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A DUTY TO RECONCILE: REVISING NEW JERSEY'S MUNICIPAL LAND USE LAW TO ENCOURAGE INTER-MUNICIPAL COOPERATION IN REGIONAL PLANNING

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INTRODUCTION

Fixed between two other municipalities in central New Jersey is a quaint and historical village borough. On one side of the borough is a rural township with rolling green hills, preserved farmland, and environmental easements. On the borough's other side is another township with some remaining farmland but increasing residential, commercial, and industrial development. The suburbanizing neighbor has scheduled a hearing to decide an application to construct a warehouse development on a property bordering the borough. The borough now faces increased traffic on already congested streets—lined with historical structures and aging infrastructure—and an adverse impact on locals' quality of life without offsetting benefits.

Between the historical borough and suburbanizing municipality is an invisible line of authority that compartmentalizes the legal rights of each town's citizens from voting on matters subject to the other town's approval.[1] Without the ability to effectively petition the neighboring government and its land use boards, many citizens are left to circulating their positions on social media and voicing their opinions at limited public sessions of the neighboring municipality's government meetings.[2] The borough citizens are left to political discourse and hopeful persuasion; almost any action by the borough government is likely futile.[3]

1. *See infra* Sections II.A, II.B, III.A; *see also* John R. Nolon, *Grassroots Regionalism Through Intermunicipal Land Use Compacts*, 73 ST. JOHN'S L. REV. 1011, 1017 (1999) ("The principal limit to the reach of local land use control is jurisdictional: This authority ends at the municipal border.").

2. *E.g.*, *Hearing on S. 3688 Before the S. Budget & Appropriations Comm.*, 219th Leg., 2020–2021 Sess., at 52:40 (N.J. 2021), https://njleg.state.nj.us/archived-media/2020/SBA-meeting-list/media-player?committee=SBA&agendaDate=2021-05-20-10:00:00&agendaType=M&av=V (statement of Hon. Gregory Westfall, former mayor of Allentown Borough).

3. *Id.*

Issues like the above example and more—of (un)neighborly land use disagreements—are not uncommon.[4] As the cost of providing government services continues to increase,[5] the approval of large land developments represents one of the most promising opportunities for municipalities to expand both their property tax base and economies as a whole.[6] However, adjoining towns, which may likely face the impact of large development, are often but a minute consideration in the political process that is planning, zoning, and land use decision-making.[7] Thus, New Jersey

4. *See, e.g.*, Steve Strunsky, *Warehouses Added to Massive $700M Adventure Crossing Sports Dome, Hotel Project near Six Flags*, NJ.COM (Mar. 11, 2021, 7:51 AM), https://www.nj.com/ocean/2021/03/warehouses-added-to-massive-700m-adventure-crossing-sports-dome-hotel-project-near-six-flags.html (residents claiming "[w]arehouses do not fit into the character of this neighborhood" at a planning board meeting approving a major development along Jackson Township's border); Jon Hurdle, *Surprise Withdrawal of Warehouse Plan Fuels Hopes of 'Sprawl' Opponents*, N.J. SPOTLIGHT NEWS (Apr. 20, 2021), https://www.njspotlightnews.org/2021/04/nj-warehouse-plan-monmouth-county-surprise-withdrawal-sprawl-opponents-take-heart-hope-development-surge-pandemic-rural-truck-traffic-choke-local-roads/ (describing local resident who is worried about impact of citizen group on neighboring town's plan to build warehouse development in separate municipality and county); Jon Hurdle, *A First Step Toward Regulating Warehouse Sprawl?*, N.J. SPOTLIGHT NEWS (Nov. 9, 2021), https://www.njspotlightnews.org/2021/11/nj-state-planning-commission-warehouse-sprawl-environmental-activists-land-use-open-space-truck-traffic-regional-curbs/ (discussing nonprofit leader's suggestion that the State take over warehouse regulation from municipalities); Bill Duhart, *Opposition Grows to Big Warehouse Developments in Small N.J. Towns*, NJ.COM (Jan. 9, 2022, 2:00 PM), https://www.nj.com/business/2022/01/opposition-grows-to-big-warehouse-developments-in-small-nj-towns.html (discussing warehouse development approval of compact borough in Lawnside, Camden County, and proposed 1.6 million square foot development in rural Pilesgrove, Salem County).

5. *See, e.g.*, Nikita Biryukov, *New Jersey's Local Governments Face Cost Crunch*, N.J. MONITOR (Oct. 31, 2022, 7:01 AM), https://newjerseymonitor.com/2022/10/31/new-jerseys-local-governments-face-cost-crunch/; *see also Local Government Costs*, N.J. STATE LEAGUE OF MUNS., https://www.njlm.org/208/Local-Government-Costs (last visited Apr. 3, 2023) ("From September, 2000 to September, 2012, the costs of local government increased 44.3%.").

6. Under New Jersey's tax system, local municipal, county, and school board funding is derived from the tax base of a municipality based on property values. *See generally* N.J. STATE LEAGUE OF MUNS., A SHORT HISTORY OF THE NEW JERSEY PROPERTY TAX & THE LONG ROAD TO REFORM (n.d.), https://www.njlm.org/DocumentCenter/View/481/A-Short-History-of-the-New-Jersey-Property-Tax-PDF. Thus, there is a pecuniary incentive for towns to bring in commercial and industrial development that provides for a greater tax base without increasing the draw on municipal services.

7. *See* William A. Fischel, *Political Structure and Exclusionary Zoning: Are Small Suburbs the Big Problem?*, *in* LINCOLN INST. OF LAND POL'Y, FISCAL DECENTRALIZATION AND LAND POLICIES 111, 111–18 (Gregory K. Ingram & Yu-Hung Hong eds., 2008), https://www.lincolninst.edu/sites/default/files/pubfiles/2105_1427_LP2007-ch05-Political-Structure-and-Exclusionary-Zoning-Are-Small-Suburbs-the-Big-Problem_0.pdf; *see also* Nolon, *supra* note 1, at 1017–18 (discussing the politics of local land use). *But cf.* Jon Hurdle, *'Warehouse Sprawl' Has Some NJ Towns Considering Acting Together on Zoning*, N.J. SPOTLIGHT NEWS (Nov. 6, 2020), https://www.njspotlightnews.org/2020/11/warehouse-

requires a comprehensive solution through which adjoining municipalities must reconcile differences in their respective land use policies and decisions that respects local decision-making while supporting cooperative regional planning.

This Note will analyze New Jersey statutes and case law concerning planning and zoning powers provided to municipalities and the consideration of adjoining municipalities in land use decisions. It concludes that the state's current statutory framework fails to effectuate "regional" land use consideration. Part I of this Note explores the background of New Jersey's enabling statute, the Municipal Land Use Law ("MLUL"), which grants the authority for planning policy and zoning regulation to local government. Part II examines state jurisprudence interpreting New Jersey's MLUL. This Part will analyze decisions made by the courts upholding the requirement that municipal governments recognize the interests of neighboring towns when enacting or altering their land use policies and identify gaps in the law that may contribute to the increasing friction today. This Part will also discuss the changing demographics of the state since the passage of the MLUL in the mid-1970s. As development increases around the state, a more robust policy is needed to encourage regional land use planning while protecting local decision-making, especially for municipalities that wish to retain present quality of life and character. Finally, Part III proposes a statutory solution to advance the regional impact objective declared in the MLUL by requiring adjoining municipalities to resolve their differences through shared land use decision-making bodies, building upon the regional boards already permitted by the MLUL and recent legislative initiatives to combat large warehouse developments.

To that end, this Note will argue for a duty to reconcile planning policies and zoning regulations between municipalities—especially in areas along municipal borders—through joint proceedings consisting of the acting municipality and its adjoining neighbor(s). As socio-political issues outpace judicial doctrine and decision-making, as well as legislative solutions, action needs to be taken to harmonize and control the regional effect of land use policy by the numerous local governments throughout the state. Importantly, this Note does not argue for top-down state planning jurisdiction but for an expanded duty in the inter-municipal resolution to the "unneighborly" problem that preserves the other dictates of local control.

sprawl-worries-rural-new-jersey-truck-congestion-rural-roads-threat-quality-of-life/ (noting that some New Jersey towns are discussing regional cooperation).

I. STATE CONSTITUTIONAL AND STATUTORY BACKGROUND

Local land use controls are a phenomenon of modern state constitutional and statutory creation.[8] The State delegates authority to local governments—often through what is referred to as enabling statutes—to regulate the use of land within each municipality's political boundaries.[9] The broad enabling statute, falling within the police powers of a state to preserve the welfare of its citizenry,[10] sets forth the duties, responsibilities, and standards for zoning regulation.[11] Each municipality may then enact its own land use laws—ordinances—for the purpose of furthering the regulated development of that community.[12] However, before land use ordinances may be enacted in New Jersey, the municipality must adopt a comprehensive plan—known as a master plan under New Jersey law—that describes the objectives of the municipality to be achieved through its planning and zoning powers.[13] Essentially, this master plan serves, in part, as the land use mission and vision of the town.

In New Jersey, the state constitution delegates planning and zoning regulation to municipal decision-makers.[14] The state legislature regulates, and local subdivisions of the state effectuate, this power

8. *See* GERALD A. FISHER, LOCAL GOVERNMENT LAW: A PRACTICAL GUIDEBOOK FOR PUBLIC OFFICIALS ON CITY COUNCILS, COMMUNITY BOARDS, AND PLANNING COMMISSIONS 159 (2021); *see also* 8 EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS §§ 25:3, 25:54 (3d ed. 2022).

9. *See id.* § 25:55; *see also* Riggs v. Long Beach Twp., 538 A.2d 808, 812 (N.J. 1988) ("Municipalities do not possess the inherent power to zone, and they possess that power, which is an exercise of the police power, only insofar as it is delegated to them by the Legislature."). As municipal zoning ordinances became a popular vehicle for regulating the use of real property, the United States Department of Commerce, under the leadership of then-Secretary Herbert Hoover, published a template zoning enabling statute for the states' consideration. FISHER, *supra* note 8, at 160. For the text of the proposed standard act, see ADVISORY COMM. ON ZONING, U.S. DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 4–13 (rev. ed. 1926), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf.

