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# Intergovernmental Zoning Immunity: Time for a New Test

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# INTERGOVERNMENTAL ZONING IMMUNITY: TIME FOR A NEW TEST?

*City of Kirkwood v. City of Sunset Hills*[1]

The City of Kirkwood (Kirkwood) engaged in negotiations with the private owners of property located within the city limits of the City of Sunset Hills (Sunset Hills) for the purpose of acquiring the property for use as a public swimming pool and recreational facility. Two days before Kirkwood was to pass an ordinance authorizing the purchase, the Sunset Hills Board of Aldermen passed an ordinance which prohibited the creation, maintenance, or operation of any public recreational facility or swimming pool within the city, except by the city itself.[2]

Upon delivery of this ordinance to Kirkwood officials, Kirkwood instituted a declaratory judgment action in the Circuit Court for St. Louis County, Missouri, to contest the validity of the Sunset Hills ordinance and to determine Kirkwood's rights were it to purchase the property in question.[3] The court held that Kirkwood had the authority under Missouri Revised Statutes section 90.010 to acquire the property located in Sunset Hills for the purposes specified in the statute. The Sunset Hills ordinance was not, however, held invalid,[4] and Kirkwood was not reassured as to its control of the property if acquired.

Nevertheless, Kirkwood proceeded to purchase the property, closing the sale in February of 1978. Sunset Hills responded by seeking injunctive relief to prohibit Kirkwood from proceeding with its plans to open the pool. The trial court, taking judicial notice of the file in the prior

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1. 589 S.W.2d 31 (Mo. App., E.D. 1979).

2. Sunset Hills officials were aware of Kirkwood's intent to purchase the property and had, in fact, discussed the possibility of joint purchase and use of the property with Kirkwood. *Id.* at 33. Negotiations will not generally be grounds for justifiable reliance, and promissory estoppel was not argued in *Kirkwood*. For a discussion of the applicability of the promissory estoppel theory in a similar case, see South Hill Sewer Dist. v. Pierce County, 22 Wash. App. 738, 741 n.1, 591 P.2d 877, 879 n.1 (1979) (county denied city unclassified use permit after giving initial approval).

3. Kirkwood claimed the authority to buy and use the land for park purposes under two Missouri statutes. "The council may . . . purchase and hold grounds for public parks within the city, or within three miles thereof." RSMo § 77.140 (1969) (now 1978). "Whenever any city desires to establish a park or pleasure grounds, the common council or mayor and board of aldermen of such city is hereby authorized and empowered to acquire property for such purposes by gift, purchase or condemnation of lands in such city or within one mile thereof . . . ." RSMo § 90.010 (1969) (now 1978). 589 S.W.2d at 33.

4. 589 S.W.2d at 34.

declaratory judgment action, permanently enjoined Kirkwood from creating, maintaining, or operating a public recreational facility or public swimming pool on the property.[5]

On appeal of both the declaratory judgment and permanent injunction, the Missouri Court of Appeals for the Eastern District dissolved the injunction against Kirkwood and held that the Sunset Hills ordinance could not be employed to prohibit the operation by Kirkwood of its public swimming pool or recreational facility.[6] The holding was based on the ground that the ordinance was invalid insofar as it conflicted with the city's legislatively delegated power to acquire land by condemnation for use as a recreational facility.[7] In reaching its decision, the court of appeals reviewed Missouri law on governmental immunity from zoning regulations and suggested that the balancing of public interests test presently employed by a number of jurisdictions[8] is the best method for resolving intergovernmental conflicts of this sort. The court of appeals declined to apply the balancing of public interests test in *Kirkwood*, however, because there was no precedent in Missouri for doing so, and because neither party requested that it do so.[9]

To date the Missouri cases fail to reveal adoption of any one of the several approaches[10] courts have developed to analyze situations in which one governmental unit (intruding unit) seeks immunity from another governmental unit's (host unit's) land use regulations.[11] The recurrent

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5. *Id.*

6. *Id.* at 43.

7. Although the court did not expressly say so, it appears that its decision was based on the power of eminent domain test. *See* note 12 and accompanying text *infra*.

