansion, thus exhausting their administrative remedies, or establish that it has absolute immunity.⁶⁰ St. Louis, in turn, argued whether there was intergovernmental immunity was a question of law to be decided by the courts rather than the city council.⁶¹ The Missouri Court of Appeals agreed with St. Louis and concluded that St. Louis’s immunity was a legal issue to be left to the courts, not an administrative issue.⁶² Therefore, the state entity, St. Louis, was not required to seek zoning approval from the local municipality, Bridgeton, regarding the expansion of the airport, and the balancing test was used to determine St. Louis’s immunity rather

56. *Id.* at 699.

57. *See id.*

58. *See, e.g., City of Bridgeton v. City of St. Louis*, 18 S.W.3d 107, 112 (Mo. Ct. App. 2000).

59. *Id.* at 110.

60. *Id.* at 111–12.

61. *Id.* at 111.

62. *Id.* at 112 (“We find it is not necessary for St. Louis to exhaust administrative remedies before asking the court in its counterclaim to determine immunity. If the question had been ‘Is the area zoned R–1 or R–2?’ it would be a question requiring the special expertise within the scope of the administrative agency’s responsibility. Bridgeton’s City Council has special knowledge and expertise in determining the zoning in areas of Bridgeton. Instead the question to be resolved here is whether or not St. Louis is immune from Bridgeton’s zoning ordinances. We find it is not necessary for St. Louis to exhaust administrative remedies.”).

than subjecting it to seeking a variance or special-use permit before the zoning board.⁶³ This court ultimately eliminated any procedural step before bringing the issue in court, similar to how Rhode Island courts have acted thus far. However, the Rhode Island Supreme Court has not outright stated that there is no procedural requirement before bringing the action in court; the court has merely avoided answering the question.⁶⁴ Recently, however, the question of what comes before action in court has been further complicated by Rhode Island's complex statutory scheme regarding land use and planning.

B. Rhode Island's Statutory Scheme

The question of application is complicated by Rhode Island's statutory scheme because the most recent intergovernmental zoning case in Rhode Island, *Town of Exeter v. State*, rejected the argument for application to the zoning board and instead utilized a provision of the Comprehensive Planning and Land Use Regulation Act (CPLURA) to rule on the case.⁶⁵ Before diving into the details of the case, it is important to understand Rhode Island's complex statutory scheme.

Rhode Island's statutory scheme includes the State Guide Plan (SGP), the Rhode Island Comprehensive Planning and Land Use Regulation Act,⁶⁶ and the Zoning Enabling Act.⁶⁷ Rhode Island's statutory scheme regarding land use breaks down how these three legislative tools interact to encourage clarity, ensure cohesiveness, and promote statewide objectives. The top tier of Rhode Island's statutory scheme regarding land use is the SGP.⁶⁸

63. *Id.* at 112–14.

64. *See, e.g.,* *Town of Smithfield v. Fanning*, 602 A.2d 939, 942 (R.I. 1992).

65. *See* *Town of Exeter v. State*, No. PC 2017-1549, slip op. at 12 (R.I. Super. Ct. Dec. 15, 2017).

66. 45 R.I. GEN. LAWS §§ 45-22.2-1–14 (2009 & Supp. | 2017).

67. 45 R.I. GEN. LAWS §§ 45-24-27–72 (2009 & Supp. | 2017).

68. *State Guide Plan*, R.I. DEP'T OF ADMIN. DIVISION OF PLAN., <http://www.planning.ri.gov/publications/state-guide-plan.php> (last visited Apr. 20, 2018) (“The State Guide Plan was established by the Rhode Island General Law 42-11-10, which states: ‘. . . [sic] the people of this state have a fundamental interest in the orderly development of the state; the state has a positive interest and demonstrated need for establishment of a comprehensive strategic state planning process and the preparation, maintenance, and implementation of plans for the physical, economic, and

The SGP is not a single document, but contains different sections such as housing, land use, and natural resources.⁶⁹ The purpose of the SGP in each of these sections is to explain the goals and policies of the state as a whole and to set out a guide to meet these goals.⁷⁰ The SGP also plays a key role in setting out the standard for local comprehensive plans created by each municipality.⁷¹ As the basis for Rhode Island's land use and planning scheme, both the comprehensive land use plans, governed by the CPLURA, and the zoning ordinances, governed by the Zoning Enabling Act, that are adopted by local municipalities must reflect and conform to the goals set out by the SGP.⁷²

