ARTICLES

THE USE OF CONSENT DECREES IN SETTLING LAND USE AND ENVIRONMENTAL DISPUTES

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I. INTRODUCTION

The resolution of complex legal issues outside formal litigation channels is a popular subject at conferences and in academic journals. Less attractive, perhaps because it is within the bounds of traditional legal process, but often without quite the degree of delay and expense normally associated with it, is the resolution of a case after filing a complaint by means of a judicially approved settlement in the form of a consent decree. Such a decree has the advantage of judicial enforceability often lacking in other forms of alternative dispute resolution. This enforceability, together with the consent of the parties, makes the consent decree a form of contract with the extra oomph of a judicial decree, taking it several steps beyond mere settlement of litigation.

The nature of the consent decree is critical to an analysis of its use in settling complex environmental and town planning law disputes. Is it a contract or is it a judgment? According to some authorities, it is merely a private contract between the litigating parties.[1]

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1. *See, e.g.*, United States v. Amour & Co., 402 U.S. 673, 681-82 (1971); 3 ABRAHAM C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 1350, at 2773 (5th ed. 1925); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324 (1988).

Others view it as a judgment of the court.[2] According to one recent commentator, the "dominant modern view is that a consent decree is a hybrid, with elements of both contract and judgment."[3] As the commentator observes, this view would require a court to decide whether a particular problem implicates the contract or the judgment/decree aspects of the consent decree.[4]

The problem assumes critical importance in examination of the judicial process upon which it may be engrafted. It takes very little time or money to merely file a lawsuit as compared to the enormous expense of motions, discovery, pretrial preparation, and the trial itself. Parties are therefore likely to attempt settlement at some stage of the pretrial proceedings, perhaps as early as the filing of a complaint. Negotiating a settlement does not require the supervision or permission of a judge; settling by means of a court order agreed to by the parties — a consent decree — does.

A settlement by consent decree has several advantages. First, if either party breaches the agreement, the other party can enforce it by means of contempt sanctions without having to file an independent lawsuit. No waiting and no expense of a separate suit is required. Second, the court will likely take an active role in seeing that the settlement is carried out. This is particularly true in complicated settlements that are to be worked out over a period of years, such as the settlement of environmental litigation involving the implementation of pollution controls either by rule or by construction of facilities. Third, the consent decree may be more easily modified during the course of settlement activity than a simple contract. Fourth, the consent decree, as a judgment of a court, is res judicata, binding the parties so they may not file a fresh lawsuit. Finally, from the perspective of the court rather than the litigants, the consent decree has the obvious advantage of calendar-clearing; it facilitates the settlement of complex litigation without lengthy trials even though court supervision of its terms may be necessary.[5] In short, the consent decree is

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2. *See* United States v. Swift & Co., 286 U.S. 106, 115 (1932); 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.409[5] (2d ed. Supp. 1991-92).

3. Kramer, *supra* note 1, at 324; United States v. ITT Continental Bakers, 420 U.S. 223, 236 n.10 (1975).

4. Kramer, *supra* note 1, at 324.

5. *E.g.*, Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988) (use of consent decree to require replacement of low- and moderate-income housing lost through new freeway construction); Pennsylvania v. Del. Valley Citizens Council for Clean Air, 483 U.S. 711 (1987) (court supervision under consent decree, after protracted litigation, requiring Pennsylvania to establish a program for the inspection and maintenance of vehicle emission systems under the Clean Air Act);

cheaper and more expeditious for the parties, and it ends complex litigation for the court.[6]

Used increasingly in the settlement of complex environmental and land use disputes,[7] the consent decree nevertheless raises several troublesome issues. First, to what extent can the consent decree authorize local government action that is contrary to normal legal procedures? Does it make a difference if the court issuing the consent decree is a federal or state court? Does the subject matter of the litigation make a difference? Does it make a difference if the abbreviated or eliminated legal process is enshrined in state statute or local ordinance, regulation, or rule?

Second, what is the effect of a consent decree on the due process rights of non-parties, such as intervenors? Can a consent decree involving only the local government and the property owner eliminate a public hearing that would normally be required for a zoning change or a particular project approval?

Part II of this Article places these questions in the context of the major and lengthy federal housing discrimination litigation in the Village of Arlington Heights, Illinois, which was eventually settled by means of a hotly contested, but eventually upheld, consent decree. Part III focuses on the first question presented above: can parties agree to bypass legal procedures by means of consent decrees? Fed-

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Gatreaux v. Pierce, 690 F.2d 616 (7th Cir. 1982) (consent decrees used for protracted housing discrimination litigation).

6. Kramer, *supra* note 1, at 325-27.

7. *See* Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988) (consent decree to provide replacement of low- and moderate-income housing destroyed in new highway construction); New York v. Adm'r, United States EPA, 710 F.2d 1200 (6th Cir. 1983) (consent decree to settle Clean Air Act litigation involving multiple parties); United States v. City of Fort Smith, 760 F.2d 231 (8th Cir. 1985) (consent decree requiring city to achieve sewage effluent limits under Clean Water Act); Monsanto Co. v. Ruckelshaus, 753 F.2d 649 (8th Cir. 1985) (consent decree establishing scientific panel to aid complex administration of company registration and competitive activities under Pesticide Act); Kilroy v. Ruckelshaus, 738 F.2d 1448 (9th Cir. 1984) (city required to terminate ocean disposal of sludge under national pollutant discharge elimination system provisions of Clean Water Act); City of Bloomington v. Westinghouse Elec. Corp., 824 F.2d 531 (7th Cir. 1987) (PCB disposal under the Resource Conservation and Recovery Act); United States v. Northeastern Pharmaceutical and Chem. Co., 810 F.2d 726 (8th Cir. 1986) (combined CERCLA and RCRA action); Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pa., 762 F.2d 272 (3d Cir. 1985) (consent decree involving citizens groups as well as the United States and the state, over enforcement of Clean Air Act provisions); City of Bloomington v. Westinghouse Elec. Corp., 824 F.2d 531 (7th Cir. 1987) (citizen intervention in a Resource Conservation and Recovery Act proceeding involving disposal of PCBs); Suburban O'Hare Comm'n v. Dole, 787 F.2d 186 (7th Cir. 1986) (consent decree to resolve airport expansion issues, formalizing role of concerned citizens groups); Travelers Indem. Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989) (consent decrees in settlement of CERCLA litigation involving over 300 parties).

eral and state courts reach somewhat different conclusions, which may encourage forum shopping for those opposed to, or favoring, elimination of lengthy process by means of the consent decree. Part IV analyzes the rights of third parties who may be affected, if not fully bound, by a consent decree that is substantially adverse to their interests. This Article concludes in Part V that the consent decree is a useful mechanism for settling complex environmental and land use litigation, but there is a danger that it might be used to shorten or eliminate state and local procedures, particularly those designed to protect the rights of third parties.