8. *See generally* City of Newark v. University of Del., 304 A.2d 347 (Del. Ch. 1973); City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (Fla. Dist. Ct. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976); Kunimoto v. Kawakami, 56 Hawaii 582, 545 P.2d 684 (1976) (suggests adoption of the test in dictum); Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 576 P.2d 230 (1978); Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N.W.2d 426 (1972); Rutgers v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972); City of Fargo v. Harwood Township, 256 N.W.2d 694 (N.D. 1977); City of Pittsburg v. Commonwealth, 468 Pa. 174, 360 A.2d 607 (1976); Lincoln County v. Johnson, ____ S.D. ____, 257 N.W.2d 453 (1977).

9. 589 S.W.2d at 43.

10. For a general criticism and discussion of the traditional methods of analysis, see Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869, 869-83 (1971); Comment, *The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses*, 19 SYRACUSE L. REV. 698, 700-07 (1968). *See generally* Annot., 61 A.L.R.2d 970 (1958).

11. The *Kirkwood* court raised a possible distinction to be made between zoning ordinances enacted pursuant to RSMO ch. 89 (1969) and the city's general police powers. 589 S.W.2d at 36 n.3. Whether characterizing Sunset Hills' authority as police power arising from RSMO §§ 79.450-.470 (1969) (now 1978),

modes of analysis are the power of eminent domain test,[12] statutory guidance test,[13] governmental/proprietary distinction test,[14] superior sovereign test,[15] and the more recently developed balancing of public interests test.[16] The *Kirkwood* court acknowledged the apparent confusion in Missouri decisional law, but suggested that if one of the parties could trace its authority to the Missouri Constitution, Missouri courts will generally hold that it takes precedence over a power not so grounded.[17] An examination of the cases illustrates that when the zoning power of one governmental entity comes into conflict with the condemnation power of another governmental entity, Missouri courts have looked to the authority behind the respective powers to determine which should prevail. This statement is of dubious value, however, since where there are conflicting authorities, a court will naturally seek the superior source. This is in essence the analysis behind each of the traditional tests.

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rather than a zoning ordinance would have changed the court's approach or analysis of the case is left unclear, but the Missouri Court of Appeals for the Western District in State *ex rel.* City of Gower v. Gee, 573 S.W.2d 107, 108 (Mo. App., K.C. 1978), reached the same conclusion by addressing the conflict as one between two governmental bodies in the exercise of their police powers. *See* text accompanying notes 39 & 40 *infra.*

12. "The rationale is that eminent domain is a natural power of the sovereign limited only by constitutional provisions, whereas the police powers which are the source of zoning authority arise from constitutional grant and statutory enactment." Lincoln County v. Johnson, ____ S.D. ____, ____, 257 N.W.2d 453, 456 (1977) (paraphrasing City of Scottsdale v. Municipal Court, 90 Ariz. 393, 397, 368 P.2d 637, 638 (1962)). For a succinct criticism of this test, see Comment, *Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEX. L. REV. 316, 317-18 (1961).

13. When the legislature anticipates possible governmental conflicts of this sort and establishes priorities in the statutes, the problem becomes one of statutory interpretation and applicability. *See* Reber v. South Lakewood Sanitation Dist., 147 Colo. 70, 75, 362 P.2d 877, 879 (1961).

14. The governmental/proprietary distinction arises from tort law, as a device for limiting the effect of governmental immunity from tort liability. *See* Annot., 59 A.L.R.3d 1244, 1254-55 (1974).

15. "[W]here the immunity from local zoning regulation is claimed by any agency or authority which occupies a superior position in the governmental hierarchy, the presumption is that such immunity was intended in the absence of express statutory language to the contrary." Aviation Servs. v. Board of Adjustment, 20 N.J. 275, 282, 119 A.2d 761, 765 (1956).

16. The balancing of public interests test was first suggested in Note, *supra* note 10, at 883-86. *See also* Rutgers v. Piluso, 60 N.J. 142, 153, 286 A.2d 697, 702-03 (1972).

17. 589 S.W.2d at 42. *See generally* Appelbaum v. St. Louis County, 451 S.W.2d 107 (Mo. 1970); State *ex rel.* Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960); State *ex rel.* St. Louis Union Trust Co. v. Ferriss, 304 S.W.2d 896 (Mo. En Banc 1957); State *ex rel.* City of Gower v. Gee, 573 S.W.2d 107 (Mo. App., K.C. 1978). *See also* Annot., *supra* note 14, at 1249.

