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REPORT OF THE

GOVERNOR'S TASK FORCE

ON LOCAL GOVERNMENT ANTITRUST LIABILITY

February 16, 1983

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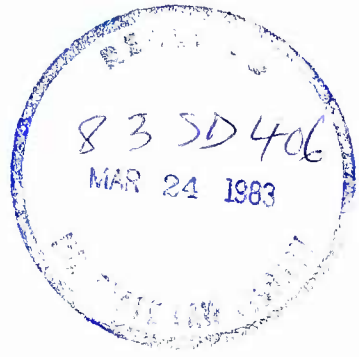

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February 16, 1983

The Honorable Harry R. Hughes
State House
Annapolis, Maryland 21404

Dear Governor Hughes:

I am pleased to forward herewith the Final Report of the Task Force on Local Government Antitrust Liability appointed by your charge letter of July 28, 1982 together with the text of four bills recommended for consideration by the Task Force.

The Task Force has undertaken a comprehensive review of the various areas of local government activity which may give rise to litigation under the Federal Antitrust Laws. It has concluded to recommend legislation at this time with respect to some such areas. With respect to the subjects of ambulance services, hospitals, and health care, taxicab regulation, and towing services, discussed at pages 14 through 16 of the Task Force Report, it has concluded to refrain at this time from presenting legislation to the General Assembly. It is the understanding of the Task Force that the Attorney General of Maryland is currently reviewing with local subdivisions their practices in these areas. Because the results of this review may render legislation unnecessary it was felt advisable to confine the bills to be presented to the General Assembly to the areas of greatest immediate need at this time.

I should like to pay tribute to the exemplary attendance and cooperation of the members of the Task Force at the numerous meetings held within a short time span as well as to the assistance furnished by personnel of the Department of Legislative Reference and the State Law Department.

Respectfully submitted,

George W. Liebmann

GWL/ir

REPORT OF THE

GOVERNOR'S TASK FORCE

ON LOCAL GOVERNMENT ANTITRUST LIABILITY

REPORT OF THE GOVERNOR'S TASK FORCE ON LOCAL GOVERNMENT ANTITRUST LIABILITY

APPOINTMENT OF THE TASK FORCE

This Task Force was appointed by the Governor on July 28, 1982, and charged "with the responsibility for identifying those areas of local government operations which are most subject to antitrust scrutiny and for recommending legislation to preserve, as much as practicable, the 'state action' defense in those areas where it is needed and appropriate." The Governor's charge letter alludes to problems presented for "such traditional governmental activities as solid waste disposal, zoning, urban redevelopment, and taxicab regulation" by the decision of the Supreme Court of the United States in Community Communications Co. v. City of Boulder, 102 U.S. 835 (1982), decided January 13, 1982.

METHOD FOLLOWED BY THE TASK FORCE

In the four months allotted for completion of the work of the Task Force, which is directed to report by December 1, 1982, the Task Force has held or scheduled eight meetings, including a public hearing on November 18, 1982, and seven work sessions open to the public. The Task Force has conducted an extensive review of published literature concerning problems presented by the Boulder decision, 1/ statutory responses in Maryland and other states, structure of Maryland laws relating to delegation of state powers to local governments, and existing state statutes and constitutional provisions regulating competition. The Task Force has also consulted with and received testimony and written submissions from numerous interested persons including a Baltimore City Councilman, the Executive Director and Assistant Executive Director of the Maryland Association of Counties, counsel for the Maryland Environmental Service, the Department of Natural Resources, the Northeast Maryland Waste Disposal Authority, a senior staff associate for the Maryland Municipal League, Legislative Counsel for Montgomery County, Maryland, the Legislative Liaison Officer for Baltimore City, a representative of the University of Maryland Institute for Government Service, a former Deputy Assistant Attorney General of the Antitrust Division of the United States Department of Justice, a Professor of Law at the University of Maryland School of Law, and fourlawyers in private practice in Baltimore and Washington, D.C. The Task Force includes among its members the City

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1/ The Boulder decision is reproduced as Appendix A hereto.

Solicitor of Baltimore City, the Chief of the Antitrust Division of the Maryland Attorney General's Office, the County Attorney of Prince George's County, the City Attorney of the City of Bowie, the County Attorney of Carroll County, the County Attorney of Kent County, and the City Attorney of the City of Rockville, in addition to lawyers in private practice with experience in representing both plaintiffs and defendants in antitrust litigation.

THE BOULDER DECISION AND ITS BACKGROUND

The decision by the Supreme Court in Community Communications Co. v. City of Boulder was a five to three decision. Five Justices joined in the majority opinion by Mr. Justice Brennan. Mr. Justice Stevens, one of the Justices joining in the majority opinion, wrote a separate concurrence. Justices Rehnquist, Burger, and O'Connor dissented; Justice White did not participate. The Boulder case arose from an action filed by a cable television operator enjoying a non-exclusive franchise against the City of Boulder to enjoin enforcement of an ordinance imposing a three-month moratorium upon expansion of existing cable television systems pending the drafting by the Boulder City Council of a model cable television ordinance. The moratorium was enacted by the Council on the stated basis that it "was necessary because petitioner's continued expansion during the drafting of the model ordinance would discourage potential competitors from entering the market." (70 L.Ed. 2d at 815). The Federal District Court held that the state action defense to the antitrust laws recognized in Parker v. Brown, 317 U.S. 341 (1943), was unavailable to Boulder and granted a preliminary injunction. The United States Court of Appeals for the Tenth Circuit reversed, holding that immunity was available because "no proprietary interest of the city is here involved." The Supreme Court of the United States reversed the judgment of the Court of Appeals and remanded the case for further proceedings. The case was later settled by the city, in part in consequence of the costs to the city of further litigation.