10. *See* FISHER, *supra* note 8, at 161; *see also* 8 MCQUILLIN, *supra* note 8, § 25:57.

11. *See, e.g.*, N.J. STAT. ANN. § 40:55D-65 (West 2013) (describing the permissible contents of a zoning ordinance under New Jersey's Municipal Land Use Law).

12. *See* FISHER, *supra* note 8, at 160–61.

13. *See id.* at 162–64; N.J. STAT. ANN. § 40:55D-62 (West 2013) ("Such [zoning] ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan . . . ."); *see also* FRANK S. SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA 61–62 (1962) (stating that planning encompasses more than mere zoning but describes the policies for a particular area of land and that master plans do not control the governing body of the municipality).

14. *See* N.J. CONST. art. IV, § 6, ¶ 2.

through the Municipal Land Use Law,[15] the most recent revision to the state's zoning enabling statute. Below, Section I.A recounts a brief history of the relevant sections of the current state constitution, including the state's policy of providing local government control over particular affairs. Section I.B discusses the MLUL and the practical implications this statute has on a municipality's land use decision-making bodies.

A. The 1947 Constitution and Home Rule

The current version of New Jersey's state constitution was adopted in 1947, replacing its century-old predecessor and becoming the third installment for the Garden State.[16] At the call of a constitutional convention, delegates considered, among other issues, the expansion of municipal zoning authority and the question of whether the State should provide for home rule by municipalities.[17] The expansion of municipal zoning authority was adopted by the delegates at the convention and remains part of the state constitution today, reading "municipalities . . . may [under the laws of the legislature] adopt zoning ordinances limiting and restricting to specified districts and regulating therein . . . and the exercise of such authority shall be deemed to be within the police power of the State."[18] The policy of "home rule" was also adopted by the delegates, solidifying in the state constitution a principle found only in prior legislation.[19] As a home rule state, New Jersey's state constitution

15. *See* N.J. STAT. ANN. §§ 40:55D-2 (West 2016), -25, -40.6 (West 2023).

16. *See New Jersey Constitutions*, N.J. STATE LIBR., https://www.njstatelib.org/research_library/legal_resources/nj_legal_resources/constitutions/ (last visited Feb. 21, 2023).

17. 3 N.J. CONSTITUTIONAL CONVENTION 548 (1947), http://www.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv3/NJConst3n548.html (demonstrating that delegates debated expanding municipal zoning authority); Bayard H. Faulkner, *New Road to Home Rule*, 44 NAT'L MUN. REV. 189, 189 (1955) (noting that delegates debated providing for home rule by municipalities).

18. N.J. CONST. art. IV, § 6, ¶ 2. The current text was revised at the 1947 State Constitutional Convention to expand a "deficient" method under the Constitution of 1844. *See* 2 N.J. CONSTITUTIONAL CONVENTION 1073 (1947), https://historicalpubs.njstatelib.org/searchable_publications/constitution/constitutionv2/NJConst2n1073/ ("The present zoning provision is limited to permitting municipalities to regulate and limit buildings and structures. It is considered that the existing provision is seriously deficient in this respect.").

19. *See The League's History by Decade, 1910*, N.J. STATE LEAGUE OF MUNS., https://www.njlm.org/176/_1910 (last visited Feb. 20, 2023) (discussing passage of the Home Rule Act of 1917).

provides significant authority to its municipalities to control their own affairs and regulate certain matters.[20] The home rule provision reads,

> this Constitution and . . . any law concerning municipal . . . government . . . shall be liberally construed in their favor. [Their] powers . . . shall include . . . those of necessary or fair implication . . . and not inconsistent with or prohibited by this Constitution or by law.[21]

The policy of allowing municipalities to maintain a degree of independent authority remains an important issue in today's state and local politics.

However, the state constitution does not empower a municipality to contradict the state legislature's broad authority to set state-wide policy, which would usurp any delegated powers.[22] Both the zoning and home rule provisions of the state constitution preclude a municipality from veering astray of state law, generally.[23] The courts will determine whether a municipal ordinance, for land use purposes or otherwise, violates the authority delegated to it by the State using a three-part test.[24] Furthermore, the courts have limited the power of a municipality's governing body (the legislative function of local government) to usurp a land use board (an instrumentality of the municipality) where the governing body has no legitimate interest in the review of the land use board's decisions.[25] Therefore, municipalities—and their governing

20. Joseph T. Kelley III & Jason Klein, *Get on the Ban Wagon: Local Cannabis Opt Outs*, N.J. LAW., Oct. 2018, at 44, 46.

21. N.J. CONST. art. IV, § 7, ¶ 11.

22. *See* Timber Glen Phase III, LLC v. Twp. of Hamilton, 120 A.3d 226, 233 (N.J. Super. Ct. App. Div. 2015) ("However, '[n]either the constitutional nor the statutory provision is a blanket authorization to pursue the governing body's particularized notion of the public good or to legislate beyond the bestowed powers, express or implied.'"); Grogan v. De Sapio, 94 A.2d 316, 316–17 (N.J. 1953) ("[L]iberal construction of statutes does not connote an extension of the boundaries delineated by the statutory phraseology as commonly used" and to "permit a municipality to impose conditions outside the statute on the exercise of its statutory powers would inevitably result in the subversion of those powers to purposes never contemplated by the Legislature under the most liberal construction" (quoting Magnolia Dev. Co. v. Coles, 89 A.2d 664, 666 (N.J. 1952))).

23. *See supra* note 22; *see also* N.J. CONST. art. IV, §§ 6–7; Jacoby v. Zoning Bd. of Adjustment, 124 A.3d 694, 699 (N.J. Super. Ct. App. Div. 2015).

24. Dome Realty, Inc. v. City of Paterson, 416 A.2d 334, 341 (N.J. 1980). The *Dome Realty* court provided that "the first question is whether the State Constitution prohibits delegation of municipal power on a particular subject because of the need for uniformity of regulation throughout the State." *Id.* The court then analyzed whether the State has in fact delegated such authority, and finally, "whether any delegation of power to municipalities has been preempted by other State statutes dealing with the same subject matter." *Id.*

25. Dover Twp. v. Bd. of Adjustment, 386 A.2d 421, 425 (N.J. Sup. Ct. App. Div. 1978) (citing Bergen Cnty. v. Port of N.Y. Auth., 160 A.2d 811 (N.J. 1960)).

bodies—retain broad authority to regulate their own affairs where the matter is not preempted by the state legislature or made the responsibility of another decision-maker by law.[26]

B. New Jersey's Local Land Use Law

One expressly enumerated power delegated by the State to municipalities is the authority to enact zoning ordinances regulating the territory under the control of the local governing body.[27] The state constitution authorizes the legislature to "enact general laws under which municipalities . . . may adopt zoning ordinances" and is justified as falling under the State's—and through it, the municipalities'—police powers.[28] One of the legislative purposes of the MLUL is to "encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare"[29] and "ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole."[30] The latter provision of the MLUL describes a public policy insisting that municipal governments consider the impact of its decisions on the region.[31] But as will be shown in a later part of this Note, the lofty legislative purpose to promote good planning in the region through each municipality does not go far enough in practice.[32]

Where the State has delegated the important political and economic tool to local government that is planning and zoning, it is unreasonable to expect a municipality to give due consideration to the interests of its neighbors when enacting and applying its regulations. It is especially unlikely that due consideration will be given when the interests of the neighboring municipality conflict with the acting municipality's objectives. As development continues in the Garden State, albeit at a

26. *See, e.g.*, Horner v. Twp. Comm, 420 A.2d 1033, 1037 (N.J. Sup. Ct. App. Div. 1980) ("The principle of preemption is founded upon the proposition that the 'municipality may not exert the delegated police power in terms which conflict with a State statute, and hence a municipality may not deal with a subject if the Legislature intends its own action, whether it exhausts the field or touches only part of it, to be exclusive and therefore to bar municipal legislation.'" (quoting State v. Ulesky, 252 A.2d 720, 722 (N.J. 1969))).

27. *See* N.J. CONST. art. IV, § 6, ¶ 2 (permitting "zoning ordinances").

28. *Id.* ("[T]he exercise of such authority shall be deemed to be within the police power of the State.").

29. N.J. STAT. ANN. § 40:55D-2(a) (West 2016).

30. *Id.* § 40:55D-2(d).

31. *See id.*

32. *See* discussion *infra* Parts II, III.

declining rate for some land use types,[33] the ability of municipalities to contain the spill-over effects of their land use decisions will become increasingly difficult. It will be more challenging to continue the policy of providing greater deference to a municipality's local decision-making when weighed against the general welfare, safety, and quality of life of the broader regional community.

1. Municipal Decision-Makers and the Political Functions in Land Use Policy

Understanding local land use under the MLUL requires at least a cursory understanding of the government entities involved and the types of regulations and policies adopted. The relevant instrumentalities of a municipality's government include the legislative governing body, such as a town council or township committee,[34] and the land use board(s), either combined in certain circumstances[35] or separated into a separate planning board[36] and zoning board of adjustment.[37] The primary tool in administering land use regulations is the zoning ordinance—local legislation adopted by the governing body of the municipality that determines the permitted uses and characteristics of defined areas.[38] The governing body exercises the delegated police power to enact and enforce

33. *See* RICHARD G. LATHROP & JOHN HASSE, CHANGING LANDSCAPES IN THE GARDEN STATE: LAND USE CHANGE IN NEW JERSEY 1986 THROUGH 2015, at 8–10, 12–13, 15, 51–52 (2020), https://doi.org/10.7282/t3-x1yc-dh86; Jon Hurdle, *NJ Warehouse Market Still Red-Hot Despite Economic Headwinds*, N.J. SPOTLIGHT NEWS (July 18, 2022), https://www.njspotlightnews.org/2022/07/red-hot-nj-warehouse-market-continues-runaway-development-ratables-jobs-environment-public-health/ ("Still, in the greater Philadelphia market, which includes South Jersey, there are 22.6 million square feet of industrial space under construction, 84% of which is being built speculatively."); *see also supra* notes 5–6 and accompanying text.

