SETTLING LAND USE LITIGATION WHILE PROTECTING THE PUBLIC INTEREST: WHOSE LAWSUIT IS THIS ANYWAY?

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INTRODUCTION

Settlement of litigation is strongly favored.[1] Settlement of land use controversies, unlike most private disputes, may have a substantial impact on nearby properties and the general welfare of the public at large. Recently, courts throughout the country have struggled to fashion a mechanism that adequately balances the rights of the litigants against the legitimate concerns of affected neighborhoods, and the public interest.

Because land use litigation encompasses a wide variety of proceedings, ranging from broad constitutional attacks, requiring extensive evidentiary bench trials and complicated expert testimony, to specific challenges to local agency decisions, necessitating only limited judicial review of an established record,[2] the scope of this article must be limited. Consequently, we will examine the legal and practical issues emanating from the more common forms of land use litigation in an attempt to explore methods by which private agreements to settle land use litigation can be made binding and enforceable as to the parties, but, at the same time, afford adequate protection to the rights of the public.

Part I of this Article explores and identifies the public inter-

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[1] *See* 15A AM. JUR. 2d *Compromise and Settlement* § 5 (1976) (citing cases advancing this maxim).

[2] There are a variety of forms a land use controversy may take. For example, constitutional attacks on the zoning ordinance may be made, in which a landowner claims that the ordinance, on its face or as applied, constitutes a violation of the Fourteenth Amendment Due Process and/or Equal Protection Clauses, or that the ordinance works a taking of his property in violation of the Fifth Amendment. A separate category of land use litigation involves challenges to the administrative decisions of zoning or planning boards.

ests that are most often implicated in land use litigation. Part II discusses the effect that settlements or dismissals of such litigation may have on the public and evaluates the traditional avenues of recourse or protection available to the public. Existing case law addressing the settlement and/or dismissal of zoning litigation in various contexts is then analyzed in Part III.[3] Finally, Part IV proposes that the settlement of zoning litigation should be subject to uniform procedures, using the judicial process to balance the competing interests, and offers three proposals as possible solutions, each addressing in varying degrees the public, private and judicial concerns.

I. THE PUBLIC INTEREST IN LAND USE CONTROVERSIES

Every zoning dispute involves a challenge to a municipal agency charged with enacting or applying the zoning laws of the municipality. Whether an appeal is brought by an aggrieved landowner, applicant or an aggrieved citizen, it will focus on the formal action taken by that agency.

The power to zone is derived from a state's constitutional power to protect and to promote the health, safety, morals and general welfare of its inhabitants.[4] Through enabling legislation, the zoning power has generally been delegated to municipalities, authorizing them to regulate the use and development of land within their borders.[5] With a few limited exceptions, most municipalities have taken advantage of this statutory power in order to plan and control growth.[6]

To comply with constitutional requirements,[7] zoning enabling legislation typically lists the purposes or objectives that lo-

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[3] Although no special emphasis on any state is intended, this Article tends to focus primarily on New Jersey caselaw.

[4] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (landmark case affirming a state's power to zone as an incident of its police powers); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (holding that zoning regulations, to be upheld, must bear a substantial relation to the public welfare).

[5] New Jersey statutes are typical. *See* N.J. STAT. ANN. §§ 40:55D-23 to -27 and 40:55D-62 to -68.3 (West 1990) (Municipal Land Use Law (MLUL), providing for formation of municipal planning and zoning board to regulate community land use).

[6] *But see* Bernard H. Siegan, *Non-Zoning in Houston*, 13 J. L. AND ECON. 71 (1970) (discussing the lack of zoning laws in Houston, Texas).

[7] To withstand constitutional scrutiny, a zoning regulation must be a reasonable exercise of the police power and not unduly burden any individual citizen. *See Nectow*, 277 U.S. at 185. Moreover, a zoning regulation must ensure that personal due process requirements are met, and must require notice and an opportunity to be heard. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

cal zoning ordinances must seek to achieve. Common among them are: to encourage appropriate state-wide land use, to provide adequate air, light and open space, to control population densities and to provide for a variety of land uses in order to meet the needs of all citizens.[8] To constitute a valid exercise of the police power, a municipality's exercise of its zoning power must promote one or more of these permissible purposes. As a result, the outcome of zoning disputes is both affected and guided by the public interests which the zoning power is required to serve.

a. The Public Interest Issue

Central to any discussion of the public interest inherent in zoning disputes is a recognition that this interest encompasses collective public rights that may transcend the interests of any landowner or applicant appearing before a local agency. An applicant or a neighboring "objector" to a proposed development may happen to represent some or all of the public interests involved. That coincidence is not a reliable source of protection. Instead, the collective or general public interest in the resolution of a case warrants independent attention.

Typically, there are at least three players involved in a zoning dispute: the applicant/landowner, the board or the municipality, and the public. Resolution by agreement of such a dispute raises a number of concerns. Among these are the impact a negotiated settlement might have upon a non-party person; how third-party objectors may protect their interests; whether or when a post-settlement challenge by a non-party should be permitted; whether such persons must be joined as indispensable parties to the settlement proceedings; whether intervention should be permitted; whether any limits should be placed on the intervenors' participation; and whether the court should, *sua sponte*, seek to represent the public. A resolution of these con-

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[8] See Dep't of Commerce, Standard State Zoning Enabling Act § 3 (1926) (*reprinted in* 5 A. RATHKOPF, THE LAW OF PLANNING AND ZONING 765 (4th ed. 1985)), which has served as a model for most state enabling acts. The permissible purposes listed therein are:

> to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.

Id.

cerns requires a delicate balancing of the rights of the public together with the interests of the municipality and the applicant.

b. A Typical Land Use Dispute

The context of the dispute is relevant to identifying the public interests that merit concern. In one typical scenario, a "variance" is sought to permit an office building on property not zoned for this use. The agency may grant the variance or deny it.[9] If the variance is granted, the plaintiff will generally be a member of the public,[10] who may often be motivated by purely selfish interests inconsistent with the general welfare. If the variance is denied, the aggrieved applicant will be the plaintiff, although civil rights groups and similar other advocates have sought judicial review where, for example, a low income or quasi-public housing project was rejected.

c. Defining the Public Interests at Stake

The prime public interest worthy of consideration by the courts is the interest in the proper enforcement of the zoning code.[11] Timed or managed growth,[12] health and environmental concerns, preservation of open space and aesthetics have also been recognized as important public concerns. Other more fundamental and constitutionally derived rights exist as well, all of which should be considered, including the right to protest or petition the government for redress of grievances,[13] along with due

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9 While the agency may decline to exercise its authority, often triggering an automatic approval or denial, such inaction is, in reality, not a choice, but rather a default in the exercise of a public function. *See, e.g.*, N.J. STAT. ANN. § 40:55D-48 (West 1990) (mandating that the board must act within specified time period or application will be "deemed approved"). As a practical matter, the right to such an approval is not often asserted. Most applicants will consent to extend the period rather than risk an immediate denial.

10 Other possible appellants have included the municipality, a neighboring municipality, a co-equal board or even a state agency, where permitted by law.

11 All zoning enabling acts must be in furtherance of the general welfare or they will be deemed ultra vires. As with all municipal actions, zoning actions are subject to challenge by members of the public. The challenge is in the nature of a complaint in lieu of mandamus or certiorari to compel performance by public officials to act or to review an action taken by them.

12 *See, e.g.*, Jerome G. Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation*, 14 SETON HALL L. REV. 851, 852-54 (1984) (explaining the commonly recognized components of urban growth and planning); Douglas K. Wolfson, *Exclusionary Zoning and Timed Growth: Resolving the Issue After* Mount Laurel, 30 RUTGERS L. REV. 1237 (1977) (scrutinizing the ability of municipalities to effectuate timed growth planning).

