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Memorandum of Individual Plaintiffs and
Amicus Curiae

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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.

ALLAN-DEANE CORPORATION, et al., :
 :
 Plaintiffs, :
 :
 v. :
 :
 TOWNSHIP OF BEDMINSTER, et al., :
 :
 Defendants. :

MEMORANDUM OF INDIVIDUAL
PLAINTIFFS AND AMICUS CURIAE

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INTRODUCTORY STATEMENT

Individual plaintiffs and the Public Advocate file this brief jointly in response to several defects in the proposed Bedminster Township Land Development Ordinance. The proposed ordinance has been developed through a constant and painstaking process of interaction between the parties. Virtually all issues have been resolved through that process except for those raised herein. With several important modifications, the Bedminster ordinance can provide real opportunity for low and moderate income families and Allen-Deane can build its share of low and moderate income units.

The proposed ordinance provides, in the Planned Residential Development mode (hereinafter PRD) for 20% subsidized and/or least cost units. These units may be provided through subsidized housing. If subsidized housing is not used or unavailable, price controlled rental or sales housing may be provided. Sales units selling for less than a cost ceiling of 2-1/2 times 80% of median income* for one bedroom units and 2-1/2 times median for two or more bedroom units will fulfill the 20% requirement. The rental units can be constructed at no larger than 15% above the ordinance's minimum net habitable floor area and can rent at a cost not to exceed the Department of Housing and Urban Development's Fair Market Rents in the Newark SMSA. Similar requirements exist in the Planned Unit Development mode.**

*Thus if median income in the area is \$20,000, a person at 80% of median would have a \$16,000 income. Two and one-half times \$16,000 means that the unit could not sell for more than \$40,000.

**In the Planned Unit Development mode, (hereinafter PUD) there is a requirement that of the 20% subsidized and/or least cost requirement, 25% or more of the units will be constructed for senior citizens, 35% or more shall be rental units for families, and at least 20% of the units will be for sale. The for sale units are bound by the same cost restrictions as in the Planned Residential Development. In addition, if subsidies are unavailable for rentals or senior citizen units, the same approach will be utilized as in the Planned Residential Development, supra.

The following deficiencies prevent the Bedminster ordinance from assuring that housing units will be available for low and moderate income persons:

1. Although there is a price ceiling in the PRD and PUD on the initial sales price, there is no price ceiling on re-sales. Therefore, the initial owner will not be prohibited from speculating and making an exorbitant profit on the home so that the home would no longer be affordable by moderate income persons. The failure to include a re-sale provision was not due to doubts about the need for it; all parties and the master recognized that it was needed. Rather a concern was raised to the master that the re-sale provision might subject Bedminster to possible anti-trust liability; because the master could not evaluate this argument, he deferred action upon it. In this brief plaintiffs will show that there is no anti-trust liability and that direction by the court can eliminate any such concern.

2. The rent control limit incorporating HUD's Fair Market Rents is too high. As will be shown below, these rentals will require a much higher income level than that of the families designed to be served by these "least cost" provisions.

The subject of controls on rent was first discussed at a meeting on June 10, 1980 with the master and parties. At that time it was agreed that there should be rent controls. The HUD Fair Market Rent standard was raised. No one at the meeting however had copies of the HUD Handbook. Therefore no one fully appreciated how the Fair Market Rent standard was computed; because of this method the Fair Market Value formula does not produce least cost housing or housing for lower income persons. In fact HUD computes the standard by taking a survey of newly constructed units in the area. The cut-off point for the fair market rent is the 75th percentile of all the new units in the HUD survey, 3/4 will be renting for less than the fair market rent while 1/4 will rent for more. In

view of this methodology, plaintiffs' submit that the HUD standard does not constitute least cost housing or housing for lower income persons and accordingly ask that Bedminster be directed to consider a lower ceiling.

3. The Township has proposed minimum square footage requirements which are in excess of the HUD minimum property standards square footage requirements. Both the affidavit of Peter Abeles and the testimony at trial of Alan Mallach establish that the Bedminster requirements do not provide least cost housing.

