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State Immunity From Zoning: A Question of Reasonableness

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NOTES

State Immunity From Zoning: A Question of Reasonableness

The author applauds the Florida Supreme Court for adopting a balancing of interests test to determine whether an agency of the State must comply with municipal zoning ordinances when it seeks to conduct its affairs, whether governmental or proprietary in nature, within the boundaries of the municipality.

Plaintiff, a city, joined by several of its residents, filed suit against defendant, an association formed to provide services for retarded people, seeking to enjoin the association from continuing to operate a respite care center in a residential area of the city. The association had entered into a contract with the Division of Retardation, Department of Health and Rehabilitative Services of the State of Florida to provide respite care services to mentally retarded citizens.[1] The association took possession of a five bedroom house in an area of the city which was zoned "single family residential," and began operating the center to provide short-term[2] residence and care for an average of 11 mentally retarded citizens.[3] The trial court rejected plaintiff's claim that the center was a nuisance and held that even though the use of the premises was contrary to the city's zoning ordinance, the ordinance could not be enforced because the association stood in the shoes of the State of Florida,[4] which, as a superior sovereign, was not subject to municipal zoning ordinances. The District Court of Appeal, Second District, reversed, holding that the proper test for deciding the consequences resulting from the exercise of a governmental function within the geographical limits of a different governmental unit, is the balancing of interests test, even when one of those governmental units is the State.

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1. Any retarded individual who is a client of the State Division of Retardation is eligible to receive services at the respite care center.

2. The average stay at the center was 2 weeks.

3. Services were provided primarily to children whose parents or guardians were either ill, on a business trip, or encountering marital difficulties.

4. Under the contract, the association was performing services which the State is required to provide under FLA. STAT. § 402.13 (1975).

On certification,[5] the Supreme Court of Florida adopted in toto the opinion of the District Court of Appeal, Second District, and *held*: Affirmed and remanded to the circuit court for further findings of fact and application of the test laid out in the district court opinion.[6] *Hillsborough Association for Retarded Citizens v. City of Temple Terrace*, 332 So. 2d 610 (Fla. 1976).

The question of governmental immunity from zoning ordinances arises in one of four ways: (1) when a governmental unit seeks to ignore its own zoning ordinance;[7] (2) when one governmental unit ignores the zoning of another governmental unit of "equal" stature;[8] (3) when one governmental unit seeks immunity from the zoning of a "greater" unit;[9] and (4) when local zoning ordinances are applied to activities of "greater" governmental units.[10]

These conflicts have presented recurring litigation in nearly every state, and the courts have developed various tests for determining whether in a given case, the governmental activity at issue is immune from the applicable zoning ordinance. The opinion of Judge Grimes at the district court level briefly surveys these tests.[11] They include: the superior sovereign test;[12] the governmental use

5. The district court of appeal denied motions to file amicus curiae briefs by the Department of Health and Rehabilitative Services and the Attorney General, but certified the case to the supreme court pursuant to FLA. CONST. art. V, § 3(b)(3) as a question of great public interest. Because the district court did not formulate a specific question, the supreme court and all parties agreed that review extended to the "decision" of the district court. 332 So. 2d at 612, n.1, *citing* Rupp v. Jackson, 238 So. 2d 86 (Fla. 1970).

6. Although the test itself is designed to be applied initially at the administrative level with the agency required to apply to the local zoning board for the necessary exemption "[t]he procedural circumstances of this case call for a determination by the trial court rather than the local zoning authority . . . ." 332 So. 2d at 613.

7. *E.g.*, Nehrbas v. Incorporated Village of Lloyd Harbor, 2 N.Y. 2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957) (city allowed to construct police garage in violation of its own zoning); Nichols Eng'r & Research Corp. v. State, *ex rel.* Knight, 59 So. 2d 874 (Fla. 1952) (city allowed to construct incinerator in violation of its own ordinance).

8. *E.g.*, City of Treasure Island v. Decker, 174 So. 2d 756 (Fla. 2d Dist. 1965) (Treasure Island held subject to zoning ordinance of St. Petersburg with respect to toll collection facility located within the city limits of St. Petersburg).

9. *E.g.*, Orange County v. City of Apopka, 299 So. 2d 652 (Fla. 4th Dist. 1974) (three municipalities sought immunity from county ordinance restricting construction of an airport in unincorporated area of the county).

10. The noted case presents an example of activities undertaken by the state or its agencies contrary to the zoning ordinances of a municpality. *See also* Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEXAS L. REV. 316, 317 (1961).

