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Defendant's Brief on Issue of Mandatory Requirement for Internal Subsidy

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY
DOCKET NO. L-36896-70 P.W.
L-28061-71 P.W.

THE ALLAN-DEANE CORPORATION, et al.,

Plaintiffs,

-vs-

THE TOWNSHIP OF BEDMINSTER, et al.,

Defendants.

Civil Action

RULS - AD - 1981 - 100

BRIEF ON ISSUE OF MANDATORY REQUIREMENTS FOR INTERNAL SUBSIDY

Alfred L. Ferguson
of Counsel

PRELIMINARY STATEMENT

This brief addresses what we anticipate to be the objections of the Office of the Public Advocate, as amicus curiae as to remedy, and the individual plaintiffs, represented by the American Civil Liberties Union, to the proposed ordinance drafted by Bedminster pursuant to this Court's Order for Remedy of March 6, 1980.

As the Court has been advised by Mr. Raymond, the court appointed Master, the Township has prepared a proposed ordinance in response to the court order, which Mr. Raymond finds generally in compliance with the requirements of the court order and which we believe will implement the intent of the court ordered rezoning. We understand Mr. Raymond is forwarding to the Court additional comments addressing the issues discussed infra.

We believe that the objections to the ordinance have to do with the provisions dealing with mandatory percentages of least cost or low and moderate income housing and the necessity of controlling the resale price of units sold at below market prices. In addition, we believe there may be other significant legal problems with ordinances even as drafted. For this reason we will

suggest infra that the wisest course of action to follow is to postpone any decision on these issues until absolutely necessary.

Background

This Court, in the Order for Remedy dated March 6, 1980, stated that the ordinance should contain a provision for a planned development overlay zone. The court order specified, in paragraph C(3) that a planned development overlay zone with certain provisions should float throughout the Corridor. The order provided that:

> ". . .the development provisions of which [the planned development overlay zone] shall include where appropriate (but not necessarily be limited to):
>
> . . .(c) provisions mandating specific percentages of least cost or subsidized units;"

The choice of words in paragraph C(3)(c) was deliberate and specifically tailored to take account of the fact that the state of the law in this area in New Jersey was uncertain and unclear. Thus, the provisions are only to be included in the planned development overlay zoning "where appropriate." This is a general limitation.

More importantly, however, the specific percentage language is directed towards "least cost" or

"subsidized units." The concept of least cost housing was used instead of low and moderate income housing to take account of the holding in Madison Township that a town has a duty to zone for its fair share of least cost housing. Zoning for a fair share of low and moderate income housing, which many thought was the holding in Mt. Laurel, had been abandoned in Madison Township. The words "subsidized units" were used, since all parties contemplated that applications might be made for federal or state subsidies.

This Court will well recall that the impetus for a commitment on behalf of the developer to dedicate a certain percentage of its units to lower income groups came, not from the individual plaintiffs or the Public Advocate, but from the developer itself. Allan-Deane consistently took the position that it was willing, and indeed committed, to reserve 20% of its units for either public or private subsidy in order to take advantage of the Mt. Laurel doctrine and to enhance its standing to challenge the constitutionality of the Bedminster ordinance. The developer repeated this commitment to the Court at the commencement of the trial, and maintained it throughout the trial, in spite of the fact that the 1977 decision in Madison

Township changed the obligation from a duty to zone for a fair share of low income housing to a duty to zone for a fair share of least cost housing. The concept of least cost, of course, does not include any definition of who can afford it. Least cost is that housing which the market mechanism will build in the absence of undue cost generating elements in the municipal development regulations.

This Court, at the trial and at post trial hearings on remedy, reminded all parties of the developer's committment. It is this commitment, and the wish of the court to enforce it on the developer, which has been the genesis of the provisions in the ordinance about which the Public Advocate and the ACLU now complain.

Mr. Coppola, the planner retained by the Township of Bedminster to draft the proposed ordinance in compliance with the Court's Order for Remedy, included various provisions mandating a percentage of subsidized or least cost housing in the first draft of the ordinance. These were extensively reviewed and debated by all parties with Mr. Raymond. It soon became evident that there were significant differences of opinion as to the wisdom of such provisions and the extent to which a municipality in New Jersey could, as a matter of law, or should, as a matter of municipal policy, go in including mandatory percentage provisions in an ordinance.