POINT I

WITHOUT A RE-SALE REQUIREMENT AND
LOWER RENT CEILINGS, THE PROPOSED
BEDMINSTER LAND DEVELOPMENT
ORDINANCE WILL NOT PROVIDE HOUSING
FOR LOW AND MODERATE INCOME PERSONS

The New Jersey Supreme Court, in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975), determined that a developing municipality, by its land use regulations "must . . . make realistically possible an appropriate variety and choice of housing" and must "affirmatively afford [the] opportunity" for low and moderate income housing. The Court further stated in Oakwood at Madison v. Township of Madison, 72 N.J. 481, 512 (1977):

"To the extent that builders of housing in a developing municipality cannot through publicly assisted means or appropriately legislated incentives . . . provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the 'least cost' housing consistent with minimum standards of health and safety"

Likewise Madison specifically conditioned corporate relief upon the developer providing 20% low and moderate income housing.

The provisions in the Bedminster ordinance as now formulated will neither "affirmatively" provide the opportunity for such housing nor make it "realistically" possible that low and moderate or least cost housing. Nor will they assure that any percentage of the Allan-Deane housing is or will remain for low or moderate income persons.

A. THE NEED FOR A LOWER RENT CEILING

Mr. Raymond in his report recognizes that "controlling the size of a dwelling in no way controls its rental or sale price." p. 11. Because of this, Bedminster has imposed rent ceilings on initial rental for the least cost units; the units

may not rent for more than the fair market rents for Section 8 housing established by the Department of Housing and Urban Development. However the rent levels set by HUD result in housing that low and moderate income persons cannot hope to afford and the methodology used by HUD is such that this result is inevitable.

The HUD schedules for monthly Fair Market Rents in the Newark SMSA (which includes Somerset County) for new construction housing is as follows:*

Bedrooms Structure	0	1	2	3	4 or more
Detached			\$755	\$837	\$877
Semi-Detached/Row	\$488	\$531	\$675	\$773	\$840
Walkup	\$428	\$466	\$599	\$686	\$749
Elevator 2-4 floors	\$493	\$524	\$654	\$729	\$797
5+ floors	\$541	\$579	\$711	\$799	\$861

(Printed in Federal Register, Vol. 45, No. 8, 1/11/80)

Using the standard rule of thumb that a family or individual should not pay more than 25% of gross monthly income for rent, the corresponding yearly income levels for those rents works out to the following:

Bedrooms	Walkups	Semi-Detached/Row	Elevator
0	\$20,544	\$23,424	\$25,968
1	22,368	25,488	27,792
2	28,752	32,400	34,128
3	32,928	37,104	
4	35,952	40,320	

Alan Mallach testified during the course of the trial that HUD defines low and moderate income families as those making between 0-80% of the median

*These figures include provision of all utilities; thus if the tenant paid for his utilities, the rents would be adjusted downwards accordingly.

income in the region. (Vol. III, 9/20/78, p. 109). He testified, as well, that for a family of four, the median income in Northern New Jersey was approximately \$18,000/year. (Vol. III, 9/20/78, p. 112).

Even a brief comparison of these figures with the incomes required for renting units at HUD Fair Market Rents reflects the futility that such rental ceilings would generate in attempting to serve lower income families. It must be remembered that senior citizen elevator units would, in all likelihood, be constructed at six stories. The incomes required to rent those units would range from \$26,000-\$34,000. In addition, garden apartments (walkups) are not provided for in certain PRDs. Therefore, the range of income for rental units in that district would be \$23,424-\$40,000+. What large lower income family is making over \$40,000/year? Finally, the medians as set forth in Mr. Mallach's testimony were developed as to a family of four. Medians which would correlate to efficiency and one bedroom units would be less, thereby indicating yet another disparity which runs counter to the notion of "least cost."

The HUD fair market rents are the rent levels established by HUD for Section 8 subsidy eligibility. A landlord must be able to rent his units for less than this amount to qualify for Section 8. His tenants in those units pay only 25% of their income as rent with a subsidy for the difference from HUD. It is in the Federal government's interest that the fair market rents be high enough to induce landlords to apply for Section 8; otherwise the funds might not be used. HUD does not set the Section 8 fair market rents at true least cost rents.