11. 322 So. 2d 571, 574 (Fla. 2d Dist. 1975).

12. *E.g.*, Aviation Servs., Inc. v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761 (1956). Under this test, immunity from local zoning is presumed in favor of an agency occupying a superior position in the governmental hierarchy.

versus proprietary use analysis;[13] the power of eminent domain theory;[14] and the statutory guidance test.[15]

In *Rutgers, State University v. Piluso*,[16] the New Jersey Supreme Court was faced with a conflict between the state university's plans to build student housing and the local township's denial of a permit to the university based on a local zoning ordinance. That court rejected the simplistic application of either the superior sovereign or the governmental/proprietary use test[17] and opted for a test which seeks to divine the legislative intent as to whether immunity should be granted, "from a consideration of many factors, with a value judgment reached on an overall evaluation."[18] New Jersey thus adopted a "balancing of interests" test to determine whether an agency of the state should be immune from a local zoning ordinance.[19]

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13. *E.g.*, City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962); Nehrbas v. Incorporated Village of Lloyd Harbor, 2 N.Y.2d 190, 140 N.E.2d 241, 159 N.Y.S.2d 145 (1957); Nichols Eng'r & Research Corp. v. State *ex rel.* Knight, 59 So. 2d 874 (Fla. 1952). Under this test, if the activity to be performed is a governmental function, it is immune from the conflicting zoning ordinance. However, if the activity is proprietary in nature, it is subject to the zoning. *See, e.g.*, Taber v. City of Benton Harbor, 280 Mich. 522, 274 N.W. 324 (1937).

For an analysis of which functions have been held to be governmental and which have been held proprietary, see 2 A. RATHKOPF, THE LAW OF ZONING AND PLANNING, Ch. 53 (3d. ed. 1966) and Comment, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEXAS L. REV. 316, 318-19 (1961).

14. *E.g.*, State *ex rel.* Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960); Mayor of Savannah v. Collins, 211 Ga. 191, 84 S.E.2d 454 (1954). Under this test, where the governmental unit seeking immunity has been granted the power of eminent domain, the grant of eminent domain is held to conclusively demonstrate that unit's superiority over conflicting zoning regulations.

15. *E.g.*, Mogilner v. Metropolitan Plan Comm'n, 236 Ind. 298, 140 N.E.2d 220 (1957). This case interpreted Indiana's zoning statute as establishing a rebuttable presumption that actions by governmental units in conflict with a county's comprehensive master plan are not in the public interest.

For an excellent survey of all the tests and the cases applying them, see Comment, *The Inapplicability of Municipal Zoning Ordinance to Governmental Land Uses*, 19 SYR. L. REV. 698 (1968).

16. 60 N.J. 142, 286 A.2d 697 (1972).

17. *Id.* at 150-51, 286 A.2d at 701.

18. *Id.* at 152-53, 286 A.2d at 702. The court listed the following factors as the most common and obvious:

> [T]he 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.

19. The court cited with favor a law review article that also condemns the prior tests as being too rigid and calls for the adoption of a balancing of interests test. Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971).

Following the reasoning of the *Piluso* decision, the Second District in *Temple Terrace* rejected application of the rigid tests used in the past in favor of a balancing of interests test.[20]

After analyzing the Florida law on the general issue of governmental immunity from zoning,[21] the court noted that although the District Court of Appeal, Fourth District, has held that the balancing of interests test is appropriate when municipal governments seek immunity from a county zoning ordinance[22] and when a county seeks immunity from a city ordinance,[23] the question of what test applies when a state agency seeks immunity from the zoning of a municipality is one of first impression in Florida.[24] Judge Grimes, speaking for the unanimous court, then proceeded to analyze each of the tests used in the past to resolve the issue.

The superior sovereign test, which had been relied upon by the circuit court, was dismissed by reference to the state constitution[25] and the Municipal Home Rule Powers Act.[26] Recognizing that the zoning power of municipalities now comes directly from the Constitution,[27] the court concluded that the case

> should not be decided solely upon the theory that since the state stands higher than a municipality upon the ladder of governmental hierarchy, the decision of its administrators should necessarily preempt the zoning authority of those charged with governing a municipality.[28]