13 *See* N.J. STAT. ANN. § 40:55D-63 (West 1990).

process rights, requiring notice and an opportunity to be heard.[14] There may even be a right not to be lulled into inaction, which implies a citizen's legitimate expectation that elected or appointed public officials will defend their formal, public decisions.[15]

II. The Effect of Settlements on the Public Interest

A principal goal of the judicial process is a prompt, fair and just adjudication of the matter in controversy. Negotiated settlement short circuits this process, and prevents adjudication of the ultimate merits of the dispute.[16]

a. Detrimental Effects

Once a complaint is filed challenging formal agency action on a development application, the parties to the lawsuit are identified and become subject to the court's jurisdiction. Unless specifically joined as defendants by the aggrieved applicant, however, the interests of a neighborhood objector, as well as those of the general public, may be unrepresented, and thus overlooked.

First, empowering an agency to settle such litigation[17] does not necessarily permit the agency to settle without some form of public participation. Without public participation, the motives driving the settlement discussions or the eventual agreement itself may not be publicized, and frequently public input is consciously avoided.[18] Second, a potential exists for the agency to

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14 *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

15 *See* Dell'Aquilla v. Bd. of Adj., 225 N.J. Super. 116, 123, 123-24, 541 A.2d 1101, 1105 (App. Div. 1988) (refusing to dismiss a zoning suit, the court declared "[i]t is important for the public to have confidence in the operations of government"); Morganelli v. Bldg. Inspector of Canton, 388 N.E.2d 708, 712 (Mass. App. 1979) (recognizing that the municipality represents the public).

16 While some settlements are reached following an adjudication, or sometimes pending an appeal, the identical issues remain.

17 The reference here relates to the terms of the settlement and whether they are proper actions by an agency. For a discussion of whether a board has the authority to negotiate, see *infra* notes 32-56 and accompanying text.

18 That analyses of litigation strategies and of a case's strengths and weaknesses should not to be disclosed to adverse parties, is obviously essential to the board's, and hence the public's interest. *See* Edra Associates v. Planning Board of Tp. of Franklin, Docket No. A-2228-89T5 (App. Div., April 10, 1991); *Morganelli*, 388 N.E.2d at 712 (recognizing the Sunshine Law exception to open meetings allows for private discussion of litigation). Two of the three proposals in Part IV of this paper argue that a public hearing on the settlement terms should be held before the settlement is approved.

"bargain" away its duty to enforce local zoning laws.[19] Even where the "bargain" is discussed at a public hearing, that hearing will likely be an empty formality, because the vote taken at such a hearing will, in most instances, simply echo the board's earlier decision to settle.[20] Finally, the public may reasonably, but perhaps not realistically, expect that municipal officials will defend their actions.[21]

As this Article will explain, the existing framework for settling zoning disputes is inadequate. A new focus on the diverse interests entitled to protection, and processes that can be followed, are essential to achieve uniform and acceptable methods of settling land use litigation.

b. Existing Protections for the Public Interest

There is, perhaps, a general perception that members of the public will be bound by a final judgment on the merits of a land use controversy, whether in favor of or contrary to their town's position.[22] This perception flows naturally from the municipality's inherent obligation to represent its constituents.[23] When a settlement is reached or a voluntary dismissal taken, however, suggestions that the result was not a fair disposition may later

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19 Some view this "abdication" as unlawful. *See* 56 AM. JUR. 2d *Municipal Corporations, Etc.* § 806 (1976) (maintaining that a municipality has the right to settle claims against it but cannot do so if it impairs a duty owed to the public). For a full discussion of this principle, see *infra* notes 32-56 and accompanying text.

20 Ironically, parties who wish to challenge this action face an uphill battle as the "reconsidered" vote, rather than the earlier vote rejecting the application, is cloaked with a presumption of validity.

21 This expectation becomes increasingly important if members of the public have been, or will be, denied the right to intervene. See *infra* notes 27-31, 57-87 and accompanying text for discussion of intervention rights in zoning disputes; *see also* Joseph J. Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105, 106-10 (1988) (discussing relaxed standards for intervention and standing when public interest litigants are involved).

22 Res judicata and collateral estoppel principles will apply unless the complaining party overcomes a strong presumption of adequate representation of his interests by the town in the prior action. *See* Morganelli v. Bldg. Inspector of Canton, 388 N.E.2d 708 (Mass. App. Ct. 1979) (while adjacent landowners have the ability to enforce public right through mandamus action, town and citizens are bound if the public right has been litigated). To circumvent the application of these rules, some courts have permitted intervention after final judgment for the purpose of prosecuting an appeal. *See, e.g.*, Hukle v. City of Kansas City, 512 P.2d 457 (Kan. 1973).

23 *See Morganelli*, 388 N.E.2d at 712 (noting that "[t]he municipality 'represents its public,' 'appears in their behalf' and 'represents the residents and property owners within its boundaries.' ") (quoting Pitman v. Medford, 45 N.E.2d 973 (Mass. 1942)).

arise. Such an agreement may circumvent the public interest to advance the parties' quest for an end to their litigation,[24] to save time and money, or to avoid a possible loss. The parties may more readily concede matters affecting the general welfare than matters touching their interests.

To ensure that public officials comply with enabling legislation, interested parties are routinely afforded standing to contest municipal actions that affect their interests. Standing to litigate is a concept broad enough to include standing to be heard on public agency agreements to settle prerogative writ cases.

c. Standing & Intervention

Liberalized standing and intervention rules are perhaps the primary protectors of the public interest in zoning litigation today. Generally, standing is liberally afforded to any "interested" person affected by an agency's actions.[25] Substantial harm or detriment is not a prerequisite.[26]

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[24] *See* Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103, 113 (suggesting there is no reason to believe settlements will achieve just results). *But see* Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976) (inadequate representation does not exist simply because intervenors may not have agreed to same facts or differed in view of law).

[25] New Jersey defines an "interested party," in part, as follows:

> [A]ny person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken under this act, or whose rights to use, acquire, or enjoy property under this act, or under any other law of this State or of the United States have been denied, violated or infringed by an action or a failure to act under this act.

N.J. STAT. ANN. § 40:55D-4.

Standing under the Federal Constitution requires a plaintiff to have suffered an " 'injury in fact' " to an interest that is debatably within the area of interests that the statute or regulation in question was intended to protect or regulate. *See* Sierra Club v. Morton, 405 U.S. 727, 733 (1972) (citation omitted). These rules have been leniently applied by many courts. *See, e.g.*, Goto v. Dist. of Columbia Bd. of Zoning Ad., 423 A.2d 917, 922-23 (D.C. App. 1980) (holding that adjoining property owner has sufficient interest on that basis and need not allege any other interest on injury). The standing criteria among the states vary, but will generally be less restrictive. *But see* Newton Heights Civic Assoc. v. Zoning Hearing Bd. of Newton Tp., 454 A.2d 1199 (Pa. Cmmw. Ct. 1983) (holding that Pennsylvania's Municipalities Planning Code Act, § 11007, limits right of appeal of zoning action to those who appeared before the board and entered their names as parties).

[26] The Supreme Court has held that aesthetic and environmental interests are sufficient to maintain standing. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 686 (1973). *See also* Student Public Interest Research Group of New Jersey v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1423-24 (D. N.J. 1985) (potential harm to negligible interests is enough to grant standing to sue in anti-pollution case).

Alternatively, the standards regulating intervention, although liberally interpreted, have some potential both to frustrate and to protect the public interest. Today, a majority of the states utilize intervention rules identical or similar to Rule 24 of the Federal Rules of Civil Procedure, which provides two routes for permitting a non-party to join in the proceedings: intervention as of right and permissive intervention.[27]

Under the federal rules, intervention as of right will routinely be granted when it is sought in a timely manner by an interested party.[28] To intervene, that party's interest must be impaired or impeded by the action's disposition, unless existing parties adequately represented the interest.[29] Even if these requirements are not satisfied, the court has discretion to permit intervention where the claim raises questions of law or fact common to the main action.[30] In ruling on such "permissive" intervention, the court need conclude only that the intervention will not unduly delay or prejudice the adjudication of the original parties' rights.[31]

III. THE JUDICIAL RESPONSE

The reported cases that have considered the problems of settling land use litigation may be divided generally into two areas: (i) cases involving an agency's *power* to settle a litigated zoning controversy with an aggrieved applicant; and (ii) those in which members of the public either are party-plaintiffs (or, less frequently, defendants), or seek to intervene in the judicial process either prior to settlement or final disposition, or seek to make a collateral attack on the settlement.