The opinion of the Court in Boulder declares that the moratorium ordinance "cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity ... or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." This holding was not inconsistent with the Court's reasoning in its earlier opinions regarding the interaction between state economic regulation and federal antitrust statutory policy. In City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978), the Court in a decision also written by Justice Brennan explained the interaction between these interests:

> In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy to be administered by neutral courts, which would guarantee every enterprise the right to exercise 'whatever economic muscle it can muster,' United States v. Topco Associates, 405 U.S. 596, 610, 92 S. Ct. 1126, 1135, 31 L. Ed.2d 515 (1972), without regard to the amount of influence it might have with local or state legislatures.
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> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

435 U.S. at 406-408. (footnotes omitted.)

The Home Rule Amendment to the Colorado Constitution was held not to constitute such a state policy on the basis that "the requirement of 'clear articulation and effective expression' is not satisfied when the state's position is one of mere neutrality respecting the municipal actions challenged as anti-competitive ... nor can those actions be truly described as 'comprehended within the powers granted' since the term 'granted' necessarily implies an affirmative addressing of the subject by the state." The Court further held, citing its earlier plurality opinion in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 394-97 (1978), that the antitrust laws "like other federal laws imposing civil or criminal sanctions upon 'persons' of course apply to municipalities as well as to other corporate entities" (70 L.Ed. 2d at 822) and declared that this interpretation of the state action doctrine "means only that when the state itself has not directed or authorized an anti-competitive practice, the state subdivisions, in exercising their delegated power, must obey the antitrust laws" (70 L.Ed. 2d at 822). Footnote 20 to the Supreme Court's opinion repeated a dictum in the Lafayette case to the effect that "it may be that certain activities, which might appear anti-competitive when engaged in by private parties, take on a different complexion when adopted by a local government." The same footnote expressly declared, "we do not confront the issue of remedies appropriate against municipal officials." Note 14 of the Court's opinion also expressly refrains from reaching the question whether the Boulder ordinance

"must or could satisfy the 'active state supervision' test focused upon in Midcal Aluminum, Inc., 445 U.S. 97, 105, a case involving the delegation of price setting powers to private entities.

The concurring opinion of Mr. Justice Stevens in the Boulder case stressed that the absence of state immunity from suit did not necessarily mean that the public officials concerned necessarily had violated the antitrust laws. The dissenting opinion stresses the problems created by applying federal antitrust statutes to local governments, including "whether the per se rules of illegality apply to municipal defendants in the same manner as they are applied to private defendants" and "the question whether municipalities may be liable for treble damages for enacting anti-competitive ordinances which are not protected by the Parker doctrine." The dissenters noted that "it will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages to compensate any person 'injured in his business or property.'" 2/

The Sherman Act was enacted in 1890. Less than five years later in Lowenstein v. Evans, 69 F. 908 (D.S.C. 1895), the District Court rejected a contention that a public instrumentality, in that case a South Carolina state liquor monopoly, was subject to suit under the Sherman Act. In 1904 in Olsen v. Smith, 195 U.S. 332 (1904), the Supreme Court rejected a similar contention directed against a state pilotage licensing statute. The principles of these decisions were reiterated in Parker v. Brown, 317 U.S. 341 (1943). Although subsequent to Parker it was occasionally suggested that state or municipal agencies acting in proprietary as distinct from governmental capacities might be subject to the antitrust laws, see Parker v. Brown, 317 U.S. at 351-52; Handler, Twenty-Five Years of Antitrust, at 930 (1973); compare Union Pacific Railway Co. v. United States, 313 U.S. 450 (1941) (arising under the Interstate Commerce Act), exposure of municipal governments to antitrust liability was not thought of as a serious possibility until the decision in City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978), holding a city operating a municipal utility subject to antitrust liability. The development in the antitrust area has taken place concurrently with the increased exposure of municipalities to civil rights damage actions which

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2/ The ramifications of the Boulder decision and the confused and conflicting responses of lower courts to it in the absence of state legislation seeking to temper its effect are outlined in a paper by Lewis Noonberg, Esquire of the Baltimore Bar printed as Appendix B to this report.

has arisen since the overruling of Monroe v. Pape, 365 U.S. 167 (1961), by Owen v. City of Independence, 100 S. Ct. 1398 (1980).

During the four years since the Lafayette decision there have been numerous antitrust cases brought throughout the country against municipalities, including several actions in Maryland. See, e.g., Highfield Water Co. v. Public Service Commission, 488 F. Supp. 1176 (D. Md. 1980). None of these suits have as yet resulted in a litigated judgment of liability, although some have given rise to monetary settlements. Because of the obvious potential for adverse impact of the Boulder decision on local governments' cable television franchises, the General Assembly by enactment of Chapter 562 of the Acts of 1982 clarified the authority of Maryland counties and cities "to supplant competition by granting one or more franchises for cable television systems on an exclusive basis, to impose franchise fees, to establish certain rates charged to subscribers, and to establish rules and regulations to govern the operation of the franchises."