II. THE PROBLEMS RESTATED

The problems of conflict with state and local laws and due process rights of third parties are nowhere more starkly presented than in the tedious litigation in *Metropolitan Housing Development Corporation v. Village of Arlington Heights*[8] over the zoning of land for low-income housing in the Chicago suburb of Arlington Heights, Illinois. In the last of the federal district court[9] and court of appeals[10] decisions, a major issue was the effect of a consent decree on the rights of intervenors who alleged, *inter alia*, that the decree impermissibly interfered with their due process rights and completely circumvented statutory procedures in connection with the annexation of unincorporated land to an Illinois municipal corporation. The courts' stake in settling litigation and the courts' strong preference to end discriminatory housing practices, together with evidence of due process afforded intervenors (though different in time and substance from what Illinois statutes provided), resulted in the federal courts upholding the consent decree. Because the courts thoroughly dealt with the two aforementioned problems in a consent decree context and because the case involved zoning as well as housing, the Arlington Heights case is worth discussing in some detail.

A. The Facts of the Case

In 1975, Metropolitan Housing Development Corporation

8. 373 F. Supp. 208 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd and remanded*, 429 U.S. 252 (1977), *on remand*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), *on remand*, 469 F. Supp. 836 (N.D. Ill. 1979), *and aff'd*, 616 F.2d 1006 (7th Cir. 1980).

9. *Arlington Heights*, 469 F. Supp. 836 (N.D. Ill. 1979).

10. *Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980).

(MHDC), a nonprofit corporation organized for the purpose of developing low- and moderate-income housing in the Chicago metropolitan area, sued the Village of Arlington Heights on the ground that its failure to rezone fifteen acres near the center of town for multiple-family use was racially discriminatory in violation of the Fourteenth Amendment to the U.S. Constitution and the Fair Housing Act of 1968.[11] The fifteen-acre parcel was owned by a religious order and used for a school and church. Much of the site was open space. While the federal district court held for the Village,[12] the Federal Court of Appeals for the Seventh Circuit reversed, holding that the ultimate effect of the refusal to rezone was racially discriminatory and therefore violated the Fourteenth Amendment to the Federal Constitution.[13] The U.S. Supreme Court disagreed with the appellate court, holding that a showing of discriminatory *intent* was necessary to establish a constitutional violation of the Fourteenth Amendment's Equal Protection Clause and that such intent was clearly lacking from the record before the district court. The Supreme Court then remanded the case to the Seventh Circuit Court of Appeals to determine whether the Village's conduct violated the Fair Housing Act.[14]

On remand, the court of appeals decided that Arlington Heights had a continuing obligation under the Fair Housing Act to refrain from zoning policies that foreclosed construction of low-income housing. Therefore, the case was remanded to the district court with direction to require Arlington Heights to identify a parcel of land within its boundaries properly zoned and suitable for low-income housing or be found in violation of the aforesaid Act.[15] The district court was soon advised by the parties that settlement negotiations were about to produce a solution to be memorialized in a consent decree.

B. The Consent Decree and the Rights of Intervenors

The consent decree entered by the district court was between the

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11. 42 U.S.C. §§ 3601-3631, *discussed in Arlington Heights*, 616 F.2d 1006, 1007 (7th Cir. 1980).

12. *Arlington Heights*, 373 F. Supp. 208 (N.D. Ill. 1974). The district court held that Arlington Heights was not motivated by racial discrimination or intent to discriminate against low-income groups when they denied rezoning to MHDC, but rather by a desire to protect property values and the integrity of the Village's zoning plan. *Id.* at 211.

13. *Arlington Heights*, 517 F.2d 409, 414-15 (7th Cir. 1975).

14. *Arlington Heights*, 429 U.S. 252 (1977).

15. *Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977).

Village of Arlington Heights and MHDC. Basically, it required the Village to annex property on its southern boundary and zone it to conform to MHDC's plans for low-income housing, together with commercial use, by an independent developer. Both the annexation and the rezoning were to take place within sixty days of the entry of the decree. The Village was also obligated to provide sewer and water to the subject property.[16]

The property subject to the consent decree was bordered by the nearby Village of Mount Prospect. Mount Prospect moved to intervene in the proceedings before the district court in order to object to the consent decree, claiming the court lacked authority to enter the consent decree and contending that the decree would be unjust and inequitable because of its potential effect on the citizens of Mount Prospect.[17] Meanwhile, Arlington Heights, after hearing and notice, approved the decree at a public meeting. The court then gave Mount Prospect permission to intervene as a representative of its citizens. The court also permitted intervention by various homeowners associations and nearby residents in Mount Prospect and then conducted three days of hearings on their objections.[18]

Objectors argued that the course of conduct followed by Arlington Heights in approving the consent decree deprived them of their rights to procedural due process. Because some regular procedures were omitted, they argued that under Illinois law, the Village was without power to assent to the decree because of those omissions in zoning and annexation procedures.[19]

Citing the federal courts' policies favoring the compromise settlement of cases[20] and congressional policy favoring open housing, the court specifically held that "a court can exercise its full equitable powers, even as against third parties, when a consent decree is filed by the original parties."[21]

The court also rejected the argument that normal zoning procedures required by Arlington Heights zoning ordinance should have been followed. These procedures consisted of formal and informal meetings between the developer and the Village staff, meetings with

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16. *Arlington Heights*, 469 F. Supp. 836, 869-72 (N.D. Ill. 1979).
17. *Id.* at 843.
18. *Id.* at 848.
19. *Id.*
20. *Id.* at 844 n.7.
21. 469 F. Supp. at 852 (noting that the Court of Appeals for the 5th Circuit holds otherwise: Southridge Plastics Div. v. Local *759*, 565 F.2d 913 (5th Cir. 1978)).

the Plan Commission and one of its committees, and a hearing before the Village Board.[22] While freely noting that the Village did not follow these procedures, the court set up against them "the broad powers of the Federal courts in enforcing settlement decrees."[23] Even though the court suspected in a footnote that the consent decree process might be used to provide relief not specifically sought in complaints,[24] the court suggested that the equity power of the court would control.