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20. 322 So. 2d at 579.
21. *Id.* at 575-76.
22. Orange County v. City of Apopka, 299 So. 2d 652 (Fla. 4th Dist. 1974).
23. Palm Beach County v. Town of Palm Beach, 310 So. 2d 384 (Fla. 4th Dist. 1975).
24. 322 So. 2d at 575.
25. FLA. CONST., art. VIII, § 2(b) provides in part:
(b) POWERS. 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.
26. FLA. STAT. § 166.021(4) (1975) provides:
The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.
27. 322 So. 2d at 577.
28. *Id.*

The court made short order of the governmental/proprietary use test. Noting first that the test has been subjected to much criticism,[29] the court declined to use it in the noted case reasoning that "if a governmental agency is authorized to perform a function, it should not make any difference whether this function is governmental or proprietary in nature for the purpose of complying with local zoning."[30] This broad rejection of the governmental/proprietary use test was tempered by the court's observation that the use of this test in Florida is apparently limited to situations where a governmental unit seeks to violate its own zoning ordinance.[31]

The association in *Temple Terrace* did not assert any right of immunity from zoning based on the power of eminent domain. The court indicated, however, that even if such a claim had been made, it would not have controlled the decision.[32]

Although acknowledging that it would be bound by any legislative statement directing that the Division of Retardation either is or is not subject to local zoning, the court found no such statutory guidance either way.[33] In the absence of legislative guidance, the court was hesitant "to suggest that there is a presumption running in either direction."[34] It should be noted, however, that the court did, in fact, create a presumption against immunity by holding that:

> When the state legislature is silent on the subject, the governmental unit seeking to use land contrary to applicable zoning regulations should have the burden of proving that the public interests favoring the proposed use outweigh those mitigating against a use not sanctioned by the zoning regulations of the host government.[35]

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29. *Id. citing* Township of Washington v. Village of Ridgewood, 26 N.J. 578, 141 A.2d 308 (1958); 2 ANDERSON, AMERICAN LAW OF ZONING § 9.05 (1968).

30. 322 So. 2d at 577.

31. *Id. citing* Orange County v. City of Apopka, 299 So. 2d 652 (Fla. 4th Dist. 1974).

32. 322 So. 2d at 578. In dicta, the court analyzed two Missouri Supreme Court cases, State *ex rel.* Askew v. Kopf, 330 S.W.2d 882 (Mo. 1960) and St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo. 1962) and concluded that the power of eminent domain does not necessarily conflict with the power to regulate land uses through zoning. Therefore, a grant of the power of eminent domain does not necessarily imply an intended immunity from applicable zoning ordinances. For a more detailed criticism of this test see *Governmental Immunity*, *supra* note 19.

33. 322 So. 2d at 578. *See* note 15, *supra*.

34. 322 So. 2d at 578.

35. *Id.* at 579.

The heart of the *Temple Terrace* decisions is in their conception of the relationship between state, county, and local governments. Noting the proliferation of state agencies[36] and the importance of proper land use,[37] the Second District stressed that state and local governments must cooperate to meet the needs of the people in the state.[38] The court thus did not see the activities of the Division of Retardation as being hopelessly irreconcilable with the city's zoning ordinance. Rather, the activity of the Division and the city zoning ordinance are both essential governmental functions designed to serve different needs of different people and every effort should be made by the two governmental units to reconcile them so as to serve all of the interests involved.[39]

The supreme court suggested that in addition to the beneficial effects recognized by the district court, the balancing of interests test will also increase efficiency.

> By requiring state agencies to seek local approval for non-conforming uses, an administrative solution is always present in the form of zoning appeals. In contrast, if the state were not required to seek local approval, the city would always be forced to litigate its disagreement, as happened here. 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 intergovernmental disputes.[40]

A point of law treated by the supreme court and not the district court reveals a keen interest in the relationship between state and local governments. The association argued that the decision in *Dickinson v. City of Tallahassee*,[41] rendered subsequent to the decision of the district court in *Temple Terrace*, required a finding of immunity.[42] In *Dickinson* the supreme court held the state to be immune from a municipal utility tax. That same court in the instant case easily distinguished *Dickinson* by reference to the fact that the zoning power of municipalities is derived from the Florida

36. *Id.* at 578. *See Governmental Immunity, supra* note 19, at 876.

37. 322 So. 2d at 579.

38. *Id.* at 579.

39. *See also Governmental Immunity, supra* note 19 at 879; City of Richmond v. Board of Supervisors, 199 Va. 679, 101 S.E.2d 641 (1958).

40. 332 So. 2d at 612 n.3.

41. 325 So. 2d 1 (Fla. 1975).

42. Petitioner's Reply Brief at 9-10, Hillsborough Ass'n for Retarded Persons v. City of Temple Terrace, 322 So. 2d 610 (Fla. 1976).