The CPLURA requires every Rhode Island municipality to create and adopt a comprehensive plan, which lays out the future vision and goals of the municipality, that is consistent with the SGP.⁷³ A comprehensive plan is different than a zoning ordinance and the two are governed by separate statutes. Under the CPLURA, specific components are required for creating a comprehensive plan and it also delineates an implementation plan.⁷⁴ The municipality submits its potential comprehensive plan to the state and the state reviews it to ensure that the municipality is in compliance with the SGP; if the proposed comprehensive plan is not in compliance, then the plan is rejected and must be resubmitted for approval.⁷⁵

social, development of the state The state guide plan shall be comprised of functional elements or plans dealing with land use; physical development and environmental concerns; economic development; human services; and other factors The state guide plan shall be a means for centralizing and integrating long-range goals, policies, and plans.”).

69. *Id.*

70. *Id.*

71. *Id.*

72. 45 R.I. GEN. LAWS § 45-22.2-3(c)(7) (Supp. | 2017).

73. See 45 R.I. GEN. LAWS § 45-22.2-9(a) (Supp. | 2017); 45 R.I. GEN. LAWS § 45-22.2-3 (Supp. | 2017).

74. 45 R.I. GEN. LAWS § 45-22.2-6 (Supp. | 2017).

75. 45 R.I. GEN. LAWS § 45-22.2-9 (Supp. | 2017). Each municipality is required to implement a comprehensive plan and update it every ten years. 45 R.I. GEN. LAWS § 45-22.2-12(a)–(b) (Supp. | 2017). In 2011, the Rhode Island General Assembly sought to remedy the issue of outdated plans by stating that “[a]ll lawfully adopted comprehensive plans shall remain in full force and effect but shall be brought into conformance with this chapter prior to July 1, 2017.” 45 R.I. GEN. LAWS § 45-22.2-2(a) (Supp. | 2017). Despite this, the majority of municipalities in Rhode Island currently have outdated comprehensive plans. An outdated plan means that state entities are not

At issue in the CPLURA is the coordination of state agencies section,⁷⁶ which stipulates that state agencies seeking to pursue a project restricted by the municipality's comprehensive plan must seek approval from the State Planning Council and meet four criteria, which include public policy inquiries and ensures compliance with the SGP, in addition to holding a public hearing on the proposed project.⁷⁷ This puts the power of approving state

required to adhere to local land use plans before the plans have been approved by the state. *See* 45 R.I. GEN. LAWS § 45-22.2-8(b)(2) (Supp. | 2017). Therefore, the state entity applying to a zoning board and the application of the balancing test would be unnecessary if a local municipality failed to update their local comprehensive plan. *See id.* In failing to rectify this issue, the municipality will have created de facto immunity for state entities from its comprehensive plan. *See id.* This provision shows that the power of a municipality to enforce their land use plans against the state is null when they have not updated their comprehensive plans and received approval from the "chief [highest ranking officer of the division of planning] or the Rhode Island superior court." *See id.*

76. 45 R.I. GEN. LAWS § 45-22.2-10 (Supp. | 2017). The statute provides:

(g) Once a municipality's comprehensive plan is approved, programs and projects of state agencies, excluding the state guide plan as provided for by § 42-11-10, shall conform to that plan. In the event that a state agency wishes to undertake a program, project, or to develop a facility which is not in conformance with the comprehensive plan, the state planning council shall hold a public hearing on the proposal at which the state agency must demonstrate:

- (1) That the program, project, or facility conforms to the stated goals, findings, and intent of this chapter; and
- (2) That the program, project, or facility is needed to promote or protect the health, safety, and welfare of the people of Rhode Island; and
- (3) That the program, project, or facility is in conformance with the relevant sections of the state guide plan; and
- (4) That the program implementation, project, or size, scope, and design of the facility will vary as little as possible from the comprehensive plan of the municipality.

Id.