Finally, as to the due process arguments raised by intervenors, the court agreed that they had a legal interest in the annexation and rezoning process and that some due process was therefore appropriate — but not necessarily as set out in Arlington Heights ordinance. The court noted the full three-day hearing before it on the merits of intervenors' objections and concluded it could not say that additional hearings before the Village and right of appeal to state courts therefrom would have substantially affected the accuracy of the truth-finding process. Therefore, considering the added burden on the parties, "the balance weighs heavily against the requested procedures."[25] This was particularly true given the projected additional costs to MHDC, the likely defeat of the public interest in open housing, and the federal policy favoring settlement of legal controversies in whole, rather than through multiple litigation that would result if the annexation and zoning matters were separated out of this complex case.[26]

Intervenors appealed, but the Seventh Circuit agreed with the district court,[27] and the U.S. Supreme Court refused to take up the matter.[28] Observing that national and local interests were now aligned rather than conflicting, the court of appeals noted the increasing prevalence of site-specific relief in the form of court judgments and decrees opening up specific parcels to low- and moderate-income housing.[29] The court then declared that the consent decree, rather than displacing the powers of local government entities, simply provided such site-specific relief with the consent of the affected Village

22. *Id.* at 844 n.6.
23. *Id.* at 854.
24. *Id.* at 854 n.19.
25. *Id.* at 862.
26. 469 F. Supp. at 862.
27. *Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980).
28. *Arlington Heights*, 434 U.S. 1025 (1978).
29. 616 F.2d at 1011.

rather and not over its opposition. Relying in part on the importance of resolving housing disputes but also on "the clear policy in favor of encouraging settlements . . . , particularly in the area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals,"[30] the court held:

> The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent *by the concerned parties* . . . *objectors* must be given reasonable notice and their objections heard and considered.[31]

This last requirement had clearly been satisfied because the intervenors were given three days to present their objections to the court below:

> Assuming that some due process applies, the question is what process is due. Due process is flexible and calls for such procedural protections as the particular situation demands . . . . The weighing and analysis of the many interests involved in this case against the private interests of the intervenors . . . confirms the district court's conclusion that the intervenors received all the process that was due.[32]

The court considered and rejected the intervenors' reliance on an Illinois appellate court decision reversing a consent decree where it was unclear whether the local government had in fact approved the settlement, where the unit of government was not "home rule," and where fair housing violations were not involved.[33] As appears in the discussion below, this raises some question about the use of the consent decree in nonfederal cases in which the fully approved consent decree requires a local government to do an act in a manner substantively and/or procedurally different from statutory requirements and where housing policy is not involved.

How strong is the policy favoring settlement of disputes, standing alone? Can only federal courts impose procedures or even substance by consent decree, when the procedure or substance is differ-

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30. *Id.* at 1014.
31. *Id.* (emphasis added).
32. *Id.* at 1015.
33. Martin v. City of Greenville, 369 N.E.2d 543 (Ill. App. 3d 1977).

ent from that required by statute, so long as the substance or procedure is somewhere provided in the court proceedings? The remainder of this Article is devoted to these questions.

III. CONFLICT WITH STATUTES AND ORDINANCES: CAN PARTIES AGREE TO BYPASS LEGAL PROCEDURES BY MEANS OF CONSENT DECREES?

The Arlington Heights litigation clearly sanctioned the use of the consent decree to bypass local zoning and annexation requirements and to end complex and lengthy litigation over alleged discrimination in housing.[34] Two sets of issues are raised by this aspect of these decisions. First, is this as widespread as the federal courts in Illinois indicate, and are there subject-matter or other limitations on such a use of the consent decree? Second, do state courts also sanction the use of consent decrees to take short cuts through statutory or ordinance procedures in the zoning and environmental law areas?

As discussed below, the answers appear to be yes, possibly, and sometimes. The consent decree is successfully applied in other circuits to modify state and local land use and environmental laws. However, in most instances, the matter before the court is discrimination in housing or some other constitutional issue. State courts do not often permit the use of the consent decree to get around state and local land use and environmental laws, but there are states that do.

A. Federal Courts and the Consent Decree Modifying State and Local Land Use/Environmental Laws

Some federal courts apparently have no qualms about using the consent decree to settle constitutional housing discrimination and environmental litigation, even if the decree requires local government to act outside of, or contrary to, their state statutory authority and/or local ordinances and regulations. One of the clearest post-Arlington Heights examples comes from New Jersey, a state that otherwise puts substantial limits upon the use in state courts of consent decrees that modify state and local laws. In *Mesalic v. Slayton*,[35] the actions of a local government allegedly were designed to thwart a landowner's plans to develop his property, thereby unlawfully depriving

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34. *See supra* notes 20-32 and accompanying text.
35. 689 F. Supp. 416 (D.N.J. 1988).

him of his property rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.[36] The parties negotiated and executed a consent decree for the purpose of ending the litigation, the pertinent part of which reads:

> All the named parties agree to comply in good faith with, and to cooperate and proceed diligently, fairly and in good faith under, now existing Jefferson Township Ordinances . . . and under state and federal law, with respect to the preparation, submission, informal and formal review, and amendment (if necessary) of plaintiff's forthcoming subdivision(s) and other documents for the development of plaintiff's Jefferson Township parcels of real property.[37]

Eight months later, and two weeks before declaring plaintiff landowner's plans and applications for development permission complete, the local government adopted amendments to its zoning ordinance. Two months later, it based a rejection of plaintiff's development plans on these amendments.

The court held that "the literal terms of paragraph eight do prohibit the defendants from applying new ordinances to plaintiff's development" and that, therefore, its terms "require defendants to process plaintiff's application under township ordinances existing at the time of the agreement."[38] The local government argued that the consent decree was unenforceable because local governments in New Jersey lacked the authority to agree not to apply future ordinances without a resolution or ordinance to that effect, even if embodied in a consent decree. The court responded that the cases cited by defendants in support of this proposition involved only state law and addressed only the relationship between state statutory law and consent decrees based on state claims. Here, on the other hand, "the enforceability of paragraph eight depends on whether the court had jurisdiction to order the relief contained therein. Jurisdiction existed if the plaintiff's *federal* claims were colorable and if the relief was fairly designed to cure the constitutional violations."[39] Thus, the consent decree, "being based on colorable allegations of federal constitutional violations, *overrides any state law to the contrary*."[40] Clearly the court emphasized the judicial decree rather than the contractual na-

36. *Id.* at 418.
37. *Id.* at 419.
38. *Id.*
39. *Id.* at 420 (emphasis added).
40. 689 F. Supp. at 422 (emphasis added).

