POST *LAFEYETTE* MUNICIPAL LIABILITY FOR REFUSING TO ZONE OUTLYING DEVELOPMENT

Commercial development of unpopulated areas threatens the vitality of central business districts and encourages municipalities to take affirmative steps to defend against urban blight.[1] As a protective measure, mid-sized cities often refuse to zone vacant land to allow the building of shopping centers that would draw business from the central business district.[2] Developers challenge the denials of competitive commercial uses on two grounds. First, municipalities do not possess authority under the zoning power to control competition.[3] Second, the denial of a competitive use is an illegal restraint of trade under the

1. The federal goverment announced a new program at the end of 1979 that permits mayors to petition the Housing and Urban Development Agent (HUD) to withhold federally funded projects aiding the construction of suburban shopping centers that threaten central business districts. 3 ZONING AND PLAN. L. REP. 42-43 (June 1980). For a review of central business district revitalization projects, see Weaver & Duerksen, *Central Business District Planning and the Control of Outlying Shopping Centers*, 14 URB. L. ANN. 57 (1977).

2. *See, e.g.,* Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980); Mason City Center Assocs. v. Mason City, 468 F. Supp. 737 (N.D. Iowa 1979); Scott v. Sioux City, No. 79-4009 (N.D. Iowa Feb. 26, 1979); Allapattah Community Ass'n of Fla. v. City of Miami, 379 So. 2d 387 (Fla. Dist. Ct. App. 1980); Hubert Realty Co. v. Cobb County Bd. of Comm'rs, 245 Ga. 236, 264 S.E.2d 179 (1980); State *ex rel.* Diehl Co. v. City of Helena, __ Mont. __, 593 P.2d 458 (1979); Board of Supervisors of Loudoun County v. Lerner, __ Va. __, 267 S.E.2d 100 (1980). *Cf.* State of Vermont District Environmental Commission #4 (Vermont prevented the development of Pyramid Mall, a regional shopping center outside of Burlington). Vermont prevented the mall under the Vermont Land Use and Development Act, VT. STAT. ANN. tit. 10, §§ 6001-6092 (1980). The statute requires a permit for each commercial or industrial development involving more than ten acres. *Id.* §§ 6001(3), 6081(a). Before the State District Environmental Commission may issue the permit, the project must comply with eleven criteria, including both traditional land use and environmental considerations. *Id.* § 6086. *See In re* Pyramid Co. of Burlington, No. S59-78CNM (Chittenden Sup. Ct. April 21, 1980) (denying the developer's motion for summary judgment to overturn the Commission's denial of the use). *See generally* R. HEALY & J. RISENBERG, LAND USE AND THE STATES 40-63 (1976).

3. *See, e.g.,* City of Miami v. Woolin, 387 F.2d 893 (5th Cir. 1968); *Ex parte* White, 195 Cal. 516, 234 P. 396 (1925); Lippow v. City of Miami Beach, 68 So. 2d 827 (Fla. 1953); Suburban Ready-Mix Corp. v. Village of Wheeling, 25 Ill. 2d 548, 185 N.E.2d 665 (1962); Exchange Nat'l Bank v. Village of Skokie, 86 Ill. App. 2d 12, 229 N.E.2d 552 (1967); Metro 500, Inc. v. City of Brooklyn Park, 297 Minn. 294, 211 N.W.2d 358 (1973); Herman Glick Realty Co. v. St. Louis County, 545 S.W.2d 320 (Mo. Ct. App. 1976); *In re* Lieb's Appeal, 179 Pa. Super. 318, 116 A.2d 860 (1955); *In re* Appeal of Stefonick, 1 Pa. Commw. Ct. 13, 271 A.2d 707 (1970); Board of County Supervisors v. Davis, 200 Va. 322, 106 S.E.2d 152 (1958). The Vermont mall developers are contesting the denial of the permit under the Vermont Land Use and Development Act, VT. STAT. ANN. tit. 10, §§ 6001-6092 (1980). *See generally* note 2 *supra*.

federal antitrust laws.[4] This Note analyzes the efficacy of both grounds and suggests a standard to determine when the federal policy for free competition preempts municipal land use regulations.

I. DENIAL OF A COMPETITIVE USE UNDER THE ZONING POWER

Originally, the zoning power derived from the common law nuisance theory.[5] Property owners are entitled to use their land without unreasonable interference from the activities of other landowners.[6] Courts grant injunctive relief against an interference[7] with property rights when the harm to individual owners outweighs the benefit to society from the continuation of the offending use.[8] Zoning eliminates the need for this balancing of interests in a particular case by limiting conflicting uses to separate districts.[9] In *Village of Euclid v. Ambler Realty*[10] the Supreme Court ratified the practice of dividing land into districts under different classifications.[11] The Court held that local government's authority to zone under its police power encompasses all land use decisions which have a rational relationship to the promotion of health, safety, morals, and the general welfare of the community.[12]

A municipality, however, cannot regulate under the police power without a delegation of authority from the state.[13] A municipality receives the power to zone from the state either through a general enabling statute[14] or from the same constitution in the form of a home

4. Stouffer v. Town of Grand Lake, No. 80-A-752 (Colo. Oct. 9, 1980); Scott v. Sioux City, No. 79-4009 (N.D. Iowa Feb. 26, 1979); Mason City Center Assocs. v. Mason City, 468 F. Supp. 737 (N.D. Iowa 1979). *See* State of Vermont District Environmental Commission #4. *See generally* 15 U.S.C. §§ 1-7 (1976).

5. *See generally Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1449-50 (1978).

6. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 596-602 (4th ed. 1971).

7. *See generally* W. PROSSER, *supra* note 6, at 602-06.

8. *See* notes 6-7 *supra*.

9. *See* Bove v. Donner-Hanna Coke Corp., 236 A.D. 37, 258 N.Y.S. 229 (1932). *But see* Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440; Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

10. 272 U.S. 365 (1926).

11. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 1.14 (2d ed. 1976).

12. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

13. *See generally* E. BASSETT, ZONING 12-15 (1936); 8 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.35 (3d ed. 1976); Note, *Antitrust Law and Municipal Corporations: Are Municipalities Exempt from Sherman Act Coverage under the* Parker *Doctrine?*, 65 GEO. L.J. 1547, 1558-78 (1977).

14. E. BASSETT, *supra* note 13, at 27.

rule provision.[15] Most states model their legislative grants of authority after the Standard State Zoning Enabling Act of 1924.[16] A city in a home rule state enjoys a general police power,[17] which includes a plenary power to zone.[18] Neither form of delegation of zoning authority indicates that control of competition or protection of established business interests is a valid zoning purpose.[19]

All zoning laws affect competition through regulation of land without being influenced by free market forces.[20] By dividing a community into districts, zoning necessarily restricts competition in the same uses between geographic areas.[21] A zoning ordinance that grants a competitive advantage to an individual or group generally does not serve the public and, therefore, is an improper exercise of the police power.[22] A land use classification, however, that serves a legitimate zoning purpose is not invalid simply because of an incidental impact on competition.[23]

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15. On home rule generally, see 2 E. MCQUILLIN, *supra* note 13, §§ 4.82, 10.09-.14; Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1969). On home rule as the source for the zoning power, see 8 E. MCQUILLIN, *supra* note 13, § 25.32; Note, *supra* note 13, at 1559-60.

16. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ACT §§ 6-7 (1926). The act grants power to a municipality to regulate land use "for the purpose of promoting health, safety, morals or the general welfare of the community." *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *See generally* D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT, 217-27 (1979).

17. *See* Community Communications Co. v. City of Boulder, [1980-2] TRADE CAS. (CCH) ¶ 63362 (10th Cir.).

18. *See* note 13 *supra*.

19. *See, e.g.,* Second Norwalk Corp. v. Planning & Zoning Comm'n, 28 Conn. Supp. 426, 265 A.2d 332 (1969); Cape Ann Dev. Corp. v. City Council of Gloucester, 374 Mass. 825, 373 N.E.2d 218 (1978). *See generally* notes 13-14 *supra*.

20. *See, e.g.,* Van Sicklen v. Browne, 15 Cal. App. 3d 122, 127, 92 Cal. Rptr. 786, 789 (1971); *In re* Lieb's Appeal, 179 Pa. Super. 318, 324, 116 A.2d 860, 865 (1955). *See generally* 3 ZONING AND PLAN. L. REP. 33-39 (May 1980).

21. *See* Zaehring v. Township of Long Beach, 56 N.J. Super. 26, 151 A.2d 425 (1959).

22. Wyatt v. City of Pensacola, 196 So. 2d 777 (Fla. Dist. Ct. App. 1967); Pearce v. City of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962); State *ex rel.* Diehl Co. v. City of Helena, ___ Mont. ___, 593 P.2d 458 (1979).

23. Carty v. Ojai, 77 Cal. App. 3d 329, 143 Cal. Rptr. 506 (1978); Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Van Sicklen v. Brown, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971); Alachua County v. Reddick, 368 So. 2d 653 (Fla. Dist. Ct. App. 1979); Lucky Stores, Inc. v. Board of Appeals, 270 Md. 513, 312 A.2d 758 (1973); Board of County Comm'rs v. Lightman, 251 Md. 86, 246 A.2d 261 (1968); Technical & Professional Servs., Inc. v. Board of Zoning Adjustment, 558 S.W.2d 798 (Mo. Ct. App. 1977); Forte v. Borough of Tenafly, 106 N.J. Super. 346, 255 A.2d 804 (1969); Duddles v. City Council of W. Lynn, 21 Or. App. 310, 535 P.2d 583 (1975); Chevron Oil Co. v. Beaver County, 22 Utah 2d 143, 449 P.2d 989 (1969).