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27 FED. R. CIV. P. 24.

28 FED. R. CIV. P. 24(a).

29 *Id.*

30 FED. R. CIV. P. 24(b). *See, e.g.*, Rhoades v. Jim Dandy Co., 107 F.R.D. 26 (11th Cir. 1985) (running of statute of limitations bars would-be intervenors' prejudice claim); Walker v. Jim Dandy, 747 F.2d 1360 (11th Cir.), *on remand* 107 F.R.D. 26 (1984) (defining prejudice against would-be intervenor); U.S. v. Marion County Sch. Dist., 590 F.2d 146 (5th Cir. 1979) (holding that on motion to intervene, a district court exercising discretion must weigh relative prejudice to parties and must balance against movant its prior opportunity to assert its position); SEC v. Charles Plohn & Co., 448 F.2d 546 (2d Cir. 1971) (holding that, because owners of exchange seat were given a full opportunity to be heard, they suffered no prejudice from being denied intervention).

31 FED. R. CIV. P. 25(b).

a. The Power to Settle

Inherent in any action taken by a municipal agency is the power to defend its actions. Where litigation ensues, the power to settle would logically seem to follow.[32] The resolution of a dispute in a manner facially inconsistent with duly adopted ordinances, however, raises serious concerns.[33]

When a landowner and municipality privately agree to certain land use restrictions or other conditions in exchange for a favorable decision or favorable rezoning, the courts have not hesitated to invalidate the agreement as "contract zoning."[34] One early case invalidating such an agreement is *Midtown Properties, Inc. v. Madison Township*.[35] In that case, a property owner sued Madison Township to compel final approval of his proposed subdivision.[36] After the suit lay dormant for two years, the parties negotiated a settlement that resulted in a written contract containing conditions precedent to the plaintiff's receipt of final ap-

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[32] *See* Whispering Woods v. Middletown Tp., 220 N.J. Super. 161, 172, 531 A.2d 770, 776 (Law Div. 1987) (holding that the absence of authority precluding agencies from settling litigation is so persuasive that no such constraints exist).

[33] For example, the *Whispering Woods* court emphasized:

> It would be unthinkable that a Planning Board, for example, charged with the proper enforcement of local planning and zoning ordinances deny an application only to turn around and negotiate a final, binding approval of it in a modified form to settle the very litigation which ensued upon the denial.

Whispering Woods, 220 N.J. Super. at 172, 531 A.2d at 776; *see also* 56 AM. JUR. 2d *Municipal Corporations, Etc.*, § 813 (1976) (recognizing that a municipality cannot bargain away any duties it owes to the public).

[34] ROHAM, ZONING AND LAND USE CONTROL 1-43 & n.21 (1978). Conditional zoning, which some states permit, authorizes a landowner to perform certain acts at the agency's prompting in the hope that it will encourage the rezoning he desires. The municipal body will have no obligation to re-zone or approve the application. *See* HMK v. County of Chesterfield, 1984 WL 2859 (E.D. Va.) (finding that an agreement between parties constituted contract zoning, not conditional zoning, because the conditions imposed were not voluntary but absolute prerequisites to the county's cooperation).

[35] 68 N.J. Super. 197, 172 A.2d 40 (Law Div. 1961), *aff'd*, 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1963).

[36] *Id.* at 203, 172 A.2d at 43. *Midtown Properties* had a complicated history with many irregularities. Apparently, the developer had obtained tentative approval for his entire subdivision in 1955, subject to sewerage, road and dedication conditions. *Id.* at 202, 172 A.2d at 43. A year later the town increased its frontage requirements to 75 feet and lot areas to 9,000 square feet. *Id.* The developer's lot did not comply with these requirements. *Id.* Without revising his plans, the developer sought final approval for 129 lots in April and May of 1957. *Id.* On May 20, 1957 the town further increased its frontage requirements to 100 feet and lot areas to 10,000 square feet. *Id.* In June of 1957 the final approval application was denied. *Id.* An appeal of the board's action was not taken to the township committee. *Id.* at 203, 172 A.2d at 43. Instead, a prerogative writ suit was filed. *Id.*

proval.[37] A consent judgment incorporating this contract was entered.[38] The agreement notwithstanding, the final subdivision was again rejected, prompting a second suit to enforce the settlement's terms.[39]

In a stinging rejection of the entire procedure, the court voided the settlement as an "attempt to do by contract what can only be done by following statutory procedure."[40] That the "contract" had been incorporated into a consent judgment could not legitimize it.[41]

The *Midtown* court's discourse on the illegality of contract zoning is a rare glimpse at one court's view of the limits of a board's power to negotiate settlements of zoning disputes:

> We would be permitting special rules to be established for plaintiff as against all other developers. We would be allowing these parties to circumvent our state laws and the township's own ordinances and regulations by not having to apply for tentative approval; giving of statutory notice to interested persons; holding of public hearings; filing of preliminary and final sketches; making of uniform regulations; by-passing the Plan-

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[37] *Id.* The contract terms required the developer to pay for and erect school facilities, to build a limited number of homes each year, and to donate four acres of land for fire and police stations. *Id.* at 205-06, 172 A.2d at 44-45. In return, the township agreed to grant final subdivision approval, to adopt any ordinances necessary to implement the contract terms, to disregard its own ordinances and statutory procedure in favor of certain delineated procedures, and to refrain from amending or changing any of its ordinances or regulations for seven years. *Id.*

[38] *Id.* at 203, 172 A.2d at 43.

[39] *Id.* at 206, 172 A.2d at 45.

[40] *Id.* Specifically the court asserted: "A municipality in exercising the power delegated to it must act within such delegated power and cannot go beyond it. Where the statute sets forth the procedure to be followed, no governing body, or subdivision thereof, has the power to adopt any other method of procedure." *Id.* at 207, 172 A.2d at 45-46. The court continued by observing that the contract attempted to confer special benefits to an individual and thus was *ultra vires* and contrary to public policy. *Id.*, 172 A.2d at 46. *Accord* Suski v. Mayor & Com'rs. of Beach Haven, 132 N.J. Super. 158, 164, 333 A.2d 25, 29 (App. Div. 1975) ("The borough cannot, by private agreement, circumvent the provisions of a valid ordinance."). *But see* Mesalic v. Slayton, 865 F.2d 46 (3d Cir. 1988) (upholding district court's determination that district court had jurisdiction to permit a settlement binding town to refrain from applying new ordinances to developer's application because federal constitutional claims were involved and the settlement would serve to redress them; state law to the contrary was overridden by constitutional claims).

[41] *Midtown Properties*, 68 N.J. Super. at 206, 172 A.2d at 45. In an oft-quoted statement, the court concluded: "Certainly, if the contract is illegal and void, having it incorporated in a consent judgment will not breathe legal life into it." *Id.* The court's strong disapproval of the town's attempt to circumvent proper zoning procedures was further demonstrated by its declaration that "[t]he zoning power delegated by the Legislature to the township officials was prostituted for the special benefit of the plaintiff." *Id.*

> ning Board's hearings and recommendations; and destroying the township's overall or master plan for the development of the township.[42]

An Illinois appellate court recently embraced this analysis in *Ad-Ex, Inc. v. City of Chicago*,[43] where the City of Chicago successfully disavowed a settlement agreement reached with the plaintiff. The city had settled the suit, which was brought by Ad-Ex, by agreeing to waive the city's 500 feet set-back requirements for the signs Ad-Ex sought to erect.[44] The court concluded that the city lacked authority to waive, by mere agreement, adherence to existing zoning ordinances.[45] Absence of an opportunity to be heard at a public meeting rendered this agreement *constitutionally* defective.[46]

A New Jersey appellate court recently reached a similar conclusion. In *Edra Associates v. Planning Bd. of Tp. of Franklin*,[47] the appellate court set aside a settlement agreement between the municipality, the planning board, the sewerage authority and the developer because the settlement provided that a validly adopted ordinance would not be enforced as to the applicant.[48] The court

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42 *Id.* at 208, 172 A.2d at 46.

43 565 N.E.2d 669 (Ill. App. Ct. 1990).

44 *Id.* at 671.