RECOMMENDATIONS OF THE TASK FORCE

The Task Force recommends immediate consideration of five pieces of legislation as follows:

1. An omnibus bill amending the various Express Powers Acts and the Baltimore City Charter to authorize counties, and municipalities to supplant competition with respect to a number of specifically identified areas of governmental activity including sale and lease of property, grant of concessions on publicly owned land, licensing and operation of transportation facilities, towing facilities, and utilities, health, and waste disposal activities.

2. A bill amending statutory authorization for liquor boards and authorities, housing authorities, industrial development authorities and soil conservation districts to similar effect.

3. An Act amending the various zoning enabling statutes to specify the authority to make anticompetitive decisions in the zoning process.

4. Amendments to the provisions of law creating the Maryland Environmental Service and the Northeast Maryland Waste Disposal Authority to specify their authority to regulate and control trade in and disposal of solid waste.

5. An amendment to the provisions of law governing the State Law Department to authorize the Office of the Attorney General to defend, as well as prosecute, antitrust actions on behalf of municipalities.

RELEVANT MARYLAND COMPETITION LEGISLATION

Since the effect of the Boulder decision is to potentially subject Maryland municipalities 3/ to civil actions in the Federal Court for violation of federal antitrust laws, it becomes pertinent to examine the provisions of state law authorizing local government actions which affect competition.

The Maryland Antitrust Act creates treble damage and other remedies similar to the remedies established by federal statute. Although Section 11-202(a)(2) of the Commercial Law Article declares a purpose that the courts in construing the Maryland Act be guided by federal interpretations, the Maryland Act contains in Section 11-203(12) a declaration that it "does not make illegal the activity of a political subdivision of the state in furnishing services or commodities."

Article 41 of the Maryland Declaration of Rights contains a declaration "that monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." Similar provisions have been contained in each constitution since 1776. The provision has been held applicable only to monopoly grants. See Grempler v. Multiple Listing Bureau, 258 Md. 419 (1970). It has also been held that a monopoly grant is not a monopoly in the constitutional sense when reasonably required for protection of some public interest or given in return for public service or given in reference to a matter not of common right. Levin v. Sinai Hospital, 186 Md. 174 (1946). This provision has been applied to invalidate at least one monopoly grant by a municipality. See Raney v. Montgomery County, 170 Md. 183 (1936). The effect of invalidation, however, is not to subject the county to damage liability but merely to subject it to an injunction against continuation of the monopolistic practice.

The competitive bidding provisions of the state procurement law, Article 21 of the Code, relating to competitive bidding by their terms do not apply to procurement by political subdivisions of the state including counties, municipalities, sanitary districts, drainage districts, soil conservation districts, and water supply districts, Article 21, § 1-202(b)(4).

3/ As used throughout the Report, "municipalities" includes counties.

The provisions of Article 25, § 3(L) relating to Commissioner Counties; the provisions of Article 25A, § 5(f) relating to Chartered Counties; the provisions of Article 25B, § 13 relating to Code Counties; and provisions of the Baltimore City Charter appear to contemplate and require the use of competitive bidding in connection with the award of specified public contracts. As with the provisions of the State Procurement Law, the sanctions for violation of these provisions generally are only prevention of award of contracts violating their terms.

DISCUSSION OF RECOMMENDATIONS

Basic to the work of the Task Force is the proposition that it is not constituted, created or composed to serve as a surrogate legislature. The Task Force has focused its attention on the principal activities of local government; those activities which have given rise to the lion's share of litigation under the antitrust laws against municipal corporations in other states. The legislation presented by the Task Force embodies a conclusion as to each of the activities dealt with by it that the General Assembly should act to displace potential federal antitrust liability. The recommended legislation and report also supplies a format for addressing problems concerning other areas of local government activity. Four reasons give rise to the Task Force's conclusions in this regard.

1) The rules governing (a) the circumstances in which municipalities may be subject to federal antitrust liability, (b) the sanctions which may be imposed against municipalities where such liability attaches to them and (c) the substantive antitrust doctrines applicable to the principal areas of local government activity are presently each so unclear, uncertain, and confused in their contours that exposure of local governments to potential antitrust liability would accord their officials no clear guide to their conduct and would do little to effectuate any coherent policy, competitive or otherwise.

2) Exposure of municipalities to civil antitrust liability in the federal courts would, by reason of rules of federal civil practice and antitrust law making summary disposition of lawsuits difficult, and by reason of other characteristics of antitrust litigation, expose Maryland municipalities and particularly smaller Maryland municipalities to crushing litigation costs even where the federal claims presented are frivolous. The high costs of antitrust litigation would be exacerbated by the present uncertainty in the applicable federal rules.

3) Where the General Assembly desires to displace existing anti-competitive municipal laws and practices with a more competitive regime, subjection of the challenged practices to

federal antitrust liability is an inefficient, costly and inappropriate means of changing policy, at least where the potential federal liabilities are unaccompanied by changes in state law. If it is desired to enforce upon municipal officials a competitive regime with respect to aspects of public policy controlled by them, the General Assembly may expressly prohibit a challenged practice, may expressly require the use of a specified form of competitive bidding or free or competitive licensing, or may amend the provisions of state procurement or other laws to require the use of specified practices in specified contexts by the municipal government. Absent such a judgment by the General Assembly and the creation of such state liabilities, exposing municipal governments to civil antitrust liability in the federal courts is inappropriate and inconsistent with sound principles of both federalism and local home rule.