The Provisions of the Proposed Ordinance

The provisions of the ordinance containing the requirements for mandatory percentages are found in the section on planned residential developments (page 600-11, section 606(C)(9), and planned unit developments, (page 600-13, section 606(D)(10)). These provisions are as follows:

Planned Residential Developments

§606(C)(9): Subsidized and/or Least Cost Housing Requirements

At least twenty percent (20%) of the total number of residential dwelling units within a Planned Residential Development shall be subsidized and/or least cost housing in accordance with the following provisions:

"a. If rental units are provided within a Planned Residential Development, the residential units shall be used to fulfill the required twenty percent (20%) and the rents of said rental units shall be subsidized in accordance with available subsidy programs authorized and regulated by the Federal Department of Housing and Urban Development or the New Jersey Housing Finance Agency. If no subsidy programs are available, this fact shall be certified to the Planning Board, and the rental units shall be restricted in size to be no larger than fifteen percent (15%) greater in area than the minimum net habitable floor area specified for the dwelling units in this Ordinance. Moreover, if no subsidy programs are available, said rental units shall be rented at a cost not exceeding the Fair Market Rents established for Bedminster Township by the Department of Housing and Urban Development, provided that rents may be subsequently increased in conformity with revised and updated Fair Market Rents as published by the Department of Housing and Urban Development.* In any case, not less than five percent (5%) of the units shall have four (4) bedrooms and not less than an additional twenty percent (20%) of the units shall have three (3) bedrooms."

"b. If enough rental units are not provided to fulfill the required twenty percent (20%), dwelling units for sale in the Planned Residential Development used to fulfill the required twenty percent (20%) shall be sold at a cost not exceeding 2 1/2 times the median income (as published by the Somerset County Planning Board) if the dwelling units contain two (2) bedrooms or more, or at a cost not exceeding 2 1/2 times 80% the median income if the dwelling units contain less than two (2) bedrooms. Not less than five percent (5%) of these units shall have four (4) bedrooms and not less than an additional twenty percent (20%) shall have three (3) bedrooms."

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* This provision is in the process of being changed to substitute an element of the Consumer Price Index instead of HUD fair market rents.

Planned Unit Developments

§606(D)(10): Subsidized and/or Least Cost Housing Requirements

At least twenty percent (20%) of the total number of residential dwellings within a Planned Unit Development shall be subsidized and/or least cost housing in accordance with the following provisions:

"a. At least twenty-five percent (25%) of the required twenty percent (20%) shall be subsidized Senior Citizen Housing units in accordance with Section 601 B. of this Ordinance. If no subsidy programs are available for Senior Citizen Housing, this fact shall be certified to the Planning Board and the required percentage of subsidized and least cost housing in the Planned Unit Development shall be provided in accordance with Sections 606 10.b. and 606 10.c. hereinbelow. The height, parking and other provisions specified for subsidized Senior Citizen Housing units in Section 601 B. of this Ordinance shall not be applied to any other housing within the Planned Unit Development."

"b. At least thirty-five percent (35%) of the required twenty percent (20%) shall be rental units subsidized in accordance with available subsidy programs authorized and regulated by the Federal Department of Housing and Urban Development or the New Jersey Housing Finance Agency. If no subsidy programs are available, this fact shall be certified to the Planning Board, and the rental units shall be restricted in size to be no larger than fifteen percent (15%) greater in area than the minimum net habitable floor area as specified in this Ordinance.

Moreover, if no subsidy programs are available, said rental units shall be rented at a cost not exceeding the Fair Market Rents established for Bedminster Township by the Department of Housing and Urban Development, provided that rents may be subsequently increased in conformity with revised and updated Fair Market Rents as published by the Department of Housing and Urban Development.* In any case, not less than five percent (5%) of the units shall have four (4) bedrooms and not less than an additional twenty percent (20%) of the units shall have three (3) bedrooms."

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* This provision is in the process of being changed to substitute an element of the Consumer Price Index instead of HUD fair market rents.