45 *Id.* at 677.

46 *Id.* Until due process was provided, the court held that the board had no jurisdiction to act. *Id.* Notice and an opportunity to be heard were upheld as essential prerequisites to any action by a municipal board. *Id. Accord* Molina v Tradewinds Development Corp., 526 So.2d 695 (Fla. Dist. Ct. App. 1988) (holding that the settlement agreement did not constitute contract zoning and was enforceable because court order expressly provided that the town comply with all statutory requirements when considering re-zoning applications). Implicit in both *Midtown* and *Ad-Ex* is a recognition that public interest concerns, typically incorporated into zoning enabling acts, are paramount. Indeed, in *Ad-Ex*, the Illinois appellate court expressly held that compliance with statutory procedures designed to protect the public outweighed the private interests of an individual and the "self-serving" interests of the city. As noted by the *Ad-Ex* court: "[t]he obligatory notice and hearing provision is designed to protect the citizens from the whims of their city fathers. It is this consideration which outweighs both any financial loss to Ad-Ex and the desire of the city government to avoid the agreement." *Ad-Ex*, 565 N.E.2d at 677.

47 No. A-2228-89T5 (App. Div., April 10, 1991).

48 The terms of the agreement required the applicant to submit revised plans removing the need for any variances, and for the board to approve those plans in accordance with zoning regulations in effect at the time of the original application. The town had, subsequent to the Board's original denial, enacted an amendment to its ordinance which would have precluded the plan as proposed. *Id.* Under New Jersey's "time of decision rule," amendatory ordinances are generally deemed controlling even "after the fact." *See* Kurvant v. Mayor & Council of Tp. of Cedar Grove, 82 N.J. 435, 414 A.2d 9 (1980). Vested rights to a given set of ordinances do not attach until after preliminary approval is obtained. *But see* S.T.C. v. Planning Bd. of Tp. of Hillsborough, 194 N.J. Super. 333, 476 A.2d 888 (App. Div. 1984) (holding the time of decision rule inapplicable if ordinance enacted subsequent to

declared that only a duly enacted ordinance or the grant of a variance could repeal or amend an ordinance.[49] The entry of a settlement agreement ratified by simple resolution, the court emphasized, could not repeal or amend an ordinance.[50] Consequently, the Township's resolution approving the settlement was legally inadequate and the agreement, therefore, was unenforceable.[51]

In sharp contrast is the Pennsylvania approach. In *Summit Township Taxpayers Assoc. v. Summit Township Bd. of Supervisors*,[52] an objector challenged a settlement that required the grant of a variance.[53] The court upheld the settlement,[54] reasoning that "even though a judicial settlement may result in a departure from the ordained zoning pattern, that kind of departure falls within the court's jurisdiction, not the board's jurisdiction."[55] Accordingly, in the court's view, while a board may depart from the ordained zoning pattern only in accordance with specified statutory procedures, a court may authorize such deviations pursuant to its power to approve settlements.[56] While this view entrusts enforcement of the zoning code to the court's sound judgment, the public interest could be overlooked absent participation by representatives of the public or opposing interests.

The Pennsylvania approach raises legitimate concerns about the breadth of both the municipality's and the court's authority, and differs sharply with the far more restrictive approach evidenced by *Midtown* or *Ad-Ex*. This judicial arrogation of authority, as some critics might describe it, may simply be judicial deference to the result that the governing agency has, in fact, determined to be in the public's best interest. Indeed, if the settlement's terms deal with the disputed legal issues, and would have been consistent with the

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an improper or wrongful denial which, if approved, would have afforded the applicant the statutory protections embodied in MLUL; thus, absent the settlement provision, the developer's application would have been rejected).

49 *Edra Associates*, No. A-2228-89T5, at 5.

50 *Id.*

51 *Id.* at 7.

52 411 A.2d 1263 (Pa. Cmmw. Ct. 1980).

53 *Id.* at 1266.

54 *Id.*

55 *Id.*

56 The *Summit* court's approach was cited approvingly in Russo v. Zoning Hearing Bd. of Perkiomen Tp., 484 A.2d 215 (Pa. Cmmw. Ct. 1984). In *Russo*, the court upheld a settlement *requiring* a town to modify the conditions it had previously attached to a tentative approval. *Id.* at 219 (citation omitted). In effect, Pennsylvania courts reserve for themselves the power to permit and enforce unconstitutional zoning actions, collaterally estopping the public from intervening and attacking board action which, although contravening a board's limited police power, are taken pursuant to a judicially approved settlement. *Summit*, 411 A.2d at 1266.

board's considerable discretion had its original action been that which it ultimately negotiated, there is no reason to presume that the proposed settlement is any *less* advantageous to the public's interest than the original decision. Nevertheless, any time the courts sanction and enforce a settlement without permitting public participation, considerations of fairness, procedural due process and the appearance of evenhanded justice dictate close scrutiny.

b. The Right to Intervene and to Attack Collaterally

If negotiated settlements are ultimately to be sanctioned, intervention and collateral attack remain the sole avenues to protect the public interest. Contract zoning challenges may not be available where a rezoning of the property is not involved or if future municipal action has not been required by the settlement's terms. Any agreement that relates to a pending or anticipated development application surely affects the public interest. This is especially so where a development application has been rejected at a public hearing and objectors are thus led to believe that the zoning agency will vigorously defend its decision in resulting litigation. Consequently, if objectors are not aware of a proposed settlement, are not enabled to voice their concerns in an effective manner, and are barred from collaterally attacking a consent order for settlement, the objectors' interests and the public interest may well be subverted.

A common example demonstrates the point. After an application for development is rejected, the aggrieved applicant challenges the denial as arbitrary, capricious and unreasonable.[57] On appeal before the trial court, the agency zealously defends its rejection of the application, but the court reverses and directs the application be approved. Satisfied to let the judgment stand, the agency declines to prosecute a further appeal. In such circumstances, should objecting members of the public be permitted to intervene to press their view of what is best for the public? The courts are far from unanimous. One theory suggests that intervention should be permitted as of right because the interested

[57] Objectors are not routinely named as party defendants by aggrieved applicants. In the first instance, the multi-party nature of the litigation creates practical obstacles in terms of obtaining a consensus for settlement purposes. Second, the objectors typically do not commit their personal or group's financial resources by jumping into the fray, at least until it appears that the defending party will or may not vigorously defend its rejection of the application. Consequently, it would be unusual, at least during the prerogative writ litigation's initial stages, to have objectors participating in any formal context.

party is no longer adequately represented.[58] Other jurisdictions simply deny, as untimely, requests to intervene after final judgment has been entered.[59]

What of the more typical case, where a settlement is reached *before* adjudication of the merits?[60] In *Rectory Realty Associates v.*

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[58] *See, e.g.*, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (holding that in an equal opportunity case, petition to intervene for an appeal was timely when brought within 30 days period of appeal to be taken); Chesterbrooke Ltd. v. Planning Bd. of Chester, 237 N.J. Super. 118, 123, 567 A.2d 221, 223 (App. Div. 1989) ("Intervention after final judgment is allowed, if necessary, to preserve some right which cannot otherwise be protected."); Hukle v. City of Kansas City, 512 P.2d 457 (Kan. 1973); Dillon Companies, Inc. v. City of Boulder, 515 P.2d 627 (Colo. 1973); Wags Transpo. System, Inc. v. City of Miami Beach, 88 So. 2d 751, 752 (Fla. 1956) ("[I]t would be contrary to every element of due process to hold that the owner should not be permitted to intervene and bring or help bring [the public's interest] to the attention of the court."); Wolpe v. Poretsky, 144 F.2d 505 (D.C. App. 1944).

[59] *See, e.g.*, Pearman v. Schlaak, 575 S.W.2d 462, 463-64 (Ky. 1978) (noting that intervenors "were seeking a free ride on the train of the Radcliff City Council, and were left at the station when the city council failed to prosecute an appeal from the decision of the trial court"); City of Bridgeton v. Norfolk & Western Railway Co., 535 S.W.2d 99 (Mo. 1976) (en banc); Bailes v. Martino, 207 N.E.2d 385 (Ohio Ct. App. 1963); Nyburg v. Solmson, 106 A.2d 483 (Md. 1954).

