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Resolving Zoning Challenges Between Local Governments

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Some of the most hotly contested disputes involving political subdivisions in Ohio are zoning disputes. Counties, townships, cities and villages in Ohio are empowered to adopt and enforce comprehensive zoning regulations.[1] Because the Ohio Constitution vests the police power of the state in the general assembly,[2] local governments enjoy this power as a result of the legislature delegating its power.[3] A particularly interesting application of this power is presented when examining whether, and to what extent, a local government may impose zoning restrictions on other sovereign political subdivisions.

The key to avoiding any costly delays in a political subdivision's acquisition or development of real property is for all parties to be informed of the law and to work in harmony — not opposition. The purpose of this article is to provide an overview of Ohio law as it relates to governmental immunity from zoning restrictions and best practice recommendations to use in public sector construction projects.

The federal government is immune to local zoning via supremacy clause

To begin, the federal government is not bound by local zoning ordinances. The supremacy clause of the federal constitution provides that a constitutional exercise of federal power is supreme to the laws passed by the states or their subdivisions.[4] Thus, local zoning ordinances must yield to any valid exercise of federal power.[5]

The state government may be immune to local zoning under *Brownfield*

Unlike the federal government, the State of Ohio and its agencies are not *automatically* immune to local zoning requirements. Historically, the Ohio Supreme Court utilized an "eminent domain test." If the state agency was vested with the power of eminent domain, it was immune to local zoning restrictions.[6] The Court ultimately rejected this analysis in *Brownfield v. State,*[7] however.

Recognizing that "[b]oth the municipality's exercise of its zoning powers and the state's exercise of the power of eminent domain are intended to effectuate public purposes,"[8] the Court rejected such a bright line test. The Court similarly rejected a bright line test which would hold immune the state's governmental functions and subject its proprietary functions to zoning.[9] Instead, the Court adopted a balancing test — the Court should "weigh the general public purposes to be served by the exercise of each power" and "resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens."[10]

The *Brownfield* court's solution to the competing interests of the local government and state was to

1 Ohio Const. Art. XVIII, § 3.
2 Ohio Const. Art.II, § 1.
3 *Holiday Homes Inc. v. Butler County Bd. of Zoning Appeals*, 35 Ohio App. 3d 161, 520 N.E.2d 605 (12th Dist. 1987).
4 U.S. Const. Art. VI, cl. 2.
5 *Curtis v. Toledo Metropolitan Housing Authority*, 36 Ohio Ops. 423, 78 N.E.2d 676 (C.P., 1947.)
6 *State ex rel. Ohio Turnpike Comm. v. Allen*, 158 Ohio St. 168, 107 N.E.2d 345 (1952).
7 63 Ohio St.2d 282 (1980).
8 *Id.* at 285.
9 *Id.* at 286.
10 Id. at 285.

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develop a two-step analysis. First, the state is required to make a "reasonable attempt" to comply with the local zoning restrictions.[11] Where feasible to do so, the state should "locate in an area zoned to permit the intended use," or "mak[e] a reasonable attempt to comply with the zoning use restrictions of the area in which the facility is located."[12] However, where the state's conformity to local zoning requirements would "frustrate or significantly hinder the public purpose underlying the acquisition of property," the courts proceed to the second step of the inquiry and examine its immunity.[13] Under the *Brownfield* balancing test, courts look to factors including "the essential nature of the government-owned facility," "the impact of the facility upon surrounding property," and "the alternative locations available for the facility."[14]

Brownfield immunity equally applies to other political subdivisions

Only two years after its decision in *Brownfield*, the Ohio Supreme Court extended its analysis to disputes between local governments and other political subdivisions.[15] Counties,[16] county hospitals,[17] public school districts[18] and transit authorities[19] have all been held to enjoy *Brownfield* immunity, for example.

In fact, the *Brownfield* analysis is arguably more important in its application to other political subdivisions than it is to the state. *Brownfield* first and foremost recognizes the need for the two governmental entities to harmonize. The zoning entity has an interest in planning for the use of land in a way that benefits the population. The *Brownfield* court's rejection of automatic, absolute immunity for the other public entity and requirement that it make reasonable efforts to comply recognizes the importance of this interest. To achieve this interest, zoning entities often require aesthetic enhancements or improvements extraneous to the building itself that are intended to benefit the public in general. In the case of private developers, there is no conflict. Ohio law has sanctioned such municipal requirements for the betterment of the surrounding community, due in large measure to the fact that private developers are uniquely situated to pass the expense of such aesthetic and extraneous improvements on to the end users and customers.