Position of Bedminster Township

Bedminster Township does not believe that there is any case or statutory law which requires, or indeed authorizes, a municipality to include mandatory percentage provisions in its ordinance. The Mt. Laurel and Madison Township doctrines have not done so. Indeed, the Supreme Court of New Jersey in Madison Township specifically reserved judgment on whether such provisions would be appropriate, much less required, for the implementation of the Mt. Laurel doctrine. See Madison, 72 N.J. at 518-519. There the New Jersey Supreme Court had reservations about allowing municipalities to use rent-skewing or density bonuses in ordinances. The issue here is requiring a developer to internally subsidize.

Indeed, the questions addressed to counsel in the six consolidated zoning cases indicate that the court is very concerned with the issues of remedy and what steps are necessary to implement the Mt. Laurel doctrine. Copies of those questions have been furnished to the Court under separate cover.

Since it is not required by a state case or

statutory law, and since the municipality in its zoning powers is limited by the grant of authority in the statute (the Municipal Land Use Law), it then follows that a municipality has no power or jurisdiction to enact or implement any such provisions.

As is argued infra, we believe that there is a strong probability of anti-trust liability inherent in many aspects of these mandatory percentage provisions, and the Township cannot enact any statute which will expose the Township or the members of the governing body who enact the ordinance to anti-trust liability.

There are also other significant problems with the mandatory percentage provisions, aside from the anti-trust implications. Compelling internal subsidies in effect makes the developer take the profit he realizes from the sale of one unit and use it to subsidize a low market price or rent for another unit. This may very well be a "taking" within the prohibition of the various constitutional provisions.

For these reasons, we suggest that this Court should allow the Township to enact the ordinances as drafted and should retain jurisdiction over §606(C)(9) and §606(D)(10) pending clarification of the law by the New Jersey Supreme Court in the six consolidated

zoning cases now before it (or by the Legislature).

This solution would avoid what would be an advisory opinion by this Court on a very complex problem of law and social policy on which even the New Jersey Supreme Court saw fit to express its reservations. If public subsidies become available, then the problem may become moot, since the internal or private subsidy provisions become operative only if public subsidies are unavailable.

We have no objection to imposing any internal subsidy requirement on Allan-Deane in order to enforce its often stated commitment. This could be by court order, instead of by ordinance.

ARGUMENT

In Madison, 72 N.J. at 518-519, the New Jersey Supreme Court stated its reservations about "rent skewing", a term which the Court used to describe all forms of private subsidy:

> "We are constrained to take a more reserved position as to the validity of zoning provisions for "rent skewing", or the allowance of greater density in either sale or rental accommodations in exchange for special concessions by the developer or rental or sale price of a limited number of units. Although this is also a widely recommended zoning technique for handling the problem of encouraging private construction of lower income housing,[28] we discern serious problems with the exercise of local zoning power in such a manner without express legislative authorization. See Board of Supervisors v. De Groff Enterprises Inc., 214 Va. 235, 198 S.E.2d 600 (Sup. Ct. 1973); Annot. 62 A.L.R. 3d 880 (1975). We will not here resolve the issue in the absence of adequate argument on the matter. However, we are not to be understood as discouraging local initiative in this area; the question, moreover, deserves legislative study and attention.

Footnote 28 is significant:

> [28]"Rent Skewing" is a generic term to the imposition of a greater proportion of land, construction or other costs on one group of units in a development in order to lower the eventual rental or sale price of another group of units therein. Rent skewing can be encouraged by a municipality in two ways: requiring that a mandatory percentage of moderately priced dwellings be constructed (this is often referred to as an MPMPD ordinance) or allowing a developer a density bonus enabling him to build, for example, one conventional unit for every two low or moderate income units constructed. See Kleven, "Inclusionary Ordinances--Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing", 21 U.C.L.A. Rev. 1432 (1974).
>
> Various alternatives have been suggested for satisfying the low and moderate income requirements: constructing federally subsidized housing, renting to low income families under a rent subsidy program,

constructing units selling or renting at or below maximums fixed in the ordinance, conveying land to the county or its designee, selling or leasing units to a redevelopment or housing authority or giving authority first refusal to rent or buy. See Kleven, supra, at 139-147.

On density bonuses or MPMPD's generally, see Rose, "The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) Is the Latest Technique of Inclusionary Zoning", 3 Real Estate L.J. 176 (1974); Rose, "The Mount Laurel Decision: Is It Based on Wishful Thinking?", 4 Real Estate L.J. 61, 68-9 (1975); Brooks, Lower Income Housing: The Planner's Response, ASPO Report No. 282 (Am. Socy. of Planning Officials, July-August 1972).