Missouri cases prior to *Kirkwood* where the zoning power of one governmental entity conflicted with an exercise of power by another governmental entity are not numerous. In one of the earlier cases, *State ex rel. St. Louis Union Trust Co. v. Ferriss*,[18] the City of Ladue intervened in an action brought by private citizens seeking to prohibit the court from entertaining a condemnation action brought by the Ladue School District which sought residentially zoned land for school purposes.[19] In basing its decision on the school district's power of eminent domain, the Missouri Supreme Court relied on both constitutional and statutory authority.[20] The court held that the municipal zoning ordinance could not restrict a school district in its selection of a site for a public school where the school district was using its eminent domain power. It was found that the school district had superior statutory authority which was derived directly from the constitutional grant of eminent domain power. The practical consequences of holding otherwise were also noted.[21]

In *State ex rel. Askew v. Kopp*,[22] private landowners living in Jackson County brought a proceeding in certiorari to challenge the county's approval of Raytown's application for authority to build a sewage disposal plant there, alleging that such building was prohibited by county zoning laws. The supreme court declined to apply the governmental/proprietary test[23] and instead looked to the "legislative intent and design in granting to cities the power to acquire sewage disposal plants."[24] The county's zoning

18. 304 S.W.2d 896 (Mo. En Banc 1957).

19. *Ferriss* is discussed in Comment, *The Missouri Municipality's Power to Zone Public and Quasi-Public Uses*, 26 MO. L. REV. 45, 45-46 (1961).

20. The court cited in the school district's favor MO. CONST. art. IX, § 1(a) (amended 1976) and RSMO §§ 165.100, .370 (1949) (current versions at RSMO §§ 177.041, .091, .131, .141 (1978)). The court traced the zoning power to RSMO § 89.020 (1949) (now 1978), which states in part: "For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict . . . the location and use of buildings, structures and land for trade, industry, residence or other purposes." The court held that the words "trade," "industry," and "residence" relate to private property only and the phrase "other purposes" was "not to be broadened to include a public use of property by the state in carrying out its constitutional mandate to establish and maintain free public schools." 304 S.W.2d at 900.

21. "Obviously, if the nine cities within the school district had the power to restrict the location of schools, it would become a practical impossibility for the school district to establish school wards and locate schools therein." 304 S.W.2d at 901.

22. 330 S.W.2d 882 (Mo. 1960).

23. *Id.* at 890.

24. *Id.* at 887. The court relied on MO. CONST. art. IV, § 37 (amended 1976) and RSMO §§ 71.680, 79.380 (1949) (now 1978), as the city's constitutional and statutory sources of authority.

authority lay in Missouri Revised Statutes section 64.090.[25] The court, however, rested its holding on the legislative intent expressed by the grant of the power of eminent domain to the city.[26] The existence of the right to condemn, even though it was not exercised in *Askew*, was found to be determinative and Raytown's power to build a sewage disposal plant was upheld.[27]

The zoning laws of St. Louis County were upheld against Manchester's power of eminent domain in *St. Louis County v. City of Manchester*.[28] Just as in *Askew*, the municipal intruding unit was attempting to establish a sewage treatment plant in the county host unit. The vital difference in *Manchester* was that the county, as a constitutional home rule charter county, had constitutional authority for its zoning laws.[29]

In *Manchester*, the county sought an injunction against construction of the sewage facility.[30] The city relied on both *Ferriss* and *Askew* as authority for its actions based on its power of eminent domain.[31] The court distinguished both cases. *Ferriss* was differentiated on the ground that Manchester's grant of the power of eminent domain did not give it the right to select the precise location for its sewage plant, but the nature of schools required that the Ladue School Board in *Ferriss* locate schools where they would best serve the public interest.[32] *Askew* was distinguished on the basis of two factual differences: Jackson County was not a home rule charter county, and the objectors were private landowners and not the county.[33] The public interest was also a factor in the *Manchester* decision. The court did not foreclose the city's power to build the plant, but required it to work within the county's zoning laws in its selection of a site. In

25. The court observed that no zoning authority is grounded in the Missouri Constitution except that granted to home rule charter counties. 330 S.W.2d at 887 n.2. *See* text accompanying note 29 *infra*.