77. *Id.*

The State Planning Council is a twenty-seven member council created by § 42-11-10. In addition to the state department and agency members, its membership includes the president and executive director of the Rhode Island League of Cities and Towns, as well as public members and representatives of non-governmental housing and environmental organizations.

Town of Exeter v. State, No. PC 2017-1549, slip op. at 14 (R.I. Super. Ct. Dec.

projects in the hands of the *State Planning Council* when they do not conform to the municipality's *comprehensive plan*. While this process may sound familiar—restricted land-use proposed by a state entity seeking approval for a variance or special-use permit to a *zoning ordinance* from the municipalities *zoning board*—it must be clear that this is a completely different process than what this Comment seeks to propose, although recent litigation seems to have confused the two processes.⁷⁸ A comprehensive plan is different than a zoning ordinance. A municipality's zoning board is a separate entity from the State Planning Council, and as such, the two should be in charge of separate issues, as discussed more fully below. A zoning board should deal with issues of zoning within their municipality and the State Planning Council should deal with state-wide planning, specifically comprehensive planning and the SGP.

Seeking to do something restricted by a zoning ordinance and seeking to do something restricted by the comprehensive plan are two different issues, but they coincide because the CPLURA requires that local zoning ordinances and maps reflect and conform to the approved comprehensive plan, which itself must be in conformance with the SGP.⁷⁹ This creates three layers which make up Rhode Island's land use regulations or tools: zoning, CPLURA, and SGP. The relationship between the CPLURA and zoning is important because in addition to the CPLURA and the SGP, Rhode Island has also adopted the Rhode Island Zoning Enabling Act of 1991.⁸⁰ Notably, “[t]he primary significance of the Comprehensive Plan Act, from a zoning standpoint, is that it constricts the city or town council's zoning power by requiring that its zoning ordinance and map conform to the comprehensive plan adopted by or for the municipality.”⁸¹ The issue that arises is how the CPLURA's section on Coordination of State Agencies relates to zoning, and, further, what it means for the balancing test.

The Zoning Enabling Act does not contain language regarding the CPLURA's Coordination of State Agencies section. It does not provide for a scheme specific to state agencies and state entities

15, 2017).

78. See *Town of Exeter*, slip op. at 11–16.

79. 45 R.I. GEN. LAWS § 45-22.2-3(c)(7) (Supp. | 2017).

80. 45 R.I. GEN. LAWS §§ 45-24-27–72 (2009 & Supp. | 2017).

81. CHASE, *supra* note 31, at 13.

for when their proposed projects do not conform to local zoning. It simply states that parties seeking a variance for their restricted project must apply to the local zoning board for approval.⁸² There is not a specific process laid out for state agencies with regard to seeking a variance or special exception; there is just an all-encompassing procedure for any individual or entity seeking to pursue a project restricted by the zoning ordinance.⁸³ This lack of clarity could result in a few different outcomes.

One view is that because a municipality's zoning ordinances must conform to its comprehensive plans, CPLURA's Coordination of State Agencies section provides the process for comprehensive plans as well as zoning.⁸⁴ This view presumes that the lack of procedure for state agencies in the Zoning Enabling Act is assent to the procedure set out in CPLURA's section on Coordination of State Agencies; this is the conclusion that the Rhode Island Superior Court recently drew.⁸⁵ The alternative view, and the view of this Comment, is that the procedure laid out in the CPLURA only applies to comprehensive plans and does not extend to zoning because the statute lacks clarity and the procedure laid out in the CPLURA is not reflected in the Zoning Enabling Act. Additionally, the two—comprehensive plans and zoning—are separate planning strategies and if the General Assembly intended for them to overlap on this issue, it would have clearly stated so. These two views are discussed in the recent decision regarding *Town of Exeter v. State*, one more favorably than the other.

III. ANALYSIS OF RECENT LITIGATION—*TOWN OF EXETER V. STATE*

The issue of intergovernmental zoning came before the court in April 2017, as Richmond and Exeter filed separate suits (later consolidated) against the Rhode Island Department of Environmental Management (RIDEM) concerning RIDEM's plan to build the Arcadia Natural Resources and Visitors Center straddling the town lines of Exeter and Richmond.⁸⁶ The

82. 45 R.I. GEN. LAWS § 45-24-41(a) (Supp. | 2017).