34. N.J. STAT. ANN. § 40:55D-4 (West 2021) (defining "governing body" as "the chief legislative body of the municipality").

35. N.J. STAT. ANN. § 40:55D-25(c) (West 2023). The statute provides, in relevant part, that the planning and zoning boards may be combined where either the population of the municipality is "15,000 or less," by ordinance. *Id.* § 40:55D-25(c)(1). Or when the planning board is made up of nine members and a voter referendum has approved the consolidation. *Id.* § 40:55D-25(c)(2). When the planning and zoning boards are combined, cases that would otherwise come before the zoning board require that certain officers be excluded from the proceedings. *Id.* § 40:55D-25(c)(1)–(2); *see also* N.J. STAT. ANN. § 40:55D-23 (West 2023) (enumerating the classes of membership on the planning board).

36. *See* § 40:55D-23.

37. *See* N.J. STAT. ANN. § 40:55D-69 (West 2004).

38. *See* Roger A. Cunningham, *Control of Land Use in New Jersey by Means of Zoning*, 14 RUTGERS L. REV. 37, 51 (1959). For a discussion of the different types of municipal governing bodies in New Jersey, see CTR. FOR GOV'T SERVS., FORMS OF MUNICIPAL GOVERNMENT IN NEW JERSEY 3 (2011).

land use policy through the municipal ordinance.[39] The state constitution and case law provide a level of deference to the land use policies and regulations a municipal governing body enacts, except where the matter is otherwise controlled by state law.[40]

The MLUL permits local government to create a planning board by ordinance,[41] the makeup of which includes residents and municipal officials.[42] The planning board exercises both a legislative policy-making function, e.g., when developing and reexamining the municipal master plan,[43] as well as a quasi-judicial function when hearing certain land use applications.[44] The planning board also reviews the official map, determining consistency with the master plan, and may serve in an advisory capacity to the governing body concerning ordinances, among others.[45] The master plan is discussed in more detail below.

The zoning board of adjustment, like the planning board, is a quasi-judicial board made up of residents who decide issues related to local land use regulations and the deviations sometimes necessary in some applications for development.[46] The specific powers of the zoning board include the ability to hear appeals of decisions made by an administrative officer enforcing a land use ordinance and to "decide requests for interpretation of the zoning map or ordinance."[47] The zoning board also has the power to grant relief from municipal ordinances—a variance—under subsections (c) and (d) of the MLUL for matters related to the nature of the property or the use regulated by the ordinance, respectively.[48]

39. *See* Cunningham, *supra* note 38, at 37 n.1, 46 n.44.

40. *See, e.g.*, Kaufmann v. Plan. Bd., 542 A.2d 457, 460 (N.J. 1988) ("Such land-use decisions are entrusted to the sound discretion of the municipal boards, which are to be guided by the positive and negative criteria set forth in the enabling statutes."). This Note discusses the level of deference provided to local governing bodies exercising their legislative decision-making power in land use as it relates to the planning and zoning processes. For discussion on the balancing test to determine municipal deference, see *infra* note 132. The scope of this discussion is thus limited.

41. N.J. STAT. ANN. §§ 40:55D-23(a), -24 (West 2023).

42. § 40:55D-23(a)–(b).

43. *See* N.J. STAT. ANN. § 40:55D-25(a)(1)–(3) (West 2023).

44. *See id.* § 40:55D-25(a); *see also* Zanin v. Iacono, 487 A.2d 780, 787 (N.J. Super. Ct. Law Div. 1984) ("[I]t is incorrect to describe a municipal planning board as purely 'ministerial.' Indeed there are instances in which a planning board acts in a quasi-judicial capacity.").

45. *See* N.J. STAT. ANN. §§ 40:55D-25, -26 (West 2023), -70 (West 2007).

46. *See* Lincoln Heights Ass'n v. Twp. of Cranford Plan. Bd., 714 A.2d 995, 1000 (N.J. Super. Ct. Law Div. 1998) ("[T]he law provides that hearings on site plan and variance applications before municipal boards are quasi-judicial proceedings . . . ."), *aff'd*, 729 A.2d 50 (N.J. Super. Ct. App. Div. 1999); *see also* N.J. STAT. ANN. §§ 40:55D-24, -71 (West 2023).

47. § 40:55D-70(a)–(b).

48. *See id.* § 40:55D-70(c)–(d).

2. Planning and Zoning Under the MLUL

The MLUL is the foundation for municipalities seeking to set up a land use policy within their respective territories. The enabling statute's provisions establish a framework for the regulation of development that can be summarily described as follows: a master plan,[49] zoning ordinances consistent with the master plan,[50] and variances to such zoning ordinances on case-by-case basis to effectuate the land use objectives of the municipality.[51] The actual MLUL is much more complicated, of course. Nevertheless, this tripartite synopsis serves as a roadmap for local land use policy and the challenges that follow.

The municipal master plan is a policy document adopted by the municipal planning board.[52] Whereas the governing body adopts a regulatory scheme that affects landowners and developers through ordinances,[53] the planning board develops an overall strategic plan of the municipality's resources through the master plan and its several elements.[54] The master plan may include several different elements, including statements on transportation circulation, utility services, community facilities and recreation, conservation, and more.[55] However, certain elements of the master plan are required prior to the enacting or amending of a zoning ordinance by the local governing body.[56] Specifically, the master plan must articulate the objectives of the municipality, both physically and socio-economically, as well as a land use element that discusses a rather large number of issues, including the topographical features of the town, water and air quality, environmental sustainability, population density, and development intensity.[57] A

49. N.J. STAT. ANN. § 40:55D-28 (West 2021).
50. N.J. STAT. ANN. § 40:55D-62 (West 2013).
51. N.J. STAT. ANN. §§ 40:55D-60 (West 2023), -70 (West 2007).
52. *See* Fischel, *supra* note 7, at 116–22.
53. *See* Cunningham, *supra* note 38, at 42–43, 51.
54. *See id.* at 39, 52–55.
55. *See* N.J. STAT. ANN. § 40:55D-28 (West 2021).
56. *See* N.J. STAT. ANN. § 40:55D-62(a) (West 2013); Manalapan Realty, L.P. v. Twp. Comm., 658 A.2d 1230, 1238 (N.J. 1995) ("The Master Plan does not have the operative effect of a zoning ordinance. But the land-use element of the Master Plan 'is required to be the basis for any zoning ordinance.'"); Pop Realty Corp. v. Springfield Bd. of Adjustment, 423 A.2d 688, 694 (N.J. Super. Ct. Law Div. 1980) ("[I]t is clear, under the [MLUL], that before a municipality may enact a new comprehensive zoning ordinance, a land use plan must have been prepared and adopted by the planning board as part of a municipal master plan.").
57. *See* § 40:55D-28. In addition to the mandatory statement of objectives, policies, and standards, and the comprehensive land use element, section 28(d) requires that a policy statement therein discuss the relation of the municipality to other "contiguous

master plan not only serves a purpose within the governance of the municipality's land use function but as a means by which the courts will weigh future ordinances and land use decisions.[58] For this and other reasons, the master plan is generally reevaluated from time to time by the planning board to ensure the land use-related goals of the municipality are current with new development.[59]

By contrast, the zoning ordinance is a more bona fide piece of municipal legislation. Once a municipality has the master plan in place to guide its land use principles, the governing body may then establish laws governing the use of land therein and define the appropriate level of development within specified zones.[60] Section 62 of the MLUL specifically provides:

> Such ordinance shall be adopted after the planning board has adopted the land use plan element . . . of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element . . . of the master plan or designed to effectuate such plan elements . . . . The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land.[61]

The governing body is further empowered by section 65 of the MLUL to include in the ordinance certain regulatory requirements to be satisfied by applicants.[62] Such acts permitted by the legislature involve use limitations of structures; the regulation of "bulk, height, number of stories, orientation, and size of buildings and the other structures"; the provision of planned development; the establishment of standards for improvements to land and the structures thereon; and other specific purposes.[63]

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municipalities," the county's master plan, the State Development and Redevelopment Plan, and the district's solid waste management plan. *Id.*

58. *See* Sophy Sedarat, *New Jersey Municipal Land Use Law: Constitutional Origin, Judicial Parameters*, 33 J. ENV'T L. & LITIG. 165, 177 nn.61–62 (2018).

59. N.J. STAT. ANN. § 40:55D-89 (West 2019) ("The governing body shall, at least every 10 years, provide for a general reexamination of its master plan and development regulations by the planning board, which shall prepare and adopt by resolution a report on the findings of such reexamination, a copy of which report and resolution shall be sent to the Office of Planning Advocacy and the county planning board.").

60. *See* Cunningham, *supra* note 38, at 52–53.

61. § 40:55D-62(a).