ture of the consent decree in this case.[41]

A federal district court in Pennsylvania came to the same conclusion in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*.[42] However, the court did not address the fact that the legislature of Pennsylvania passed a statute prohibiting the funding of a consent decree mandating an auto emissions and inspection program to satisfy Clean Air Act requirements, even though the court recognized that "[i]t is well settled that a state law which purports to nullify or prevent compliance with a federal judicial decree is unconstitutional and without effect."[43]

The court relied on a subsequently overruled decision of the U.S. Supreme Court[44] that implied a federal court "lacks the power under our federalist system to countermand the decision of a state legislature not to expend state funds on the . . . program."[45] Instead, the Court found the state in civil contempt for failure to comply with the consent decree and directed the U.S. Secretary for the Department of Transportation to reject projects or grants for highway projects in the Pittsburgh or Philadelphia areas except for safety or mass transit purposes.[46]

The federal housing case of *Yonkers Racing Corp. v. City of Yonkers*[47] is similar. There, a consent decree settled housing discrimination litigation, requiring the city to initiate compulsory purchase proceedings within sixty days, requiring the U.S. Department of Housing and Urban Development (HUD) to review the site and solicit proposals for public housing, and requiring construction to proceed forthwith.[48] To the objection by one of the parties that the decree avoided statutory compulsory purchase procedures, the court responded that there was an exception in the statute from such procedures in the event of an emergency in the public interest, that the record amply supported a finding of such an emergency, and that, in any event, there had been adequate procedure in court pursuant to the consent decree. The court held substantially the same with re-

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41. *Id.* at 419.

42. 533 F. Supp. 869 (E.D. Pa.), *aff'd*, 678 F.2d 470 (3d Cir. 1982).

43. 533 F. Supp. at 878.

44. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

45. 533 F. Supp. at 878.

46. *Id.* at 881-82.

47. 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

48. 858 F.2d at 859.

spect to lack of compliance with state environmental assessment laws, noting that again there was some ground for a statutory exception given the nature of the proposed project.[49]

A somewhat different result, though not directly contrary, was reached by the Third Circuit in the low-income housing case of *Society Hill Civic Ass'n v. Harris*.[50] There, a homeowners' association challenged a consent decree that provided for the financing and construction of low-income housing in their relatively exclusive residential neighborhood, in part on the ground that such new housing would not comply with applicable single-family zoning regulations. However, the gravamen of the complaint was not that the decree would force violation of local zoning per se, but that HUD's own regulations provided that preliminary proposals for new construction must include evidence that such proposed construction is permissible under applicable zoning ordinances or regulations.[51]

The court held that "[t]he consent decree itself could not, and does not, specifically authorize HUD to fund housing that does not comply with the local zoning ordinances."[52] This raises the question of what is special about HUD regulations that insulates them from consent decrees if local laws are not so insulated. Indeed, the court gives a cryptic answer in the same paragraph:

> Had the above regulation never been promulgated, then, we might well be inclined to conclude that the Association's complaint as to this issue was not ripe for adjudication at this time. Such an issue could more properly be determined only after the plans for the housing were finally approved, *so that any inconsistency between the plans and the zoning code could be demonstrated*.[53]

What is the court saying? Is it simply addressing the ripeness issue given the procedural aspects of the case? (The Association successfully appealed motions to dismiss from the court below.) Or is it

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49. *Id.* at 866-68. *See also* Knoll v. St. Charles County, 766 F. Supp. 744 (E.D. Mo. 1991) (ordering a property tax increase in order to fund an improvement that was part of a consent decree settling building code violations); Affiliated Realty & Management Co. v. City of Highwood, No. 87c 10170 (N.D. Ill. Aug. 3, 1989) (Without dealing with the merits of the consent decree, the court noted that a decree suspended the creation of one commercial zoning district and restored the application of the original district to the landowner's property all apparently without the usual hearings and notice that accompany local zoning changes).

50. 632 F.2d 1045 (3d Cir. 1980).

51. *Id.* at 1057.

52. *Id.*

53. *Id.* (emphasis added).

signalling that consent decrees may not order actions that conflict with local zoning, even in housing discrimination cases?

At least one court is quite clear. In *Gautreaux v. Landrieu*,[54] a federal district court in Illinois held that "HUD may not . . . 'force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes.' "[55] The above was dicta in a dispute over the extent to which a consent decree could require an Illinois agency to undertake certain actions.

Taking a slightly different tack, the Federal Court of Appeals for the District of Columbia in *Citizens for a Better Environment v. Gorsuch*[56] held that a consent decree can limit the discretion of the U.S. Environmental Protection Agency (EPA) just as a judgment could. In denying a motion to vacate a consent decree settling complex toxic waste and other litigation arising under the Clean Water Act, the court rejected the argument that the decree, by directing the Administrator of the EPA to do certain "nonstatutory" acts, was impermissibly limiting its discretion. The court noted that a trial court need not inquire into the precise legal rights of the parties nor resolve all the claims of the parties in entering a consent decree (which the court reiterated was a judicial act) in order to avoid protracted litigation and accomplish a voluntary settlement of civil controversies.[57] Even though the decree directed the EPA to promulgate certain regulations, this was not an impermissible infringement.[58]

Parenthetically, it would seem clear that a state court cannot bind an agency of the federal government by consent decree in environmental or any other litigation any more than a state court decision could do so. Indeed, a federal court has so held: a state court consent decree that vacated a state implementation plan required under the Clean Air Act and approved by the EPA does not preclude federal enforcement of such a plan.[59]

It is equally clear that a state supreme court cannot vacate a federal consent decree. In *Delaware Valley Citizens' Council for*

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54. 523 F. Supp. 665 (N.D. Ill. 1981), *aff'd*, 690 F.2d 616 (7th Cir. 1982).
55. *Id.* at 670 (quoting Hills v. Gautreaux, 425 U.S. 284, 306 (1976)).
56. 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984).
57. 718 F.2d at 1125-26.
58. *Id.* at 1127.
59. United States v. Ford Motor Co., 814 F.2d 1099, 1101 (6th Cir.), *cert. denied*, 484 U.S. 822 (1987).