The fair market rents are derived through a comparison formula with newly constructed dwelling units of modest design in the market area. HUD collects data on comparable units in the area (comparable as to dwelling type and bedroom size). At least twelve comparables should be chosen. HUD then ranges the rents

of those units from lowest to highest, after adjusting according to the inflation rate. The fair market rent chosen is at the 75th percentile of those units. This means that of all the comparables utilized in assessing reasonable rents, the rent chosen is the one 75% above the lowest on the scale. As an example, if 16 comparables were utilized, the lowest at \$400/month, the highest at \$600/month, and the twelfth highest at \$550/month, the \$550 figure would be that used as the fair market rent. (HUD Handbook No- 7420.1 - Chapter 8).

It is eminently clear, therefore, that the fair market rents selected are not least cost. In fact, 75% of the units surveyed, which were comparable, were renting at a cost below the fair market rent. Thus, modest, perfectly suitable rental units could be constructed at less than the HUD fair market rents. This formula may be sufficient for HUD's purpose but it should not be deemed sufficient for providing housing for low and moderate income persons.

B. THE NEED FOR A RE-SALE REQUIREMENT

The proposed Bedminster ordinance places limits on the sales price of new least cost housing units. The rationale is that because of our housing shortage, a small home could easily be bid up to a price well beyond what a moderate income person could afford.

The reason for proposing re-sale controls is similar. Without a re-sale provision, the price control mechanism will furnish only a temporary solution to the lower income housing crisis. Therefore all parties felt that a re-sale provision was important. Mr. George Raymond- the Court-appointed master, so stated in this report of May 27, 1980:

"I am very much aware that control over the initial sales price of a privately owned house provides no guarantees against the initial purchaser's reaping windfall profits on resale, with a resulting escalation of subsequent sales prices beyond the reach of families in the income class for whom they were initially intended. In high quality areas, such as Bedminster Township,

controlling the size of a dwelling in no way controls its rental or sales price. Experience shows that the more desirable a community, the more of a premium people are prepared to pay for the privilege of living in it, even at the sacrifice of space standards by comparison with similarly priced units available in less desirable environments. For this reason, I have suggested to the Township a mechanism for precluding such windfall profits by regulating resale prices into the indefinite future. The Township has rejected my suggestion on the advice of its attorneys based on the possibility that such regulation of resale prices would run afoul of anti-trust statutes. (p. 10-11).

The Township attorney in his May 22, 1980 letter to the court states:

I advised the Township that there were significant problems under the anti-trust laws of New Jersey and the United States as to the control of prices of condominiums or townhouses on resale. Mr. Raymond, I believe, was of the opinion that any mandatory set aside for sales units would be worthless unless such controls were implemented. I believe Mr. Mallach agrees, and we also agree. While there is a substantial argument that such action by a municipality would be considered "state action" and therefore exempt from anti-trust liability, it is by no means clear that this would be true. . . .

The issue of potential anti-trust liability is very real. While every party to this litigation may indeed agree not to assert such a claim against the Township, any such provision would have to apply throughout the Corridor in all the planned development zones, and of course no future developer who is not a party to this litigation can be bound.

For all the foregoing reasons, we are constrained to advise the Town against adopting a mandatory set aside for sales units with a price control mechanism on resale. Such a provision is not found in the draft ordinance. (p. 3-4)(emphasis added).

The importance of re-sale controls was emphasized in a recent law review article which recommends resale provisions.* The authors therein cited

*Strauss and Stegman, Moderate Cost Housing After Lafayette: A Proposal Urban Lawyer, Vol. 11, No. 2, p. 209 (1979).

the example of Irvine, California where no resale provision was present in the mandatory percentage ordinance. At the time of that writing, 85 homes were constructed in the first phase of development at a cost of from \$31,500-\$33,000. Within a month, the first resale sold for \$51,500 and subsequent resales exceeded \$70,000. The same situation was present for the second phase of development. To prevent this the commentary recommends adoption of a resale requirement and drafts a model ordinance based upon the ordinance in Palo Alto, California.