26. *Askew* has been cited as a leading case decided under the eminent domain test. *See* Lincoln County v. Johnson, ____ S.D. ____, ____, 257 N.W.2d 453, 456 (1977); Annot., *supra* note 14, at 1266; Note, *supra* note 10, at 874.

27. 330 S.W.2d at 889.

28. 360 S.W.2d 638 (Mo. En Banc 1962).

29. *Id.* at 641. *See* MO. CONST. art. VI, § 18(c) (amended 1976).

30. The city had neither received nor applied for a building permit as required by the county zoning law. 360 S.W.2d at 639.

31. Manchester cited the same authorities as used by the court in *Askew*. *Id.* at 640. *See* note 24 *supra*.

32. 360 S.W.2d at 640-41. *See also* Comment, *supra* note 12, at 324-25.

33. In fact, in *Askew* the Jackson County Board of Adjustment had granted permission for the sewage plant construction. 330 S.W.2d at 884. A survey of the zoning immunity cases reveals that the antagonists usually are both governmental entities, but the outcome seems to be unaffected when private landowners seek to enforce the zoning laws. *See generally* Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 576 P.2d 230 (1978) (private landowners obtained injunction against state agency based on county zoning regulations).

this respect, the *Manchester* court's reasoning reflects the analysis required by the balancing of public interests test.[34]

In *Appelbaum v. St. Louis County*,[35] private citizens and the municipality of Bel-Ridge by cross petition sought an injunction to prevent the county from constructing a landfill within the city limits of Bel-Ridge and St. John in contravention of their municipal zoning ordinances.[36] The same provision of the constitution[37] which the county relied on in *Manchester* was relied on here to sustain the county's authority to build the landfill. The court held that the county was not subject to the municipal zoning ordinances, and relied on *Ferriss*. In so doing the court returned to the county's constitutionally granted power of eminent domain and the lack of an express statutory or constitutional grant to the municipality of power to restrict the county's exercise of eminent domain.[38]

The last zoning immunity case to come before Missouri appellate courts prior to *Kirkwood* was *State ex rel. City of Gower v. Gee*.[39] Factually, it is very similar to *Askew*; the city of Gower applied for an exception to Buchanan County's zoning laws in order to build a sewage treatment facility on land it had purchased there. The Missouri Court of Appeals for the Western District affirmed the lower court's reversal of the county's denial of the exception. Both *Appelbaum* and *Manchester* were distinguished because they each dealt with a constitutional charter county. *Askew* was declared to be precisely in point and controlling.[40]

If there is any consistency, the Missouri decisions may be illustrative of what one commentator has called a "*sub rosa* judicial interest balancing,"[41] *i.e.*, an underlying consideration of the reasonableness of the intruding unit's actions weighed against the host unit's interest in land use control.[42] The balancing of public interests test merely calls for such

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34. *See* text accompanying note 54 *infra*.

35. 451 S.W.2d 107 (Mo. 1970).

36. In addition to the claim that the landfill would violate the municipalities' zoning regulations, the objectors alleged that the county's actions were arbitrary and capricious. The court said that "an ordinance of the legislative body . . . is cloaked with a presumption of validity." 451 S.W.2d at 114. *See* McMurry v. Kansas City, 283 Mo. 479, 492-93, 223 S.W. 615, 619 (En Banc 1920). *See also* Comment, *supra* note 10, at 711-13 (discussing host unit's possible arguments that the intruding unit's actions are an abuse of discretion or will create a nuisance).

37. 451 S.W.2d at 109. *See* MO. CONST. art. VI, § 18(c) (amended 1976).

38. The municipality's zoning authority was based on RSMo § 89.020 (1969) (now 1978). 451 S.W.2d at 113.

39. 573 S.W.2d 107 (Mo. App., K.C. 1978).

40. *Id.* at 112.