Clean Air v. Commonwealth of Pennsylvania,[60] the state moved to vacate a consent decree requiring it to implement a statewide vehicle inspection and maintenance program under the Clean Air Act. The court of appeals held that the consent decree was res judicata on Pennsylvania in state court actions challenging the authority of state officials to enter into such a decree. As the concurring judge put it, on pure federalism principles:

> The state's order is untenable not only because the prior federal order was *res judicata*, which it was, but because a state has no power to disturb any federal decree. This conclusion flows necessarily from the constitutional principles that structure "Our Federalism" and most particularly from the supremacy clause. State courts are "destitute of all power" to interfere with the proceedings or decisions of the national courts.[61]

The same court in *Commonwealth of Pennsylvania v. EPA*[62] held that the federal government could constitutionally require the states to pass legislation establishing a regulatory program to enforce the Clean Air Act.[63] Largely to the same effect, the U.S. Supreme Court held in *Spallone v. United States*[64] that a city must pass legislation to which it agreed in a consent decree.[65]

Other environmental cases appear to approve limitation of state actions based on promises made in a consent decree without addressing the issue of conflict with state and local law. Thus, in *City of Las Vegas v. Clark County*,[66] the Ninth Circuit noted with apparent approval that "[t]he Consent Decree provides no guarantee against the State promulgating effluent limitations that are not more stringent."[67] The implication is that the state was bound by the terms of the consent decree to keep from promulgating less stringent regulations. The court observed that although a consent decree has attributes of both a contract and a judicial act, it is "construed with reference to ordinary contract principles."[68]

On the other hand, in another fair housing case, the Sixth Cir-

60. 755 F.2d 38 (3d Cir. 1985).
61. *Id.* at 45 (Stern, J., concurring).
62. 500 F.2d 246 (3d Cir. 1974).
63. *Id.* at 262-63.
64. 487 U.S. 1251 (1988).
65. *Id.* at 1258-60.
66. 755 F.2d 697 (9th Cir. 1985).
67. *Id.* at 702.
68. *Id.*

cuit in *Dotson v. United States Department of Housing and Urban Development*,[69] wrote considerable dicta on the "unique properties" of a consent decree even though it had previously held that consent decrees basically should be construed as contracts. The court concluded that it is the consent decree that governs "the behavior of the parties during the life of the decree."[70] This implies perhaps a different standard for those decrees that call for ongoing supervision by the court and those that do not. This theme is picked up by federal courts dealing with the question of intervention and the rights of third parties following the entry of a consent decree, which is discussed in Part IV of this Article.

B. State Courts and Consent Decrees: Conflict with State/Local Laws

State courts appear less likely to permit consent decrees that adversely affect local zoning and environmental laws. Perhaps the leading case in the field is the previously noted Illinois case of *Martin v. City of Greenville*.[71] There, a "settlement order" permitting a landowner to construct multiple-family units in a single-family district was struck down for failure to comply with hearing and notice requirements of both the city zoning ordinance and the State of Illinois zoning enabling legislation.[72] As before observed, the city was bound by that legislation as a non-home rule municipality, and there was substantial question about the city council's having agreed to the "oral" settlement in the first place. Nevertheless, the court's language is unqualified:

> In the case at bar, the foregoing statutory and ordinance requirements were not met by the attempted settlement agreement. Consequently, the city council members acted beyond their authority, either individually or collectively, in attempting to amend the Greenville Zoning Ordinance . . . . A municipality may not, under the guise of compromise, impair a public duty owed to it, and neither the municipal officials nor the trial court may usurp the legislative process.[73]

Illinois has retreated somewhat from this position in two other

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69. 731 F.2d 313 (6th Cir. 1984).
70. *Id.* at 318.
71. 369 N.E.2d 543 (Ill. App. 3d 1977). *See supra* note 33 and accompanying text.
72. *Id.* at 545.
73. *Id.* at 545-46.

appellate cases. Neither retreat, however, came from the district that rendered the *Greenville* decision. In *Chicago Title & Trust Company v. Village of Mount Prospect*,[74] the court held that a collateral attack upon a consent decree by a non-party could not be based on the failure of Mount Prospect to follow its own zoning procedures notwithstanding the language in the *Greenville* case.[75] This was so because the enacted ordinances were at best voidable, rather than void, and the *Greenville* court did not consider that issue because in *Greenville* the attack was a direct one on the consent decree. In this case, a municipality near Mount Prospect collaterally attacked a consent decree that provided for a large residential development on land bordering both municipalities but which was to be annexed to Mount Prospect. While homeowners' associations were permitted to intervene, the recently incorporated municipal corporation of Prospect Heights was not. Prospect Heights objected to the zoning of the property for residential use on the ground that, because it was accomplished pursuant to consent decree, the hearing and notice provisions of the Mount Prospect zoning ordinance were ignored.

While this is a fairly technical holding, it nonetheless indicates a reluctance by at least one other appellate district in Illinois to enforce the *Greenville* decision limiting consent decrees. The court chose to let stand the zoning accomplished through the consent decree even though it might be "voidable" under direct attack by a party to the litigation.[76]

The Illinois Court of Appeals for the Second District also upheld a town planning decision by consent decree, although nothing indicates that local procedures were properly followed. In *Gary-Wheaton Bank v. Village of Lombard*,[77] the court held that a consent decree approving a subdivision plat consisting of five lots and allowing construction thereon of two-family residences was not invalid. In sum, the majority of Illinois courts are not striking down consent decrees that zone or grant development approval even absent the normally required hearing and notice procedures that are otherwise required.

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74. 513 N.E.2d 915 (Ill. App. 3d 1987).

75. *Id.* at 918-19.

76. *Id.* But see Ad-Ex, Inc. v. City of Chicago, 565 N.E.2d 669, 678 (Ill. App. 3d 1991), where the same court has recently described a consent decree as "merely the court's recordation of the private agreement of the parties" and "not a judicial determination of the rights of the parties" which differs from the federal view expressed in the cases discussed in this Article and denigrates the value and substance of such decrees.

77. 404 N.E.2d 1115 (Ill. App. 3d 1980).