62. N.J. STAT. ANN. § 40:55D-65 (West 2013).

63. *Id.*

Once a municipal governing body has enacted a zoning ordinance, land development contrary to the ordinance is not necessarily prevented. Land use applicants may apply to the appropriate land use board, either the planning board or zoning board of adjustment, for a variance with respect to the ordinance.[64] The zoning board of adjustment, whose purpose and powers are described above, may hear appeals concerning the application and enforcement of a municipal zoning ordinance for specific site developments.[65] The zoning board may issue two types of variances under the MLUL, commonly referred to as (c) and (d) variances, named after their respective subsections.[66] A (c) variance allows for deviation from the zoning ordinance's requirements where nonconformance is due to the "physical characteristics of the land or the existing structure,"[67] or where the benefit to the property in relation to the community's land use policies "substantially outweigh[s] any detriment."[68] A (d) variance permits departure from a zoning ordinance for "special reasons" when the deviation relates to use or a principal structure, expansion of nonconforming use, conditional use, floor-area ratio, density, and height.[69]

3. Regional Planning Tools Available to Municipalities and Counties

In addition to establishing the powers and duties of municipal land use decision-makers, the MLUL authorizes combinations of municipalities and counties to enter "joint agreement[s] providing for the joint administration of" the land use matters under the municipal or county jurisdiction.[70] Article 10 of the MLUL thus permits *voluntary* inter-municipal agreements for planning and zoning functions and provides a framework for two or more municipalities to organize such a relationship. Within Article 10, sections 77 through 88 (save for section 88.1) were adopted by the state legislature in 1975 as part of the original MLUL.[71] Nevertheless, few towns in New Jersey have implemented agreements to establish regional land use boards for planning and

64. N.J. STAT. ANN. § 40:55D-70(c)–(d) (West 2007).
65. *See id.* § 40:55D-70.
66. *See id.*
67. Jacoby v. Zoning Bd. of Adjustment, 124 A.3d 694, 707 (N.J. Super. Ct. App. Div. 2015) (citing Lang v. Zoning Bd. of Adjustment, 733 A.2d 464, 470 (N.J. 1999)); *see* § 40:55D-70(c)(1).
68. § 40:55D-70(c)(2); *Jacoby*, 124 A.3d at 707.
69. § 40:55D-70(d)(1)–(6).
70. *See* N.J. STAT. ANN. § 40:55D-77 (West 2023).
71. *See* 1975 N.J. Laws 1171–75.

zoning.[72] Perhaps it is the politics involved in the planning and zoning process at the local level[73] that has left voluntary regional planning and zoning largely unimplemented by municipalities that could benefit the most from the practice.

Inter-municipal planning is not novel, nor is it confined to New Jersey.[74] The State of New York's land use law has provided for inter-municipal agreements for planning and land use control longer than article 10 of the MLUL has in New Jersey.[75] Professor John R. Nolon of Pace Law School's Land Use Law Center discusses extensively the benefits of cooperation between New York municipalities—and local governments, generally—on planning and zoning matters.[76] Professor Nolon enumerates the several instances where multiple municipalities in New York have formed "intermunicipal agreements" with neighboring towns.[77] Despite Professor Nolon characterizing the growing use and scope of these agreements,[78] he ultimately concludes that while the voluntary agreement framework seems to be used productively and widely, "[t]he problem with this generalization is that these experiences are highly particular and occur in all too few locations."[79]

72. *Cf. Towns Too Close to Ignore Regional Planning*, N.J. HILLS MEDIA GRP. (Oct. 11, 2001), https://www.newjerseyhills.com/towns-too-close-to-ignore-regional-planning/article_4bc3557c-f2c6-5438-82b8-236735ed0b98.html. The legislature has mandated regional planning in specific locations by enacting regional development laws. *See Regional Planning*, N.J. FUTURE, https://www.njfuture.org/issues/planning-and-governance/regional/ (last visited Feb. 21, 2023) (discussing the Hackensack Meadowlands Development Act, Pinelands Protection Act, and the Highlands Water Protection and Planning Act).

73. *See supra* note 7 and accompanying text.

74. *See* John R. Nolon, *Comparative Land Use Law: Patterns of Sustainability*, 37 URB. L. 807, 830–31, 837, 848 (2005) (discussing cooperation in planning and land use control between local governments in Tanzania; Ontario, Canada; and Washington, United States). In Tanzania, "[t]he Act refers to 'land sharing arrangements between pastoralists and agriculturalists,' and villages are authorized to enter into joint land use agreements with any other village council concerning the use of land by one or more groups." *Id.* at 831. Professor Nolon continues, "Ontario's land use planning act, adopted in 1990, provides for the formation of provincial and municipal planning boards, *intermunicipal planning advisory committees*, the creation of zoning regulations, site plan control, and the protection of environmental resources and natural features." *Id.* at 837 (emphasis added). Finally, "Washington State's Growth Management Act aims to concentrate development more effectively by requiring county governments to adopt comprehensive land use plans that designate urban and rural areas and that prohibit urban densities from occurring in rural areas." *Id.* at 848 (footnote omitted).

75. *See* Nolon, *supra* note 1, at 1019 (discussing how New York's allowance of inter-municipal compacts "leads the nation" in such regional planning tools).

76. *See id.* at 1019–21.

77. *See id.* at 1014, 1020–33.

78. *See id.*

79. *See id.* at 1039.

New Jersey's MLUL provides municipalities with a clear framework to adopt planning policies, enact zoning regulations and land use controls, and deviate from those regulations when necessary. The MLUL also provides those municipalities with the means to cooperate as a regional unit in exercising these land use responsibilities; nevertheless, many do not. Part II, below, discusses the regional consideration required of municipal land use decision-makers when acting within their exclusive jurisdiction—when the municipality has not agreed to share decision-making with its neighbors. When towns do not form an agreement, adjacent municipalities and their citizens are left to the judicial process to enforce neighborly zoning practices required of the acting municipality.

II. MUNICIPAL LAND USE AFFAIRS IN NEW JERSEY COURTS

In addition to the statutory framework enacted by the State through the MLUL, the state courts have developed a rich body of case law interpreting the statute in the five decades since its passage.[80] This Part will show when and to what degree the courts have held a municipal decision-making body to have insufficiently considered the regional assessment of its actions. Moreover, this Part will show inconsistent determinations of municipal land use decision-making capability and analyze the vulnerabilities that such gaps in law and analysis create when considering the dilemma of land use control across the state. As shown in Part I, municipal governing bodies and land use boards are part of a political process.[81] Despite the fairness and reasonableness impressed upon these bodies by the court, these decision-makers, by their very nature, have cause to favor their own municipality over others. This inherent bias weakens the impact of regional planning objectives set by the legislature and ultimately requires the court to step into the land use decision-making function.

A. The Court's Focus on Regionality and Neighboring Towns

After reviewing the summary framework of municipal land use control (master plan, zoning ordinances, decisions on variances to such ordinances)[82] and the public meetings that accompany such decisions discussed in the previous Part,[83] it becomes clearer that issues of regional

80. *See* N.J. CONST. art. IV, § 6, ¶ 2; *see also supra* text accompanying notes 14, 40.
81. *See supra* note 7 and accompanying text.
82. *See* discussion *supra* Section I.B.2.
83. *See* discussion *supra* Section I.B.1.

consideration and good policy development may be frustrated—perhaps even evaded—in the local political process. Questions arise as to who may participate as a member of the public at these crucial meetings and how a municipal land use decision-maker must consider the MLUL's mandate that "development of individual municipalities . . . not conflict with the development and general welfare of neighboring municipalities."[84] New Jersey courts have clarified these issues both with prior land use statutes and the present MLUL.

1. Regional Consideration and Balancing Interests

New Jersey courts have historically focused on the regional impact of land use decisions, even prior to the current MLUL.[85] In *Borough of Cresskill v. Borough of Dumont*,[86] the New Jersey Supreme Court considered the validity of "spot zoning"[87] in litigation alleging that an ordinance had a negative impact on the regional public welfare, was inconsistent with any master plan, and exceeded the zoning powers conferred by the legislature.[88] There, Dumont's governing body amended the zoning law of a particular block located in a mostly residential neighborhood to permit a commercial use.[89] Cresskill, together with the similarly residential municipalities of Demarest and Haworth and multiple individuals, sued to block the change.[90]

The Supreme Court of New Jersey affirmed the trial court's holding that the zoning decision did not "promote the public welfare" or align with the comprehensive plan of Dumont or its neighbors and that the decision

84. *See* N.J. STAT. ANN. § 40:55D-2(d) (West 2016).

85. *See* Jacoby v. Zoning Bd. of Adjustment, 124 A.3d 694, 703–04 (N.J. Super. Ct. App. Div. 2015) ("[O]ur Supreme Court recognized that 'the most appropriate use of any particular property depends not only on all the conditions . . . within the municipality . . . but also on the *nature of the entire region* . . . .'" (quoting Duffcon Concrete Prods. v. Borough of Cresskill, 64 A.2d 347, 349–50 (N.J. 1949))).

86. 104 A.2d 441 (N.J. 1954).

87. Spot zoning is the change of a particular piece or pieces of property within a larger portion of a municipal zoning map that creates an inconsistency between that property and the surrounding zone. *See* WILLIAM M. COX & STUART R. KOENIG, NEW JERSEY ZONING & LAND USE ADMINISTRATION § 10-8.2, at 200 (Jonathan E. Drill & Lisa A. John-Basta eds., 2022); *see also* Gallo v. Mayor, 744 A.2d 1219, 1225 (N.J. Super. Ct. App. Div. 2000) (describing spot zoning as "the use of the zoning power to benefit particular private interests rather than the collective interests of the community"). As exemplified in the case, the block in question and surrounding areas were zoned for residential use prior to an amendment adopted by the Dumont governing body to zone the block for business commercial use. *See Creskill*, 104 A.2d at 443. The issue of spot zoning is beyond the scope of this Note but may be considered an issue to adjoining municipalities, among others.

88. *See Creskill*, 104 A.2d at 444–47.

89. *See id.* at 443.

90. *See id.* at 442.

failed to achieve the purposes of the land use act.[91] Analyzing provisions of the prior land use law (the Municipal Planning Act) governing impact studies and permitting the scope of those studies to include area beyond the municipal territory, the *Cresskill* court reasoned that Dumont's spot-zoned ordinance impermissibly approved a land use that was inconsistent with the surrounding area, specifically the adjacent residential neighborhood.[92] Although the court discussed the duty to consider regional implications of land use decisions,[93] its holding emphasized the land use act's proper procedure for alleviating the regulatory pressure of zoning ordinances: the local zoning board of adjustment.[94] Contrary to that procedure, the governing body's zoning change encroached upon the power of the zoning board to grant permission to an applicant to deviate from the local land use regulations.[95] The court concluded that, had the issue of a zoning variance for the property been presented to the zoning board, proper

91. *See id.* at 444, 448.