4) On the basis of its review of the particular areas of regulatory and proprietary activity dealt with by its draft legislation, the Task Force has concluded that important considerations of public policy make appropriate rejection of competitive regimes with respect to each field addressed.

The Task Force's conclusions with respect to each of these subjects will be elaborated below:

1. Uncertainty of the federal law

As previously noted, the Boulder and Lafayette decisions were silent or purposefully ambiguous as to such important subjects as the question whether municipalities are liable to relief in damages as well as by way of injunction, whether the damages awardable against municipalities are single or treble damages, whether municipal officials are subject to criminal liability for anti-competitive practices, whether the same practices condemned as violations of the antitrust laws when engaged in by private entities would likewise be condemned when engaged in by municipalities, what weight if any is to be given to municipal declarations of purpose in carrying out anti-competitive policies, and a myriad of other questions.

In addition, it is to be noted that the subjection of municipalities to federal antitrust liability has involved the federal courts in the adjudication of claim involving industries and practices such as solid waste disposal, water supply, trash collection, mass transit and airport administration, zoning, and urban redevelopment with respect to which there is no significant pre-existing body of precedent under the federal antitrust laws defining which practices in the context of a particular industry are deemed per se violations, which are justified under the rule of reason, and which, though not per se violations, are properly

subject to condemnation on the basis of an evaluation of all surrounding circumstances. This lack of prior experience has meant that many cases challenging municipal activity in the lower federal courts will be tried as rule of reason cases in which the litigated issue is not merely whether defendants have violated rules defining antitrust violations but whether there should be a rule condemning a particular type of municipal practice as an antitrust violation. As has often been pointed out, the federal antitrust laws are couched in terms of such broad generality that the judgments which the federal courts make in enforcing them are frequently quasi-legislative in their nature. For a considerable time to come, therefore, each case involving a challenge to municipal practices in the federal courts under the antitrust laws will involve receipt in a time-consuming trial-type procedure of large quantities of the sort of economic, historical and other testimony generally presented to state legislators and Congressional committees in connection with legislative hearings. Because of the high ideological content of many of the issues raised, sharp divergence may be expected to appear in the judgments of the lower federal courts and in ensuing judgments of the Courts of Appeals. Indeed, most dramatically in the area of challenged practices relating to health care but in other contexts also, sharp divergences in the lower court opinions have begun to appear already.

In considering whether the state's public policy should be one of acquiescence in the competitive regime sought to be fostered by Boulder or selective displacement of that regime, this feature of the post-Boulder rules cannot be ignored. The Boulder litigation itself involved a challenge to a municipal moratorium statute designed to place competitors for a cable television franchise on equal terms. Displacement by the state of some of the effects of Boulder thus constitutes displacement of uncertainty, not of clearly stated rules promoting competition.

2. Burdensome nature of antitrust litigation

The nature of federal antitrust litigation renders it peculiarly burdensome to local governments, particularly smaller local governments. Such litigation is conducted not in local courts but in the United States District Court located at a distance from most municipalities. Unlike litigation under the Federal Civil Rights statutes, to which municipalities have, in recent years, been increasingly subject, it involves not interpretation of more or less clearly stated statutory mandates and a limited body of case law, but rather application in widely varying situations of a ninety-year body of case law developed apart from, and frequently without reference to, the statutory texts. Antitrust litigation, by reason of the relatively inaccessible body of substantive law governing it, has

increasingly become the province of a specialized bar concentrated in metropolitan areas and commanding, where defendants are represented, high hourly rates of compensation.

The costs of antitrust litigation are enhanced by two additional factors. Since Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962), courts have applied a rule that

> summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross examination that their credibility and weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury.

These principles have been applied in a myriad of antitrust actions to deny summary judgments which would be appropriate in other types of cases, see 6 Moore Federal Practice § 56.17(5). In the Fourth Federal Circuit in which Maryland is situated, even the ordinary rules as to summary judgments have been applied with unusual strictness since the decision in Stevens v. Howard Johnson Co., 181 F.2d 390 (4th Cir. 1950), the court traditionally holding that summary judgment is inappropriate "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom," see 6 Moore Federal Practice § 56.15(1.04). For this reason antitrust litigation characteristically is not resoluble upon motion to dismiss or motion for summary judgment but only after prolonged discovery proceedings which characteristically involve lengthy depositions frequently lasting for several days with respect to each important witness. Further, it is to be noted that where a defendant succeeds in ultimately securing dismissal of an antitrust case or a victory at trial his attorney's fees as in most litigation are not reimbursable to him. In consequence, the bringing and extended prosecution of an antitrust action, even if the action results in an ultimate victory, will frequently be a catastrophe for a municipal government, particularly a smaller municipal government. 4/ Given these attributes of antitrust litigation it is cold comfort for

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4/ The Attorney General of Maryland, who was recently empowered by Chapter 139 of the Acts of 1982 to defend Soil Conservation Districts in antitrust cases, recently has requested a special allocation of $40,000 from the Board of Public Works to defend a single antitrust suit against five districts, the Maryland Department of Agriculture and the Secretary of Agriculture.