Ironically, because such a person may intervene only if his interests are not adequately protected, his application may ordinarily be denied *prior* to resolution of the case, and at the same time precluded *after* judgment is entered as "untimely", a classic "catch-22." *See Summit*, 441 A.2d at 1265-66 (objectors who failed to intervene during the pendency of litigation challenging the validity of a zoning ordinance were barred form intervening because their purported reliance on the town to represent their interests was rejected as too "speculative" and an inadequate excuse for forbearing earlier intervention).

The Pennsylvania position demonstrated in *Summit* is unusual but not unique. Research discloses only a few cases which barred public objectors from collaterally challenging zoning actions taken subsequent to a settlement. *See* Monroe Realty Co. v. Middletown Properties, Inc., 182 N.J. Super. 659, 442 A.2d 1095 (Law Div. 1981); Rectory Realty Associates v. Town of Southampton, 543 N.Y.S.2d 128 (App. Div. 1989).

[60] Most commentators acknowledge that settlements are essentially private contracts that may be approved by a court and incorporated into a consent decree. Although the order may be a final disposition of the case, it is not an adjudication on the merits but simply a recordation of the private agreement. A threshold requirement for the application of *res judicata* is a valid, final judgment on the merits. For collateral estoppel to apply, the issue must have been actually litigated and determined. Clearly, a settlement agreement does not meet either of these requirements. *See* Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 894-95 (defining consent decrees). *See also* Pierce v. MacNeal Memorial Hospital Ass'n, 360 N.E.2d 551 (Ill. App. Ct. 1977) ("order affirming and incorporating the settlement agreement . . . was not a judicial determination of the rights of the parties but was a consent decree"). But see Edelstein v. City of Asbury Park, 51 N.J. Super. 368, 143 A.2d 860 (App. Div. 1958), where the court stated that consent judgments are entitled to the same treatment as full adjudications. *Id.* at 388, 143 A.2d at 871. The court, however, proceeded to hold that the plaintiff was entitled to challenge the municipality's resolution agreeing to settle the case and to attack the consent de-

Town of Southampton,[61] a New York appellate court rejected intervention on the eve of settlement and precluded collateral attack of any settlement agreement that the lower court had approved.[62] Although concerned about possible prejudice to the private litigants,[63] the court appeared unmoved by the settlement's ultimate impact on the public interests.[64] Instead, the court concluded that the request to intervene's untimely nature and the attendant prejudicial effects flowing therefrom outweighed the public's rights to notice and to be heard.[65]

Similarly, in *Point Pleasant Canoe Rental v. Tinicum Tp.*,[66] a federal court denied intervention to objectors two days before a settlement hearing, but more than a year after the suit was filed.[67] Accepting the general proposition that a municipality presumably represents its citizens' best interests, the court concluded that mere disagreement with a town's handling of a suit did not constitute such inadequate representation as would justify intervention.[68] Significantly, the settlement neither compromised

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cree which incorporated the resolution. *Id.* at 386, 143 A.2d at 870. The court noted:

> The mere fact that a judgment was entered by consent does not preclude appropriate inquiry into the validity of the municipal authorization therefor. Such underlying action is subject to the same attack and review as any other governmental act, and the judgment is only as good as the authorizing action. To hold otherwise would be to insulate municipal acts from review, in derogation of the public interest, where they would be contrived to take the form of a judgment by consent.

Id. at 389, 143 A.2d at 871-72.

61 543 N.Y.S.2d 128 (App. Div. 1989).

62 *Id.* at 129.

63 *Id.* The court noted that the plaintiff had already relied on the prospect of settlement and had negotiated to sell several parcels of the land at issue. *Id.*

64 For instance, the settlement may have permitted building in a manner prohibited by the zoning code or it may have precluded the town from enforcing certain provisions of its zoning ordinances. The terms of the settlement are not set forth so the actual effect is unknown.

65 The court emphasized that the petitioners seeking intervention were aware of the action for over a year before attempting to intervene. *Rectory*, 543 N.Y.S.2d at 129. The court further declared that "[i]n any event, contrary to the proposed intervenors' contentions, we find that the settlement constitutes a legitimate compromise of conflicting claims." *Id.* This decision cannot be considered sound authority for precluding a full airing of the public interest. Intervention must either be permitted as of right or the public must be permitted to attack subsequent board actions. It is questionable whether the latter may ever be properly denied.

66 110 F.R.D. 166 (E.D. Pa. 1986).

67 *Id.* at 168, 171-72.

68 The court maintained: "That [intervenors] would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that [defendants] did not adequately represent their interests in the litiga-

statutory procedures nor precluded any interested party from challenging a subsequent zoning amendment.[69]

Yet another approach has been articulated by an Illinois appellate court in *Wheeling Trust & Savings Bank v. Village of Mount Prospect*.[70] In *Wheeling*, the objectors filed a petition to intervene within two days of discovering the town's intention to settle.[71] Granting the petition, the court reasoned that until the town announced its intention to settle, the intervenors had been adequately represented.[72] Accordingly, the court reasoned, the petition could not be said to have been untimely.[73]

Two strikingly disparate decisions illustrate New Jersey's inconsistent approach to the problem. In *Whispering Woods v. Middletown Tp.*,[74] objectors were granted leave to intervene to assert that a proposed settlement and its subsequent ratification by the town should be set aside.[75] Rather than reject the settlement outright, the court approved it subject to an important caveat: the settlement had to result in further municipal hearings compliant with all substantive and procedural statutory requirements, including notice to affected property owners and a concomitant opportunity for their position to be heard.[76]

This solution is of little practical value. It neither requires that any specific action be taken, nor prevents objectors from bringing a subsequent suit. Thus, the applicant does not leave the courthouse with an enforceable guarantee that the municipal agency will approve his application. The board may succumb to vocal voter hostility and either deny the application after a hearing, or decline to make the "agreed-upon" amendment to the zoning code. Even if the agency acts in accordance with its settlement agreement, the applicant still remains subject to continuing

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tion." *Id.* (quoting Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 504 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976)).

69 *Id.* at 172.

70 331 N.E.2d 172 (Ill. Ct. App. 1975).

71 *Id.* at 174.

72 *Id.* The court's ruling was premised on its determination that intervention rules should be liberally construed in order to advance their purpose of disposing of all related claims of interested parties in one suit and avoiding multiplicity of actions. *Id.*

73 *Id.*

74 220 N.J. Super. 161, 531 A.2d 770 (Law Div. 1987).

75 *Id.* at 165, 531 A.2d at 772. The intervention motion was brought two weeks after suit was filed and one day before the municipal agency, at a public meeting, voted to approve the settlement. *Id.*

76 *Id.* at 172, 531 A.2d at 776.

litigation by objectors.[77] Furthermore, processing one suit until settlement, and thereafter permitting a second suit by objectors, fails to conserve judicial resources and results in additional expenses to all parties, including the municipality.[78] In retrospect, it would seem that parties to a *Whispering Woods*-type settlement would be better served by adjudicating their suit rather than settling it.

A contrary result was reached in *Monroe Realty Co. v. Middletown Properties, Inc.*[79] There, the court concluded that the objectors' failure to intervene in the original zoning litigation precluded them from later attacking the public action that implemented a negotiated settlement.[80] The court reasoned that "[t]he law favors settlements and discourages attacks by those who fail to exercise rights which they have to insure that they can participate in judicial actions in a timely fashion,"[81] and that refusing to allow collateral attack of a settlement by those who failed to participate initially leaves that party no worse off than if the original case had been decided, on the merits, adversely to the town.[82]

The viability of *Monroe Realty* may be questioned on several fronts. Under the predecessor statute to N.J.S.A. section 40:55D-17d, then in effect, an aggrieved developer was entitled to appeal a local agency denial directly to the municipal governing body. The current statute precludes this type of municipal review.[83] Moreover, every version of this statute has contained explicit protections for the benefit of the public: all actions must be taken at properly-noticed public meetings at which the public is given

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77 *See* Molina v. Tradewinds Development Corp., 526 So. 2d 695, 696 (Fla. Dist. Ct. App. 1988) (in upholding and enforcing a settlement agreement against a town, the court expressed that its decision "should not be construed to affect the Intervenors' right to challenge any subsequent action taken by the City regarding amended applications which may be submitted by Tradewinds.") There is, however, one subtle, yet powerful, difference in this circumstance: If an objector files a new suit, the presumption of validity attaches to the new resolution, shifting the burden of proof to the objector.