The resale provision is not difficult to implement. The master proposed a simple way of accomplishing this.* Orange County California's process is even simpler. The applicant at the time of project approval must provide guarantees that the units will continue to be available to low or moderate income persons at the time of re-sale; this can be done through restrictive covenants running with the land or thorough agreements with non-profit organizations or governmental agencies.**

*My suggestion was as follows: To prevent the reaping of a windfall profit, the first buyer would be limited in the resale price to the purchase price adjusted for inflation plus the cost of improvements, similarly adjusted for the period since their installation. The same resale price limitation would apply to every subsequent owner.

In order to police and implement this resale price limitation mechanism, the Township would create a housing board. It would have five members, and initially one would be appointed by the Public Advocate. After five years, a resident of the subsidized units would be a member. The housing board would determine the resale price with the seller, who would be required to inform the board of his intent to sell. The price would be established between the seller and the board. The board would maintain a waiting list, on a first come-first serve basis (perhaps with Township residents given first priority). The board would notify the first eligible buyer on the list, and after that, the transaction would be between the seller and the buyer at the stipulated purchase price. If the first buyer on the list looks at the unit and doesn't like it, the next potential buyer on the list gets the opportunity to buy. There would have to be time limits imposed upon notification of intent to sell, and other provisions to protect the seller against unreasonable delays. (p. 11-12 of master's report to court).

** Orange County Board of Supervisors, Resolution 78-295 (2/28/78).

Section 2 of this brief will show that the only barrier to this necessary step, the anti-trust argument is not a real obstacle. Accordingly the plaintiffs urge that it be implemented.

POINT II

EVEN THOUGH BEDMINSTER CAN LEGALLY
IMPOSE RE-SALE REQUIREMENTS, A COURT
ORDER MANDATING THIS WOULD ELIMINATE
ALL POSSIBLE ANTI-TRUST CONCERNS

The only reason that the master has not recommended re-sale restrictions is that Bedminster has argued that such a restriction could expose Bedminster to anti-trust liability. In this section, plaintiffs will show that Bedminster does not face such liability. Nevertheless plaintiffs request the court to mandate such requirements so that any possible anti-trust concern is completely disposed of.

Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce."* The thrust, then, of the Sherman Act was the control of agreements which unreasonably interfered with the free flow of interstate commerce** and in which the parties forming the agreement benefited. To determine whether an unreasonable restraint exists, the courts ordinary employ a rule of reason test;*** however certain agreements such as price-

*"Congress was concerned with attacking concentrations of private economic power unresponsive to public needs, such as 'these great trusts, these great corporations, these large moneyed institutions.' 21 Cong. Rec. 2562 (1890)." City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 428 (1978) (Stewart, dissenting).

**Plaintiffs maintain that interstate commerce is not involved herein. However, the New Jersey Antitrust Act has been interpreted in a substantially similar manner. See section 2C.

***"[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).

fixing have been declared per se unreasonable.*

In 1943 the Supreme Court noted that the Sherman Act historically was a prohibition on individual action not against action of the state.**There was no decision on whether a municipality was exempt from anti-trust liability until City of Lafayette v. Louisiana Power & Light, 435 U.S. 389, 98 S. Ct. 1123 (1978) was decided. The City owned utility was accused of violating the Sherman Act. The court in a 5-4 decision held that municipalities in some circumstances could be liable for violations of the Anti-Trust Act when they engage in practices not authorized or directed by the state.

Bedminster objected to including a re-sale restriction in its ordinance because of the possibility that it could be exposed to anti-trust liability under City of Lafayette. In the remainder of this section, plaintiffs will show that the municipality cannot be liable if it voluntarily enacts a re-sale provision because (A) City of Lafayette applies only to municipal proprietary actions and (B) it is authorized by state law. They conclude furthermore that there is 100% certainty of exemption from anti-trust liability if this court orders Bedminster to insert such a provision.