Where "rent skewing" takes the form of resale price control, or requiring the developer to subsidize low priced units with high priced units, rent skewing is not permissible.

The opinion of Judge Eynon in Uxbridge Associates v. Cherry Hill (Docket No. L-47571-77) is to the contrary. The actual holding in that case, however, is simply that the developer did not take advantage of the relief provisions of the ordinances; "this plaintiff created his own hardship". Transcript, p. 16 l. 12. The rest is dicta.

In any event, it is evident that any scheme to mandate rent skewing by private developers will force courts into the quagmire of deciding whether a developer can receive "a just and fair return" under the ordinance. See transcript, p. 18-21. See discussion of the Rent Control cases, infra.

We do not believe that either the courts or municipalities of this State shouldembark on this perilous course until clear direction is given by the State Legislature.

POINT I

INTERNAL SUBSIDY BY DEVELOPERS CANNOT BE REQUIRED: THE RENT CONTROL PRECEDENT IS NOT PERSUASIVE.

We anticipate the Public Advocate will argue that if it is permissible to limit rent increases, it is permissible to limit sales prices of sole units. This argument is facially appealing, but is simplistic and does not resolve any problems.

The Supreme Court of New Jersey has construed the police power as broad enough to permit municipalities to engage in rent control. In Inganamort v. Fort Lee, 62 N.J. 521 (1978), the Court sustained ordinances fixing the prices of rents in the face of broad constitutional challenges. See also Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543 (1975); Brunetti v. New Milford, 68 N.J. 576 (1975); Troy Hills Village v. Parsippany-Troy Hills Township Council, 60 N.J. 604 (1975) (rent control ordinances held not to violate substantive due process and equal protection and held not to be confiscatory).

The court has also held that the municipal zoning power gives municipalities the authority to restrict certain

uses to specific classes of people. Taxpayers Association of Weymouth Township v. Weymouth Township, 71 N.J. 249 (1976) (upholding zoning ordinance limiting the use of mobile home units in trailer parks to families with heads of households 52 years of age or older); Shepard v. Woodland Township, 71 N.J. 230 (1976) (upholding ordinance permitting senior citizen communities as a special use exception in a residential argicultural district).

However, the Court has also recognized constitutional limitations on municipal power to enact ordinances regulating rent control. In Property Owners Association of North Bergen v. Township of North Bergen, 74 N.J. 327 (1977), the court specifically rejected a rent control ordinance which would require the landlord to subsidize Senior Tenants (persons over 65 years of age with annual incomes less than $5,000) or alternately would require other residents of the apartment buildings to subsidize the senior tenants.

Under the challenged ordinance rents for Senior Tenants were frozen. Upon a showing of need, landlords could increase the rent of non-senior tenants by a maximum of 15%. If he could not meet his expenses with the 15% increase, the township would provide a subsidy of up to 10% of rents being paid by Senior Tenants. There was no provision in the ordinance for landlord relief if the combination of the 15% and

10% increases did not permit the landlord to meet his expenses.

The Supreme Court first recognized the power of municipalities to enact rent control ordinances which provided landlords with a reasonable return and noted the laudable purpose of the legislation. Nevertheless, the court rejected the ordinance for two reasons. First, the ordinance may prevent the landlord from obtaining a fair and reasonable return.

> Under the terms of the ordinance, the landlord may not recoup any additional funds to which he is rightfully entitled. Imposition of that burden would deprive a owner of property without due compensation. Such rent control is confiscatory and unconstitutional.

74 N.J. at 336.

Secondly, the court objected to the burden of the initial rent increases (the 15% increase) being born exclusively by the non-Senior Tenants.

> The Public Advocate,* conceding that landlords are entitled to a fair return upon their investment, contends that the subsidization should be born by the remaining tenants who are not Senior Tenants. The Advocate relies upon public utility rate structure decisions where in certain types of uses have been charged less than their cost of service and others in excess thereof. At oral argument he asserted that the trial court should exercise its discretion in determining whether the financial burden should be placed on the remaining tenants, the Senior Tenants, or all tenants in the building. None of those contentions are persuasive.