Maryland municipalities to be advised, as the Task Force was by a former Deputy Assistant Attorney General in charge of the Antitrust Division, that they should not be concerned about Boulder because "there is a great distance between an allegation and a finding of [antitrust] liability." It is the very length of that distance that in and of itself creates legitimate concern about the application of federal antitrust sanctions in this sphere.

3. Greater appropriateness of other sanctions.

As has previously been noted, maintenance of the status quo may give rise in some situations to exposure of local governments to liability in the federal courts for antitrust violations in circumstances in which no state statute interdicts their conduct. Even if the General Assembly were to conclude that as to one or more subjects covered by the proposed legislation subjection to federal antitrust liabilities of Maryland municipalities is appropriate, the appropriate primary sanctions for violation of competitive rules should be not civil actions against municipalities in federal courts but clearly stated commands of state law. If, by way of illustration, the General Assembly were to conclude that the views of some critics of existing forms of taxicab regulations are justified, 5/ the appropriate remedy would appear to be an enactment by the General Assembly of a new form of licensing statute providing for some sort of open entry or competitive award of franchises. It would be unfair if a legislative judgment in favor of a more competitive regime were implemented only by acquiescing in the subjection of Maryland municipalities to unclear potential liability in the federal courts rather than to clear statutory guidelines.

As has previously been noted, the Task Force does not regard itself as a surrogate legislature. It has made recommendations as to the balance to be struck between regulation and competition in the particular important spheres of government activity dealt with by its proposed legislation. It recognizes that the General Assembly may wish as to certain of these particular areas to cast the balance differently. The Task Force, however, urges that if the General Assembly feels constrained to reject the Task Force's recommendations to any particular area of immunity that it do so not simply by striking the immunity provision from the Task Force's bill but by providing separate legislation according clear guidance to municipal officials and members of the industry

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5/ See, for example, Kitch, et al., The Regulation of Taxicabs in Chicago, 14 Journal of Law and Economics 285 (1971).

in question as to what is required of them as a matter of state law.

4. Important Policies Supporting Existing Municipal Practices

The Task Force has concluded that as to certain specific fields, immunity from federal antitrust liability might be obtained by enactment of the recommended legislation. Because achievement of that immunity requires a clearly articulated and affirmatively expressed policy of the General Assembly to supplant competition in those fields with local government regulation, the Task Force has undertaken to present the rationale for preserving anticompetitive practices as opposed to promotion of competition by subjection to federal antitrust laws. In its consideration of the Task Force recommendations the General Assembly should separately consider the competitive impact of each power granted. The rationale in each instance is set out below:

Zoning

The Task Force has concluded to recommend specific legislation amendatory of each of the zoning enabling statutes confirming that municipal regulations in this sphere may have an anti-competitive impact. The case law that has already developed has been sufficient to indicate the prospect of extensive litigation in this sphere. See Nelson v Utah County, 1978 Trade Cas. (CCH) ¶ 62,128 (D. Utah 1977); Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977), and see the extended discussion in Dabney, Antitrust Aspects of Anti-competitive Zoning, Antitrust Bulletin, Fall, 1979 at 435-77. There is already established Maryland law, which the Task Force does not seek to modify, that zoning actions which have no purpose but the protection of competitors are subject to challenge on that basis. See Lucky Stores, Inc. v. Board of Appeals, 270 Md. 513 (1973); Aspen Hill Venture v. Montgomery County Council, 265 Md. 303 (1972). In the ordinary case, however, zoning retrictions, though in some instances influenced by anti-competitive purposes, are supported by other legitimate reasons. See, e.g., American Oil Company v. Board of Appeals, 270 Md. 301 (1973); Board of County Commissioners v. Lightman, 251 Md. 86 (1968). Foremost, every zoning restriction involves a judgment on the part of the local governing body that economic activity which has been adjudged by a landowner to be beneficial to him should be restricted or prohibited either because it involves a noxious or dangerous use whose incidence is to be minimized to the extent consistent with the needs of society or because it is, in the language of the Euclid v. Ambler Realty Co. case, "a right thing in the wrong place, like a pig in the parlor instead of the barnyard." 272 U.S. 365 (1926). What zoning by definition is about is the

denial of proposed uses which the marketplace has determined to be economically advantageous.

Even in the view of commentators sympathetic to the application of antitrust constraints to zoning, the Boulder rule would result in elaborate proceedings exploring such essentially legislative issues as the existence of less restrictive alternatives to zoning prohibitions, weighing of environmental benefits against economic detriments, and other matters of a like character. See Dabney, supra. To the extent that the General Assembly may deem it desirable to foster greater regard for competitive considerations in the zoning process, other mechanisms than subjection to unguided federal or state antitrust liability are available. Consideration of competitive impact might be added to the catalogue of matters permitted to be considered in zoning determinations by the zoning enabling statutes, see, e.g., Article 66B, § 4.03. The enabling statutes might be amended to expressly prohibit types of restrictions deemed to have especially adverse impacts on competition. The Task Force has not deemed it within its charge to weigh the benefits of such more limited approaches. Absent some form of immunity, the process of litigation would enhance the costs and delays attendant upon land development and, to the extent that litigation required allowance of uses now prohibited, such uses would have adverse environmental and other social impacts. Accordingly, the Task Force recommends language amendatory of the zoning enabling statutes designed to clarify existing authority.