A. CITY OF LAFAYETTE APPLIES ONLY TO PROPRIETARY OPERATIONS OF MUNICIPAL GOVERNMENTS

The 5-4 decision in Lafayette produced three opinions: a plurality opinion by Justice Brennan representing the opinion of 4 justices; a concurring opinion by Chief Justice Berger and a dissent by Justice Stuart representing the opinions of four justices. The dissenters would have exempted municipalities from anti-trust liability in all cases. The concurring opinion

*"There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue is conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Railway Co. v. United States, supra, 356 U.S. 1, 4 (1958) (emphasis added).

**Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307 (1943).

of Justice Berger would exempt a municipality from anti-trust liability in all cases except where the municipality carries out a proprietary enterprise, i.e., runs a business. Five members of the Lafayette court would hold that a municipality cannot be liable for anti-trust activity because of its actions in adopting a zoning ordinance, a non-proprietary function.

Chief Justice Berger's opinion states that the Sherman Act applies to "the proprietary enterprises of municipalities." 95 Sup. Ct. at 1123, 1141. Since the municipal activity of supplying electric service, the "running of a business enterprise, is not an integral operation in the area of traditional government functions " Lafayette, supra, 98 Sup. Ct. at 1142, it is subject to the Anti-Trust Law. A municipality is liable "to the extent that it engages in business activity in competitive areas of the economy." Lafayette, 98 S. Ct. at 1143. The dissent summarized Berger's opinion as stating that municipalities are subject to anti-trust liability "when they engage in proprietary enterprises" but that they "retain their antitrust immunity for other types of activity." Lafayette, 98 S. Ct. at 1144.

Law review articles support this distinction*. It then appears that despite Bedminster's concerns five members of the Supreme Court would hold that a municipality is not liable under the Anti-Trust Law for an exercise of its zoning power.

*"The distinction has value in defining the proper scope of the exemption of municipalities. First, it embodies a policy inherent in Parker - a governmental unit acting in a regulatory capacity is not motivated by a desire to maximize profits. Regulatory conduct is motivated by a desire to enhance the social and economic welfare of citizens and is based, in theory, on an assessment by the governmental unit of the inadequacy of normal market forces to achieve this end. . . . As a proprietor, a governmental entity is encouraged by profit maximization . . ."
Note, Antitrust Law - Municipal Immunity - Application of the State Action Doctrine to Municipalities, 1979 Wis. L. Rev. 570, 598. See also Notes, The Application of Antitrust Laws to Municipal Activities, 79 Colum. L. Rev. 518 (1979) and Note, Municipal Antitrust Liability: Applying City of Lafayette v. Louisiana Power and Light Co., 31 Bay. L.R. 563 (1979).

B. BECAUSE PROVISION OF HOUSING OPPORTUNITY FOR LOW AND MODERATE INCOME PERSONS THROUGH PRICE CONTROLS IS AUTHORIZED BY STATE POLICY, BEDMINSTER IS IMMUNE FROM ANY POSSIBLE ANTI-TRUST LIABILITY

The plurality opinion is that a municipal action, though in restraint of trade, is exempt from anti-trust liability when the State "directs or authorizes its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws." Lafayette, 98 S. Ct. at 1138. The executive, judicial and legislative branches have authorized municipalities to act to promote low and moderate income housing and therefore, since such action reflects state policy, Bedminster's re-sale agreement would be exempt from anti-trust liability.

The legislative, executive and judicial branches have all recognized that provision of housing for lower and moderate income persons is a important state policy. Such policy declarations can be found in the New Jersey Mortgage Finance Agency Law,* N.J.S.A. 17:11B-1; the New Jersey Housing Finance Agency Law, N.J.S.A. 55:14J-1**, the Limited Dividend Housing Corporation Law, N.J.S.A. 55:16-1***