83. *See id.*

84. *See Town of Exeter*, slip op. at 13–14.

85. *See id.* at 15, 15–16.

86. Donita Naylor, *Richmond and Exeter file suit to stop DEM building in Arcadia Management Area*, PROVIDENCE J. (Apr. 25, 2017),

proposed project was predominately located in Richmond, with a small section extending over the border and located in Exeter.⁸⁷ RIDEM did not apply to either zoning board regarding this project, which Richmond and Exeter (the Towns) argued does not conform to either town's zoning ordinances.⁸⁸ Here, there were inconsistencies in each party's facts on whether the Towns were notified of RIDEM's plan to construct the facility; however, RIDEM provided the court with the letters of project awareness sent to RIDEM by both Towns.⁸⁹ Based on these letters of project awareness, RIDEM moved forward with the project until receiving cease and desist orders from the Town of Exeter.⁹⁰ The Towns then pointed to the zoning ordinances violated by RIDEM's plan.⁹¹ Based on the facts, the zoning violations were located predominately in the Town of Richmond.⁹² The proposed site is an R-3 zoning district limited to "low density residential uses not to exceed a density of one dwelling unit per three acres and, by special use permit, low intensity non-residential uses that meet performance standards with regard to groundwater protection."⁹³ Specifically, an R-3 zoning district prohibits indoor and outdoor recreational facilities, and thus, the proposed use did not comply.⁹⁴

Here, the Rhode Island Superior Court laid out the issue of the case as "the obligation of the sovereign, i.e., the State, to conform to and comply with municipal zoning and land use ordinances and regulations and the procedures related thereto."⁹⁵ The Towns relied heavily on *Blackstone Park*; however, the court noted that *Blackstone Park* left open the question of whether any procedural steps "must be followed before the issue of immunity may be raised and addressed."⁹⁶ The court concluded that

<http://www.providencejournal.com/news/20170425/richmond-and-exeter-file-suit-to-stop-dem-building-in-arcadia-management-area>.

87. *See Town of Exeter*, slip op. at 2.

88. *See id.* at 2–5.

89. *See id.* at 2–3.

90. *Id.* at 2–3, 5.

91. *Id.* at 4–5.

92. *Id.*

93. *Id.* at 5.

94. *See id.* at 2, 5.

95. *Id.* at 6.

96. *Id.* at 6–7.

Blackstone Park contradicts the notion of requiring the state to seek approval of the zoning board before raising the issue in court.⁹⁷ The court further looked to *Town of Lincoln v. State of Rhode Island* and *Town of Smithfield v. Fanning* in concluding that there is no precedent in this jurisdiction that lays out the proper procedure of what should happen before the balancing test is applied in court.⁹⁸

The Rhode Island Superior Court, here, was of the view that the CPLURA answers the question of whether or not a state entity needs to apply to the local zoning board prior to bringing the action in court.⁹⁹ It concluded that the procedure discussed in the CPLURA's section on Coordination of State Agencies applies not only to comprehensive plans, but also extends to zoning ordinances, even though the statute does not clearly state this.¹⁰⁰ The court presumed that because the zoning and comprehensive plan must conform, the procedure used for intruding state entities seeking to pursue a restricted project should be the same as well.¹⁰¹ If that were the case, however, then the CPLURA's Coordination of State Agencies procedure should have been implemented in the 1992 case, *Town of Smithfield*, which was decided after the statute was created.¹⁰² The court there, however, used the balancing test,¹⁰³ rather than applying this procedure, which the court is now assuming applies to both zoning and comprehensive planning. While zoning and planning do go hand in hand and their consistency must be in alignment, extending the procedure for one to the other might not be the proper interpretation of the statute. If the General Assembly intended for this interpretation, applying the procedure in CPLURA to zoning, it had the opportunity to clarify this understanding following when it updated the statute in 2011.

The alternative view—and the view adopted in most jurisdictions that use the balancing test—is to require the intruding entity, the state, to apply to the local zoning board

97. *Id.* at 8–9.

98. *Id.* at 9–12.

99. *See id.* at 12.

100. *See id.* at 13–14.