92. *See id.* at 446–47 (citing N.J. STAT. ANN. § 40:55-1.11, *repealed by* Municipal Land Use Law, 1975 N.J. Laws 1107–82). The court discussed two statutes here. First, the court cited the older N.J. STAT. ANN. § 40:55-10, which required a municipal decision-maker to give "[d]ue regard" to neighboring municipalities when developing the master plan. *See Creskill*, 104 A.2d at 446. However, the court then immediately stated that the statute was repealed by the Municipal Planning Act of 1953. *Id.* (citing § 40:55-1.11). Whereas the former act specified *due regard* when developing the comprehensive plan, the 1953 statute provided merely that planning boards "may include in its scope Areas outside the boundaries of the municipality." *Id.* at 447 (citing § 40:55-1.11). Thus, despite the court noting that the legislature expanded the regional consideration when passing the 1953 law, the actual language fails to convey as much.

Second discussed is N.J. STAT. ANN. § 40:55-1.12. *See* N.J. STAT. ANN. § 40:55-1.12, *repealed by* Municipal Land Use Law, 1975 N.J. Laws 1107–82. Perhaps the court overemphasized this section, which provided that the purpose of the master plan "shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality and its environs." *Cresskill*, 104 A.2d at 446 (citing § 40:55-1.12). Requiring a purpose of the master plan to promote regional harmony is less substantial than a duty to give *due regard* to neighboring towns, language missing from the amended 1953 land use law.

93. *See Cresskill*, 104 A.2d at 445–47. The courts of other jurisdictions have cited to *Cresskill*'s recital of the obligation to consider regional impact. A dissenting opinion by Judge Breitel of the New York Court of Appeals reads:

> Admittedly there is a strong presumption favoring the municipality's delegated authority to regulate land uses within its own territory. [The county law], however, impinges on that authority and a court may find overriding considerations sufficient to require overriding that authority . . . . Any change in zoning of the parcel, therefore, would have its greatest effect on [the neighboring town], and only an incidental effect on [the host town].

Town of Bedford v. Vill. of Mount Kisco, 306 N.E.2d 155, 161–62 (N.Y. 1973) (Breitel, J., dissenting) (citations omitted) (citing *Cresskill*, 104 A.2d 441).

94. *See Cresskill*, 104 A.2d at 447.

95. *Id.* at 448.

consideration would have been given to the master plan's purpose, a procedure which the court spends a considerable amount of its opinion reviewing.[96]

Moreover, the *Cresskill* court noted little need to answer the question of whether a foreign municipality and residents of the same had standing to challenge the altered zoning ordinance.[97] Nevertheless, the court succinctly stated that while reviewing the requirement for regional consideration in a master plan, the governing body of Dumont must provide to the residents of an adjoining municipality the same rights—to speak and protest a change in zoning—that it would provide to its own residents.[98] Although this dicta by the court does not provide a bright-line right to challenge neighboring land use decisions outright, such a statement does, at the very least, underscore the voice provided to concerned neighbors at important land use hearings.

Since *Cresskill*, however, the state legislature has repealed the previous law and enacted a new enabling law. The current Municipal Land Use Law of 1975 altered the statutory language examined in *Cresskill* while maintaining the general requirement that regional consideration be given in certain land use decisions.[99] The court's analysis concerning regionality is similar under the MLUL but is expanded by the criteria examined when a land use decision-maker can grant a variance under the law.[100] Recently, in *Jacoby v. Zoning Board of Adjustment*,[101] the court considered whether a zoning board is required to consider the surrounding characteristics, including historical, scenic, and aesthetic factors, of both the acting and neighboring towns when granting a variance to a developer.[102] Importantly, *Jacoby* procedurally

96. *Id.* at 446.

97. *Id.* at 444 ("It is therefore immaterial whether the municipal and remaining individual plaintiffs have adequate status to challenge the ordinance and the question is therefore reserved."). For more on the subsequent discussion by the court on this issue, see Dover Twp. v. Bd. of Adjustment, 386 A.2d 421, 425–26 (N.J. Super. Ct. App. Div. 1978) ("Practical politics being what they are, one can readily foresee lively wrangling among governmental units if each may mount against the other assaults . . . to vindicate the public right." (quoting Bergen Cnty. v. Port of N.Y. Auth., 160 A.2d 811, 817 (N.J. 1960))).

98. *Cresskill*, 104 A.2d at 445–46 ("At the very least Dumont owes a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights as they would to those of residents and taxpayers of Dumont.").

99. *See, e.g.*, N.J. STAT. ANN. §§ 40:55D-2(d) (West 2016), -28(d)(1)–(4) (West 2021), -70(d) (West 2007).

100. *See* § 40:55D-70(c)–(d).

101. 124 A.3d 694 (N.J. Super. Ct. App. Div. 2015).

102. *Id.* at 703–05.

differs from *Cresskill* in that it presents a challenge to a land use board's decision rather than a governing body's legislative enactment.[103]

Land use decisions like the granting of variances, among others, require the quasi-judicial determination discussed previously.[104] Arguably, zoning decisions by land use boards are more controversial than a governing body's enactment of a land use ordinance because zoning cases can arise more often and—rather than changing zoning law and policy, broadly—ask to *deviate* from the law already purposely established.[105] Such was the case in *Jacoby*, where a developer sought a height variance,[106] among others, from the Englewood Cliffs zoning board to erect an eight-story building.[107] After conducting six hearings on the matter, the zoning board passed a resolution granting the variance with findings that the development fit within the local master plan and improved the surrounding general welfare.[108] The plaintiffs, who were "residents in the community," sued to block the zoning board's decision, including the height and bulk variances, and appealed the trial court's judgment in favor of the board.[109]

The appellate division concluded that the zoning board did not satisfy its duty to consider the regional impact of its decision to grant the height variance and held that the regional consideration is necessary in a board's analysis of the "special reasons" in its decision.[110] The *Jacoby* court analyzed the zoning board's decision for both the positive[111] and negative[112] criteria necessary for obtaining a variance.[113] First, in its

103. *Compare id.* at 699, *with Cresskill*, 104 A.2d at 442–44.

104. *See* discussion *supra* Section I.B.1.

105. Zoning ordinances are the items of legislation passed by the municipal governing body. *See* discussion *supra* notes 34–38. Variances and other land use applications that go before a planning or zoning board, however, come about when an applicant appeals a restriction on the property. *See* discussion *supra* notes 52–59, 64–69; *see also* § 40:55D-70.

106. *See Jacoby*, 124 A.3d at 694; § 40:55D-70(d)(6) (permitting "a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure"). Section 70(d) permits six total variances for "special reasons." § 40:55D-70(d).

107. *Jacoby*, 124 A.3d at 699.

108. *Id.* at 699–701.

109. *Id.* at 699.

110. *Id.*

111. The "positive" criteria requirement means an applicant must show "special reasons" as to why the decision-making board should allow the developer to deviate from the zoning ordinance's restriction(s). *Id.* at 702; § 40:55D-70(d).

112. The "negative" criteria requirement for seeking a variance demands that an applicant show the development would not cause "substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Grasso v. Borough of Spring Lake Heights, 866 A.2d 988, 992 (N.J. Super. Ct. App. Div. 2004) (quoting § 40:55D-70(d)).

113. *See Jacoby*, 124 A.3d at 702–08.

positive or "special reasons" analysis, the zoning board failed to investigate the reason why a nonconforming structure must be built on the property.[114] In other words, no good reason was supplied for why a 143.8-foot structure, instead of a thirty-five-foot structure that would have complied with the zoning ordinance, had to be built.[115] Second, the board's negative analysis failed to substantively mention the surrounding area and left out any consideration of surrounding historical sites that could be affected.[116] Due to the zoning board's failures, the court remanded the issue back to the board having given a clear recipe for what a new resolution should contain.[117]

Even if the protections discussed by the *Jacoby* court are assumed sufficient to protect municipalities from certain zoning decisions in another municipality, the building up—or urbanization—of an adjacent town, even if slowly, only lends support to that town's justification of continued development in the area.[118] Moreover, *Jacoby* lends insufficient predictability to the regional consideration requirement because (1) the court discussed regional consideration only as it relates to a (d) variance;[119] (2) the height variance requested for the subject property was particularly and greatly beyond the zoning regulation of the surrounding area;[120] and (3) both developers and municipalities still lack a well-defined formula to determine what deviations may survive regional consideration and what might not.

114. *Id.* at 702–04.

115. *Id.* at 702–03 (citing *Grasso*, 866 A.2d at 988).

116. *Id.* at 705–06.

117. *Id.* at 708. A similar disposition was ordered in *Grasso*, where the court remanded the issue back to the local zoning board for "further development" by the board concerning the requested variance. *Grasso*, 866 A.2d at 996.

Decisions made by planning or zoning boards that contain sufficient evidence as to the board's findings of fact and conclusions of law will likely lead to the court upholding the decision upon challenge. *See, e.g.*, Richmond URF, LLC v. Zoning Bd. of Adjustment, No. A-2977-14T1, 2016 WL 4262578, at *7 (N.J. Super. Ct. App. Div. Aug. 15, 2016) (per curiam) (upholding a zoning board decision to grant height variance where the board conducted hearings and solicited advice from local historic commission); Zafar v. Zoning Bd. of Adjustment, No. A-1608-18T4, 2019 WL 7168665, at *6 (N.J. Super. Ct. App. Div. Dec. 24, 2019) (per curiam) ("[B]ecause the record contains substantial evidence supporting the Board's decision, we conclude it did not act in an arbitrary, capricious, or unreasonable manner in determining that [the development application] qualifies as a prior legal non-conforming use [under section 70(d) of the MLUL].").

118. *Cf.* Holloway v. Zoning Bd. of Adjustment, No. A-4405-15T4, 2019 N.J. Super. Unpub. LEXIS 2233, at *22 (N.J. Super. Ct. App. Div. Oct. 30, 2019) ("Moreover, the project was consistent with the surrounding neighborhood and with the surrounding area. As [the developer's] planner had pointed out during his testimony, two other buildings in the vicinity were approved for twelve stories.").