78 Indeed, a municipality's decision to settle may have been fueled by its view that the public issues or interests involved did not warrant the type of expenditures required to keep the litigation alive.

79 182 N.J. Super. 659, 442 A.2d 1095 (Law Div. 1981).

80 *Id.* at 662, 442 A.2d at 1097.

81 *Id.*

82 *Id.* at 663, 442 A.2d at 1097.

83 Amendments to § 40:55D-17(d) authorize appeals from interested parties aggrieved by a zoning board of adjustments' grants of a variance, pursuant to N.J. STAT. ANN. 40:55D-70d, but only where an ordinance permitting such an approval has been adopted.

an opportunity to be heard.[84] Furthermore, any interested party has the right to seek relief from the courts through a complaint in lieu of prerogative writ,[85] a right that may not have been adequately considered in *Monroe Realty*.

An additional concern is the conclusion that an adverse adjudication on the merits would leave the objector no worse off than a rejection of his attempt to collaterally attack the settlement. While an adverse adjudication on the merits may very well, but not necessarily, preclude further action, it would do so only after the court independently determined that the board had acted unlawfully and unreasonably. When a settlement is reached, however, the court has not adjudicated the merits of the board's actions. Absent a procedure requiring approval after public notice and an opportunity to be heard,[86] the public is left uncertain as to whether or not its opposition to a proposed development was well-founded, or was even considered.[87]

c. Promoting Public Interests Over Private Interest

Citing public interest concerns, the New Jersey Superior Court, Appellate Division, in *Dell'Aquilla v. Board of Adjustment of the City of Hoboken*,[88] refused to dismiss a prerogative writ action despite the parties' agreement to do so. There, an objector challenged the grant of a use variance and site plan approval.[89] Allegations of official misconduct and impropriety permeated the case.[90] The objector had agreed to dismiss his suit and executed a stipulation to this effect, but then changed his mind.[91] The trial court ultimately upheld the dismissal, concluding that plaintiff's execution of the dismissal stipulation was voluntary.[92] Based upon the perceived need to protect the public interest, the appellate court reversed and reinstated the complaint.[93]

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84 *See* N.J. STAT. ANN. §§ 40:55D-9, -10 (West 1990).

85 *See* N.J. CT R. 4:69; *see also* N.J. STAT. ANN. § 40:55D-17 (West 1990).

86 See *infra* section IV(b) for a discussion outlining this approach.

87 *See, e.g., Morganelli v. Building Inspector of Canton*, 388 N.E.2d 708, 712 (Mass. App. Ct. 1979).

88 225 N.J. Super. 116, 541 A.2d 1101 (App. Div. 1988).

89 *Id.* at 118, 541 A.2d at 1102.

90 *Id.* at 119-20, 541 A.2d at 1103. The court was particularly concerned with claims of bribes and conflicts of interest. *Id.*

91 *Id.* at 119-21, 541 A.2d at 1102-03.

92 *Id.* at 121, 541 A.2d at 1103.

93 *Id.* at 123, 541 A.2d at 1105. The court expressly avowed that the effect this had on the plaintiff was irrelevant; the only concern was the effect on the public. *Id.* at 123-24, 541 A.2d at 1105. *But see* J.L. Mason Group of Missouri, Inc. v. Dardenne Prairie, 763 S.W.2d 727 (Mo. Ct. App. 1989). In *Dardenne Prairie*, a land-

The *Dell'Aquilla* court examined the propriety of authorizing private parties to negotiate the settlement of litigation that affects the public interest.[94] Acknowledging a pervasive public interest in land use controversies, the court commented that although the law favors settlement, the principle that there be no breach of public trust to foster private gains merited more recognition.[95] Accordingly, while settlements should be encouraged, they must not be permitted to frustrate public rights inherent in zoning disputes, thereby necessitating an adjudication on the merits.[96] The court asserted "that the public has an interest in the airing of the issues underlying the Board's action here and that that interest may have been thwarted as a result of the questionable conduct of the parties and their attorneys in securing a dismissal."[97]

To remedy the varying and inconsistent approaches that courts have taken in the various procedural contexts described above, the next section will suggest uniform procedures that balance the competing concerns.

IV. Proposed Solutions

The promotion of the public interest must be a prime judicial concern in any zoning litigation, whether or not an adverse party purports to represent the public interest. Litigants cannot be counted on to press the public interest at the expense of a selfish or parochial concern.

To arrive at a solution that protects the competing interests of the private litigants and such public concerns as may be involved in a given zoning dispute, a careful balance must be struck. Potential solutions are explored below.

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owner brought suit to challenge the town's *denial* of his rezoning application. *Id.* at 728. The applicant's voluntary dismissal of the suit preempted the objectors desire to intervene. *Id.* at 729. The dismissal was upheld by the appellate court, which deferred to the trial court's discretion in permitting dismissals. *Id.* That settlement, however, undoubtedly required later board action that could be challenged, as contrasted with the dismissal in *Dell'Aquilla*, which left the variance grant intact.

94 The court stressed:

> [A] court maintains the discretion to refuse to dismiss a suit where such a disposition might serve to compromise the public interest in the litigation. . . . Clearly, a premature termination of this suit will prevent an inquiry into the public interest through scrutiny of the propriety of the granting of the variance and site plan approval as well as the circumstances leading up to the attempt to dismiss the action.

Dell'Aquilla, 225 N.J. Super. at 122, 541 A.2d at 1104 (citations omitted).

95 *Id.* at 123, 541 A.2d at 1104.

96 *Id.*

97 *Id.*

a. Enforcing the Settlement

One possible solution is to permit and enforce negotiated settlements between the parties. If the settlement contemplates a subsequent public hearing, objectors will be offered an opportunity to review the revised application and establish a record of their positions. Although the settlement's terms may control the board's resolution, the board's ultimate action is still subject to judicial review. The applicant has an enforceable agreement, but one that is subject to attack by objectors as *ultra vires* or otherwise void as against public policy.[98]

An alternative approach would authorize the litigants to elect whether to submit a negotiated settlement for judicial review prior to further agency action. If such approval, on notice to affected property owners and the public at large, is sought and obtained, subsequent agency action should not be subject to collateral attack. Alternatively, where the litigants forego judicial review of a settlement requiring agency action, the settlement itself should remain subject to collateral attack by objectors, who may directly attack the implementing agency action.

The above proposal is consistent with the judicial deference afforded agency action. The agency is given the authority, in the first instance, to review the potential problems associated with the settlement on which it has agreed, and to decide whether judicial protection of the settlement is necessary.

Questions arise, however, concerning whether any limitations should be placed on a zoning or planning board whose members change on a continuing basis. New board members may confront a settlement that they might have rejected. If any ordinances that affect the property were adopted pursuant to the settlement agreement, refusal to apply them would likely be deemed *ultra vires*.[99] On the other hand, if the municipality is free to circumvent the prior settlement, little incentive to resolve such litigated matters would exist. Unless the settlement of land use litigation is determined to be inappropriate as contrary to public policy, settlements must be enforceable, even as against subsequently elected or appointed representative bodies.

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98 Of course the board's ultimate approval will be cloaked with the same presumption of validity that attached to its original decision, thereby diminishing the likelihood of a judicial reversal, provided a sufficient basis exists in the record to sustain the approval as neither arbitrary, capricious nor unreasonable.

99 *See Edra Associates*, No. A-2228-89T5 at 2-3; *Ad-Ex Inc. v. City of Chicago*, 565 N.E.2d at 677.

b. Fairness Hearing by the Court

Fairness hearings, at which a judge assesses a proposed settlement's fairness and reasonableness, have been advocated as a necessary prerequisite to judicial approval in certain types of "public law" litigation, primarily due to the effect a judicially-sanctioned decree may have on the interests of absent third parties.[100] Of course, in the zoning context, the parties' settlement will be subject to the court's jurisdiction only if a prerogative writ action has already been filed. If not, the parties cannot be forced to submit the proposed settlement to a fairness hearing. In that case, a fairness hearing requirement must be either imposed by statute or be encouraged by informing the parties of the beneficial, deterrent effect a court's approval may have on the settlement or subsequent litigation.