Courts distinguish purposeful manipulation of the competitive elements in a community from incidental anticompetitive effects by focusing on the primary reason for the regulation.[24] When an ordinance excludes one use while permitting a similar activity in the same area, courts may discern an improper intention on the part of the zoning authority to aid a particular party.[25]

A. *The Manipulation of Competition Through Zoning*

Courts consistently deny property owners standing to maintain a suit under zoning laws to enjoin construction of competitive establishments.[26] Zoning ordinances that grant certain businesses a competitive advantage by excluding similar enterprises are similarly unenforceable.[27] The police power offers no justification for excluding compati-

24. *See, e.g.,* Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971); Carty v. Ojai, 77 Cal. App. 3d 329, 143 Cal. Rptr. 506 (1978); Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Van Sicklen v. Browne, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971); Second Norwalk Corp. v. Planning & Zoning Comm'n, 28 Conn. Supp. 426, 265 A.2d 332 (1969); Wyatt v. City of Pensacola, 196 So. 2d 777 (Fla. Dist. Ct. App. 1967); Fogg v. City of S. Miami, 183 So. 2d 219 (Fla. Dist. Ct. App. 1966); Suburban Ready-Mix Corp. v. Village of Wheeling, 25 Ill. 2d 548, 185 N.E.2d 665 (1962); Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962); Forte v. Borough of Tenafly, 106 N.J. Super. 346, 255 A.2d 804 (1969); Cunningham v. Planning Bd., 157 N.Y.S.2d 698 (Sup. Ct. 1956), *modified on other grounds*, 4 A.D.2d 313, 164 N.Y.S.2d 601 (1957); Duddles v. City Council of W. Lynn, 21 Or. App. 310, 535 P.2d 583 (1975); Chevron Oil Co. v. Beaver County, 22 Utah 2d 143, 449 P.2d 989 (1969); Board of Supervisors of Loudoun County v. Lerner, __ Va. __, 267 S.E.2d 100 (1980).

25. *See, e.g.*, Jeisy v. City of Taylorville, 81 Ill. App. 3d 442, 401 N.E.2d 627 (1980); Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962); Board of Supervisors v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975).

26. The problem arises most often when a zoning authority grants a variance that increases the level of competition in the permitted use. *See* U.S. DEPT. OF COMMERCE, A STANDARD STATE ENABLING ACT 7 (1926). Most states allow variances to zoning ordinances under special circumstances when strict application of a classification would impose an unnecessary hardship. Puritan-Greenfield Improvement Ass'n v. Leo, 7 Mich. App. 659, 153 N.W.2d 162 (1967). *See* CAL. GOV. CODE §§ 65906, 65911 (Deering 1979); N.Y. TOWN LAW § 267(5) (McKinney Supp. 1978).

An interested business owner may seek to enjoin the operation of the variance to prevent the construction of a competitive establishment. For cases denying standing to existing businesses to protest variances allowing competition on adjacent property, see Circle Lounge & Grille, Inc. v. Board of Appeals, 324 Mass. 427, 86 N.E.2d 920 (1949); Cord Meyer Dev. Corp. v. Bell Bay Drugs, Inc., 20 N.Y.2d 211, 229 N.E.2d 44, 282 N.Y.S.2d 259 (1967). For cases denying standing to protest variances that allowed competition a substantial distance from plaintiff's property, see Swain v. County of Winnebago, 111 Ill. App. 2d 458, 250 N.E.2d 439 (1969); Kreatchman v. Ramsburg, 224 Md. 209, 167 A.2d 345 (1961). *But see* Skaggs-Albertson's, Inc. v. ABC Liquors, Inc., 363 So. 2d 1082 (Fla. 1978). *See generally* Mandelker, *Control of Competition as a Proper Purpose in Zoning*, 14 ZONING DIG. 33, 34-35 (1962).

27. *See, e.g., Ex parte* White, 195 Cal. 516, 234 P. 396 (1925) (invalidates bar on any further

ble uses in the same area.[28] Therefore, courts will presume an improper discriminatory intent when ordinances benefit particular business interests at the expense of competition from noninterfering enterprises.[29]

A proper zoning purpose, however, will validate a regulation even though it has an anticompetitive effect.[30] Zoning considerations such as traffic and fire hazards legitimize denial of new construction.[31] In addition, aesthetics and preservation of open space and the character of a community will support a zoning authority's desire to prevent high density development[32] by refusing building permits.[33] Moreover, re-

entry to commercial zone); Wyatt v. City of Pensacola, 196 So. 2d 777 (Fla. Dist. Ct. App. 1967) (invalidates three-year ban on uses of innovative dry cleaning solvent to allow ordinary dry cleaners grace period to adopt the technique); Fogg v. City of S. Miami, 183 So. 2d 219 (Fla. Dist. Ct. App. 1966) (disallows ban on drive-in uses to protect walk-in uses); Frost v. Village of Glen Ellyn, 30 Ill. 2d 241, 195 N.E.2d 616 (1964) (discontinues ban on drive-in restaurants); Suburban Ready-Mix Corp. v. Village of Wheeling, 25 Ill. 2d 548, 185 N.E.2d 665 (1962) (reverses denial of permission to build additional ready-mix plants); LaSalle Nat'l Bank v. City of Park Ridge, 74 Ill. App. 3d 647, 393 N.E.2d 623 (1979) (voids ordinance prohibiting carryout restaurants that allowed sit-down restaurants); Exchange Nat'l Bank of Chicago v. Village of Skokie, 86 Ill. App. 2d 12, 229 N.E.2d 552 (1967) (voids ordinance prohibiting combined car wash and gas station); Pearce v. Village of Edina, 263 Minn. 553, 118 N.W.2d 659 (1962) (reverses denial of shopping center use on property surrounded by regional centers).

28. Under nuisance theory an existing business establishment cannot claim that activities of a similar operation constitute an offending use. Circle Lounge & Grille, Inc. v. Board of Appeals, 324 Mass. 427, 431, 86 N.E.2d 920, 922 (1949). *See* note 26 *supra* and accompanying text.

29. The beneficial effect of an ordinance on some businesses will not justify an absolute exclusion of competitive uses under the police power. "The public welfare with which the City and the courts must be concerned is the welfare of the whole community. A benefit or anticipated benefit to a special group within the City is not enough." Fogg v. City of S. Miami, 183 So. 2d 219, 221 (Fla. Dist. Ct. App. 1966). *See* Weaver & Duerksen, *supra* note 1.

30. *See* Second Norwalk Corp. v. Zoning & Planning Comm'n, 28 Conn. Supp. 426, 265 A.2d 332 (1969). Defendant was denied commercial use (1) to prevent competition with existing business and (2) to avoid an increase in traffic. The documented intention to shield certain enterprises from competition did not void the ordinance that was valid on other grounds. *Id.* at 431, 265 A.2d at 334.

31. *See, e.g.,* Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971); Second Norwalk Corp. v. Zoning & Planning Comm'n, 28 Conn. Supp. 426, 265 A.2d 332 (1969); Allapattah Community Ass'n of Fla. v. City of Miami, 379 So. 2d 387 (Fla. Dist. Ct. App. 1980); Alachua County v. Reddick, 368 So. 2d 653 (Fla. Dist. Ct. App. 1979); Hubert Realty Co. v. Cobb County Bd. of Comm'rs, 245 Ga. 236, 264 S.E.2d 179 (1980); Dawson Enterprises v. Blaine County, 48 Idaho 506, 567 P.2d 1257 (1977); Cunningham v. Planning Bd., 157 N.Y.S.2d 698 (Sup. Ct. 1956), *modified on other grounds*, 4 A.D.2d 313, 164 N.Y.S.2d 601 (1957).

32. City of St. Paul v. Chicago, St. P., M. & O. Ry., 413 F.2d 762 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969); Nopro Co. v. Town of Cherry Hills Village, 180 Colo. 217, 507 P.2d 344 (1972); Amalgamated Trust and Sav. Bank v. County of Cook, 82 Ill. App. 3d 370, 402 N.E.2d 719 (1980); Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 586 P.2d 860 (1978).

33. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980).

strictions on the number of similar competing commercial uses permitted in close proximity are enforceable to discourage the proliferation of billboards,[34] gas stations,[35] and adult bookstores and movie theaters.[36]

State courts disagree as to the propriety of considering the demand for additional business in the formulation of a zoning regulation. Some courts find that the requirement that building permit applicants prove a need for a contemplated use improperly protects existing businesses from competition.[37] Other courts uphold the requirements because they prevent the construction of businesses that the community cannot support.[38] Recent decisions accept need as a valid zoning consideration only if the zoning authority has developed specific guidelines to determine when sufficient demand for development exists.[39]

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34. Metromedia, Inc. v. City of Pasadena, 23 Cal. 3d 762, 592 P.2d 728, 159 Cal. Rptr. 212 (1979).

35. Lucky Stores v. Board of Appeals of Montgomery County, 270 Md. 513, 312 A.2d 758 (1973); Board of County Comm'rs v. Lightman, 251 Md. 86, 246 A.2d 261 (1968); Hempturn Realty Corp. v. Larkin, 197 N.Y.S.2d 644 (Sup. Ct. 1959). *See* Mosher, *Proximity Regulation of the Modern Service Station*, 17 SYRACUSE L. REV. 1 (1965) (no traffic or safety hazard results from proliferation of gasoline stations, so the underlying objective of proximity ordinances must be to limit competition).

36. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980).