119. *See Jacoby*, 124 A.3d at 702.

120. *See id.* at 703.

However, not all cases challenging a neighboring municipality's planning or zoning decision will be struck down by the courts. In the case of *Borough of Allendale v. Township Committee*,[121] the court held that the "'inherently beneficial' use" of affordable housing being developed on newly rezoned land abutting a fully developed neighboring town evinced a use that would not be struck down.[122] According to *Allendale*, a state mandated development of large-scale housing, even discretionarily placed along the border abutting a developed neighbor, does not trigger the scrutiny laid down by *Cresskill* and the MLUL because it is presumptively beneficial and the rezoned lot so chosen was "particularly suited."[123] But this begs the question of what the outcome would have been had both the acting and adjacent towns not been fully developed. Alternatively, what if both towns had been equally developed?

More so, the standard in *Allendale* begs the policy question, at least, whether towns should be permitted to move affordable housing or other *beneficial use* developments to the borders where it can burden a neighboring municipality and leave the acting municipality minimally affected. What happens when the tax *benefit* of new development is attributed to the acting municipality, but any other *burden* of development is received by its neighbor? These particular but pertinent questions seem to have been evaded by the courts.

2. Who Gets Notified of Changes?

The previous Section shows that a challenge to a neighboring municipality's zoning ordinance amendment or development application decision can be brought by both towns and individuals.[124] The ability for either the government or an individual to sue provides more opportunity for neighboring decision-makers to be held accountable. But who has the

121. 404 A.2d 50 (N.J. Super. Ct. Law Div. 1979), *aff'd*, 426 A.2d 73 (N.J. Super. Ct. App. Div. 1981).

122. *See id.* at 52 ("If a developing municipality must 'bite the bullet' and rezone for least-cost housing, its fully developed neighbors must endure the inconvenience of potential increased traffic and decreased property values.").

123. *See id.* The court reasons that,

> Since the rezoned land lies entirely in Mahwah, traditional home rule concepts would ordinarily cloak the ordinance with a presumption of validity. But the new [MLUL] mandates a regional approach to these problems. Both municipalities have an interest in this contiguous land and neither is entitled to the benefit of presumption . . . . Rezoning to provide a fair share of least-cost housing promotes the general welfare. As such, it is tantamount to providing an "inherently beneficial" use, and positive aspects should be weighed heavily against zoning harm in determining validity.

Id. at 51–52 (citations omitted).

124. *See supra* Section II.A.1.

right to be notified of those land use changes? As previously discussed, there are numerous times when a municipal land use matter requires procedural notice to certain individuals,[125] including owners of property subject to rezoning and those within a certain distance of a proposed development application.[126] But statutory notices are not necessarily a reliable means for communicating with the public or ensuring community participation in land use matters. In *Gallo v. Mayor*,[127] the appellate division decided the question of whether zoning changes made by recommendation of the reexamination of the municipal master plan required notice to property owners in the 200-foot notice boundary.[128] The court answered no, holding that such changes, in comparison to the notice requirements of a zoning ordinance, did not require notice by the municipality evinced by the legislature's lack of such requirement in the statute.[129] By that standard, changes to the master plan affecting property owners both in the municipality and those adjoining the municipality could be vulnerable to adverse changes of land use policy and resulting regulations. In a situation where the property or zone borders another town, only the adjoining municipality would receive notice.[130] To the *Gallo* court, the notoriety of the master plan reexamination process is at least one reason why notice here can be foregone.[131]

Notice to individuals or municipalities will not very likely make or break either group's resolve to challenge a proposed zoning ordinance, master plan reexamination, amendments to both, or a land use decision. However, it does fit within the puzzle of an adversarial and procedural

125. *See supra* Section I.B.2.

126. *See* N.J. STAT. ANN. § 40:55D-11 (West 2023) ("Contents of notice of hearing on application for development or adoption of master plan"); N.J. STAT. ANN. § 40:55D-12 (West 2005) ("Notice of applications"); N.J. STAT. ANN. § 40:55D-12.4 (West 2005) ("Military facility commander; notice from municipality"); N.J. STAT. ANN. § 40:55D-13 (West 2016) ("Notice concerning master plan"); N.J. STAT. ANN. § 40:55D-15 (West 2016) ("Notice of hearing on development regulation; notice of action on capital improvement program or official map"); N.J. STAT. ANN. § 40:55D-62.1 (West 2016) ("Notice of proposed change to classification or boundaries of zoning districts").

127. Gallo v. Mayor, 744 A.2d 1219 (N.J. Super. Ct. App. Div. 2000).

128. *See id.* at 1220.

129. *See id.* at 1224–25.

130. *See* N.J. STAT. ANN. § 40:55D-89 (West 2019). It is important to note, however, that the statute only provides notice to adjoining municipalities after the "report and resolution have been prepared" by the planning board. *Id.*

131. *See Gallo*, 744 A.2d at 1224–25. *But see* Fulton's Landing, Inc. v. Borough of Sayreville, No. A-0873-13T4, 2015 WL 6112935, at *9–10 (N.J. Super. Ct. App. Div. Oct. 19, 2015) (distinguishing Sayreville's zoning ordinance from the facts of *Gallo* because Sayreville's ordinance was not adopted as part of a lengthy master plan reexamination period and was not a "broad-based review").

system that can shut out crucial stakeholders by means of overwhelming complexity coupled with bureaucratic politicking.

B. Limitations on the Deference to Municipal Control

For as much power and authority that is deferred to a municipality making its own land use policies, it is not unlimited.[132] This limitation has both positive and negative consequences when considering the desire for thoughtful regional planning. On one hand, the limitation of the land use policy deference to a municipality provides an opportunity for adjoining towns to question the validity of actions taken by the municipal decision-maker.[133] But on the other hand, limitations to municipal deference can inadvertently further frustrate the planning element of regional consideration.[134]

Municipal land use boards are limited in what they can consider when granting site plan approvals and variances. In *Dunkin' Donuts of New Jersey, Inc. v. North Brunswick Township Planning Board*,[135] the court held that a planning board's power to review a specific site plan's impact on traffic may be limited only to the property properly before the board as an application.[136] To account for existing traffic problems in an area already lawfully zoned is a matter for the governing body of the municipality.[137] So, where a land use board is determining whether to grant a site plan approval that must conform with standards established

132. For more information on the balancing test the court uses for determining whether an act by municipal government is within its authority authorized by the State, see Dome Realty, Inc. v. City of Paterson, 416 A.2d 334, 341 (N.J. 1980). In *Dome Realty*, the state supreme court articulates the test as follows:

> This Court has established a three-part analysis for determining the propriety of an exercise of legislative authority by a municipality. Under this approach the first question is whether the State Constitution prohibits delegation of municipal power on a particular subject because of the need for uniformity of regulation throughout the State . . . . If the Legislature may delegate authority in the area under scrutiny, the second question is whether the Legislature has in fact done so. The third part of the analysis reflects the Legislature's prerogative to divest delegated authority from a municipality. This final issue is thus whether any delegation of power to municipalities has been preempted by other State statutes dealing with the same subject matter.

Id. (citations omitted).

133. *Cf.* Borough of Cresskill v. Borough of Dumont, 104 A.2d 441, 445–46 (N.J. 1954); Jacoby v. Zoning Bd. of Adjustment, 124 A.3d 694, 703–04 (N.J. Super. Ct. App. Div. 2015).

134. *See* Andrew P. Gulotta, *Darkness on the Edge of Town: Reforming Municipal Extraterritorial Planning & Zoning in Illinois to Ensure Regional Effectiveness & Representation*, 28 SAINT LOUIS U. PUB. L. REV. 495, 514 (2009).

135. 475 A.2d 71 (N.J. Super. Ct. App. Div. 1984) (per curiam).

136. *Id.* at 73 (citing N.J. STAT. ANN. §§ 40:55D-7 (West 2009), -41(b), -42 (West 2023)).

137. *Id.*

by ordinance,[138] which in turn must conform with the master plan,[139] it cannot examine the regional impact of the application's possible traffic generation but only the specific "ingress to and egress from a site."[140] However, where a municipality's governing body has adopted an ordinance limiting uses that add to traffic congestion, such an analysis may be made by the land use board in its decision.[141]

Those limitations of towns hinder their ability to act on matters as they arise. The MLUL hinders case-by-case adaptation to the circumstances arising from regional impacts. Should municipality *A* approve the building of a development across the border from neighboring municipality *B*, *A*'s own land use board(s) would be powerless to stop encroaching development without *A's* governing body either (a) amending certain ordinances to allow for consideration of traffic issues and others, or (b) completely changing its zoning regulations.[142] The detailed factual basis for determining whether the regional impact consideration meets the statutory intent (including the balancing test for beneficial uses and the limitations on land use boards when approving applications) begs the need for clearer statutory standards and more proactive planning and land use decision-making tools for adjoining municipalities.

Moreover, should the political and economic benefit of land use decisions by one town that impacts another outweigh the latent or dormant effects that may plague the adjacent town's quality of life? With a limited window to appeal land use board decisions,[143] the state legislature cannot expect municipal decision-makers to know all the potentially dormant effects of a development application where testimony on the record shows little negative impact or difference, but practical usage of the property causes the opposite.

A proactive approach would reduce the burden on the courts to decide issues between municipal zoning ordinances as well as development applications based on such ordinances and local master plans. New statutory requirements to mandate reconciliation between municipalities on planning and zoning changes would better implement the state's public policy to encourage regional planning through local

138. *See* N.J. STAT. ANN. § 40:55D-50 (West 2013) ("Final approval of site plans and major subdivisions").

139. *See* N.J. STAT. ANN. §§ 40:55D-37 (West 2023), -38 (West 2013).

140. *Dunkin' Donuts of N.J.*, 475 A.2d at 73.