Constitution, whereas the power to tax is not.[43]

Inherent in the *Temple Terrace* opinions is a strong awareness of the important role that land use control must play in the future of Florida. However, no mention was made of the Local Government Comprehensive Planning Act.[44] Reference to provisions of that Act appear to lend further support to the courts' emphasis on land use control[45] and may even constitute statutory guidance[46] compelling state agencies to comply with a county's comprehensive plan[47] when engaged in development of property within that county.[48] The Planning Act also provides for close cooperation between state, county, and municipal planning authorities.[49] It would be anomalous to require such cooperation between planning authorities at all levels, while granting other state authorities absolute immunity to ignore

43. 332 So. 2d at 612. While the zoning power of municipalities is derived directly from the Florida Constitution, art. VIII, § 2 (b), the power to tax, although constitutionally authorized by art. VII, § 9(a), requires an implementing statute.

44. FLA. STAT. §§ 163.3161 - .3211 (1975).

45. FLA. STAT. § 163.3161 (1975):

> (3) It is the intent of this act that its adoption is necessary so that Florida local governments can preserve and enhance present advantages; encourage the most appropriate use of land, water, and resources consistent with the public interest; overcome present handicaps; and deal effectively with future problems that may result from the use and development of land within their jurisdictions . . . .
>
> (4) It is the intent of this act to encouarge and assure cooperation between and among municipalities and counties and to encourage and assure coordination of planning and development activities of units of local government with the planning activities of regional agencies and state government in accord with applicable provisions of law.

46. *See* note 15 *supra*.

47. FLA. STAT. § 163.3161; *see* § 163.3177 which described the requirements of a comprehensive plan.

48. The Act gives the comprehensive plan full legal status. Section 163.3194 provides:

> (1) After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted . . . .

Section 163.3164 (4) in defining "development," refers to FLA. STAT. § 380.04 (1975), which provides that:

> (1) "Development" means the carrying out of any building or mining operation or the making of any material change in the use or appearance of any structure or land and the dividing of land into three or more parcels.

The breadth of this statutory language suggests a legislative intent that governmental actions at all levels be consistent with the comprehensive plans of local and county governments.

49. FLA. STAT. §§ 163.3204, .3207 (1975).

the very product of that cooperative effort.[50]

There are still some difficult problems remaining. First, as the Second District noted, there remains clear Florida precedent in support of applying the governmental/proprietary use test to determine whether a governmental unit can ignore its own zoning ordinance.[51] Although beyond the scope of the holding in the noted case, the *Temple Terrace* courts' criticism of the governmental/proprietary use test[52] and the passage of the Planning Act,[53] seem to undercut the authority of this precedent.

There also remains the problem of land use control in our federal system of government, and the amount of deference which federal and state governments should grant to each other.[54] This, of course, is clearly beyond the scope of this note. Nonetheless, it looms as an important problem in the not too distant future.

These, and perhaps other problems in the area of governmental immunity will remain; however, the decision rendered by the Second District and adopted by the supreme court in *Temple Terrace* presents a reasoned analysis for resolution of the problems.

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Lease of Bay Bottom Land Does Not Constitute State Action

Responding to allegations of discriminatory membership policies violative of the fourteenth amendment equal protection clause, the court in Golden *held that the leasing of bay bottom land by the City of Miami to a private club did not constitute state ac-*

50. It should be noted that the Planning Act contains the standard clause: Nothing in this act is intended to withdraw or diminish any legal powers or responsibilities of state agencies or change any requirements of existing law that local regulations comply with state standards or rules. FLA. STAT. § 163.3211 (1975). However, this does not diminish the force of the clear legislative intent that the state cooperate with local governments to achieve the most effective land use program possible.

51. Nichols Eng'r & Research Corp. v. State *ex rel.* Knight, 59 So. 2d 874 (Fla. 1952); ALA Mobile Home Park, Inc. v. Brevard County, 246 So. 2d 126 (Fla. 4th Dist. 1971).

52. *See* text accompanying notes 29-31, *supra*.

53. *See* note 48 *supra*, particularly FLA. STAT. § 163.3194(1) (1975).

54. *See e.g.*, Maryland-Nat'l Capital Park and Planning Comm'n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973), *noted in* 10 WIL. L.J. 477 (1974) (reviewing court should particularly scrutinize a federal agency decision not tofile an environmental impact statement when such action results in a deviation from local zoning procedures).