37. *See, e.g.,* Commission on Pollution Control and Ecology v. Worth James, 264 Ark. 144, 568 S.W.2d 27 (1978); Sun Oil Co. v. Board of Zoning Appeals, 9 Ohio Misc. 101, 223 N.E.2d 384 (1966); *In re* Lieb's Appeal, 179 Pa. Super. 318, 116 A.2d 860 (1955). *See generally* Dabney, *Antitrust Aspects of Anticompetitive Zoning*, ANTITRUST BULL. 435, 441-42 (1979).

38. *See, e.g.,* Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971); Van Sicklen v. Browne, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971); Lucky Stores, Inc. v. Board of Appeals of Montgomery County, 270 Md. 513, 312 A.2d 758 (1973); Board of County Comm'rs v. Lightman, 251 Md. 86, 246 A.2d 261 (1968); Peterson v. Mayor of Palisades Park, 127 N.J.L. 190, 21 A.2d 777 (1941); Hempturn Realty Corp. v. Larkin, 197 N.Y.S.2d 644 (Sup. Ct. 1959); Richardson v. Zoning Bd. of Review, 101 R.I. 194, 221 A.2d 460 (1966). *See also* Technical & Professional Servs., Inc. v. Board of Zoning Adjustment, 558 S.W.2d 798 (Mo. Ct. App. 1977) (lack of need for cemetery is evidence use is not compatible).

Some courts, however, do not distinguish between zoning decisions based on need and improper competition control. *See* Herman Glick Realty Co. v. St. Louis County, 545 S.W.2d 320 (Mo. Ct. App. 1976); Bar Harbour Shopping Center, Inc. v. Andrews, 23 Misc. 2d 894, 196 N.Y.S.2d 856 (Sup. Ct. 1959).

39. In Board of Supervisors of Loudoun County v. Lerner, __ Va. __, 267 S.E.2d 100 (1980), plaintiff applied for a rezoning of his property to a "planned development shopping center classification." The county denied the application in accordance with its comprehensive plan, which established guidelines for new development, including a minimum population to support the new development. The court affirmed the county application of standards from the comprehensive plan.

> While the term "minimum population to support" may be subject to the two interpretations advanced by the parties, we believe that the Board, acting within its discretion, was

B. *Zoning to Protect Established Commercial Centers*

In some zoning cases courts have upheld an ordinance that restricts growth in less developed areas in order to ensure the survival of established commercial centers.[40] In *Chevron Oil Co. v. Beaver County*,[41] for example, the zoning authority prevented development in an isolated area. The county refused to rezone the region adjacent to a freeway from grazing to highway service because the new use would have enabled tourists to bypass Beaver City completely.[42] The zoning commission recognized a duty to protect the livelihood of local citizens before permitting the development of an unpopulated area.[43]

In *Forte v. Borough of Tenafly*[44] the strong public interest in revitalizing the central business district[45] also justified variance denials for certain suburban uses. The Borough of Tenafly enacted an ordinance which disallowed any commercial use with an adverse effect on downtown business[46] in order to effectuate a plan that prohibited all retail uses outside the city's core.[47] The court emphasized that a municipality

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entitled to interpret the term in the manner it thought would best implement the comprehensive plan, provided the interpretation was reasonable within the context of the language employed in the plan.

Id. at 10. *See also* Carty v. Ojai, 77 Cal. App. 3d 329, 143 Cal. Rptr. 506 (1978); Pillman v. Village of Northbrook, 65 Ill. App. 3d 40, 382 N.E.2d 399 (1978); Braidwood v. City of Portland, 24 Or. App. 477, 546 P.2d 777 (1976); Vermont District Environmental Commission #4.

40. City of St. Paul v. Chicago, St. P., M. & O. Ry., 413 F.2d 762 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969); Carty v. Ojai, 77 Cal. App. 3d 329, 143 Cal. Rptr. 506 (1978); Ensign Bickford Realty Corp. v. City Council of Livermore, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Second Norwalk Corp. v. Planning and Zoning Comm'n, 28 Conn. Supp. 426, 265 A.2d 332 (1969); Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970); Forte v. Borough of Tenafly, 106 N.J. Super. 346, 255 A.2d 804 (1969); Chevron Oil Co. v. Beaver County, 22 Utah 2d 143, 449 P.2d 989 (1969).

41. 22 Utah 2d 143, 449 P.2d 989 (1969).

42. The court deferred to the planning commission's finding that:

[A]ny tourist business which would go to the isolated junction area would be a loss to the established businesses of Beaver City. . . . [A]ny earnings and profits which might be engendered by the new establishment would tend to drain away into other towns of comparable size to Beaver which lie in adjoining counties . . . .

Id. at 144, 449 P.2d at 990.

43. *Id.*

44. 106 N.J. Super. 346, 255 A.2d 804 (1969).

45. For an enumeration of the public's interests in the central business district, see Weaver & Duerksen, *supra* note 1, at 60-63.

46. TENAFLY, N.J. ORDINANCE NO. 939: "This district is intended for commercial and wholesale services and small local convenience neighborhood service establishments and other businesses not suited to the general retail business zone, and to provide uses which will not have an adverse effect upon the downtown business core." Forte v. Borough of Tenafly, 106 N.J. Super. 346, 349, 255 A.2d 804, 805 (1969).

47. *Id.*

may not exclude a use simply because it competes with a particular enterprise.[48] A municipality may choose, however, to benefit one zone over another.[49] The court stressed that any amount of incidental interference with competition, even a grant of a virtual monopoly over retail business, cannot invalidate an otherwise legitimate classification.[50]

Courts will presume an incidental effect on competition when a comprehensive zoning plan designates uses for a large area.[51] A long range plan may dictate the timing and location of commercial development without discriminating against any one property owner.[52] Rezoning, which prevents construction of a new shopping center, constitutes a valid exercise of the police power when it coincides with a general plan for orderly growth.[53] Courts similarly uphold the denial of requests for

48. *Id.* at 351, 255 A.2d at 806.

49. Tenafly has what it considers to be a decaying central business core, choked by poor parking and traffic facilities. We take judicial notice that this is a problem which today faces many municipalities. Tenafly could have permitted the deterioration to continue into blight, hoping that new and desirable retail business areas would develop elsewhere. Instead, it appears that it wishes to make a strong effort to revitalize the present area. . . . We hold that it has the right to do so . . . .

Id. at 351-52, 255 A.2d at 806-07.

50. *Id.*

51. *See, e.g.,* City of Tempe v. Rasor, 24 Ariz. App. 118, 536 P.2d 239 (1975); Ensign Bickford Realty Corp. v. City Council of Livermore, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Van Sicklen v. Browne, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971); Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1976); Duddles v. City Council of W. Lynn, 21 Or. App. 310, 535 P.2d 583 (1975); Board of Supervisors of Loudoun County v. Lerner, __ Va. __, 267 S.E.2d 100 (1980). *See generally* Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976). *See also* note 39 *supra* and accompanying text.

52. *Compare* Ensign Bickford Realty Corp. v. City Council of Livermore, 68 Cal. App. 3d 467, 477, 137 Cal. Rptr. 304, 310 (1977) *with* City of Tempe v. Rasor, 24 Ariz. App. 118, 123, 536 P.2d 239, 244 (1975).

53. *Compare* Carty v. Ojai, 77 Cal. App. 3d 329, 143 Cal. Rptr. 506 (1978) (rezoning to prohibit construction of center valid because consistent with general plan) *with* Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970) (ordinance permitting shopping center use void because rezoning was in opposition to the comprehensive plan).

The Lexington, Kentucky plan at issue in *Fallon* had a regional shopping center policy designed to protect city merchants. The classification for integrated shopping centers applied to applicants requesting shopping center use regardless of previous classification of property. The ordinance allowed the commission to consider the impact of the proposed center or surrounding land use and the downtown business district. The plan recommended approval for new centers only when their sales revenues would not decrease the business of existing shopping areas. *Id.*; Tarlock, *Not in Accordance with a Comprehensive Plan: A Case Study of Regional Shopping Center Location Conflicts in Lexington, Kentucky*, 3 URB. L. ANN. 133, 138-61 (1970). *See also* State of Vermont Environmental Commission #4 at 4-5. The new ordinance at issue in *Fallon* stated that the planning commission had not intended to decrease competition between shopping areas. *See* Tarlock, *supra*, at 167-74. Neighborhood property owners had standing to claim they would be adversely

rezoning to permit development of commercial centers when the goal of this development is to stimulate growth in other areas.[54] The recent trend toward regional and state land use planning allows communities to protect existing commercial centers from competition.[55] Land use authorities can prevent development outside city boundaries that competes with enterprises in the central business district[56] by increasing the scope of comprehensive plans.[57]

Several recent cases demonstrate judicial recognition of the plight of the city center.[58] A vital central business district depends on suburban retail customers.[59] Downtown merchants cannot compete for this market against convenient regional shopping malls without protectionist zoning.[60] Courts are predisposed to promote the concentration of commercial development in urban centers to control population density and avoid the expense of duplication of public services in the city and

affected by a shopping center in their residential neighborhood. Fallon v. Baker, 455 S.W.2d 572, 573 (Ky. 1970). *Cf.* Swain v. County of Winnebago, 111 Ill. App. 2d 458, 250 N.E.2d 439 (1969) (downtown merchant has no standing to challenge rezoning for regional shopping center a substantial distance away). *See generally* cases cited in note 26 *supra*. The court declared the ordinance void because there was no evidence to support the rezoning in opposition to the plan. Fallon v. Baker, 455 S.W.2d 572, 574-75 (Ky. 1970).

54. Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Alachua County v. Reddick, 368 So. 2d 653 (Fla. Dist. Ct. App. 1979); Forte v. Borough of Tenafly, 106 N.J. Super. 346, 255 A.2d 804 (1969); Board of Supervisors of Loudoun County v. Lerner, __ Va. __, 267 S.E.2d 100 (1980).

55. Regional considerations support efforts to prevent outlying shopping centers by providing an additional reason for denying development permission and by preventing development outside city boundaries that adversely affects an established business district within the city. *See, e.g.*, National Merritt, Inc. v. Weist, 41 N.Y.2d 438, 361 N.E.2d 1028, 393 N.Y.S.2d 379 (1977) (upholding ordinance limiting commercial development to neighborhood as opposed to regional centers); Save a Valuable Environment v. City of Bothell, 89 Wash. 2d 862, 576 P.2d 401 (1978) (invalidating rezoning for center because city could not act in disregard of effects outside city limits).

56. *See generally* D. MANDELKER & R. CUNNINGHAM, *supra* note 16, at 1207-68.

57. *See* Willamette Univ. v. Land Conservation and Dev. Comm'n, 45 Or. App. 355, 608 P.2d 1178 (1980) (state-wide planning goals to preserve farm land took precedence over city decision to convert land to urban use). *See also* Mindel v. Township Council of Franklin, 167 N.J. Super. 461, 400 A.2d 1244 (1979).

58. *See, e.g.*, Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980); Carty v. Ojai, 77 Cal. App. 3d 329, 143 Cal. Rptr. 506 (1978); Second Norwalk Corp. v. Planning & Zoning Comm'n, 28 Conn. Supp. 426, 265 A.2d 332 (1969); Forte v. Borough of Tenafly, 106 N.J. Super. 346, 255 A.2d 804 (1969); Chevron Oil Co. v. Beaver County, 22 Utah 2d 143, 449 P.2d 989 (1969).

59. *See* Comment, *The Shopping Center Radius Clause: Candidate for Antitrust?*, 32 Sw. L.J. 825, 825-26 (1978).

60. *See* Weaver & Duerksen, *supra* note 1, at 58-60.

outlying areas.[61] Courts recognize that the unimpeded flow of capital to the suburbs will jeopardize city support for previously established facilities and utilities.[62]

If a city articulates the public interest in the improvement of its downtown area in a comprehensive zoning plan, the city should prevail against a developer's appeal on the denial of a permit to build a new center.[63] A municipality can insulate itself from attack through a comprehensive plan of protectionist zoning which is premised on the traditional zoning concerns of traffic, fire hazards,[64] aesthetics,[65] and duplication of public facilities and services.[66]

II. DEVELOPERS' CAUSE OF ACTION FOR DENIAL OF A COMPETITIVE USE UNDER THE ANTITRUST LAWS

In the last three years, some developers have devised a new strategy to combat a city's attempt to protect downtown commercial prosperity. In addition to an improper zoning purpose claim under state law,[67] developers assert that the denial of a shopping center use violates the fed-

61. *See* Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 567 P.2d 1257 (1977). Affirming the denial of a rezoning to construct an auto dealership, the court stated:

> In promoting the concentration of commercial development within existing urban areas, the county is seeking to control population density, foster the free flow of traffic and prevent congestion along a major artery, and avoid the costly consequences of spreading county services too thin. Such policies, it is clear will often-times restrict the use of land to uses other than "the highest and best use" dictated by the marketplace and will prevent a landowner from using land for its most suitable use. But we cannot say that they bear no rational relation to the health, safety, morals and welfare of the community.

Id. at 513-14, 567 P.2d at 1264-65. *See also* Board of Supervisors of Loudoun County v. Lerner, __ Va. __, 267 S.E.2d 100 (1980).

62. Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980); City of St. Paul v. Chicago, St. P., M. & O. Ry., 413 F.2d 762 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969); Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970); Duddles v. City Council of W. Lynn, 21 Or. App. 310, 535 P.2d 583 (1975).

63. Many states mandate planning by local governments and demand zoning be consistent with the comprehensive plan. *E.g.,* ALASKA STAT. §§ 29.33.070, .085, .090 (1980); CAL. GOV. CODE § 65300 (Deering 1979); DEL. CODE ANN. tit. 9, §§ 6807(a), 6904 (1974); HAWAII REV. STAT. § 225-21 (1976); IDAHO CODE §§ 67-6508, 6511 (1980); VA. CODE §§ 15.1-427, -446.1 (Supp. 1979). Some states do not require a comprehensive plan, but instead rule that zoning must be in accordance with any plan that is adopted. *E.g.,* ARIZ. REV. STAT. ANN. § 9-462.01(E) (1977); ME. REV. STAT. ANN. tit. 30, § 4962(1)(A) (1978). *See generally* Mandelker, *supra* note 51, at 956-65.

64. *See* note 31 *supra* and accompanying text.

65. *See* notes 32-33 *supra* and accompanying text.

66. *See* notes 38, 62 *supra* and accompanying text.

67. *See* note 3 *supra* and accompanying text.

eral antitrust laws.[68] Plaintiff developers prefer the antitrust claim because it allows treble damages, attorney's fees, a federal forum,[69] and a potentially favorable body of substantive law.[70] Developers have frequently filed their antitrust complaints under the Sherman Act.[71]

A. *Restraints of Trade Under the Sherman Act*

Section 1 of the Sherman Act condemns associations that restrain interstate commerce in the United States.[72] The Supreme Court has interpreted section 1 to prohibit only unreasonable restraints of trade.[73] In order to determine whether an association unreasonably restrains trade, courts apply either a per se rule or rule of reason analysis.[74] The per se rule invalidates trade agreements which impose such a detrimental effect on competition that an extended investigation of the business excuse for the association is unnecessary.[75] Plaintiffs invariably triumph if the court classifies the challenged activity as a per se violation.[76] Under rule of reason analysis, courts carefully examine the

68. *See* note 2 *supra* and accompanying text. *See also* State of Vermont District Environment Commission #4. Pyramid Mall developers contend the denial of the permit under the state land use act amounts to a conspiracy under section 1 of the Sherman Act.

69. 15 U.S.C. § 15 (1976).

70. Bosselman, *Does the Lafayette Case Bring Zoning Under the Antitrust Laws*, 31 LAND USE DIG. 4 (1979).

71. Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980); Mason City Center Assocs. v. Mason City, 468 F. Supp. 737 (N.D. Iowa 1979); General Growth Properties v. Sioux City, No. 91992 (D. Iowa Feb. 12, 1975); *In re* Pyramid Co. of Burlington, No. 559-78CNM (Chittenden Sup. Ct. (Vt.) April 21, 1980).

72. Section 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1976).

73. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

74. *See* L. SULLIVAN, ANTITRUST 153 (1977).

75. The Supreme Court announced the standard to determine activities that are per se illegal in Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958).

76. Conduct found to be per se illegal includes: (1) Agreements among competitors to fix prices, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); (2) group boycotts, Klor's, Inc. v. Broadway-Hale Stores, Inc., 357 U.S. 207 (1959); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); (3) tying arrangements, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Northern Pacific Ry. v.

industry involved to determine whether the agreement promotes or suppresses competition.[77] Defendants succeed more readily in the rule of reason case because the court will consider alternatives available to the city under the circumstances.[78]

Section 2 of the Act prohibits monopolizing,[79] focusing on single firm conduct designed to achieve or maintain monopoly power in a market.[80] The primary issue under the statute is the share of the market controlled by the defendant.[81]

B. *The Developers' Complaint*

A zoning authority cannot control or monopolize a market by itself.[82] Thus, developers label the denial of a shopping center use as an illegal contract, combination, or conspiracy under section 1 of the Sherman Act.[83] The typical complaint alleges a conspiracy between members of the zoning commission and the downtown merchants or developers to exclude the suburban regional center.[84] The zoning com-

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United States, 356 U.S. 1 (1958); (4) Agreements among competitors to divide markets, United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

77. *See* National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

78. *See* E. GELLHORN, ANTITRUST LAW AND ECONOMICS 219-27 (1976).

79. Section 2 provides:

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1976).

80. *See* United States v. Grinnell Corp., 384 U.S. 563 (1966).

81. Courts ascertain market share by investigating defendant's control over both the product and the geographic markets. The relevant product market includes all goods or services that have a high degree of functional interchangeability. *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). The relevant geographic market consists of the area in which suppliers of the good operate and where buyers naturally turn to acquire the product. *See* United States v. Pabst Brewing Co., 384 U.S. 546 (1966); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

82. *See* note 79 *supra*.

83. *See* note 72 *supra*.

84. In Mason City Center Assocs. v. Mason City, 468 F. Supp. 737 (N.D. Iowa 1979), the court said:

> Plaintiffs' complaint alleges the following specifically relevant facts. Holmen and Ericson [merchant defendants] have entered into an agreement with the city to organize and plan the Downtown Center upon the express condition that the City prevent any

mission claims that the state action exemption protects it from application of the Sherman Act.[85] The merchant defendants may demur under the *Noerr-Pennington* doctrine, which shields private attempts to influence governmental bodies from antitrust scrutiny.[86] The court may deny the parties' motions to dismiss in order to consider whether the zoning commission waived the state action exemption by conspiring with private merchants to restrain trade[87] and whether the *Noerr-Pennington* doctrine does not apply to governmental activities of a proprietary nature.[88]

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person or firm from planning or constructing a regional shopping center that would compete with the Downtown Center.

Id. at 740. *See also* Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980); Scott v. Sioux City, No. 79-4009 (N.D. Iowa Feb. 26, 1979).