Nevertheless, further reluctance to permit consent decrees to modify local land use law is reflected in *PMC Realty Trust v. Town of Derry*.[78] There, a consent decree permitted the use of land for which a variance had been denied, resulting in an appeal. However, before the landowner could take advantage of the consent decree, the town amended its zoning ordinance to prohibit the use altogether. Claiming that the consent decree vested the landowner's right to construct the proposed multiple-family housing, the court held: "A town may exercise its zoning authority only in accordance with applicable statutes . . . . The town may not bargain away this delegated authority, even under the form of a consent judgment."[79]

The court relied in part on the New Jersey case of *Midtown Properties, Inc. v. Township of Madison*,[80] where the court refused to enforce a consent decree entered by a developer. The township provided that the developer need only comply with the township's then-existing ordinances and regulations. However, the township refused to approve plaintiff's final subdivision application stating that "where a [zoning statute] sets forth procedure to be followed, no governing body, or subdivision thereof, has the power to adopt any other method of procedure."[81] Furthermore, the court held that the defendants had no authority to exempt plaintiff from the township's procedures for filing and approval of his plan or to surrender, as stated in the consent decree, their "inherent power, right and duty to keep their zoning and planning ordinances mutable by making necessary amendments or changes for the benefits of the public."[82]

To the contrary is the Colorado case of *City of Boulder v. Sherrelwood, Inc.*.[83] There, in settlement of Boulder's claim that the landowner's planned development approvals had expired and the granting of an extension would violate subsequently passed land use and environmental ordinances, the parties signed and a court entered a consent decree that declared the planned development approvals valid and permitted the landowner to proceed with the planned de-

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78. 480 A.2d 51 (N.H. 1984).

79. *Id.* at 53.

80. 172 A.2d 40 (N.J. Super. Ct. Law Div. 1961).

81. *Id.* at 45-46.

82. *Id.* at 45. See also Mesalic v. Slayton, 689 F. Supp. 416 (D.N.J. 1988) where, in dicta, the court noted that "[o]ther [New Jersey] cases have also held that agreements between municipalities and landowners are void if they attempt to circumvent the requirements of the state zoning statute." *Id.* at 420.

83. 604 P.2d 686 (Colo. Ct. App. 1979).

velopment subject to the continuing jurisdiction of the court. Boulder then sought to apply certain subsequently enacted floodplain regulations despite language in the consent decree that stated the planned development was to be "subject to all land use and floodplain regulations of the Plaintiff City of Boulder in effect as of May 1, 1969, but free of any such regulation adopted by the City of Boulder subsequent to May 1, 1969."[84] The court held that "[t]o the extent that the consent decree was a judgment of the trial court, this language rendered the floodplain issue res judicata."[85]

At least one other state case dealing with federal environmental law appears also to reflect the position that state statutes are inferior to consent decrees in environmental cases. In *Occidental Chemical Corp. v. Department of Environmental Conservation*,[86] a New York intermediate court of appeal held that a consent decree issued in federal court took precedence over a later-enacted state statute.[87] The consent decree, issued in settlement of *United States v. Hooker Chemicals and Plastics Corp.*,[88] provided that, in exchange for a site owner's undertaking certain activities to clean up a hazardous dump site, it would be released by all governmental parties from all future claims under health and environmental statutes arising out of activities the site owner was required to undertake in compliance with the consent decree.[89]

Shortly thereafter, the New York legislature enacted a fee system to provide for recovery from regulated entities a portion of certain expenses for administering certain regulatory programs, including hazardous waste. Some of the activities the site owner was required to undertake under the aforementioned consent decree were included in that fee system.[90] The court held that the department could not charge such fees, even though authorized and required to do so by New York statute, because the consent decree immunized the site owner from such fees as would attach to those activities covered in the statute that were also required by the consent decree.[91]

In sum, consent decrees appear likely to fare better in federal

84. *Id.* at 689.
85. *Id.*
86. 499 N.Y.S.2d 221 (N.Y. App. Div. 1986).
87. *Id.* at 225.
88. 540 F. Supp. 1067 (W.D.N.Y. 1982).
89. 499 N.Y.S.2d at 222.
90. *Id.*
91. *Id.* at 225.

court than in state court. However, there are state courts that will confer the same kind of superior status on consent decrees by emphasizing the judicial decree rather than the contractual nature of the beast. It would also appear that the pendulum is swinging in favor of using such decrees even if some formal process is lost, so long as there is some process in the judicial proceedings.

IV. THE RIGHTS OF THIRD PARTIES: COLLATERAL ATTACK AND DUE PROCESS

While the rights of non-parties to the litigation can obviously be affected in a variety of forums, it is in federal courts that the issues arise most commonly. This is apparently so for two reasons. First, third parties are fond of alleging that their loss of procedural rights rises to a deprivation of procedural due process under the Fourteenth Amendment to the U.S. Constitution. Second, Rule 24 of the Federal Rules of Civil Procedure provides for third party intervention in federal litigation, provided it is "timely."[92] As one commentator has observed, the effect is to bar a collateral attack on a judgment entered by consent decree if a third party has been denied intervention for lack of timeliness. This has at least two effects: (1) it limits the third party's choice of forum to that proceeding in which the consent decree is entered, and (2) it requires that a third party act quickly or the request will not be "timely."[93]

As to the matter of due process, the Arlington Heights case makes clear that not every denial of intervention results in a denial of due process, and hearings before courts may well substitute for hearings before local boards, commissions, and legislative bodies. After all, due process requires only that every litigant have an opportunity to be heard. The choice of forum is not necessarily or even usually that of the litigant/party, at least in terms of satisfying due process.[94] Moreover, excessive intervention can lead to expensive and extended litigation, the very evil that the consent decree is designed to prevent. As the federal district court judge in *Kelley v. Thomas Solvent Co.*[95] observed in denying amici leave to intervene in a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) proceeding already involving ninety parties:

92. Kramer, *supra* note 1, at 332.
93. *Id.*
94. *Id.* at 338-39.
95. 717 F. Supp. 507 (W.D. Mich. 1989).

> I see no reason to subvert the very purpose of this settlement agreement, which is to avoid the costs of extended litigation, by ordering a hearing on whether the settlement represents the percentage of responsibility that would be adjudicated against Grand Trunk if this case were tried. The amici ask this Court to allow nearly a year of discovery for them to prepare themselves adequately. All this, from my perspective, serving to further increase the costs of litigation — perhaps for no reason and by those who are not even parties in this case.[96]

A. Due Process and the Federal Courts

As noted above, most due process claims involving consent decrees arise in federal courts, as the Arlington Heights litigation amply demonstrates. Another example, again involving housing, comes from the Court of Appeals for the Third Circuit in *Society Hill Civic Ass'n v. Harris*.[97] Recall that the plaintiff in this case sought to intervene to protect property values in a Philadelphia neighborhood where HUD and the Philadelphia Redevelopment Authority (RDA) proposed to construct multi-family low-income housing. Other intervenors were tenants that would be at least temporarily displaced while their buildings were renovated. The Association challenged the various consent decrees settling the litigation between the to-be-evicted tenants and HUD and the RDA on a variety of grounds.[98]