*N.J.S.A. 17:11B-3 states: "The Legislature hereby finds: that the drastic decline in new housing starts, together with the existing large number of substandard dwellings, has produced a critical shortage of adequate housing in this State adversely affecting the economy of this State and the well-being of its residents; that there exists a need for adequate, safe and sanitary housing for New Jersey's residents; that a large and significant number of New Jersey residents have and will be subject to hardship in finding adequate, safe and sanitary housing unless new facilities are constructed and existing housing where appropriate, is rehabilitated; that unless the supply of housing . . . is increased significantly and a large number of residents of this state will be compelled to live in unsanitary, overcrowded and unsafe conditions to the detriment of the health, welfare and well-being of these persons and of the whole community of which they are a part; "

** N.J.S.A. 55:14J-2 states: "It is hereby declared that there exists in this State a need for adequate, safe and sanitary dwelling units for many families of moderate income in this State; . . . ; and that, unless the supply of housing for families of moderate income is increased significantly and expeditiously, a large number of the residents of this State will be compelled to live under unsanitary, overcrowded and unsafe conditions to the detriment of the health, welfare and well-being of these persons and of the whole community of which they are part.

***N.J.S.A. 55:15-1 states: It is hereby declared that there is a severe housing shortage in the State; that there are places in many municipalities of the (foonte continued on next page)

and the Senior Citizen Rental Housing Tax Law, N.J.S.A. 55:14I-1.* The Governor by promulgation of Executive Order 35, April 7, 1976 also declared that it is state policy to alleviate the "serious shortage of adequate, safe and sanitary housing accommodations for many households at rents and prices they can reasonably afford, especially for low and moderate income households " (page 1); the Executive Order also recognizes the municipal obligation to provide for this housing.** The Supreme Court recognized this in Mt. Laurel.

The Legislature has implemented the use of price controls to deal with this problem. The judiciary has held that municipalities are authorized to take affirmative steps to respond to this shortage and has held that the legislature

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State where dwellings lack proper sanitary facilities and are in need of major repairs or unfit for residential use; that these conditions are detrimental to the health, safety, morals, welfare and reasonable comfort of the people of the State; that these conditions reduce economic values and impair private investments and public revenues; that the improvement of these conditions requires the production of new dwellings at rents which the families who need housing can afford; "

*N.J.S.A. 55:14I-3 states: "It is hereby found and declared that there exists in various parts of this State a seriously inadequate supply of decent, safe and sanitary rental housing for elderly persons and elderly families in the lower middle-income brackets at rentals which said persons and families can afford; that this situation tends to cause serious social unrest; that the lack of properly constructed rental housing units designed specifically to meet the needs of the elderly of this State in the lower middle-income bracket at rentals which this class of elderly can afford constitutes a menace of the health, safety, welfare and morals of the public;"

**Executive Order 35 which directs the Department of Community Affairs to allocate a fair share of low and moderate income families provides:

WHEREAS, there exists a serious shortage of adequate, safe and sanitary housing accommodations for many households at rents and prices they can reasonably afford, especially for low and moderate income households, newly formed households, senior citizens, and households with children; and WHEREAS, it is the policy of the State of New Jersey, as reflected in numerous acts and programs, to alleviate this housing, shortage; and it is the law of the State of New Jersey that each municipality, by its land-use regulations provide the opportunity for the development of an appropriate variety and choice of housing for all categories of people, consistent with its fair share of the need for housing in its region; and

(footnote continued on next page).

has authorized price controls as a response. Housing built under the New Jersey Housing Finance Agency must be rent controlled by the Housing Finance Agency. See Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of Town of West New York, 71 N.J. 451 (1976) and only persons under a certain income may occupy the units N.J.S.A. 55:145-10; in the absence of state policy, such requirements would violate the Anti-Trust laws. The New Jersey Supreme Court has held that the legislature has authorized a municipality confronted with a housing shortage to control rents. Ignanamort v. Borough of Fort Lee, 62 N.J. 521 (1973). The same authority has been given to municipalities in enacting land use controls.* In Mt. Laurel the Supreme Court held that developing municipalities must provide as part of the zoning controls "the opportunity of an appropriate variety and choice of housing for all categories of persons who may decide to live there". In Taxpayers Ass'n. of Weymouth v. Weymouth Tp., 71 N.J. 249 (1976) the Supreme Court held that municipalities were authorized to require developers in certain zones to rent only to senior citizens; this practice also would face the same anti-trust problems unless authorized by the state. The Supreme Court stated in Weymouth that compliance with Mt. Laurel"would be impossible if the municipality could not design its land use regulations to provide for the unsatisfied housing needs of