Solid Waste

There has already been significant litigation suggesting that municipal efforts to regulate the solid waste stream give rise to potential federal antitrust liabilities. Concern has been expressed to the Task Force by the state agencies charged with implementation of solid waste disposal plans, the Maryland Environmental Service and the Northeast Maryland Waste Disposal Authority, concerning the possible application of Boulder to this industry. Because regulation of the waste stream is basic to the planning of new solid waste disposal plants and landfills and because of the large public investments required and the long delay ensuing with respect to creation of new solid waste disposal facilities, the General Assembly has long considered that operation in this area of a regime of laissez-faire does not serve the public interest. The need for immunizing legislation is given force by the fact that the Supreme Court in Hybud Equipment Corp. v. City of Akron, 71 L. Ed.2d 640 (1982), reversed and remanded a decision (654 F.2d 1187 (6th Cir. 1981)) holding direction of the waste disposal stream immune from antitrust scrutiny. Because the Maryland Environmental Service and the Northeast Maryland Waste Disposal Authority are both

responsible for waste disposal in solid waste disposal service districts created pursuant to Natural Resources Article § 3-106, the Task Force advises that their statutory authorization also should contain a clear articulation of affirmative legislative intent to regulate and control trade in and disposal of solid waste.

Ambulance Services, Hospitals and Health Care

Because many Maryland municipal corporations engage in the operation of hospitals and regulation of ambulance services, the Task Force has deemed it desirable that the obligations of Maryland municipalities in this sphere be addressed by legislation. With respect to ambulance service, a large body of experience, including the need to provide for ambulance service in outlying areas and on a 24-hour basis, has led many municipalities to grant exclusive franchises, regulate rates or otherwise restrict entry into the ambulance service business. Grant of an exclusive ambulance franchise was challenged in Gold Cross Ambulance v. City of Kansas City, 1982-2 Trade Cas. (CCH) ¶ 64,758 (W.D. Mo. 1982). In the interests of discouraging costly litigation in Maryland, legislation in this area appears desirable.

The regulatory issues with respect to hospitals and health care are highly debatable and warmly debated. See Symposium, 41 Md. L. Rev. 1-73 (1982); Symposium, 34 Vand. L. Rev. 849-1201 (1981). In Maryland there has been significant political and judicial scrutiny of arrangements in this area. In the view of the Task Force, no benefit would be derived from the subjection of practices of public hospitals with regard to health care providers to whatever federal antitrust controls may exist. The Task Force notes that the benefits of various types of reimbursement arrangements have been warmly debated throughout the country (see Health Services v. Holy Cross Hospital, 290 Md. 508, 531 n.6 (Davidson J., dissenting)), and that the decision whether a public hospital should render such services through staff positions or by exclusive or non-exclusive arrangements with private providers is a matter appropriately left to managerial discretion and the political process in the municipality and state. Because the size of hospitals varies as does the number of available physicians, exclusive arrangements are frequently necessary and appropriate to obtaining the prompt provision of necessary health care. 6/

6/ The legislation recommended by the Task Force is not intended to alter the present contours of the Maryland Antitrust Act as it relates to the contracting or staffing practices of private hospitals.

Public Transportation

The operation of taxicabs, buses, and other transportation facilities and the grant of franchises for them has been a traditional municipal function. The practices of municipalities in this sphere are highly visible and readily subject to political checks. There is an obvious public interest in the provision of transportation services since such services are especially needed by vulnerable groups of the population including the very young, the very old, the sick, and the disabled as well as persons of limited income. There is a similar public interest in the provision of transportation services to remote locations and at times of day and night in which the provision of such services, absent public regulation, might not be remunerative for the purposes of persons rendering them. There is also an interest in predictability and uniformity in rates and the avoidance of discriminatory practices as well as in the promotion of use of such services as alternatives to privately owned transportation facilities resulting in greater expenditure of energy resources. Municipal activities in this sphere have also been the subject of litigation in other jurisdictions which it is the Task Force's purpose to discourage. See Crocker v. Padnose, 483 F. Supp. 229 (D. Mass. 1980). To the extent that the General Assembly deems it desirable to alter established practices, the appropriate means is through either enactment of a licensing law of statewide applicability or amendment of the Express Powers Acts to restrict municipal discretion in adopting particular types of franchise arrangements.

Cable Television

The General Assembly, by enactment of legislation in the 1982 session in this sphere, has already recognized that the public interest in grant of exclusive or non-exclusive cable television franchises outweighs any benefits which might be derived from subjection of municipal practices in this regard to federal antitrust liability. Because the rendition of cable television services involves a substantial capital investment, predictability in the law governing such franchises is highly necessary. The rendition of such services is frequently most economically conducted on the basis of monopoly service and public interest may require greater uniformity in rates than would be produced by untrammeled competition. The appropriateness of authorizing municipal activity in this sphere free of generalized federal antitrust constraints appears evident. The Task Force has determined to make no change in present law.