A fairness hearing would be similar to the public hearings held prior to board action. The applicant and/or municipal agency involved could explain the settlement and the basis for its support. Members of the public could comment for or against the settlement. Participants could call witnesses or present other forms of evidence regarding the advisability of approving the settlement. Those favoring this approach deem it essential that members of the public be given notice and an opportunity to be heard.[101] A fairness hearing, affording limited intervention to present arguments or to appeal an approved settlement, seeks to balance competing concerns.[102] Intervention is permitted, but only to determine the settlement's fairness, not to allow the intervenor to compel a full adjudication of the case's merits.[103]

Prior to sanctioning any agreement to dismiss the litigation, the court would ascertain the nature and extent to which the litigation's adjudication or dismissal implicates public interests. Where substantial detriment is likely to result, or where the agreement is illegal or otherwise contravenes public policy, the court must be empowered to reject the settlement.[104] Alterna-

100 *See, e.g.*, Schwarzschild, *supra* note 60, at 927-30 (promoting a fairness hearing procedure in Title VII cases). *But see* Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 U. MICH. L. REV. 321 (1988) (suggesting fairness hearings are unnecessary).

101 *See* Schwarzschild, *supra* note 60, at 929-30.

102 A procedure similar to that utilized in settling class actions was developed by Judge Skillman in approving the settlement of *Mt. Laurel* (affordable housing) litigation in Morris County Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359, 484 A.2d 1302 (Law Div. 1984). *See also* Schwarzschild, *supra* note 60, at 929-30.

103 *See id.* at 933-34.

104 Thus, the court, and not the public, will have the veto power over the settle-

tively, the court may permit, or even guide, the parties to renegotiate specific areas of concern.[105] The parties' knowledge that a judge must ultimately pass upon the fairness and reasonableness of any settlement proposal will inevitably result in negotiated terms that will not, at least in an obvious way, disserve the public interest.

Where it preliminarily appears to the court that the proposed settlement does not obviously result in substantial detriment to the public and is not illegal or void as against public policy, the court should schedule a fairness hearing, of which the public is given notice[106] and afforded an opportunity to participate.[107]

If further municipal action is necessary to implement the settlement, the court should retain jurisdiction. No final (appealable) order should be entered until all of the necessary public

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ment. It is within a court's discretion to deny dismissal of a case when appropriate. *See* Fed. R. Civ. P. 41(a) & (b) (providing for voluntary dismissal with Court approval after an answer is filed). This power has been applied when public interests are implicated by the suit. *See, e.g.*, Dell'Aquilla v. Bd. of Adjustment of City of Hoboken, 225 N.J. Super. 116, 122, 541 A.2d 1101, 1104 (App. Div. 1988) (stating that "a court maintains the discretion to refuse to dismiss a suit where such a disposition might serve to compromise the public interest in the litigation"); Gunther v. City of Milwaukee, 258 N.W. 865, 867 (1935) (explaining that "where a public interest is involved or the interest of a third party, it is the duty of the court to consider those interests in determining whether or not to dismiss the action.").

105 This comports with Judge Skillman's and Professor Schwarzschild's approach. *See Morris County Fair Housing Council*, 197 N.J. Super. at 369-71; Schwarzschild, *supra* note 60, at 929-32.

106 The form and quality of such notice may be as limited as publication in a newspaper of general circulation within the municipality, or as extensive as certified letters being mailed to residents within a specific geographic region, or a combination of both.

If a proposed settlement is rejected by the court and a revised agreement is reached, the new proposal must also be subject to a fairness hearing. While this may appear burdensome, it is likely that the issues addressed in the original fairness hearing will be indicative of whether a settlement is ultimately feasible or not.

107 Any member of the public participating in the fairness hearing should also be afforded a limited right to intervene, at least for the limited purpose of appealing the court's approval of any settlement. *See* Schwarzschild, *supra* note 60, at 932-33. Intervenors should be permitted to brief their positions and state their position for the record but ought not be given full party status. *Id.* Instead, their limited right of intervention should be limited to appealing the court's approval of the settlement. *See also* Kramer, *supra* note 100, at 359. Professor Kramer, although concluding fairness hearings to be unnecessary, cites three justifications for consent decrees: consent decrees may make it more difficult for third parties to protect their interest; judicial integrity is preserved if a court ensures that the decree is fair to all affected parties; and the benefits of the hearing, in terms of accommodating third party interests, exceed its costs with respect to time, money and lost settlements. *Id.*

actions have been completed.[108] In light of the court's retention of jurisdiction, any challenge of the action implementing the settlement must be raised in the context of the original litigation.

An approach similar to that outlined above was articulated in many respects in *Tabaac v. Atlantic City*.[109] In *Tabaac*, the parties reached a settlement to a complex taxpayer's lawsuit involving valuable property in Atlantic City. At the outset, it was understood that the settlement was to become effective only upon the approval of the trial court — an approval premised upon a finding that the settlement was fair to all taxpayers in Atlantic City.[110]

The procedure utilized required publication of a detailed notice of the settlement to all taxpayers and an opportunity for the taxpayers to present their objections at a fairness hearing. The court hired its own experts to evaluate the settlement at the parties' expense. Only after hearing the objectors and reviewing the proposed settlement's terms, in light of its own experts' recommendations, did the court render a determination regarding the settlement's fairness and its binding effect upon all parties, including all Atlantic City taxpayers.[111]

Judge Haines, who adjudicated the matter, clearly understood that this settlement, which only two taxpayers negotiated, would affect thousands of persons,[112] but recognized as well that a final, binding decision was necessary:

> When taxpayers' suits are concluded by a court-approved settlement or by trial, the disposition should be final and binding upon all taxpayers similarly situated. Any other result would be intolerable, subjecting defendants, frequently public bodies, to the prospect of a multitude of suits, making settlements impossible and final judgments inconclusive. Certainty is as much a necessity and as much in the public interest in taxpayers' actions as in any other.[113]

The procedures routinely followed for the approval of class ac-

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[108] This approach helps avoid a "super-zoning board" stigma for the court. Proper statutory procedures are encouraged while the court protects the public interest and promotes judicial economy. It is also similar to the approach developed in *Mount Laurel* cases, where no final judgment is entered until all necessary public actions have been implemented.

[109] 174 N.J. Super. 519, 417 A.2d 56 (Law Div. 1980).

[110] *Id.* at 523, 417 A.2d at 58-59.

[111] *Id.* at 537, 417 A.2d at 66.

[112] Judge Haines found that "[i]t would be entirely irresponsible if the resolution of such litigation could be effected by so small a minority without requiring court approval." *Id.* at 534, 417 A.2d at 64.

[113] *Id.* at 534-35, 417 A.2d at 65.

tion settlements were relied upon in evaluating the settlement.[114] The factors deemed relevant to the *Tabaac* court's analysis were that there were viable defenses to the taxpayers' claims, that rejecting the settlement would result in a lengthy and complex trial, and that no major opposition to the settlement procedure was raised.[115]

While the *Tabaac* approach ensures that public concerns receive prominent court consideration in a negotiated settlement, the parties may well expend much time and effort at a fairness hearing. If the proposed settlement contemplates subsequent municipal agency action, however, the litigants may take some comfort in the knowledge that (presumably) the same court has already determined the proposed resolution to be fair and reasonable without resulting in substantial detriment to general welfare. Although there is no guarantee, truly frivolous appeals would, as a practical matter, likely be deterred.

This proposed procedural framework is not without drawbacks. In fact, this framework gives rise to several pressing questions, including: how a court can compel a party to participate in a suit that party wants dismissed; whether the court may employ the contempt power or the appointment of a Master to do so; and how a court can prevent a party from simply reapplying to a board with which that party has reached a private settlement.