101. *Id.* at 15.

102. *See Town of Smithfield v. Fanning*, 602 A.2d 939 (R.I. 1992).

103. *See id.* at 941–42.

before approaching the court to apply the balancing test. The Rhode Island Supreme Court has continuously found that “when the language of a statute is clear and unambiguous, [the Rhode Island Supreme Court] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.”¹⁰⁴ Looking at the plain and ordinary meanings of the words of this statute directs us to the procedure in the provision laid out in the CPLURA as applying only to comprehensive plans.¹⁰⁵ If the General Assembly intended for the procedure laid out in the CPLURA to extend to zoning ordinances, it could have explicitly said so in the CPLURA or in the Zoning Enabling Act. However, this was not how the General Assembly wrote the statute and therefore the court should not assume that the procedure extends to zoning ordinances. While the court should “consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.”¹⁰⁶ This, however, does not mean that we should assume that when the General Assembly lays out a specific procedure for one section of a statutory scheme (comprehensive planning) that it applies to a related section (zoning) when that second section gives no mention to the first’s procedure. This is especially true because the statutory schemes for comprehensive planning are contained in one section and zoning is contained independently in another section. If there is no specific overlap within the sections, then we need not assume the procedure for one applies to the other, even if the two concepts are related as they both deal with land use planning.

IV. STATE ENTITIES SHOULD BE REQUIRED TO APPLY TO THE ZONING BOARD

In addition the above argument regarding the statutory scheme, the majority of cases favor state-entity application to the local zoning board because it lowers costs, encourages conformity, removes judges as the initial decision-makers, and places the

104. *State v. Hazard*, 68 A.3d 479, 485 (R.I. 2013) (quoting *Alessi v. Bowen Court Condo.*, 44 A.3d 736, 740 (R.I. 2012)).

105. *See id.*

106. *Id.* (quoting *Mendes v. Factor*, 41 A.3d 994, 1002 (R.I. 2012)).

power in the hands of the municipality that created the zoning ordinances.¹⁰⁷ Requiring application to the zoning board would take judges out of the position of being the initial zoning authority, instead leaving the initial review to the local zoning board, which is in the best position to weigh the state's need for the proposed project against the effect it will have on the municipality, the community and the environment.¹⁰⁸ Judges should not be making this initial decision, especially when the cases and the application of the balancing test tend to favor the government entity.¹⁰⁹

Additionally, requiring the government entity to apply to the local zoning board for a variance or special-use permit allows the two entities to work together to determine the best implementation strategy. This step would give power back to the local municipality that might otherwise be taken away if continuously overlooked or ignored. Beginning with the application to the zoning board is "cheaper and faster, and it puts the local land use decision in local hands where, in this case, it belongs."¹¹⁰ Further, if the zoning board does not grant a variance or special-use permit, the government entity can then appeal and have the issue reviewed in court.¹¹¹

It is also important to note that Rhode Island explicitly adopted the balancing test from *Rutgers*, in which the state entity first applied to the zoning board prior to litigation and application of the balancing test.¹¹² Although *Rutgers* does not outright say that a state entity should apply to the local zoning board prior to application of the balancing test in court, since Rhode Island

107. See Taylor & Wyckoff, *supra* note 3, at 668–69.

108. Lincoln County v. Johnson, 257 N.W.2d 453, 457–58 (S.D. 1977) ("The host zoning authority is then in a position to consider and weigh the applicant's need for the use in question and its effect upon the host unit's zoning plan, neighboring property, environmental impact, and the myriad other relevant factors to be considered for modern land use planning and control.").

109. See CHASE, *supra* note 31, at 66–67.

110. Brown v. Kan. Forestry, Fish & Game Comm'n, 576 P.2d 230, 239 (Kan. Ct. App. 1978).

111. *Id.* As it currently stands, the municipality is typically the party to bring suit when they disagree with the state's proposed project. Under my proposed method, the state would be the one bringing suit after first applying to the municipalities zoning board.