85. Under the general state action exemption, the antitrust laws do not apply to otherwise valid governmental action that results in a restraint of trade or monopoly. *See* Parker v. Brown, 317 U.S. 341 (1943); notes 91-97 *infra* and accompanying text.

86. The *Noerr-Pennington* doctrine is a corollary of the governmental immunity from the antitrust laws. The doctrine protects private citizens who induce the government to take lawful actions. *Compare* Eastern R.Rs. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 172 (1961) (Railroads, through their trade association and agents, conducted a deceptive publication plan to encourage laws restricting competition from truckers. The court held the conspiracy, intended only to influence official action, did not violate the Sherman Act.) *with* UMW v. Pennington, 381 U.S. 657 (1965) (Union and large employers agreed to eliminate small coal companies by inducing the Secretary of Labor to establish high minimum wages for employers of TVA suppliers. The Court declared the challenged act itself legal and not part of a larger concerted effort violative of the Sherman Act.).

The doctrine protects private citizens who induce the government to take lawful action. As long as the efforts of the citizens are genuine, the immunity applies, even if the municipal activities result in an elimination of competition. Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 227-28 (7th Cir. 1975). *But see* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (conspiracy to clog process of state agency by producing sham claims not exempt under the *Noerr* rule); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969) (bribery not exempt under *Noerr*). *Compare* Ernest W. Hahn, Inc. v. Coddy, 615 F.2d 830 (9th Cir. 1980) (complaint by successful developer stated a claim under sham exception to *Noerr-Pennington* doctrine in view of the fact that unsuccessful developer filed 13 baseless lawsuits) *and* Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F. Supp. 1124 (N.D.N.Y. 1977) (allegations that shopping center developers financed suits by nearby property owners to amend zoning ordinance did not prevent *Noerr-Pennington* immunity), *aff'd*, 578 F.2d 1372 (2d Cir.), *cert. denied*, 439 U.S. 983 (1978), *with* Bracken's Shopping Center, Inc. v. Ruve, 273 F. Supp. 606 (S.D. Ill. 1967) (downtown merchant's suit to change ordinance to prevent construction of suburban center protected under *Noerr-Pennington* regardless of motivation).

87. Mason City Center Assocs. v. Mason City, 468 F. Supp. 737, 745-46 (N.D. Iowa 1979).

In Scott v. Sioux City, No. 79-4009 (N.D. Iowa Feb. 26, 1979), plaintiff's allegation of conspiracy in restraint of trade was sufficient to allege that the denial of the variance by the city council was an invalid or illegal governmental action falling outside *Parker* and *Noerr-Pennington* immunity. *See* Harman v. Valley Nat'l Bank, 339 F.2d 564, 566 (9th Cir. 1964).

88. *See* note 87 *supra*. *See also* Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th

C. *The State Action Exemption*

The developer cannot file suit against the zoning commission and private merchants without encountering the state action exemption.[89] Until recently, the exemption protected states and their officers and agents, including municipalities, from antitrust prosecution.[90] The state action exemption originated in *Parker v. Brown*,[91] in which the Supreme Court observed that Congress did not intend the Sherman Act to restrain the anticompetitive activities of a state and its officers.[92] In *Parker* an agricultural association challenged California's raisin marketing program which was designed to maintain high prices.[93] The Court admitted that the project, if instituted by private citizens, would constitute an illegal restraint of trade.[94] The program, however, was beyond the scope of the Sherman Act because California undertook the marketing scheme in its sovereign capacity[95] rather than as an attempt

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Cir. 1977), *vacated and remanded*, 435 U.S. 992, *opinion reinstated*, 583 F.2d 378 (7th Cir. 1978); Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975); Israel v. Baxter Laboratories, Inc., 466 F.2d 272 (D.C. Cir. 1972); George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); E.W. Wiggins Airways v. Massachusetts Port Auth., 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *In re* Airport Car Rental Antitrust Litigation, [1979-2] TRADE CAS. (CCH) ¶ 62746 (N.D. Cal.); Pinehurst Airlines, Inc. v. Resort Air Servs., Inc., [1979-2] TRADE CAS. (CCH) ¶ 62744 (M.D.N.C.); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978).

89. Law review articles dealing generally with the *Parker* exception include: Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 A.B.A. ANTITRUST L.J. 950 (1970); Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE W. RES. L. REV. 221, (1975); Posner, *The Proper Relationship Between State Regulation and Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974).

90. At least one student author assumes that the lack of antitrust actions against municipalities is the result of the *Parker* doctrine. *See* Note, *The Antitrust Liability of Municipality Under the* Parker *Doctrine*, 57 B.U.L. REV. 368, 379 n.68 (1977). *But see* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) (municipality is a person for Sherman Act purposes).

91. 317 U.S. 341 (1943).

92. *Id.*

93. *Id.* at 341, 346. In addition to the antitrust attack on the California Agricultural Prorate Act, the private raisin producer alleged that the statute was invalid under the 1937 Federal Agricultural Marketing Agreement Act and the commerce clause. *Id.* at 344. The Court found that the California Act did not conflict with the federal statute. *Id.* at 354. The Court also realized that the raisin industry was a local concern under state regulation absent preemptive federal legislation. *Id.* at 360-61, 368.

94. *Id.* at 350.

95. "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a State or its officers or agents from activities directed by its legislature." *Id.*

to further a proprietary interest.[96]

Subsequent Supreme Court decisions severely restricted the *Parker* state action exemption.[97] In *Goldfarb v. Virginia State Bar*[98] a Virginia couple accused the state bar association of price fixing by requiring a minimum fee schedule.[99] The Virginia legislature had delegated authority to the state supreme court to regulate the legal profession.[100] The state court acknowledged the state bar as an administrative agency,[101] but did not rule on the minimum fee issue.[102] Because the challenged activity was not "required by the state acting as sovereign,"[103] the Supreme Court unanimously concluded that the state bar was not exempt from liability under the antitrust laws.[104]

In *Cantor v. Detroit Edison Co.* [105] the Court refused to apply *Parker* immunity to private action not compelled by state law.[106] An electric utility, on its own initiative, instituted a program that allowed custom-

96. The state created and enforced the private raisin program in execution of a governmental policy. *Id.* at 352. The Court suggested that the state could not immunize private action by authorizing it. *Id.*, at 351-52. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 386-87 (1951) (Louisiana statute that enforced private price-fixing agreement invalid); Northern Secs. Co. v. United States, 193 U.S. 197, 344-47 (1904) (state's liberal incorporation statute does not exempt corporation's conspiracy to restrain competition in railways).

97. *See generally* Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363 (1978); Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 COLUM. L. REV. 979, 1006-16 (1977); Teply, *Antitrust Immunity of State and Local Government Action*, 48 TUL. L. REV. 272 (1974); Note, Parker v. Brown *Revisited: The State Action Doctrine After* Goldfarb, Cantor *and* Bates, 77 COLUM. L. REV. 898 (1977).

98. 421 U.S. 773 (1975).

99. *Id.* at 775. Virginia state law required house puchasers to produce title insurance issued after a title examination by a member of the state bar. Plaintiffs instituted the class action price fixing suit because no lawyer would perform the service for less than the minimum rate under the schedule. *Id.* at 775-76, 778.

100. *Id.* at 790.

101. *Id.* at 791.

102. The state bar had joined in the private anticompetitive activity of the county bar by imposing sanctions for deviations from the rate schedule. *Id.* at 790-91. The Supreme Court of Virginia, however, had not requested the state bar to produce a schedule or demanded its enforcement. *Id.* at 790.

103. *Id.* at 790. The Court interpreted *Parker* as exempting all regulations mandated by the state. "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state action as sovereign." *Id.* The Virginia Supreme Court stated that it was permissible for lawyers to consider the state bar's fee schedule. The court further directed lawyers to avoid setting all changes according to the schedule. *Id.* at 788-89, 789 n.19.

104. *Id.* at 791.

105. 428 U.S. 579 (1976).

106. *Id.* at 598.

ers to exchange used light bulbs for new ones without a separate charge.[107] A druggist protested that the electric company's use of its protective monopoly restrained competition in the sale of light bulbs.[108] Defendant utility company claimed a state action exemption because of the state commission's approval of the bulb exchange program in its general tariff.[109] The Court assumed the commission was neutral on the question of the bulb exchange because the program was not essential to the tariff or the operation of the utility.[110] The Court explained that state regulation of a private enterprise evokes an implied exemption only if the regulation is necessary to effectuate the regulatory system.[111] The Supreme Court again denied the applicability of the exemption.[112]

A majority of the Court in *Bates v. State Bar of Arizona*[113] articulated a standard that simplified the conflicting interpretations of

107. Detroit Edison operated the light bulb exchange program before the creation of the Michigan Public Service Commission. *Id.* at 583.

108. Because no other retailer could include the cost of light bulbs in the rates for electric service, the utility was operating with an unfair advantage. Plaintiff presented evidence that defendant supplied over fifty percent of the light bulb market. *Id.* at 581-82. Plaintiff, in effect, charged defendant utility company with operating a tying agreement, refusing to sell electric service without including the cost of light bulbs in the charge. The Supreme Court initially prohibited tie-in arrangements when the owner of a patent conditioned the sale of the patented goods on the purchase of a second unpatented product. *See* IBM v. United States, 298 U.S. 131 (1936); Motion Pictures Pats. Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917); Henry v. A.B. Dick Co., 224 U.S. 1 (1912). Eventually the Supreme Court found that tying practices violate the Sherman Act if defendant has substantial market power in the tying product and a substantial volume of commerce in the tied product. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953). Tying is a per se antitrust offense. *See* International Salt Co. v. United States, 332 U.S. 392 (1947). *See generally* L. SULLIVAN, *supra* note 74, at 431-71; Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506 (1974); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958).