If the court informs the parties that the settlement is unacceptable, the plaintiff could dismiss the suit in reliance upon a private agreement with the zoning agency. If he does so, however, he abandons any protection against a later attack that judicial approval after a fairness hearing would have afforded. By participating in a court-ordered fairness hearing, a litigant can ensure that a binding, enforceable resolution of the case is achieved.[116] Without it, the par-

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[114] Specifically, the decision cites to the four factors outlined in the *Manual for Complex Litigation*, Part 1, § 1.46 (West 1977):

> 1. The strength of the plaintiff's case balanced against the amount of the settlement offer.
> 2. The ability of the defendants to pay.
> 3. The complexity, length and expense of further litigation.
> 4. The amount of opposition to the settlement.

Tabaac, 174 N.J. Super. at 535, 417 A.2d at 65.

[115] *Id.* at 535-37, 417 A.2d at 65-66. The objection raised by the taxpayers at the fairness hearing related solely to the terms of the settlement rather than the fact of settlement. In essence, different variations on the settlement terms were requested by the objectors. Judge Haines decided not to reject or force a renegotiation despite the taxpayers demands. Rather, Judge Haines declared that "[i]t is the Court's function to determine the reasonableness of the agreement, not to renegotiate the terms of settlement." *Id.* at 524.

[116] Faced with the record established by the parties at the fairness hearing, absent

ties subject themselves to wide open collateral attack with no judicial protection.[117]

c. Public Action on the Settlement

Criticisms of the prior proposals include the absence of a local public hearing, potentially excessive court supervision and/or control of settlement negotiations, and possibly sanctioning *ultra vires* acts by a public body charged with protecting its citizens. A different method of achieving a certain level of protection while avoiding some of these criticisms calls for the board to consider the proposed settlement at a properly noticed public hearing.[118]

This approach accords a board free reign to negotiate a settlement with its adversary in private and on its own terms.[119] The fruits of these negotiations must then be presented to the public by both the board and its adversary, prior to the municipal agency's ratification of the agreement.[120]

Although an affirmative vote will formally approve the settlement and the agreed-upon development plan, the board is still free to reject the settlement, which can then be revised or the pending litigation resumed. If the board approves the settle-

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a clear abuse of discretion, court-sanctioned settlements will, for the most part, be upheld on appeal. Professor Schwarzschild noted:

> The abuse-of-discretion "standard" is something of an incantation, but in practice it means that the trial judge's approval of a settlement is usually upheld on appeal. There is a greater basis for intelligent appellate review, however, when third parties have had the opportunity to put their objections on the record and the district court has responded to those objections and stated the reasons for its actions. The availability of a meaningful record increases the realistic possibility of a "second look" by the court of appeals.

Schwarzschild, *supra* note 60, at 931-32 (footnotes omitted).

117 Even in jurisdictions that permit or encourage collateral attacks on negotiated settlements, the standard of review generally precludes reversal absent a clear abuse of discretion. Consequently, court-sanctioned settlements will, for the most part, be upheld. Furthermore, faced with the record established by the parties at the fairness hearing, an objector's chances on appeal would be significantly reduced.

118 This approach obviously has relevance only to litigation challenging board action by way of prerogative writ, and would be inapplicable to litigation claiming the invalidity (facially or applied) of zoning ordinances.

119 The power to negotiate is argued by many as within the prerogative of the parties. *See supra* notes 32-57 and accompanying text. This proposal recognizes that right while still advancing the public interest.

120 The municipal board may approve the application despite public objections, but its action will be subject to judicial review and, if appealed, will negate the benefits of the settlement for both the board, the applicant, or such other party who may have brought suit. Of course, the decision of the board would be entitled to a presumption of validity.

ment, however, the court ultimately will enter a judgment of dismissal incorporating the settlement's terms.

If a member of the public objects to the settlement as approved by the municipality, the court should review the settlement under an abuse of discretion standard, because the municipality's action is presumptively valid and because it presumably acted for the benefit of the public at large, despite that a number of individual citizens may still feel aggrieved. So long as the courts can conclude that the settlement agreement was reasonable, as Judge Haines explained in *Tabaac*,[121] the municipal decision should not be second-guessed. Under such circumstances, the original litigation may, without fear of further litigation, be dismissed.[122] Where the settlement agreement constituted an abuse of the board's discretion, the parties will be forced either to renegotiate the agreement's terms or to resume the pending litigation.

Frequently, there is a need for further municipal action, such as amending an ordinance provision or approving a specific development plan *after* the settlement has been accepted by the municipal agency. Because all statutory requirements still must be followed, a public hearing on a revised or new development application must still occur. The board and the public, however, will be bound by the settlement's parameters, with notice and an opportunity to be heard already having been provided.[123] The subsequent hearing, though necessary, will be a mere formality, insofar as it is required only to adhere to the specifics of the enabling legislation.[124]

This solution is comprehensive and addresses most of the interests implicated by zoning disputes. It subjects proposed settlements to public scrutiny, affords public objectors the opportunity to contest a settlement resolution, results in a single tribunal

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121 174 N.J. 519, 417 A.2d 56 (Law Div. 1980).

122 Of course, an aggrieved objector may appeal that determination to the appellate division.

123 The public was permitted to participate in the approval of the settlement and to challenge the board's actions.

124 A problem may arise, however if interim ordinances are adopted which may affect the property at issue. As previously noted, a board does not have the power to ignore duly enacted ordinances that are presumed to promote the public welfare. This problem can be averted by affording subsequent board actions retroactive validity from the date of the court's order. Accordingly, the property owner's rights are vested on that date and are not affected by later municipal action. *See, e.g.*, N.J. STAT. ANN. § 40:55D-49 (West 1990) (upon preliminary approval, the applicant is protected against most changes for three years).

hearing all related claims, and provides for a final, binding court order. Additionally, an enforceable court order and a vested right in the negotiated settlement terms protect the original appellant's private interests.

This proposal also promotes the municipality's interest in defending its actions. The municipality's power to negotiate and settle disputes is legitimized and preserved.[125] In addition, the municipality and its tax-paying constituents are spared the costly time and expense of protracted litigation.

This approach also respects and even vindicates the maxim that "the law favors settlement."[126] Furthermore, when settlements are challenged, judicial economy is promoted by joining the settlement challenge with the pending main action. The entire controversy can be disposed of by one judge and the decision given the effect of *res judicata*. This framework also averts a second round of litigation before a judge unfamiliar with the case and the problem of sanctioning an *ultra vires* action or compelling the continuation of a suit against the parties' wishes. Finally, the court avoids the label of "a super-zoning board."[127]

Obviously, this proposal does not solve all of the foreseeable problems. Foremost is the potential number of public hearings that the proposal could require. There is no question that continuous hearings, wherein the agency is required to build a record, may be time consuming, and may present a potential for waste of governmental time and resources. Moreover, if the settlement contemplates an agreement to enact desired legislation or to revise troublesome ordinances, a super-majority of the governing body may be required under the enabling act[128] and may be unachievable.

Nevertheless, the public interest appears well served. By providing for municipal action with respect to the proposed settlement terms, the protections provided by the zoning laws can be preserved. The zoning laws require public notice of the proposed settlement and a meaningful opportunity to be heard,

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125 *See supra* notes 32-56 and accompanying text.

126 *See, e.g.*, Summit Tp. Taxpayer Ass'n v. Summit Tp. Bd. of Supervisors, 411 A.2d. 1263, 1266 (Pa. Cmmw. Ct. 1980); Dell'Aquilla v. Bd. of Adjustment of the City of Hoboken, 225 N.J. Super. 116, 123, 541 A.2d 1101, 1104 (App. Div. 1988).

127 The process is controlled by the municipality while the court remains as an overseer.

128 *See* N.J. STAT. ANN. § 40:55D-63 (West 1990) (if a protest against any proposed amendment or revision of a zoning ordinance is filed, such amendment or revision will not pass unless two-thirds of the governing body of the municipality approve).

whereby objectors can ensure that public officials have not abused the trust placed in them.

V. CONCLUSION

The public interest should be given significant attention in zoning disputes. Although all of the solutions articulated above focus to some degree on that public interest, it is imperative that, to best serve the interests of the parties and the public, a uniform and predictable approach be adopted by the courts.