141. *See id.* ("But the authority to prohibit or limit uses generating traffic into already congested streets or streets with a high rate of accidents is an exercise of the zoning power vested in the municipal governing body." (citing N.J. STAT. ANN. § 40:55D-62 (West 2013))).

142. *See* discussion *supra* notes 99–102, 109–19.

143. *See* COX & KOENIG, *supra* note 87, § 40-3.2, at 827–33 ("Time Limits").

zoning,[144] without the need for State intervention by top-down planning.[145]

III. GETTING MUNICIPALITIES TO THE REGIONAL PLANNING "TABLE"

This Part presents a statutory solution to inter-municipal land use conflict. The need for this is twofold: a new statutory requirement prevents one municipality from overburdening its neighbor(s), while also allowing development to continue albeit in a graduated style that promotes the regional consideration purpose of the MLUL. A requirement to work together before conflicting policies and decisions arise will likely lessen the threat of costly and time-consuming court challenges. This Part first discusses legislation drafted specifically to ameliorate the large warehouse development issue threatening suburban and rural parts of the state. It then articulates supplements to the MLUL, based partly on the new legislation and existing regional land use decision-making, requiring reconciliation of land use policy differences in vulnerable areas on municipal borders before ex post challenges arise. The increased requirement for municipalities to cooperate is justified by the political, social, and economic benefits of good and predictable regulation of land use interests.

A. Recent Legislation and the Regional Planning Appetite

1. S. 3688: An Inceptive Proposal for Regional Communication on Warehouse Development

Legislation introduced in the 2020–2021 session, titled, "An Act concerning the approval of certain large warehouse development projects and related municipal land reassessment concerns, supplementing and amending [the MLUL]; and supplementing chapter 4 of Title 54 of the Revised Statutes,"[146] takes a step in the right direction. The bill, then referred to as S. 3688, promotes regional—albeit broad—planning for land use issues in New Jersey, focusing exclusively on the emerging issue of large warehouse development—one that threatens much of New Jersey's undeveloped, open space, and agricultural land.[147] Under the bill, a scheme of "host" and "adjoining" municipalities is created within

144. *See* N.J. STAT. ANN. § 40:55D-2(d) (West 2016).

145. In essence, requiring each municipality to reconcile differences of zoning policy within several feet of the municipal line would promote graduated regional planning. *See infra* Part III.

146. S. 3688, 219th Leg., 2020–2021 Sess. (N.J. 2021) (Senate Committee Substitute).

147. *See generally id.; see also* discussion *supra* note 4.

the existing MLUL framework.[148] The legislation provides that upon the receipt of an application for a large warehouse development by a host municipality's land use administrator, the administrator must provide notice to an adjoining municipality.[149] The formal notice allows the adjoining municipality to adopt "a resolution of regional concerns and deliver a copy of the resolution to the [adjoining municipality and land use applicant]."[150] Where the host municipality borders a county line, thus affecting an adjoining municipality in a different county from that of the host, the legislation requires that the State Planning Commission hold a regional impact hearing together with the involved parties.[151] Otherwise, the county planning board for the county in which the municipalities are located may conduct the regional impact hearing.[152]

The main feature of the bill requires a host municipality to prepare a "regional economic and land use impact report" on the subject development prior to a hearing by the county planning board or State Planning Commission.[153] This requirement likely aims to alleviate the burden of factual findings conducted otherwise at the local land use board meetings. The report would include at least (1) the extent of the development's retail sales capture; (2) the development's impact on retail space supply and demand in the region; (3) the effect on wages, benefits, and community income levels; (4) a projection of public service costs; (5) an estimated projection of revenues; (6) the impact on the county's and neighboring counties' retail sales; (7) the development's impact on the master plans of municipalities in the region; and (8) the effect on average vehicle miles traveled by retail customers.[154] The proposed codification of these important considerations would proactively require land use decision-makers to seek particular information on regional impact that courts could otherwise only speculate and remand for further findings by the land use board.[155]

148. S. 3688 §§ 2, 3. The bill defines "[h]ost municipality" as "the municipality where the application for development . . . has been filed." *Id.* § 3 (amending N.J. STAT. ANN. § 40:55D-4). "Adjoining municipality" is defined as "a municipality that shares a municipal boundary with another municipality." *Id.* § 2 (amending N.J. STAT. ANN. § 40:55D-3).

149. *Id.* § 4 (supplementing N.J. STAT. ANN. § 40:55D-12).

150. *Id.* § 5(b)(1).

151. *Id.* § 5(b)(3).

152. *Id.* § 5(b)(2).

153. *See id.* § 6 ("The preparation of a regional economic and land use impact report shall not be waived, and shall be completed and distributed no later than the date on which a hearing of a county planning board or the State Planning Commission is scheduled to first consider an application for a large warehouse development.").

154. *See id.* § 6(c)(1)–(8).

155. *See supra* Section II.A.

2. Limitations and Criticisms of the Bill

Despite the merits of the Senate Budget and Appropriations Committee's substitute legislation for modernizing the MLUL, the new legislation does not come without limitations or criticism. First, the scope of the legislation is unnecessarily limited to "large warehouse development."[156] To relieve municipalities of the burden of imposing development, any solution must include major development beyond large warehouses, meaning the legislation should apply to any development application of a certain size or character relative to the surrounding zone, not just a singular type of development.[157] Second, a regional impact hearing before a county planning board or the State Planning Commission will not, by itself, further the regional consideration purpose of the MLUL. Although the regional impact step may save municipalities from a large warehouse development if it can be shown to the respective regional decision-maker that it fails the criteria above, it will likely not solve the long-term issue of competing land use interests between neighboring municipalities. By replacing local decision makers, even if in disagreement, with county- or state-wide decision makers, this bill removes local control of land use policymaking. The bill also falls short of promoting graduated regional planning by requiring this extra step to the present development application process no matter where in the neighboring municipality the development is proposed. While such a framework may be defensible for type-specific (e.g., warehouse) controls, it would very likely not work for a comprehensive system governing all types of development applications.

Additionally, the bill faced criticism from stakeholder groups at the committee hearing.[158] With the more than seventy-five-year tradition of home rule in New Jersey,[159] altering the power of municipalities will prove difficult as amendments and supplements to the law follow the legislative process led by those who politically benefit from municipal authority.[160] As the bill moved through the legislative process, prominent

156. *See* S. 3688, § 1(a) (Senate Committee Substitute) (stating specific legislative findings and declarations regarding large warehouse developments).

157. *Cf. id.* §§ 3, 7 (relying on future rules promulgated by the State Planning Commission after the enactment of the legislation to define "large warehouse development").

158. *See infra* note 161.

159. See discussion *supra* Section I.A of the adoption of home rule in the New Jersey Constitution.

160. Legislators are the leaders who would be held to account for any change made to the state's land use law and the home rule doctrine by its relation to the powers provided under the MLUL. A power given is difficult to take away. Legislators could face pressure from county and municipal political leaders who have significant partisan control in New

stakeholder groups directed unfavorable opinions of the legislation to influential leaders of the state legislature.[161] In its letter, the New Jersey Business and Industry Association ("NJBIA") attacked the unnecessariness of the legislation, provided that the current law protects against unlimited deviation from zoning ordinances, land use regulations based on a master plan, and proper noticing.[162] The NJBIA further wrote, "[u]ncertainty in the process can very well damage the one development market in New Jersey that is having a growth surge."[163] Though a limitation, the uncertainty around land use decisions without the bill will remain when left to panels of citizens and if appealed, to the courts.[164]

B. Expanding on the Proposed Legislation and Providing for More Predictable Land Use Resolution

1. A Statutory Duty to Reconcile Land Use Differences Between Adjoining Municipalities

Rather than requiring extra steps for determining the regional impact of a proposed development in addition to the land use hearing for the application, this Note offers the mandatory creation of regional land use boards (as already permitted and governed by the MLUL) in cases where one municipality's planning or zoning practices significantly differ from its neighbor(s). Similar to how the planning board and zoning board of adjustment make quasi-judicial determinations of changes to a person's property where it is close enough to impact or affect another's property,[165] or where it violates a boundary imposed by law, a regional board of municipal decision-makers would hear and resolve applications and disputes for actions that trigger the need for inter-municipal

Jersey. *Cf.* JULIA SASS RUBIN, DOES THE COUNTY LINE MATTER? AN ANALYSIS OF NEW JERSEY'S 2020 PRIMARY ELECTION RESULTS 1–2 (2020), https://www.njpp.org/wp-content/uploads/2021/01/NJPP-Report-Does-the-County-Line-Matter-Update-wiht-Final-Vote-Counts.pdf. Furthermore, county partisan committees are made up of municipal leaders and individuals. *See* N.J. STAT. ANN. § 19:5-3 (West 2021) ("Membership and organization of county committees").

161. *See* Letter from Ray Cantor, Vice President of Gov't Affs., New Jersey Bus. & Indus. Ass'n, to Members, Senate Budget & Appropriations Comm. (May 20, 2021) [hereinafter NJBIA Letter], https://njbia.org/wp-content/uploads/2016/05/NJBIA-Testimony-on-S-3688-May-20-2021.pdf; *see also Hearing on S. 3688 Before the S. Budget & Appropriations Comm.*, *supra* note 2, at 55:00 (testimony of Mr. Mike Egenton, N.J. State Chamber of Commerce, in opposition to S. 3688).

162. *See* NJBIA Letter, *supra* note 161.

163. *Id.*

164. *See Hearing on S. 3688 Before the S. Budget & Appropriations Comm.*, *supra* note 2, at 54:45 (N.J. State Chamber representative discussing the need for predictability).

165. *See* discussion *supra* note 44.

action.[166] The author proposes a statutory trigger within the MLUL for the creation of regional land use boards made up of the affected municipalities and based upon a border buffer zone.