41. Note, *supra* note 10, at 873.

42. *See* 360 S.W.2d at 640 ("St. Louis County does not undertake to forbid or prohibit altogether the construction of a sewage disposal plant . . . but con-

activity to be carried on openly and frankly.[43] For this reason the eastern district court of appeals expressed a strong interest in adoption of this mode of analysis in the *Kirkwood* decision.[44]

The balancing of public interests test gained an increasing number of adherents during the 1970s.[45] The reasons for this following are several. One prevalent concern is the fear of abuse that could attend the grant of absolute immunity from local zoning regulations, such immunity being grounded on what is frequently equal statutory authority and not necessarily on a disinterested concern for the best interests of both governmental entities.[46] It also has been said that to base zoning immunity on a mechanical test is to elevate form over substance.[47] Most persuasive is the argument that in today's modern world of urban sprawl, land use planning and control has gained increasing importance, and should not be dismissed without careful thought and justification.[48] It appears only reasonable to require an intruding governmental unit to try to work within its host unit's zoning regulations, and attempt to arrive at a cooperative resolution of the conflict based on the needs of both entities.[49]

Under the traditional tests, once the court determines that the intruding unit has the superior authority, the zoning regulations of the host unit are declared a fortiori inapplicable to the intruding unit's activities.[50]

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tends that the location and construction . . . must be made in conformity with the county's laws and ordinances . . . .").

43. *See* Note, *supra* note 10, at 884.

44. 589 S.W.2d at 43.

45. *See* cases cited note 8 *supra*.

46. As the court said in *Manchester*, "It is unlikely . . . that the city would undertake to construct such a facility in a residential portion of its own city." 360 S.W.2d at 642. *See* Orange County v. City of Apopka, 299 So. 2d 652, 654 (Fla. Dist. Ct. App. 1974); City of Fargo v. Harwood Township, 256 N.W.2d 694, 700 (N.D. 1977).

47. Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 112, 576 P.2d 230, 238 (1978); Town of Oronoco v. City of Rochester, 293 Minn. 468, 471, 197 N.W.2d 426, 429 (1972).

48. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571, 579 (Fla. Dist. Ct. App. 1975), *aff'd*, 332 So.2d 610 (Fla. 1976); Town of Oronoco v. City of Rochester, 293 Minn. 468, 471, 197 N.W.2d 426, 429 (1972); Lincoln County v. Johnson, ____ S.D. ____, ____, 257 N.W.2d 453, 457 (1977).

49. Courts in two jurisdictions have specifically declined to adopt the balancing of public interests test. Seward County Bd. of Comm'rs v. City of Seward, 196 Neb. 266, 276, 242 N.W.2d 849, 855 (1976) ("while such a rule may have its merits and advantages, it also has its disadvantages because of lack of guidelines for its operation and increased difficulties of application"); South Hill Sewer Dist. v. Pierce County, 22 Wash. App. 738, 743, 591 P.2d 877, 880 (1979) (eminent domain test proper in light of legislative intent as expressed by applicable statutes).

50. *See, e.g.*, City of Scottsdale v. Municipal Court, 90 Ariz. 393, 397, 368 P.2d 637, 639 (1962); Decatur Park Dist. v. Becker, 86 Ill. 442, 447, 14 N.E.2d

The intruding unit need not make application for variances or exceptions, and presumably need not even consult with the host unit's officials as to its plans. In Missouri, when the cities of Gower and Raytown did attempt to work with the host unit's zoning agencies, those agencies' actions were later declared *coram non judice* by the courts.[51]

Under the balancing of public interests test the host unit's zoning regulations are presumed valid. The intruding unit is required to comply with the zoning agency's procedures by applying for a variance or exception or requesting that an area be rezoned.[52] The burden of proof is on the intruding unit to justify the selection of the particular site for its landfill, airport, sewage facility, or whatever the nonconforming use might be.[53] Shifting the burden of proof forces the intruding unit to consider carefully all possible sites, and enhances the chance that more responsible land use decisions will result.