A principal claim of the Association was that it was entitled to collaterally attack the consent decrees because it was a denial of due process to be bound by a judgment of proceedings in which it had not participated. The court of appeals agreed. Noting that the Association had not been permitted to intervene in the litigation resulting in the consent decrees and that the lower court had not retained jurisdiction (thereby making direct intervention now impossible), the court found that "due process demands that the Association be allowed its challenge, and that the district court erred in precluding it."[99] The court observed that if it had failed to intervene earlier because of tardiness, for example, they might very well be barred from collateral attack here.[100] But this was not the case. Indeed, the key is

96. *Id.* at 519.
97. 632 F.2d 1045 (3d Cir. 1980).
98. *Id.* at 1049.
99. *Id.* at 1051.
100. *Id.* at 1053.

contained in a lengthy footnote making crystal clear the importance of permitting intervention in order to preserve a consent decree against later collateral attack on due process grounds:

> If the property owners had been allowed to intervene in *Salvitti*, and had received a full and fair adjudication on the merits of the issues raised by the Association here, it is quite possible that the Association would be precluded from the present suit by the *res judicata* effect of the prior adjudication. This is so because *res judicata* is frequently extended to those in "privity" with the parties to the suit, or to those whose interests were fully and fairly represented by the parties. Thus we do not claim, as the dissent contends, that the Association escapes the *res judicata* bar simply because it was not a party to the *Salvitti* suit. Rather, we conclude that the Association is not barred by *res judicata* because the other property owners were denied intervention and did not have an adjudication on the merits of the issues raised by the plaintiffs in this case. Therefore, the district court in the present case adjudicated the Association's legal rights on the basis of a prior suit in which the Association's interests went entirely unrepresented.[101]

The critical importance of permitting parties to participate if they are to be bound is reiterated in *Sullivan v. City of Pittsburgh*.[102] There the court of appeals held that, while a consent decree is indeed a judgment, it does not bind or preclude claims of non-parties who had been given no opportunity to present their claims in court.[103]

The federal environmental law cases are split on both the right to intervene and the effect of a consent decree on those who have sought and been denied intervention. Standing for the traditional view is the U.S. Court of Appeals for the Ninth Circuit in *County of Orange v. Air California*.[104] Shortly before the entry of a consent decree settling National Environmental Policy Act (NEPA) litigation between Orange County, the City of Newport Beach, and several citizens' groups in which the adequacy of the environmental impact statement concerning future airport development was challenged, the City of Irvine sought and was denied permission to intervene. Both

101. *Id.* at 1050 n.4 (citations omitted).

102. 811 F.2d 171 (3d Cir. 1987).

103. *Id.* at 181. See also Sanguine, Ltd. v. United States Dep't of Interior, 798 F.2d 389 (10th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987), where Indian tribal members not adequately represented by Board of Indian Affairs with respect to their oil-producing lands were permitted to set aside consent decree and litigate on the merits.

104. 799 F.2d 535 (9th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

the trial and appellate courts held that the motion to intervene (made just before settlement and after five years of litigation) was not timely. The court observed that the consent decree had been preceded by extensive and well-publicized negotiations.[105] However, the court also held "that Irvine is not precluded by *stare decisis*, collateral estoppel, or res judicata from taking other action . . . (consent decrees — products of negotiation rather than contested litigation — are not likely to carry *stare decisis* effects measurably adverse to the proposed intervention in any future proceedings)."[106]

A similar position was taken by the U.S. Court of Appeals for the Seventh Circuit in *City of Bloomington v. Westinghouse Electric Corp.*.[107] Shortly before the entry of a consent decree settling Resource Conservation and Recovery Act (RCRA) and CERCLA enforcement actions for the cleanup of hazardous waste dumping sites, and after the district court had heard extensive public comments from it and others, the court denied the motion of the Indiana Public Interest Research Group (InPIRG) to intervene on the ground that it was not timely.[108] After agreeing with the trial court that the motions were filed too late in the proceedings, the court observed that if InPIRG were allowed to intervene "there can be no consent decree absent InPIRG's agreement . . . . Thus the lengthy and difficult negotiation process in which the present parties participated would be wasted."[109] The court further emphasized that InPIRG had had ample opportunity to present its views:

> Thus, it is difficult to understand why InPIRG should be allowed to intervene in the present case for the purpose of presenting its views on the consent decree to the court after it had already been afforded an opportunity to do so. Because InPIRG has already had an opportunity to present its views to the district court, it would suffer little prejudice if it were denied permission to intervene at this late stage in the proceedings.[110]

A somewhat different conclusion was reached by the U.S. Court of Appeals for the Third Circuit in *National Wildlife Federation v. Gorsuch*.[111] Emphasizing the judicial decree nature of a consent de-

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105. 799 F.2d at 538.
106. *Id.* at 538-39.
107. 824 F.2d 531 (7th Cir. 1987).
108. *Id.* at 533.
109. *Id.* at 536.
110. *Id.* at 537.
111. 744 F.2d 963 (3d Cir. 1984).

cree rather than its contractual nature, the court denied the right of third parties to collaterally attack a consent decree even though they had been denied permission to intervene in the proceedings. In an action to prevent the dumping of sewage sludge into the ocean contrary to the Marine Protection, Research and Sanctuaries Act, the National Wildlife Federation (NWF) did not intervene but rather worked "behind the scenes" with the EPA. Not until the parties were in the midst of settlement negotiations did NWF seek to intervene in the litigation. Their motion was denied, and they did not appeal.[112] The court of appeals noted that while a third party who is denied leave to intervene is in a different posture than a party seeking to collaterally attack a judgment, nevertheless under certain conditions such a collateral attack should be barred:

> Preclusion of a third person from collateral attack on a consent decree to *which he was not a party is a step to be taken cautiously and only in unusual circumstances.* The factors present here are not typical and emphasize the narrowness of our holding. In sum:
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> (1) plaintiffs were aware of both suits, knew that their interests were at stake, and monitored both actions closely;
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> (2) the two suits were inextricably intertwined in that the statute, regulations, and dumping area at issue were identical;
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> (3) the New York case was adjudicated in an adversary proceeding and the plaintiffs chose not to file a motion to intervene, even for the purpose of appeal when it became obvious that E.P.A. would not seek appellate review;
>
> (4) plaintiffs filed an amicus brief in the New Jersey suit rather than attempting to timely present the same issues as intervenors;
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> (5) plaintiffs failed to appeal the denial of their motions for intervention in the New Jersey action; and
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> (6) the New Jersey consent decrees established only interim relief, rather than final resolution of the questions at issue, and provided for administrative proceedings in which plaintiffs could participate.[113]