109. [W]hile the existing tariff remains in effect, respondent may not abandon the program without violating a Commission order, and therefore, without violating state law. It has, therefore, been permitted by the Commission to carry out the program, and also is required to do so until an appropriate filing has been made and has received the approval of the Commission.

428 U.S. at 585.

110. The fact that other utilities did not have similar programs was evidence that the "exemption was not necessary in order to make the regulatory act work." *Id.* at 584-85, 597.

111. *Id.* at 597.

112. The Court found "no logical inconsistency betwen requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Id.* at 596.

113. 433 U.S. 350 (1977). Appellants, licensed attorneys and members of the Arizona state bar, charged that the disciplinary rule, which prohibits attorneys from advertising, violates the

Parker, *Goldfarb*, and *Cantor*. The state action exemption depends on the degree of the state's independent regulatory interest in the challenged activity.[114] The Court immunized the Arizona state bar from antitrust attack for its regulation of attorneys' advertising according to a disciplinary rule of the Arizona Supreme Court.[115] The Court distinguished *Goldfarb* because the restraint in *Bates* was an affirmative command of the state supreme court which was promulgated in accordance with a longstanding regulatory system.[116] *Cantor* did not control the outcome because the public entity in *Bates* was under continuous supervision by the state.[117]

The Supreme Court first applied the antitrust laws to a municipality in *City of Lafayette v. Louisiana Power and Light Co.*[118] Municipally-owned power companies sued a privately-owned competitor for antitrust violations.[119] The defendant brought a counterclaim against the city under the Sherman Act alleging illegal attempts to delay the construction of the private utility's nuclear power plant.[120] A sharply di-

Sherman Act because it tends to limit competition. The state bar had served the lawyers with a complaint because they advertized legal fees for particular services. *Id.* at 353-56.

114. Justice Blackmun, writing the opinion for the Court, stated that the state's interest in *Bates* "in regulating the activities of the bar is at the core of the State's power to protect the public." *Id.* at 361. The state's interest is so high because of its governmental function of administering justice. *Id.* at 361-62. Justice Blackmun emhasized that the state had a long standing habit of controlling solicitation and advertising by attorneys. *Id.* at 362.

115. The challenged restraint in *Bates* derived from Arizona Supreme Court Rules 27(a) and 29(a) and Disciplinary Rule 2-101(B).

116. The Supreme Court Rules in *Goldfarb* did not mandate the price fixing conspiracy. 421 U.S. 773, 790 (1975). *See* note 109 *supra* and accompanying text. In contrast, Rule 29(a) of the Supreme Court of Arizona provides: "The duties and obligations of members of the bar shall be as prescribed by the Code of Professional Responsibility of the American Bar Association, effective November 1, 1970, as amended by this Court." ARIZ. REV. STAT. ANN., Rule 29(a) (Supp. 1980), *cited in* Bates v. State Bar of Ariz., 433 U.S. 350, 360 n.12 (1977).

117. The Court emphasized that the decision in *Cantor* would have been different if the claim had been against a public official or agency instead of a private company. 433 U.S. at 361. *See* Cantor v. Detroit Edison Co., 428 U.S. 579, 585-92, 600-01 (1976). In *Bates*, the Arizona Supreme Court "is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process." 433 U.S. at 361.

118. 435 U.S. 389 (1978).

119. Lafayette alleged the private utility company violated Sherman Act sections 1 and 2 by preventing operation of competing utilities, refusing to wheel power, foreclosing supplies from defendant's markets, and instituting sham litigation to prevent financing for petitioner's electric generation facilities. *Id.* at 392 n.5.

120. The counterclaim alleged that the city engaged in sham litigation to prevent competition from the nuclear electric power-generating plant and to displace the private utility within municipal boundaries. Municipalities are authorized to own and operate utilities under LA. REV. STAT. ANN. §§ 33:1326, :4162, :4163 (West 1966). In the city of Lafayette, the municipal utilities had a

vided court affirmed the denial of the municipality's motion to dismiss the counterclaim under the *Parker* doctrine.[121] A five justice majority agreed[122] that a municipality is a person for the purposes of the Sherman Act.[123] A plurality of the Court recognized an exemption for anticompetitive municipal conduct.[124] The plurality determined whether the exemption applies from "the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of."[125] The exception would protect only municipal activity that state policy requires or directs to displace competition.[126]

Chief Justice Burger joined the majority holding that municipalities are subject to scrutiny under the antitrust laws.[127] Chief Justice Burger,

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virtual monopoly over city service and competed with defendant private utility over the suburban market. 435 U.S. at 392 n.6.

121. *Id.* at 394.

122. Justice Brennan announced the opinion of the Court with respect to part I. Chief Justice Burger and Justices Marshall, Powell, and Stevens joined. Justice Marshall filed a concurring opinion.

123. 435 U.S. at 395. *Compare* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) (municipality is a "person" for purposes of section 8 of the Sherman Act, the definitional section), *with* Georgia v. Evans, 316 U.S. 159 (1942) ("any person" in section 7 of the Sherman Act includes states). *But see* Note, *supra* note 13, (recent court decisions indicate cities are gaining independent standing and power). *See also* Reynolds v. Sims, 377 U.S. 533, 575 (1964).

124. *See generally* Cutin, *Antitrust Comes to the Cities—Analysis of* City of Lafayette v. Louisiana Power & Light Co. *and its Effect on Municipal Antitrust Liability*, 5 U. DAYTON L. REV. 7 (1980); Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518 (1979); Note, *supra* note 13; Note, City of Lafayette, Louisiana v. Louisiana Power & Light Co.: *Will Municipal Antitrust Liability Doom Effective State-Local Government Relations?*, 36 WASH. & LEE L. REV. 129 (1979); 45 BROOKLYN L. REV. 165 (1978); 28 KAN. L. REV. 166 (1980).

125. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 394 (1978). The Supreme Court approved the standard suggested by the court of appeals:

> [W]hether the state legislature contemplated a certain type of anticompetitive restraint . . . it will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.

Id. at 393-94 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).

126. The Court rejected the idea that political processes can safeguard the public against anticompetitive behavior by a municipality. "If municipalities were free to make economic choices counseled solely by their own anticompetitive effects, a serious chink in the armour of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 408 (1978).

127. *See* note 122 *supra*.

however, agreed with the dissent[128] that only governmental activities should entitle municipalities to the state action exemption.[129] Chief Justice Burger's concurrence focused on the langauge from *Parker* that granted immunity for governmental, as opposed to proprietary, functions of a municipality.[130] He defined a protected governmental activity as an "integral operation in the area of traditional government functions,"[131] thus presenting the connection between the state action exemption and principles of federalism.[132] The Chief Justice denied the city of Lafayette immunity from liability in its capacity as a utility operator[133] because the municipality's interest in preventing legitimate competition was not essential to the federal system.[134]

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128. Justice Stewart filed a dissenting opinion, in which Justices White and Rehnquist joined. Justice Blackmun joined in all but part IIB. The dissent applied a blanket state action exemption to all governmental bodies. 435 U.S. at 426. The dissent predicted that municipal governments could not fulfill their function under the threat of antitrust liabilty.

> [A] prudent municipality will probably believe itself compelled to seek passage of a state statute requiring it to engage in any activity which might be considered anticompetitive. Each time a city grants an exclusive franchise, or chooses to provide a service itself on a monopoly basis, *or refuses to grant a zoning variance to a business* . . . state legislative action will be necessary to ensure that a federal court will not subsequently decide that the activity was not contemplated by the legislature.

Id. at 438 (Stewart, J., dissenting) (emphasis added).

129. *Id.* at 422-24.

130. Chief Justice Burger interpreted *Parker* as firmly rooted in the principles of federalism, allowing a state action exemption to preserve the dual system of government. *Id.* at 421. The Chief Justice suggested state action analysis should evolve parallel to the development of concepts of federalism. *Id.* at 421 n.2. *See* Parker v. Brown, 317 U.S. 341 (1943). "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351.

131. Chief Justice Burger designated municipal functions that should be immune from the antitrust laws through a phrase borrowed from National League of Cities v. Usery, 426 U.S. 833, 852 (1976). It is difficult to predict which functions fulfill the definition. A nonexhaustive list in *National League* included fire prevention, police protection, sanitation, public health, and parks and recreation. *Id.* at 851.

132. Chief Justice Burger's opinion implied that even Congress could not subject traditional governmental functions to antitrust challenge. 435 U.S. at 423. *See* National League of Cities v. Usery, 426 U.S. 833 (1976):

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner . . . .

Id. at 845.

133. 435 U.S. at 425.

134. *Id.* at 425-26.

D. *State Action Exemption After* Lafayette

The decision in *Lafayette* encourages private antitrust suits against municipalities.[135] Plaintiffs assert that municipal decisions that grant a competitive advantage to one economic unit over another substantiate an antitrust cause of action.[136] A series of recent federal district court opinions denies immunity to municipal defendants from claims that arise from their participation in business.[137] The nonexempt activities include: Entering into exclusive procurement contracts[138] and operating public utilities,[139] hospitals,[140] airports,[141] and parks.[142] The district courts, however, continue to withdraw other municipal activities from antitrust scrutiny.[143] The Sherman Act does not preempt some exer-

135. *See* Rose, Municipal Antitrust Liability After *City of Lafayette* (unpublished paper presented at NIMLO Conference on "Municipalities and Antitrust Ligitation").