74 N.J. at 337.

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* The Public Advocate appeared as amicus curiae.

Property Owners Association makes clear that even under the broad construction of the police powers granted by the New Jersey constitution and state legislative enactments, and even with a public purpose of unquestioned worth, municipalities are without power to control prices of residential dwellings when such control will require a limited number of other private citizens (or the developer) to bear the costs of the control.

POINT II

MUNICIPAL ORDINANCES WHICH ENFORCE RESALE PRICE MAINTENANCE OF HOUSING UNITS VIOLATE FEDERAL AND STATE ANTI-TRUST STATUTES.

A. Price fixing is a per se violation of the Federal and State anti-trust laws.

Section 1 of the Sherman Anti-trust Act, 15 U.S.C. §1 et seq., prohibits "[e]very contract, combination... or conspiracy in restraint of trade or commerce..."

The Supreme Court, in interpreting the broad language of the Act, has recognized that because certain practices are so inherently anti-competitive that they constitute a per se violation of the anti-trust laws, the defendant is conclusively presumed to have violated the law. The Supreme Court has long held that price-fixing agreements in general are unlawful per se under the Sherman Act. U.S. v. Socony - Vacuum Oil Co., 310 U.S. 150, 218 (1940). Specifically, the Court has held that resale price maintenance agreements, setting maximum price controls, severely intrude upon the ability of buyers to compete and survive in the market and are illegal per se. Albrecht v. Herald Co., 390 U.S. 145, 153 (1969).

* * *

The New Jersey anti-trust act, N.J.S.A. 56:9-1, et seq., parallels the federal statute, and federal decisions are

significant precedent for applying the state statute. See, e.g., Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 237-238 (Ch. 1972).

B. The "State Action" Doctrine excludes states, acting as sovereign, from the anti-trust laws.

In Parker v. Brown, 317 U.S. 341 (1943), the Court upheld a California statute specifically authorizing the establishment of agricultural marketing programs expressly restricting competition among raisin growers and fixing the prices at which the growers could sell their product. The Court created the "State Action" exemption to the Sherman Act excluding states, acting as sovereign in a legitimate sphere of regulation, from the anti-trust laws.

However, the Court has narrowly defined the State Action exemption to the Sherman Act. In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), a retail druggist selling light bulbs brought suit against a private electric utility which provided light bulbs to customers without additional charge, alleging that the utility was using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs. The defendant argued that the practice has been approved by the state authority regulating public utilities. The Supreme Court reversed the dismissal against the plaintiff retailer,

finding that Parker v. Brown did not immunize private action even though approved by a state agency in a "pervasively regulated" industry. Indeed, the Court stressed that the Parker holding was limited to "official action taken by state officials," even when commanded by the State. Id. at 591-92, n. 24.

Furthermore, the "State Action" must be exercised by the appropriate state agency wielding the power in question. In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court struck down a minimum fee schedule for attorneys published by a county bar association and enforced by the Virginia State Bar when it found that the anti-competitive effects of the minimum fee schedules were not directed by the state acting as sovereign. In contrast, the Court declined to use the anti-trust laws to invalidate the Arizona Supreme Court's ban on attorney advertising because the challenged restraint was the "affirmative command" of the Arizona Supreme Court, which was "the ultimate body wielding the state's power over the practice at law," and thus the restraint was "compelled by direction of the State acting as a sovereign." Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977), citing Goldfarb v. Virginia State Bar, 421 U.S. at 791.

C. The "State Action" exception does not exempt a state's subdivisions engaging in anti-competitive activities from the anti-trust laws unless acting pursuant to a comprehensive state mandated scheme of regulation.

Courts have generally refused to exempt municipal governments from the anti-trust laws by reason of their status as such and have engaged in a much higher level of scrutiny of the state's legislative intent regarding anti-competitive behavior by municipal governments. See, City of Fairfax v. Fairfax Hosp. Ass'n., 562 F.2d 280 (4th Cir. 1977) (lease of hospital by county industrial development authority to county hospital association, which operated only other hospital in county, not immune from anti-trust laws); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), infra; Kurek v. Pleasure Driveway and Park Dist., 557 F.2d 580 (7th Cir. 1977), vacated and remanded 435 U.S. 389, remanded F.2d 378 (1978), infra; Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) (municipal corporations engaging in joint boycott agreement not to sell plaintiff's products in municipal facilities not exempt from anti-trust laws).