(footnote continued from previous page)

WHEREAS, it is the policy of the State that local government should be the primary authority for planning and regulating land-use and housing and housing development; and that the State shall provide appropriate assistance to local governments so that municipalities can meet their obligation to provide an opportunity for the development of an appropriate variety and choice of housing for all categories of people, consistent with the municipality's fair share of the need for housing in its region;

*"Zoning is in its essential policy and purpose a component of the reserve element of sovereignty denominated the 'police power,' the sovereign right so to order the affairs of the people as to serve common social and economic needs" Rockhill v. Chesterfield Township, 23 N.J. 117, 124-25 (1957).

specific, narrowly defined categories of people." Weymouth, 71 N.J. at 293. The court found that policy was authorized by both the Constitution and state law. Plaintiffs therefore conclude that a re-sale provision to assist low and moderate income persons obtain housing is authorized by the New Jersey Constitution and by the policies of the New Jersey legislative, executive and judicial branches; accordingly the policy is exempt from a Lafayette anti-trust challenge.

C. NEW JERSEY ANTI-TRUST LAW DOES NOT PRECLUDE A
RE-SALE PROVISION

The Sherman Act applies only upon proof of a "substantial and adverse" effect on interstate commerce Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 743 (1976) or that a "not insubstantial amount of interstate commerce is affected." Northern Pacific R.R. Co. v. United States, 356 U.S. 1, 6 (1958). Unless this is proven, the Federal Act does not apply but rather the state anti-trust act would apply. N.J.S.A. 56:9-1. This act also exempts activities "directed, authorized or permitted" by state law N.J.S.A. 56:9-5(c). Therefore for the same reasons discussed under the Federal law discussion, Bedminster could not be liable under the state anti-trust law.

D. EVEN THOUGH BEDMINSTER CAN LEGALLY IMPOSE RE-SALE
REQUIREMENTS, A COURT ORDER MANDATING IT WOULD ELIMINATE
ALL POSSIBLE ANTI-TRUST ISSUES

Plaintiffs have shown that Bedminster is authorized by state policy to provide for resale agreements. This should be sufficient. The only greater protection that could be given to the municipality would be for the state as sovereign to impose this requirement. Such complete protection could be given if this court imposed such a re-sale requirement.

There is no doubt that a court order or a decision by a New Jersey court is an "attribute of sovereignty" Rhodes v. Chausovsky, 137 N.J.L. 459 (Sup. Ct. 1948), an exercise of the state's sovereign power. Likewise it is clear that this court has the power to enforce rights conferred by the New Jersey Constitution

even in the absence of implementing legislation. Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 196 (1971). If this court directs Bedminster to impose a re-sale requirement, Bedminster will be acting in accordance with "the state's command, in accordance with restraints that "the state . . . as sovereign imposed." Lafayette, 98 S. Ct. 1123.

The master would have recommended the re-sale provision except for anti-trust questions he, as a planner, could not answer. All parties recognize that the limitations are necessary if low and moderate income housing is to be maintained. This court can put an end to the anti-trust issue by ordering it to be included in the ordinance.

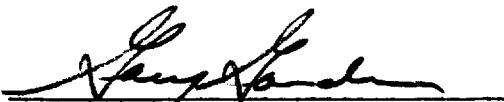
CONCLUSION

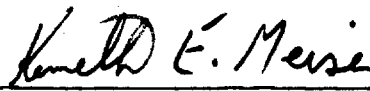
WHEREFORE individual plaintiffs and the amicus curiae respectfully request the court to enter an order directing Bedminster Township to:

1. Include a re-sale control provision;
2. Reduce the maximum rent to an amount lower than the H.U.D. fair market rents; and
3. Reduce their minimum square footage requirements.

Respectfully submitted,

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