136. One commentator explains that as municipalities engage in more business and regulatory activity, the likelihood that a private party will be economically injured increases. *Id.* at 3-5.

137. *See* Jordan v. Mills, [1979-1] Trade Cas. (CCH) ¶ 62704 (E.D. Mich.) (price-fixing suit brought against operation of single store in state prison barred by state action exemption because regulation of prison traditional governmental function).

138. *See, e.g.,* Duke & Co., Inc. v. Foerster, 521 F.2d 1277, 1282 (3d Cir. 1975) (municipality not exempt from Sherman Act section 1 suit for refusing to sell plaintiffs malt products on concession stands); *In re* Airport Car Rental Antitrust Litigation, [1979-2] Trade Cas. (CCH) ¶ 62746 (N.D. Cal.) (municipality not immune from charge of conspiracy to grant a monopoly in airport rental cars); Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025, 1032 (N.D. Tex. 1978) (no exemption for ordinance awarding exclusive contract to cab company for pick-up service from airport).

139. *See* Almeda Mall v. Houston Lighting & Power Co., [1977-1] Trade Cas. (CCH) ¶ 61485 (S.D. Tex.) (city regulated utility not exempt from antitrust scrutiny for refusing to sell shopping center single-metered power). *But see* Shrader v. Hurton, 471 F. Supp. 1236, 1242 (W.D. Va. 1979), *aff'd*, 626 F.2d 1163 (4th Cir. 1980) (ordinance requiring connection to public water system exempt because of government act to provide water).

140. *See* City of Fairfax v. Fairfax Hosp. Ass'n, 562 F.2d 280 (4th Cir. 1977) (reversed grant of summary judgment for city that had acquired a private hospital and leased it to a county nonprofit organization). *But see* Huron Valley Hosp., Inc. v. City of Pontiac, 466 F. Supp. 1301 (E.D. Mich. 1979) (local requirement of certificate of need for hospital permit immune because authorized under state policy to restrict entry of new health care facilities).

141. *See* Pinehurst Airlines, Inc. v. Resort Air Servs., Inc., [1979-2] Trade Cas. (CCH) ¶ 62744 (M.D.N.C.) (county board of commissioners not immune from charges of conspiracy to prevent airline from becoming fixed lease operator at local airport).

142. *See* Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580 (7th Cir. 1977) (park district subject to suit for price fixing at pro shops operated on municipal golf course), *vacated and remanded*, 435 U.S. 992, *opinion reinstated*, 583 F.2d 378 (7th Cir. 1978).

143. *See* Cedar-Riverside Assocs., Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978) (city housing development immune because granted monopoly under state law), *aff'd*, 606 F.2d 254 (8th Cir. 1979). *See also* Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 719-20 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978) (advisory committee on New Jersey ethics immune for prohibition of advertising in phone book); Ladue Local Lines, Inc. v. Bi-State Dev. Agency,

cises of police power that traditionally cause an anticompetitive effect.[144]

The district courts have not developed a uniform rule on municipal liability for the anticompetitive effect of land use decisions. One court avoided the immunity issue because the zoning denial was a noncommercial act outside the purview of the antitrust laws.[145] Since *Lafayette*, once a complaint fulfills jurisdictional requirements under the Sherman Act, municipal liability depends on a finding that the state activity compelled displacement of competition.[146]

E. *State Action Exemption and Denial of Competitive Use in Bad Faith*

The district courts consistently deny immunity for zoning practices that result from municipal participation in an anticompetitive conspiracy between private parties.[147] An ordinance that benefits a particular business in a geographic market improperly denies a use.[148] An ordinance is an invalid exercise of the police power, and is unauthorized by state enabling statutes, if it does not advance the general welfare.[149] In addition, a municipal zoning authority violates federal antitrust laws under the *Lafayette* rule if the state does not mandate the ordinance under a valid regulatory policy.[150] A developer of an outlying shop-

433 F.2d 131, 137 (8th Cir. 1970) (city monopoly of public transportation exempt under legislative authorization); E.W. Wiggins Airways v. Massachusetts Port Auth., 362 F.2d 52, 55 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966) (defendant immune for conspiracy to establish exclusive fixed base operation at airport because agent of the state).

144. *See* Jordan v. Mills, [1979-1] Trade Cas. (CCH) ¶ 62704 (E.D. Mich.) (prison store price-fixing suit barred by state action doctrine because regulation of prisons traditional governmental function); Gibson Distrib. Co. v. Downtown Dev. Ass'n, [1978-2] Trade Cas. (CCH) ¶ 62143 (Tex.) (Sunday closing laws not preempted by the Sherman Act).

145. Miller & Son Paving Co. v. Wrightstown Township Civic Ass'n, 443 F. Supp. 1268, 1272 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 840 (1979).

146. *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

147. *See* Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992 (1978), *aff'd on rehearing per curiam*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Mason City Center Assocs. v. Mason City, 468 F. Supp. 737 (N.D. Iowa 1979); Scott v. Sioux City, No. 79-4009 (N.D. Iowa Feb. 26, 1979).

148. *See* notes 25-29 *supra* and accompanying text.

149. *See* notes 12-19 *supra* and accompanying text.

150. A municipality authorized to zone under an enabling act is liable because the state did not explicitly delegate power to benefit individuals. *See* note 16 *supra*. A municipality operating under home rule may exercise powers indispensable to the functioning of local government. These powers do not include participating in a conspiracy for private profit. *See* City of Denton v.

ping center must, therefore, allege that the zoning authority's concerted efforts to restrain trade by enacting use restrictions involved private parties.[151]

Before denying the state action exemption, courts require confirmation of the alleged conspiracy.[152] Unless the developer has proof of an actual agreement between the defendants, he must use circumstantial evidence to advance a conspiracy claim.[153] Courts allow the inference of conspiracy from parallel behavior only under compelling circumstances.[154] Factors that support the likelihood of joint agreement between officials and private parties include the opportunity for illicit transactions[155] and a motive for entering the anticompetitive conspiracy.[156]

The plaintiff in *Whitworth v. Perkins*[157] charged the city officials and residents of Impact, Texas with conspiracy to restrain trade in alcoholic beverages. Plaintiff claimed that the zoning ordinance prohibiting the sale of liquor on residential lots purposely created an "oasis in a dry city."[158] The court focused on two primary considerations: the personal interests of government decisionmakers and whether the ordinance advanced those interests.[159]

Denton Home Ice Co., 119 Tex. 193, 27 S.W.2d 119 (1930). *See generally* sources cited in note 15 *supra*.

151. *See* Rose, *supra* note 137, at 4.

152. *See, e.g.,* Mason City Center Assocs. v. Mason City, 468 F. Supp. 737, 744 (N.D. Iowa 1979); Scott v. Sioux City, No. 79-4009 (N.D. Iowa Feb. 26, 1979).

153. *See generally* L. SULLIVAN, *supra* note 74, at 313-19; ABA, ANTITRUST LAW DEVELOPMENTS 34-37 (1975).

154. *See* Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., 346 U.S. 537, 541 (1954) (consciously parallel actions do not compel finding of agreement); Pevely Dairy Co. v. United States, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950) (reversed finding of conspiracy to fix prices because of evidence that same prices were inevitable). The compelling circumstances are sometimes labeled "plus factors." Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199, 205-06 n.19 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962); C-O Two Fire Equip. Co. v. United States, 197 F.2d 489, 493 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952).

155. Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 548-50 (5th Cir. 1978), *rehearing denied*, 591 F.2d 1343 (5th Cir.), *cert. denied*, 444 U.S. 924 (1979). *But see* Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969).

156. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

157. 559 F.2d 378 (5th Cir. 1977), *vacated*, 435 U.S. 992, *aff'd on rehearing per curiam*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

158. *Id.* at 380.

159. The court remanded for more evidence on "the number of acres in Impact which are zoned for commercial use, who owns such land, the relationship of these zones to each other, and the past and present status of the parcel of land owned by the plaintiff. . . ." *Id.* at 382.

F. *State Action Exemption and Denial of Competitive Use in Good Faith*

The district courts have not found a municipality liable under the antitrust laws for refusing to rezone for a regional shopping center in order to preserve the financial security of the downtown business district.[160] The plurality in *Lafayette* treats zoning intended to grant a competitive advantage the same as it treats a good faith zoning decision that is valid under state law.[161] By delegating the power to zone, the state does not explicitly mandate specific ordinances or advocate a policy to displace competition for any reason in the land use field.[162] Thus, if courts adopt the *Lafayette* plurality view, a municipality may be liable for denying a shopping center use as a misuse of discretion.[163]

A state can protect against *Lafayette* liability by specifically announcing in the body of an enabling act that the public interest in preserving the downtown area has priority over the private interest in building additional outlying shopping centers.[164] A declaration by the state that there shall be no antitrust consequences to zoning regulations is insufficient to shield cities from developers' suits.[165] A majority of the Supreme Court would remove from Sherman Act scrutiny all zoning decisions that perform "integral governmental function[s]."[166] The Court has not, however, provided criteria to determine whether particular local land use determinations fall within the exempted category. Finally, most scholars in the land use field do not consider zoning essential to the survival of a city's commercial district.[167] In practice, however, most cities and many counties use zoning to plan for future

160. *See* cases cited in note 2 *supra*. Two courts, however, have called for additional investigation into the motives behind denials of outlying competitive uses. *See* Mason City Center Assocs. v. Mason City, 468 F. Supp. 737 (N.D. Iowa 1979); Scott v. Sioux City, No. 79-4009 (N.D. Iowa Feb. 26, 1979).