Water and Sewer Service and Waste Collection and Disposal

In the view of the Task Force, municipal activities in this sphere are highly visible and subject to significant political restraints. Because of the public interest in universality of service and reasonably uniform rates; in direction of the waste stream; in avoidance of construction of duplicative facilities; and in prevention of environmental degradation the appropriateness of municipal authority in this sphere to grant franchises, establish rates and establish licensing requirements, free of the constraints imposed by federal antitrust legislation, appears evident. Chapter 522 of the Acts of 1972 requires the Maryland Environmental Service in preparing five-year water, waste-water, and solid waste projects to "consider the effects of public versus private ownership of water and wastewater facilities." § 3-106(d) of the Natural Resources Article. Maryland Environmental Service is a state agency § 3-103(a). Municipal activities in this sphere have given rise to litigation not only in Maryland in the Highfield case but in other jurisdictions as is evidenced by the City of Lafayette case and by Gas and Electric Co. v. Sacramento Public Utility District, 526 F. Supp. 276 (E.D. Cal. 1981); Schrader v. Horton, 471 F. Supp. 1326 (W.D. Va. 1979); Community Builders, Inc. v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981); City of Mishawaka v. American Electric Power Co., 465 F. Supp. 1320 (N.D. Ind. 1979).

Towing Services

For reasons similar to those discussed above in connection with ambulance services, many municipalities have enacted regulations of towing services providing for the grant of exclusive franchises, forms of rate regulation and required service, and other measures which might have anti-competitive impact. These regulations may be necessary in order to avoid over-reaching by towing operators who are in an excellent position to oppress consumers with need for immediate use of their cars and in order to insure the availability of towing services in geographically remote areas and at inconvenient hours of the night.

Concessions and Leases

It has been a practice of many Maryland municipalities to grant monopoly concessions for the sale of various goods and services on public property with a view not toward promoting competition but to maximizing franchise fees or profits to the political subdivision or with a view toward providing employment for disfavored groups or with a view toward fostering the availability of service in inconvenient places and at times of

day which might not attract services at reasonable rates in a competitive market. The Task Force believes that municipal practices in this sphere enjoy a high degree of political visibility and control. The Task Force notes that municipal activities with respect to the operation of airports, parking lots, and recreational facilities have been the subject of substantial litigation resulting in inconclusive and conflicting results reinforcing its conclusion that legislation in this sphere is desirable. See Pueblo Aircraft Service v. City of Pueblo, 1982-1 Trade Cas. (CCH) ¶ 64,668 (10th Cir. 1982) (State Action Doctrine applicable); Pinehurst Airlines, Inc. v. Resort Air Services, 476 F. Supp. 543 (M.D.N.C. 1979) (State Action Distrine inappliable); Guthrie v. Genesee County, 494 F. Supp. 950 (W.D.N.Y. 1980); Corey v. Look, 641 F.2d 32 (1st Cir. 1981); Kurek v. Pleasure Driveway, 557 F.2d 580 (7th Cir. 1977), vacated and remanded, 435 U.S. 992 (1977), original judgment reinstated, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1978); Duke and Company v. Foerster, 521 F.2d 1277 (3d Cir. 1975); Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971).

Urban Development and Redevelopment in Baltimore City

Because of concerns by the Baltimore City Administration that the City's activities with respect to urban redevelopment extend beyond the activities of Housing Authorities and Industrial Development Authorities addressed by the legislation recommended by the Task Force, infra at page 19, the Task Force has recommended specific legislation addressed to urban redevelopment activities in Baltimore City designed to immunize land acquisition, leasing and loan transactions undertaken in connection with such activities.

SPECIAL PURPOSE DISTRICTS

The Task Force has also concluded to recommend legislation, set out in a separate bill, addressing problems of law important to these types of special purpose districts: Liquor Boards and authorities, Housing Authorities, Industrial Development Authorities, and Soil Conservation Districts. Its rationale as to each is set out below:

Alcoholic Beverages

There exists a long history of municipal regulations of alcoholic beverage licensees. Because places where alcoholic beverages are consumed are frequently noisy and give rise to neighborhood disturbances, restrictions on the number of places of consumption and on their location have been commonplace, as have restrictions on hours of operation. Because promotional activities of liquor dealers and distributors have on occasion

been inconsistent with public goals of producing temperance in the use of alcoholic beverages and because the multiplication of retail distribution outlets has been deemed by some subdivisions not to serve the public interest, restrictions in this area also are common. Enactment of such restrictions is a highly visible process subject to adequate public checks. The proposed legislation also covers the sale and distribution of alcoholic beverages to protect local governments and authorities which engage in those activities. The Task Force is of the view that those municipalities which adopted restrictive systems have acted rationally upon appraisal of local interests and that the benefits obtained from the restrictions outweigh any detriment which might result from the limitation of competition which might be enforced by the present, not entirely clear, provisions of federal antitrust statutes. Accordingly, the Task Force recommends immunizing legislation in this area, which also has fostered litigation elsewhere. Because the Liquor Boards of some counties are independent of County government, their inclusion in the legislation relating to special purpose districts appears necessary. Art. 2B § 1 declares the state's purposes in regard to liquor as being "to obtain respect and obedience to law and to foster and promote temperance", language accorded respect in U.S. v. Maryland Licensed Beverage Assn., 168 F.Supp 431 (D.Md. 1958). Liquor boards have been held not be state agencies within the meaning of the Administrative Procedure Act. Valentine v. Board, 291 Md. 523 (1982).

Soil Conservation Districts

These entities have already given rise to antitrust litigation since Boulder, and by legislative enactment in 1982, the Attorney General was authorized to defend legal actions against such districts and has requested a substantial allocation of funds from the Board of Public Works for the purpose of defending pending litigation.

The entities have as one of their major purposes the making available of seeds, fertilizer and goods and services to farmers for the purpose of fostering soil conservation. Integral to this purpose is the provision of services and materials in competition with services and goods available in the private sector, frequently on more favorable terms.