This is not to say that the intruding unit is foreclosed from establishing its nonconforming use if the host unit refuses to compromise. The dissatisfied governmental entity always then has access to the courts. One commentator, the originator of the balancing of public interests concept, has suggested a number of factors which a court should consider in such a case:

> 1. Is there any statutory guidance as to which interest should prevail? Does the statute explicitly authorize immunity or does it merely direct a particular governmental unit to perform a certain function without mentioning any possible exemption from local zoning regulation?
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> 2. Do the zoning ordinance and any other manifestation of

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490, 493 (1938); Appelbaum v. St. Louis County, 451 S.W.2d 107, 113 (Mo. 1970); State *ex rel.* Askew v. Kopp, 330 S.W.2d 882, 890 (Mo. 1960); Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451, 456 (Mo. 1959); State *ex rel.* St. Louis Union Trust Co. v. Ferriss, 304 S.W.2d 896, 903 (Mo. En Banc 1957); City of Kirkwood v. City of Sunset Hills, 589 S.W.2d 31, 43 (Mo. App., E.D. 1979); State *ex rel.* City of Gower v. Gee, 573 S.W.2d 107, 112 (Mo. App., K.C. 1978); Seward County Bd. of Comm'rs v. City of Seward, 196 Neb. 266, 277, 242 N.W.2d 849, 855 (1976); South Hill Sewer Dist. v. Pierce County, 22 Wash. App. 738, 747, 591 P.2d 877, 882 (1979); Comment, *supra* note 10, at 699.

51. State *ex rel.* Askew v. Kopp, 330 S.W.2d 882, 890 (Mo. 1960); State *ex rel.* City of Gower v. Gee, 573 S.W.2d 107, 112 (Mo. App., K.C. 1978).

52. *See* Comment, *supra* note 12, at 326-28.

53. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571, 579 (Fla. Dist. Ct. App. 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976) (state home for the mentally retarded); Brown v. Kansas Forestry, Fish & Game Comm'n, 2 Kan. App. 2d 102, 113-14, 576 P.2d 230, 238 (1978) (public parking lot in subdivision); City of Fargo v. Harwood Township, 256 N.W.2d 694, 698 (N.D. 1977) (sanitary landfill); Lincoln County v. Johnson, ____ S.D. ____, ____, 257 N.W.2d 453, 458 (1977) (sanitary landfill); Note, *supra* note 10, at 884.

the local planning process comprehend alternative locations for the facility?

3. Did the governmental unit consider alternative locations for the facility?

4. What is the scope of the political authority of the governmental unit performing the function relative to the body instituting the zoning ordinance?

5. Has there been any independent supervisory review of the proposed facility by a governmental unit of 'higher' authority such as a state-wide planning commission? Was this review designed by statute to be exclusive?

6. How essential is the facility to the local community? To the broader community?

7. How detrimental is the proposed facility to the surrounding property?

8. Has the governmental unit made reasonable attempts to minimize the detriment to the adjacent landowners' use and enjoyment of their property?

9. Has there been any attempt to comply with the zoning procedure for obtaining an amendment or a variance? Have the adversely affected landowners been given an opportunity to present their objections to the proper nonjudicial authorities?[54]

Only if a court decides on the basis of all these considerations that the host government's refusal to amend or grant exception is unreasonable should the regulation be declared inapplicable.

Adoption of the balancing of public interests test, as suggested by the *Kirkwood* court, would not result in any radical change in Missouri decisional law. Compliance with legislative intent is the underpinning of the various analyses presently used by the courts. Although legislative intent is only one factor to be considered by the court under the balancing test, where that intent is clear it still should be determinative, as the courts always must defer to clear legislative intent, unless that intent is unconstitutional. Where there is no clear intent, however, the balancing test would foster reasonable land use control and encourage an appraisal of the needs and objections of both governmental entities. With no explicit legislative mandate to the contrary, the dicta in *Kirkwood* recommending adoption of the balancing of public interests test should be followed.

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54. Note, *supra* note 10, at 883-84. *See also* Rutgers v. Piluso, 60 N.J. 142, 153, 286 A.2d 697, 702-03 (1972).

It has been suggested that the final arbiter of intergovernmental zoning conflicts should be an independent statewide planning agency vested with the authority to review such cases. *See* Note, *supra* note 10, at 882. The method worked out by the courts, however, whereby the zoning laws are presumed valid and the intruding entity works with the host's zoning authorities would seem to provide an adequate remedy without creation of another state agency.