Within these buffer zones, the regional board requirement would arise in two instances: (1) when a municipality's master plan or zoning ordinances provide for a level of development within the zone that is a certain degree greater than the lesser developed neighboring municipality;[167] and (2) when the actual development on land presently existing is to the same degree than the lesser developed neighboring municipality. Ideally, the legislation enabling this framework would provide that the Commissioner of the State Department of Community Affairs (the "Department") will promulgate regulations creating the formula and factors weighing whether a regional board would be mandatory. The Department would also be instructed to promulgate a formula for determining the size of the buffer zone as municipalities can range in size.

The regional land use board arrangement would be triggered by a petition from one of the municipal governing bodies—likely the smaller or lesser developed—to the adjoining municipality and the Department. To protect against the unnecessary use of the regional land use board, the Commissioner of the Department would be required to certify the difference in level of development triggered the regional land use board requirement. If the factors within the municipalities' buffer zone equalized, a municipality could then petition to dissolve the regional board upon showing the differences between the land use policies of the towns no longer needs a separate regional land use jurisdiction.

166. *See* discussion *supra* Section III.A.1.

167. The "level of development" to be compared between municipalities should include bulk characteristics, minimum lot size, floor-to-area ratio, density, and permitted uses of the properties within the land use zones of the border buffer zone.

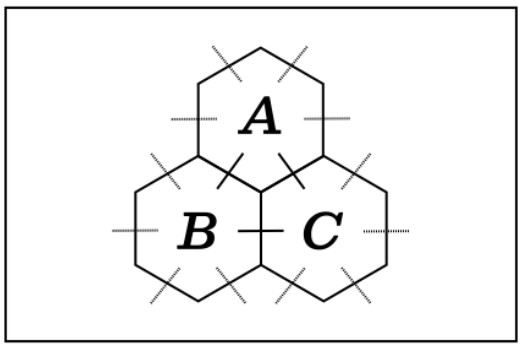

Figure 1. Duties of municipalities under the present MLUL. Illustration by author.

In Figure 1, *A*, *B*, and *C* are municipalities under the present MLUL. Their duties to each other, the solid black lines, include those expressed in statute and case law to consider the general welfare and character of the region.[168] But the current framework creates a vulnerability where *A* and *B* are both urbanized municipalities and *C* is more rural in character with corresponding infrastructure because the "region" now includes greater character of an urban setting than a rural one.[169] In theory, the land use policies of *A* and *B* are more likely to encroach upon *C* and thus create a trend in support of an *A*-*B* land use policy. Even if the due regional consideration required by law helps to slow down the trend, it does not help to insulate *C* from the negative effects of municipalities *A* and *B* long term.

168. *See supra* Sections II.A.1, III.A.

169. *See supra* note 118 and accompanying text (explaining that the urbanization of an adjacent town provides support for that town's continued development in the area).

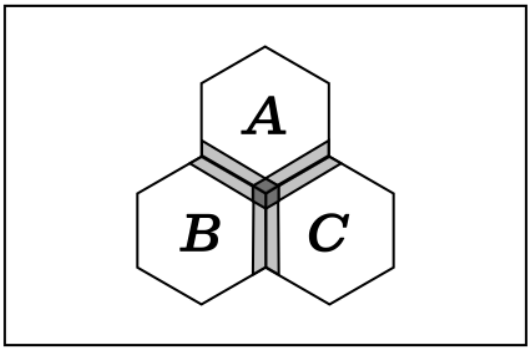

Figure 2. Buffer zones in proposed mandatory regional board framework. Illustration by author.

To the contrary, a system utilizing the proposed mandatory regional board framework would create buffer zones in *A*, *B*, and *C* to allow for graduated planning policy and zoning controls by the regional board. A graduated approach allows for eased transitions between allowed uses and density and, thus, would likely mitigate the issues arising from abrupt developments potentially impacting less developed neighbors.[170] The proposed framework in Figure 2 also promotes deference to lesser developed municipalities, a policy alluded to in the analysis of the *Allendale* court.[171] This deferential policy would provide protection to more rural areas of the state and prevent the situation where greater developed towns overcome lesser developed areas.[172] Here, the adjoining neighbor would have the opportunity to be a part of the decision-making process impacting its citizens, and the involved municipalities would jointly resolve disputes concerning land use actions in the light gray regions. In rarer circumstances, all of the municipalities joining at a nexus, represented by the dark gray region in the center, would conduct land use matters in a multi-municipality regional land use board. Different from S. 3688, this framework provides for a semi-permanent

170. *Cf.* Jacoby v. Zoning Bd. of Adjustment, 124 A.3d 694, 699 (N.J. Super. Ct. App. Div. 2015) (discussing a proposed eight-story building in a thirty-five-foot building height zone).

171. *See* Borough of Allendale v. Twp. Comm., 404 A.2d 50, 52 (N.J. Super. Ct. Law Div. 1979), *aff'd*, 426 A.2d 73 (N.J. Super. Ct. App. Div. 1981).

172. I offer the visual of the soap and pepper experiment. Pepper flakes are spread onto the surface of water in a pan. When soap is introduced to the middle of the pan, the pepper flakes disperse to the edges of the pan. Likewise, here, the deference to lesser-developed municipalities will keep urban development away from the boundaries of these rural towns. Development is still allowed to flourish but maintained regionally with lesser impact on the undeveloped and developing areas.

jurisdiction between two or more municipalities as the need arises. The regional board exists as a distinct quasi-legislative and quasi-judicial decision-making body until the conditions creating the board no longer exist. This method provides stability and predictability to developers, and a voice to communities otherwise overshadowed by imposing neighbors.

2. Legal and Economic Externalities: Statutorily Assigning Responsibility for Regional Land Use Disagreements

Under the current MLUL, an individual or entity must sue to challenge a land use decision made by a municipal decision-making body.[173] Absent an affirmative step, decision-makers as well as the application developer (depending on the land use decision being made) can circumvent the principles of regional consideration discussed throughout this Note. Challenging every potential violative action taken by a neighboring municipality is a costly and inefficient use of the adjacent town's resources to preserve itself. Requiring an adjacent municipality to positively act to preserve its character is abhorrent to the principle that the acting municipality has a duty to consider the region.[174] Requiring towns to work together on planning and zoning actions along their borders would prevent unnecessary litigation by providing a venue for towns to reconcile their differences and similarities in objectives.

Without some legal mechanism to keep conflicting decision-makers accountable, the cost of attempting and succeeding—not being challenged by a neighboring town or citizen, or getting instructions to cure a defective decision by the court—is relatively low.[175] For example, if municipality *A* knows it can approve a variance for a tax revenue-bearing development application within a certain number of feet from municipality *B* and expects little to no challenge from its neighbor *B*, economics (and common sense) provide that *A* will take the opportunity to approve the variance.

Using economic theory, where the costs of the action in question remain low, a change in legal liability will likely change little to nothing of the parties' actions.[176] Although it would be difficult to calculate the

173. N.J. STAT. ANN. § 40:55D-18 (West 2001).

174. *See* discussion *supra* Sections I.B.2, II.A.1.

175. As seen in the cases discussed *supra* Sections II.A and II.B, the court will remand decisions that do not comply with the MLUL's mandates.

176. *See* Daniel Q. Posin, *The Coase Theorem: If Pigs Could Fly*, 37 WAYNE L. REV. 89, 90–91 (1990).

opportunity cost of evading a procedural framework,[177] civil penalties or the risk of avoiding costly land use hearings may be the proverbial "bite" needed to economically force municipalities to engage in the joint resolution of regional land use issues. Using the example from above, if *A* were required to consult with *B* from the start and conduct regional land use hearings or an impact assessment (as described in the senate legislation above) before making a decision, *B* would have ample time to review and object to any possible detrimental characteristic in the land use action. *A* may still weigh the costs and decide to navigate around some of the procedural safeguards. Nevertheless, state law could dictate that any land use decisions rendered when an adjoining municipality has objected is void, thus *A* may think twice before initiating a costly and time-consuming proceeding.[178]

CONCLUSION

New Jersey's laws provide, in principle, the recognition of neighborly land use decision-making practices. The challenge, however, came from the implementation of such laws when 565 local decision-makers must entertain strategic, financial, economic, and political issues. Although New Jersey courts have reiterated the requirement of municipal governing bodies and land use boards to consider the regional impact of new zoning ordinances and development decisions,[179] the balancing test and factual analyses employed by the courts have become less than effective. The author also recognizes that New Jersey's municipal land use law statutorily provides for the contemplation of regional impact with respect to land use and other zoning policies.[180] However, the author advocates throughout this Note that the courts are unreasonably left to rely on a highly political—and self-rewarding—system to effectuate the regional consideration public policy espoused in the MLUL.

With development easily pushed to the outer edges of municipal boundaries, the financial and economic benefits for one municipality become the traffic and logistical burden for another. Nevertheless, the courts have upheld the development of large housing facilities and commercial malls under the pretense that they promote the general welfare of the region despite the possibility for negative impacts on

177. *See id.* at 94–96; *cf.* C. Carter Ruml, *The Coase Theorem and Western U.S. Appropriative Water Rights*, 45 NAT. RES. J. 169, 182–83 (2005) (applying the Coase Theorem to complicated and expensive statutory water transfer rights).

178. *Cf.* Ruml, *supra* note 177, at 190.

179. *See* discussion *supra* Section II.A.1.

180. *See* discussion *supra* Section II.A.1.

neighboring towns.[181] Without further involving the courts in such frequent local land use decisions, a statutory framework for the resolution of land use issues (zoning, planning, and other decision-making) within existing frameworks for regional land use boards can preemptively solve inter-municipal challenges without the need to fully withdraw from the tradition of local independence under the State's home rule doctrine. To provide for a more standardized way of ensuring regional consideration, municipalities should be required to reconcile their differences rather than rely on the courts as a first line of defense where there will always be one winner and one loser.

181. *See, e.g.*, Borough of Allendale v. Twp. Comm., 404 A.2d 50, 51–52 (N.J. Super. Ct. Law Div. 1979), *aff'd*, 426 A.2d 73 (N.J. Super. Ct. App. Div. 1981).