161. *See* notes 30-57 *supra* and accompanying text.

162. *See* note 19 *supra* and accompanying text.

163. *See* Nelson v. Utah County, [1978-1] Trade Cas. (CCH) ¶ 62128 (D. Utah 1977) (zoning enabling legislation giving the power to zone and adopt a master plan does not require the activity; therefore zoning is discretionary).

164. *See* note 134 *supra* (Justice Stewart's dissent in *Lafayette*).

165. *See* Star Lines, Ltd. v. Puerto Rico Maritime Ship. Auth., 451 F. Supp. 157, 162, 166-68 (S.D.N.Y. 1978) (state law that stated, "[T]he Antitrust Laws shall not be applicable to any action of the defendant taken pursuant to the provisions hereof," did not attempt anticompetitive activities).

166. *See* notes 135-38 *supra* and accompanying text.

167. *See* E. BASSETT, *supra* note 13, at 13.

growth.[168] Thus, it is unclear whether the Supreme Court's formula will immunize zoning that attempts to preserve the central business district.

III. MUNICIPAL LIABILITY FOR DENIAL OF COMPETITIVE USE

If the plurality view in *Lafayette* prevails in subsequent decisions, developers will litigate all shopping center use restrictions under the Sherman Act. The decision to deny a use is not one of the enumerated activities that constitutes a per se offense.[169] Therefore, the courts will consider the use denial under the rule of reason analysis.[170]

A. *Conflict Between The Sherman Act and State Zoning Laws*

Both state zoning and federal antitrust laws invalidate an ordinance that prohibits a shopping center use for the purpose of benefiting established businesses. A conflict arises only when section 1 of the Sherman Act voids a local regulation enacted for a legitimate purpose under the state's police power. In the field of constitutional law, courts deal with inconsistencies between state and federal laws under the doctrine of preemption.[171] Whether local zoning laws unduly burden areas of fed-

168. *See* 1 R. ANDERSON, *supra* note 11, § 7.27; 5 N. WILLIAMS, AMERICAN PLANNING LAW § 18.03 (1974).

169. The agreement is not a horizontal restraint of trade, which implicates competitors on the same market level. A horizontal market division would be per se invalid. *See* United States v. Topco Assocs., 405 U.S 596, 608 (1972); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241-43 (1899); United States v. Consolidated Laundries Corp., 291 F.2d 563, 574 (2d Cir. 1961).

Neither does the agreement involve a vertical arrangement to divide territories between customers and suppliers. Vertical territorial restraints are subject to rule of reason analysis. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

One commentator suggests that the city's powers are analogous to those of a seller of a unique product, including the ability to allocate vertically territories and enforce a horizontal allocation among distributors. *See* Dabney, *supra* note 37, at 469.

In the case of a good faith denial of a shopping center use, the zoning authority does not give effect to a private horizontal territorial agreement. Therefore, the rule of reason would apply to the vertical market allocation scheme under the *Lafayette* plurality's approach.

170. *See* notes 74-78 *supra* and accompanying text.

171. State action in direct conflict with federal legislation is generally void. The supremacy clause states:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land—, and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. The preemption issue usually arises when state power is dismissed

eral regulation depends on the existence of less restrictive alternatives available to the local authority.[172]

Courts can examine preemption concerns in antitrust zoning suits by permitting the municipality to raise a public interest defense.[173] This defense would safeguard legitimate municipal activities, such as protective zoning schemes, that are not expressly contemplated by the state in the enabling legislation. In order to raise this defense successfully, the zoning commission must assert a valid purpose for enacting the ordinance,[174] demonstrate that the denial of the shopping center use does not have an unreasonable anticompetitive effect,[175] and show that the use denial furthers the governmental purpose initially asserted by the commission.[176]

The first element requires the zoning commission to explain the reason for the denial of the shopping center variance. The defendant must

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because of implications from federal domination of a field of regulation. The federal antitrust laws would directly oppose many state and local regulations but for the state action exemption. The Supreme Court devised that doctrine to preserve the federal system. *See* notes 130-32 *supra* and accompanying text. *Lafayette* omits unauthorized municipal activities from the state action exemption, displacing the authority of independent local activity. *See* notes 124-25 *supra*; note 137 *supra* and accompanying text. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 267-70 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 376-401 (1978).

172. The Supreme Court has applied the standard to determine whether state regulations are valid under the commerce clause. *See, e.g.,* Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 354 (1977) (state requirement that closed containers of apples be labeled only by United States standards invalid because nondiscriminatory alternatives were available); Great Atlantic & Pacific Tea Co. v. Cottrel, 424 U.S. 366, 376-77 (1976) (state cannot condition the right to sell out-of-state milk on other state's reciprocal agreement to sell milk because other, simpler restrictions can maintain quality of milk); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-56 (1951) (ordinance prohibiting sale of milk produced more than five miles away void because city could inspect producers to ensure quality of milk); Minnesota v. Barber, 136 U.S. 313 (1890) (public health purpose of state requirement that livestock be inspected in state immediately before slaughter better served by inspection elsewhere).

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), applied the standard in the text by permitting an exemption only to the extent necessary to make the regulatory system work. *See* notes 110-11 *supra* and accompanying text.

173. The public interest in a local regulatory scheme is not raised in the context of rule of reason analysis. *See generally* Note, *The Application of Antitrust Laws to Municipal Activities*, *supra* note 124.

174. This element parallels the requirement for a valid ordinance under state law. Defendant zoning commission should articulate the public benefits accomplished by the regulation.

175. This element of the defense parallels the concerns of *Cantor* and preemption analysis under the commerce clause. *See* note 172 *supra*.

176. This element requires the rational relation test usually required by the Court for local regulation of business. *See* City of New Orleans v. Dukes, 501 F.2d 706, 710 (5th Cir. 1974), *rev'd on other grounds*, 427 U.S. 297 (1976).

establish the following sequence of events that would take place but for the regulation: Outlying development will draw vital business away from the downtown center; the movement will impair land values and the property tax base; and the city will be unable to find essential services for the public welfare.[177]

Under the second element of the defense, the municipality must show that the use denial does not unreasonably affect competition because viable commercial alternatives exist for the shopping center developer.[178] To support this contention the zoning commission could suggest a possible location for the shopping center in the central business district or in another outlying area already zoned for commercial use. Absent proof of an alternate site, the city's defense fails because an absolute ban on growth in the area is impermissible.[179]

In the third element of the public interest defense, the zoning commission must exhibit how the allegedly anticompetitive ordinance promotes the continued vitality of the downtown commercial area. The zoning commission may introduce evidence that the amount of goods sold in the central business district either remained constant or decreased less than it would have without the use restriction. The commission should link these figures to the stability of the property tax base and the city's capacity to maintain its level of governmental services.[180]

177. *See* State of Vermont District Environmental Commission #4 at 4-5 (findings on economic impact).

178. *See* notes 172, 175 *supra*.

179. *See* Pascock Ass'n v. Mayor of Washington, 74 N.J. 470, 379 A.2d 6 (1977); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

180. *See* exhibits of Burlington presented to the Vermont Environmental Commission:

> We find that the development as proposed will place an unreasonable burden on the ability of the City of Burlington to provide municipal and governmental services, but will not place an unreasonable burden on the ability of the Town of Williston or other local governments to provide such services. Our findings are supported by the following:
>
> 1) The transfer of retail sales to the mall would result in a decrease in the appraised value of commercial properties in Burlington that would, without an increase in the City's tax rate, reduce potential revenues by $450,000 to $600,000 per year after adjustment for increased state aid to education attributable to a reduced tax base.
>
> 2) Demand for governmental services provided by the City of Burlington would not decrease as a result of the construction and operation of the mall.
>
> 3) The City of Burlington is operating at a staffing level approximately 15% below that of other no-growth cities of similar size in the Northeast.
>
> 4) City departments are operating at levels which cannot absorb reductions in funding without reducing levels of service, for example:
>
> (a) The Burlington Fire Department mans its equipment at personnel levels lower than recommended by the fire insurance rating organization and has no per-

IV. CONCLUSION

Lafayette increases the likelihood of a successful antitrust suit by a developer against the zoning authority that denied a competitive use. *Lafayette* augments state rules against improper zoning because the decision exposes allegedly anticompetitive use denials to antitrust scrutiny. Municipal liability for unauthorized activities, however, also threatens attempts to plan future land use. Without considering the public interest, *Lafayette* subordinates the state action exemption and local freedom of action to the federal policy of free competition.

The public interest defense recognizes preservation of a downtown district as a valid local concern. The defense, however, does not advocate the *Parker* application of total immunity for all governmental actions. Defendant zoning commissions have the burden of proving that an anticompetitive policy does not underlie the prohibition of outlying development. Thus, the defense considers the countervailing interests of modern commercial development and the economic survival of established business districts.

Carol Robin Stone

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sonnel to provide regular fire inspection and prevention services. As a result, property owners in the City of Burlington pay for fire insurance at higher rates than would otherwise be the case.

(b) The Police Department does not have sufficient personnel to maintain what it feels are satisfactory levels of foot and car patrols.

(c) The Street Department is unable to provide adequate snow removal and is operating equipment uneconomically beyond its normal useful life.

5) Construction of the mall would result in a substantial net increase in revenue to the Town of Williston after adjustment for reduction in state aid for education due to higher property values and provision for additional services attributable to the mall.

6) No other municipality has shown that the mall would place an unreasonable burden on its ability to provide municipal or government services.

State of Vermont District Environmental Commission #4 at 25-26.