The other public entity, however, has a competing interest in efficiently using its tax dollars in the way it sees fit. Unlike private enterprises, public entities do not have the ability to pass along expenses. Additionally, political subdivisions can only spend their allocated tax dollars in furtherance of their statutory charge. If a zoning requirement mandates an expenditure that falls outside their statutory charge, even if those improvements serve to benefit the public in general, the expenditure would be invalid. Finally, the other entity has an elected body with its own agenda and priorities. Without some immunity, zoning entities could compel other political entities to spend their tax dollars in furtherance of the zoning entity's agenda, even if that expenditure would be contrary to the charge of the other public entity.

Local governments and zoning boards do not have the authority to determine *Brownfield* immunity

Critically, under the *Brownfield* framework, the state and other political subdivisions need only make "reasonable efforts" to comply with local zoning ***restrictions***. There is no duty to comply with local zoning ***procedures***. To that end, in the wake of *Brownfield*, courts have held that the state and political subdivisions are not required to "follow a locally prescribed set of procedures to obtain the approval of the local zoning agency."[20] That is, these other entities are not required to apply to the local zoning board for a variance. Thus, courts have observed that any proceeding before a zoning board or board of zoning appeals is "superfluous."[21]

Similarly, a local government cannot issue a stop work order on a project for nonconformance with zoning restrictions. Where the state or political subdivision cannot conform to zoning restrictions though reasonable efforts, it may simply proceed with its project.[22] Only a court — and not the local government or zoning board — may stop the work,[23] and only a court may determine whether the State or political subdivision is immune under *Brownfield*. "Even though the *Brownfield* factors might be similar to the factors a zoning board might consider in making other determinations, ... a zoning board is not the proper body to determine whether a state agency is immune in a particular instance."[24]

Brownfield immunity, however, is limited to zoning requirements. It does not provide immunity to other building requirements, such as storm water drainage, site access, fire safety and building code compliance, for example. Political subdivisions must still comply with those requirements.

Cooperation is the key to efficient public construction

As has been a theme of this article — and, indeed, the key dictate of the *Brownfield* court — the zoning entity and the other political entity must attempt to cooperate, and, often times, the best way to cooperate is to go through the zoning process to identify problematic issues, if time permits. Once those issues are identified, the entities should first evaluate whether the zoning request is something that is even within the statutory ability of the other political entity to provide. If so, the entities should "weigh the general public purposes to be served by the exercise of each power" and "resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens."[25] A reasonable approach by both entities to this analysis should lead to the symbiotic relationship going forward, which is certainly in the best interest of both entities and the public as a whole.

11 Id. at 286 (and observing that "[w]henever possible, the divergent interests of governmental entities should be harmonized rather than placed in opposition.")
12 *Taylor v. State, Dep't of Rehab. & Correction*, 43 Ohio App. 3d 205, 209, 540 N.E.2d 310 (1988).
13 Brownfield at 286.
14 *Id.* at 286–87.
15 *City of E. Cleveland v. Bd. of Cty. Comm'rs of Cuyahoga Cty.*, 69 Ohio St. 2d 23, 25, 430 N.E.2d 456, 458 (1982).
16 *Id.*
17 *City of Ironton v. Bd. of Trustees of Lawrence Cty. Gen. Hosp.*, No. 1772, 1986 WL 14462 (Ohio Ct. App. Dec. 18, 1986).
18 *Bd. of Educ. of Cleveland City Sch. Dist. v. Puck*, No. 41855, 1980 WL 355270 (Ohio Ct. App. Nov. 20, 1980).
19 *Laketran Bd. of Trustees v. Mentor*, 135 Ohio App. 3d 187, 733 N.E.2d 313 (1999).
20 *Taylor* at 209.
21 *Laketran* at 195.
22 *Taylor* at 211 ("... if compliance with local zoning would in the opinion of the state agency prevent it from performing its essential governmental duties, it may proceed unless enjoined by a court of competent jurisdiction...").
23 *Id.*
24 *Laketran* at 195.
25 *Brownfield* at 285.