112. See *Rutgers, State Univ. v. Piluso*, 286 A.2d 697, 699 (N.J. 1972).

adopted the balancing test from *Rutgers*, it would be fair to assume Rhode Island should adopt the process used there as well.¹¹³ Further, the explicit explanation of the application procedure and its obvious compliance with rejecting absolute immunity, because it explicitly gives power to the municipality to accept or reject an application, show that this is the procedure Rhode Island should use. This policy consideration, along with others, clearly show why Rhode Island should require state entities to apply to the local zoning board just as any other citizen or private entity is required to do when seeking to pursue a project that does not conform to a zoning ordinance.

As decided in *Blackstone Park*, state entities do not have absolute immunity with regard to zoning.¹¹⁴ Requiring state entities, which are the intruding entity, to comply with the zoning procedure of local municipalities puts the power back in the hands of local governments and aligns itself with rejecting absolute immunity.¹¹⁵ Not requiring application to the zoning board and putting the issue immediately before a court, as Rhode Island has done thus far, appears to be absolute immunity since all of the intergovernmental zoning issues have been resolved in favor of the state.¹¹⁶ Putting the issue before the zoning board prior to bringing the issue in court allows members of the municipality to raise their questions and concerns about the proposed state project that will immediately affect their community. This gives municipalities some power in their zoning and planning, instead of allowing state entities to determine what their town or city will look like and what projects will go forward. The purpose of requiring the procedural step of application to the zoning board is “a way to bring the parties together to seek common ground, and a way to harmonize competing, but not necessarily conflicting, public policy directives.”¹¹⁷

The policy goals of the state and municipality are bound to occasionally conflict or differ over proposed projects.¹¹⁸ Allowing

113. *See id.*

114. *Blackstone Park Improvement Ass'n v. State Bd. of Standards & Appeals*, 448 A.2d 1233, 1239–40 (R.I. 1982).

115. *See Brown*, 576 P.2d at 239.

116. *See id.* at 232.

117. *Taylor & Wyckoff*, *supra* note 3, at 669.

118. *See id.* at 654, 657.

the municipality to first examine the project and to review it under its zoning ordinances, and requiring the state to undergo the application, encourages the two governments to work together to find common ground on the issue.¹¹⁹ This route encourages efficiency because the Zoning Enabling Act clearly lays out the process for seeking a variance or special use permit, depending on the project the state is seeking to move forward with.¹²⁰ Additionally, application to the zoning board promotes judicial economy by encouraging the two governmental parties to resolve their conflict outside of the court, thereby reducing the number of zoning cases the court hears. Requiring state entities to apply to the local zoning board might also cause the state to seek out locations which are already zoned for their proposed project rather than seeking to do something restricted by the zoning ordinance. More generally, adding this procedural step might eliminate the issue all together. This procedural step, moreover, demands compliance with the zoning process and when compliance is not possible under the proposed project, the state must either ask for permission or adjust, instead of enjoying the absolute immunity the Supreme Court expressly stated it does not have.¹²¹ Then, only in instances where the two government parties cannot reach an agreement should the state entity have the option of appealing to the court to apply the balancing test.

CONCLUSION

The process of intergovernmental zoning should begin with the intruding state entity applying to the local zoning board for a variance or special exception before elevating the issue to the court to apply the balancing test. This is the trend in the majority of jurisdictions that use the balancing test, and there is no reason for Rhode Island to be an exception despite the conflict with the CPLURA. Absent clarity in CPLURA that the stated procedure related to comprehensive plan extends to zoning ordinances, Rhode Island courts should move towards requiring state entities to apply to local zoning boards when their projects are restricted

119. *Id.* at 669.

120. 45 R.I. GEN. LAWS § 45-24-41 (Supp. | 2017).

121. *Blackstone Park Improvement Ass'n v. State Bd. of Standards & Appeals*, 448 A.2d 1233, 1240 (R.I. 1982).

by zoning ordinances. While the Rhode Island Superior Court recently opposed this conclusion, this question will likely continue to be brought before the courts. The fact that the majority of Rhode Island municipalities have outdated comprehensive plans further shows the ambiguity of Rhode Island's statutory scheme regarding zoning. Clarity by the General Assembly is necessary moving forward for both the statutory scheme as well as the procedures of intergovernmental zoning, specifically the procedure that occurs prior to the balancing test. In its current state, there is a disconnect that needs to be resolved.