In City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the plaintiffs were cities

which were granted the power to own and operate electric systems under state law. The cities sued Louisiana Power & Light, a private utility, alleging various anti-trust violations. Louisiana Power & Light counterclaimed, also asserting anti-trust offenses, and the cities moved to dismiss the counterclaim under the "State Action" immunity doctrine of Parker. The Court held that municipal governments are exempt from federal anti-trust sanctions only when the anti-competitive action is taken "pursuant to state policy to displace competition with regulation or monopoly public service." Id. at 413. The Court clearly defined the scope of the Parker doctrine by describing the standard set forth in the decision:

> ...[W]hen the State itself has not directed or authorized an anti-competitive practice, the State's subdivision in exercising their delegated power must obey the anti-trust laws.

Id. at 416.

The already strict standard enunciated in Lafayette has been interpreted narrowly. In Mason City Center Associates v. City of Mason City, Iowa, 468 F.Supp. 737 (N.D. Iowa 1979), plaintiffs were denied a rezoning of their land for the purpose of developing a regional shopping center. Plaintiffs sued the city, its council members, and another developer, charging that the city and the developer had entered into an anti-competitive agreement to prevent the development of a competing shopping center. The city contended that its action in refusing

to rezone was protected as a matter of law by the "State Action" exemption of Parker.

The Court, in denying the municipality's motion to dismiss, proposed a two-tier test. First, the Court cited Goldfarb, supra, and the plurality opinion in Lafayette, supra, for the proposition that:

> It is not enough that . . . anti-competitive conduct is "prompted" by state action; rather anti-competitive activities must be compelled by direction of the State acting as sovereign.

468 F. Supp. at 472.

The Court further explained the first part of its test.

> . . . other considerations of special significance are whether or not the state policy requiring the anti-competitive restraint is specifically part of a comprehensive regulatory system; and is clearly articulated, affirmatively expressed and actively supervised by the state as the policy maker. Id. at 742, citing Lafayette. (Emphasis in original.)

Assuming that a state statute compels a municipality's anti-competitive activites, "the court would further have to find that the grant of a Parker state action exemption is necessary in order to make the state's zoning statute work, and even then only to the minimum extent necessary." Id. at 743, citing to Lafayette. (Emphasis in original.)

In the wake of Lafayette, lower courts have universally adopted a narrow view of the test for finding "state action" by a subordinate unit of government. They have focused on a test endorsed by a majority in Lafayette, 435 U.S. at 413:

> ...the Parker doctrine exempts only anti-competitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.*

In Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority, 451 F.Supp. 157 (S.D.N.Y. 1978), the court reviewed the line of state action cases leading to Lafayette and summarized the test as follows:

> The threshold inquiry called for in each case is whether the state, acting as a sovereign, had required the instrumentality in question to engage in a particular form of anticompetitive behavior. 451 F.Supp. at 166.

The court explained that the test does not mean that the specific act must be directly authorized by the legislature, but that:

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*This language was the conclusion of Part II of the plurality opinion, but it was specifically endorsed by Justice Burger. See 435 U.S. at 425, fn. 6.

> The legislature must direct its instrumentality to engage in a particular type of anticompetitive activity and then each subsequent action of that type will have satisfied the treshold requirement for Parker immunity. Id.

In Star Lines, a publicly created shipping authority terminated a private entity as booking agent for authority-owned ships and granted the exclusive right to another private entity. The court reviewed the statutory language creating the authority, and although the language exempted the authority from the antitrust laws, the court found that the language did not confer "blanket immunity" such as to give it power to engage in agreements to create monopolies. Therefore, it found that the authority's exercise of its power was "too tenuous" to permit the conclusion that its intended scope of activity included such anti-competitive conduct. 451 F.Supp. at 167. It dismissed the defendant's motion for summary judgment.

Likewise, in Woolen v. Surtran Taxi Cabs, Inc., 461 F.Supp. 1025 (N.D. Tex. 1978), defendant municipalities owned an airport, and granted an exclusive right to a single taxi cab company to pick up passengers at the airport. In a suit by other taxi owners challenging the local ordinance on antitrust grounds, the municipalities moved for summary judgment, citing the Parker doctrine. The district court noted that the airport scheme had been the subject of prior litigation and had been upheld. However, in light of the recent cases narrowing the scope of Parker, the court denied defendants' motion.