A similar result was reached by the Court of Appeals for the Sixth Circuit in *United States v. Jones & Laughlin Steel Corp.*.[114] There, the City of Cleveland sought to intervene during a public comment period upon a proposed consent decree between the steel company and the United States settling litigation over alleged viola-

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112. *Id.* at 965-66.
113. *Id.* at 971 (emphasis added).
114. 804 F.2d 348 (6th Cir. 1986).

tions of the Clean Air Act and Clean Water Act.[115] Cleveland sought reimbursement for its negotiating efforts and for the adverse effects on quality of life in the city. Reversing the trial court, the appellate court found no basis for Cleveland's demands, in the absence of any other pleadings and evidence, because they were for all practical purposes voluntary services. Cleveland was asserting an independent claim for a share of the money awarded as part of the consent decree without any basis and, therefore, lacked the right to intervene or attack the decree.[116] On the other hand, federal courts have occasionally permitted intervention as late as the partial consent decree process if the court becomes convinced that the intervening party was adequately represented up until the time of a proposed settlement by the original parties. For example, in *In re Acushnet River & New Bedford Harbor*,[117] the court permitted intervention to contest a proposed consent decree by the Natural Wildlife Federation (NWF) three and one-half years after CERCLA litigation commenced over PCB disposal. The court felt that NWF "apparently believed the settlement to be a betrayal" and "then moved promptly to intervene."[118] Of course, most courts agree that the right to intervention does not carry with it any right to block a consent decree agreed to by the principal parties, particularly if they have had an adequate opportunity to object.[119]

B. State Cases and the Rights of Third Parties

Cases dealing with state due process/collateral estoppel issues are few and far between. *Morris County Fair Housing Council v. Boonton Township*[120] deals tangentially with the subject. In settlement of a so-called *Mt. Laurel* claim (developer alleging that by failing to zone his land for multiple-family housing, a local government is failing to meet its fair share of regional low- and moderate-income housing needs), the defendant local government and one of the devel-

115. *Id.* at 349.

116. *Id.* at 352.

117. 712 F. Supp. 1019 (D. Mass. 1989).

118. *Id.* at 1023.

119. United States v. Hooker Chem. & Plastics Corp., 540 F. Supp. 1067 (W.D.N.Y. 1982). "It is well settled that '[t]he right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects.' " *Id.* at 1083 (quoting Zipes v. TWA, 455 U.S. 385, 392 (1982) (quoting Air Line Steward and Stewardesses Ass'n v. TWA, 630 F.2d 1164, 1169 (7th Cir. 1980))).

120. 484 A.2d 1302 (N.J. Super. Ct. Law Div. 1984).

opers proposed to enter into a consent decree that would foreclose the second developer from pursuing his *Mt. Laurel* remedy.[121] Such a consent decree would also bind non-party, lower-income persons.[122] While the courts in New Jersey "have long endorsed the policy of encouraging the settlement of litigation,"[123] the court expressed great concern over the potential for lowering the amount of low-income housing in frustration of the *Mt. Laurel* doctrine:

> The risks of improvidently approving a settlement and issuing a judgment of compliance are most acute in *Mount Laurel* litigation brought by developers. A plaintiff developer and defendant municipality have complementary objectives in settlement negotiations which are likely to result in an agreement which does not advance the goals of *Mount Laurel*. A municipality's objective is to be assigned a small fair share of lower income housing. A developer's objective is to secure approval of his project. If a judgment of compliance is entered approving a settlement which advances both of these objectives, the result would be the construction of a small number of lower income housing units while insulating the municipality from further *Mount Laurel* litigation for six years.[124]

Nevertheless, the court rejected the notion that a judgment of compliance could only be entered after a full trial and held that the court could enter such a judgment binding on parties with pending actions as well as other parties, provided adequate notice and opportunity for further testimony is provided by the court.[125]

V. CONCLUSION

The consent decree is an increasingly viable tool for settling complex litigation in the land use and environmental law fields. As the cases demonstrate, the consent decree is most prevalent and most commonly accepted in litigation arising in the federal courts. The federal courts also appear to be most likely to accept those aspects of the consent decree that direct action outside of, if not in contravention of, state and local processes for dealing with the use of land. This is particularly true in the fields of housing discrimination and environmental law, but the interests of the federal courts in settling

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121. *Id.* at 1304.
122. *Id.* at 1306.
123. *Id.*
124. *Id.* at 1307.
125. *Id.* at 1310.

any complex litigation appears also to be a compelling reason.

Recall that in 1955 when Justice Douglas penned his famous opinion in *Berman v. Parker*,[126] most commentators assumed that the fast and loose treatment of the Public Purpose Clause of the Fifth Amendment was limited to urban renewal cases. Then, a quarter of a century later, Justice O'Connor, writing for a unanimous court in *Hawaii Housing Authority v. Midkiff*,[127] extended the concept to eminent domain proceedings generally. In federal courts at least, the consent decree genie is out of the bottle, as the environmental cases demonstrate.

In state courts, the situation is by no means so clear. Many state courts still refuse to permit the use of the consent decree to circumscribe state and local land use or environmental procedures. However, it is possible to explain away the difference solely on the basis of separation of powers. State courts are coequal with the state legislature, which, either directly or through local governments, sets out certain provisions that the court is loath to tamper with through the consent decree.

The matter of procedural due process rights of third parties is murkier still, with both federal and state courts in disagreement over whether such rights can be cut off. Clearly the courts should and do require some measure of due process. But to the extent the affected parties are permitted to intervene in court proceedings in a meaningful fashion prior to the consent decree, then whether or not it is to their liking, courts appear to be willing to cut off intervenors' rights to collaterally attack the consent judgment that results, particularly given the courts' predilection for ending complex and expensive litigation.

The use of the consent decree to settle complex litigation thus presents a problem and opportunity: the avoidance of complex and lengthy town planning and environmental impact approvals. There is theoretically little to prevent local government and landowner from agreeing to settle litigation by means of a consent decree granting approval of development without all the procedures and permits required by state or local law, including lengthy hearing requirements, so long as due process rights of third parties are honored to some extent in the judicial process.

This may be a salutary result where environmental impact and

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126. 348 U.S. 26 (1954).

127. 467 U.S. 229 (1984).

land development regulations have grown in number and complexity so as to unduly complicate and lengthen the land development process for years and years. On the other hand, it behooves the courts to take special care that they do not become an unwilling substitute for local land use and environmental permit agencies simply for the sake of convenience and expediency.