The court attempted to find a state policy to displace competition with regulation or monopoly public service, but a review of several statutes yielded no such policy. The court noted that some statutes "merely authorize" but do not "require" the anticompetitive activity. 461 F.Supp. at 1031. The court also found that "home rule" charters, without more, do not confer immunity on municipal action.

See also Pinehurst Airlines, Inc., v. Resort Air Services, Inc., 1979-2 Trade Case ¶62, 744 (D.C.N. Carolina, 1979) (municipality authorized by statute to own and operate an airport is not authorized to grant exclusive status to one airplace service company at the airport - motion to dismiss on Parker grounds dismissed).

The zoning power has also come under scrutiny of the antitrust laws after Lafayette. In Mason City Center Associates v. City of Mason City, supra, 468 F.Supp. 737, plaintiff developers complained that municipal officials had entered into an agreement with another developer of a shopping center to restrict further shopping center development by zoning. Defendants moved for a dismissal on state action grounds, which the district court denied.

Applying the "displace competition" test and the Goldfarb test requiring that "anticompetitive activities ...be compelled by direction of the State acting as

sovereign," the court found that:

> Although zoning statutes assuredly sometimes have anticompetitive affects, it is somewhat fatuous to contend that they inevitably reflect a state's clear and affirmative intent to displace competition with regulation of monopoly public service. 468 F.Supp. at 742.

In Whitworth v. Perkins, supra, 559 F.2d 378 (5th Cir. 1977), vacated and remanded 435 U.S. 992 (1978), opinion reinstated and remanded 576 F.2d 696 (5th Cir. 1978), cert. den. 99 S. Ct. 1224 (1979), a city enacted an ordinance permitting the sale of liquor, but forbidding its sale in residential zones. The town was adjacent to a "dry" city in a "dry" county. Plaintiff alleged that the zoning ordinance was passed specifically to exclude him from the liquor business.

The Fifth Circuit relied on Parker, Cantor, and Bates and reversed the trial court's dismissal of plaintiff's claims on "state action" grounds. The Supreme Court vacated the decision for reconsideration in light of Lafayette, and in response the Fifth Circuit reconsidered and reinstated its decision that the state action exemption did not apply.

The Seventh Circuit in Kurek v. Pleasure Driveway and Park District, supra, 557 F.2d 580 (7th Cir. 1977), vacated and remanded 435 U.S. 992 (1978), remanded 583 F.2d 378 (1978), cert. den. 439 U.S. 1090 (1979), also considered an antitrust complaint by concessionaires of a publicly

operated park district who were allegedly terminated when they refused to raise their prices and engage in horizontal price fixing. The Court rejected the defendants' assertion of Parker immunity on the basis of Cantor and Goldfarb. Following vacation by the Supreme Court in light of Lafayette, the Seventh Circuit affirmed its decision that the alleged anti-competitive behavior was not shielded by the "state action" exemptions.

Two recent cases have upheld Parker immunity for subordinate governments. In Huron Valley Hospital v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979), a non-profit hospital brought suit against the city and state health officials alleging a conspiracy to exclude it from the market for providing hospital facilities in violation of federal anti-trust laws. The Court reviewed the federal and state statutes and concluded that the Parker immunity was appropriate.

> Plaintiff has vigorously attacked the state Certification of Need Process because it excludes new entrants into the hospital field for the benefit of existing hospitals. Yet, this is exactly what the state regulatory scheme demands. 466 F. Supp. at 1311-1312.

Michigan had a comprehensive statutory scheme of regulating new hospital construction to prevent unneeded construction and duplication of facilities, as does New Jersey.

See, N.J.S.A. 26:2H-1 et seq.

In Community Communications Co., Inc. v. City of Boulder, 1980-2 CCH Trade Cas. ¶63, 362 (10th Cir. 1980), Boulder imposed a moratorium on a non-exclusive cable T.V. franchisee from expanding to new customers while the city took bids for franchising additional cable providers. The trial court found no state action immunity, but the court of appeals reversed.

First the court examined whether the municipality had the authority to regulate cable T.V. and found that under Colorado constitutional home rule powers as interpreted by the Colorado Supreme Court, it has such powers. Second, the court rejected the trial court's reliance on Lafayette and distinguished it because of the distinction between proprietary and governmental functions. Third, the court found that the Colorado regulatory scheme was supported by the Supreme Court decision in California Retail Liquors Dealers Ass'n. v. Midcal Aluminum, Inc., 48 U.S.L.W. 4238 (March 3, 1980) which set out a two-part test for governmental anti-trust immunity:

1. The restraint must be "clearly articulated and affirmatively expressed as state policy";
2. The policy must be "actively supervised" by the state itself.

The Tenth Circuit reliance on Lafayette is questionable. First, Lafayette does not distinguish between proprietary and

governmental interests. Chief Justice Burger, in his concuring opinion, noted that the case could and should turn on the fact that the cities were engaged in proprietary activity, and thus the case was "an ordinary dispute among competitors in the same market." But Justice Burger did not limit his concurrence to the exercise of proprietary functions by states or other subordinate units of government. Rather, he specifically endorsed the application of a strict test to both monopoly and regulatory state functions:

> While I agree with the plurality that a State may cause certain activities to be exempt from the federal anti-trust laws by virtue of an articulated policy to displace competition with regulation, I would require a strong showing on the part of the defendant that the State so intended. (Emphasis added.)

435 U.S. at 425, n.6. Moreover, as Chief Justice Burger noted, the question of whether the municipality was functioning in a proprietary capacity was not even a formal finding of fact before the court. 435 U.S. at 418, n. 1.

The Tenth Circuit reliance on California Retail as support for municipal authority to regulate cable T.V. is also questionable. 1980-2 CCH Trade Cas. at 75, 843. California Retail involved state regulation of wine wholesalers. It did not involve regulation by subordinate units of government. Thus, the two-part test set out in California Retail does not address

the problem of regulation by a municipality.

More significantly, the distinction between regulatory and proprietary is illusory. See discussion of the problem of this distinction in Melton, The State Action Antitrust Defense for Local Governments: A State Authorization Approach, 12 Urban Lawyer 315 (1980), at p.326.

After Lafayette, lower courts have unanimously applied a strict test for finding a state action exemption for municipal regulatory activity. The question of whether municipal regulations are "state action" will turn on whether such activity has been mandated by the state acting as sovereign.

* * *

In summary, a municipality is not permitted to engage in anti-competitive behavior unless there is

1) an "affirmative command" of the "untimate body wielding the State's power," Bates, supra, or

2) a state legislative mandate for the specific anti-competitive activity such that the activity is necessary for the municipality to effect the mandates of the statute. Parker, supra; Lafayette, supra; Mason City, supra.

Neither prerequisite is satisfied in New Jersey. The zoning power is a limited delegation of authority given to municipalities by the State Constitution, N.J. Const., Art. IV, §VI, ¶2. See, e.g., Taxpayers Ass'n of Weymouth Twp. v. Weymouth, 80 N.J. 6, 20 (1976). The enabling statute, the Municiple Land

Use Law, N.J.S.A. 40:55D-1 et seq., does not even suggest that anti-competitive behavior, which would be otherwise illegal, is either allowed or encouraged. Therefore, until the New Jersey legislature acts comprehensively, a New Jersey municipality would incur anti-trust liability, civil and criminal, in attempting to fix or otherwise regulate the resale price of housing units.

CONCLUSION

For the foregoing reasons we believe that compulsory rent skewing (internal subsidies of either rental or sales units) is not permissable under the State Constitution and Enabling Act. Accordingly, we recommend that the court enforce the 20% committment of the developer Allan-Deane by court order, rather than by ordinance applicable to all developers. We recommend that the provision as drafted be enacted, with the stated recognition that it is incomplete and needs further revision if public subsidies prove to be unavailable. The court should retain exclusive jurisdiction of these sections so that any developer who feels aggrieved by these sections must come before this Court. This procedure will allow maximum flexibility for both the court and the Township to revise the ordinance in accordance with the decision of the New Jersey Supreme Court in the six consolidated zoning cases or in accordance with State Legislative enactment. It will also protect the Township from further litigation, and will provide an expeditious forum for this limited class of disputes.

Respectfully submitted,

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