Soil Conservation Districts are essentially the product of federal legislation, 16 U.S.C. § 590 ff. That legislation declares a purpose of encouraging cooperative associations and protecting the interests of small producers (§ 590(h)(b)) and further authorizes federal payments to providers of goods and services at prices which "may be limited to a fair price fixed in

accordance with regulations prescribed by the Secretary." § 590h(b). The Districts are now largely State funded.

Housing Authorities

Federally subsidized housing projects constructed by housing authorities are heavily regulated by federal law as to rents and other matters. See Note, 16 Md. L. Rev. 259.

Although it was originally thought that mixed income housing would be subject to constitutional challenge, Matthaei v. Housing Authority, 177 Md. 506 (1939), later changes in federal and state statutes cast this in doubt. Art. 44 A, § 8A relating to the Housing Opportunities Commission of Montgomery County enacted by Chapter 508 of the Acts of 1974, for example, recites "the shortage of . . . housing cannot wholly be relieved through the operation of private enterprise and . . . the construction of housing for persons of eligible income . . . (is) therefore not competitive with private enterprise." See, also, Art. 44A § 8B as to Baltimore City.

Although Jackson v. Housing Opportunities Commission, 44 Md. App. 304, 307, aff'd on other grounds, 289 Md. 118, 120, assumed that housing authorities were state rather than local agencies, the Task Force presents legislation to eliminate any possibility of antitrust liability as to such authorities, which enjoy adequate federal, state and local controls as to rents and other practices.

Industrial Development Authorities

Industrial Development Authorities could be characterized as state agencies by a parity of reasoning with Housing Authorities. See, Art. 41, § 266A-1. § 266A-2 authorizes multiple public purposes such as "relief of conditions of unemployment." See Eberhart v. City of Baltimore, 291 Md. 92, holding an authority to be separate from a municipality though not deciding whether it is a state agency and upholding relief of unemployment as a proper purpose. The statute proposed includes not only Authorities but actions of the counties or municipalities incorporating the authorities or functioning as such.

Because such purposes may lead authorities to make loans to some competitors which accord them advantages over other competitors, the potential for antitrust litigation is quite real. Yet favoritism of some businesses over others is integral to and inherent in any program of public loans on favorable terms to private industry. Because of the adequacy of political checks, the public visibility of loan decisions, and the danger

that these well-established programs may be vitiated by the threat of antitrust litigation by inevitably dissatisfied competitors, the Task Force recommends an immunity statute. This statute, of course, will not immunize from antitrust liability illegal or ultra vires activity, such as bribery of loan-granting agencies, nor will it modify the existing constitutuional limitations on public loans of credit.

LIMITED NATURE OF TASK FORCE RECOMMENDATIONS

The Task Force is concerned for it to be understood that the purpose of the legislation sponsored by it is to clarify the extent to which certain anti-competitive acts of municipalities acting within granted home rule or other powers are to be deemed effectuations of state policy permitting the restriction of competition. Recommendations of the Task Force are not intended to do any of the following things:

1. To accord municipalities any substantive powers not accorded them by existing home rule provisions or other legislation;

2. To restrict any powers currently accorded municipalities by home rule or other legislation; or

3. To authorize municipalities or their officers to engage in any activity which is ultra vires their power under existing state legislation or charter provisions.

With respect to the last matter, it is important to make it clear that it is not the purpose or import of the Task Force's legislative recommendations to confer immunity on local officers for actions taken contrary to local or state law. Thus, for example, a municipal officer who awards contracts in violation of a state or local competitive bidding statute or charter provision regulating their award has long been subject to federal antitrust liability and is protected by no official or governmental immunity as a long series of federal antitrust cases involving bid-rigging makes clear. It is not the purpose of the Task Force's proposals in any way to alter this result or to legitimize or immunize municipal activities in areas beyond municipal authority under the Express Powers Acts.

THE REQUIREMENT OF CLEAR ARTICULATION

As previously noted the Boulder decision alludes in a general way to a requirement that state permission for a challenged restraint must be clearly articulated and affirmatively expressed as state policy (445 U.S. at 105). In the view of the Task Force and of most commentators, this does not import a requirement that

the state command its municipalities, for example, to gra exclusive taxicab franchises as distinct from authorizing them to do so. This is made clear by the City of Lafayette case which was reaffirmed in Boulder and in which the Surpeme Court observed: "We agree with the Court of Appeals that an adequate state mandate for anti-competitive activities of cities and subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'." (435 U.S. at 415). The United States District Court for the District of Maryland in the Highfield Water case (488 F. Supp. 1176 (D. Md. 1980)) applied the standard of Lafayette, and nothing in Boulder indicates any change in this recently promulgated standard.

THE REQUIREMENT OF STATE SUPERVISION

In Boulder the Supreme Court expressly reserved the question whether state supervision of local governments is necessary, 70 L. Ed. 2d at 819 n.14. Boulder, however, contains language expressly noting that "a state may frequently choose to effect its policies through the instrumentality of its cities and towns," 70 L. Ed. 2d at 819. Lafayette similarly recognizes that the states have "freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws" (435 U.S. at 415). There is thus far a division in the case law as to whether active supervision of local policy by some state agency is requisite to immunity.

In the view of the Task Force the quoted language from Boulder and Lafayette as well as the views of most commentators are inconsistent with the notion that active supervision by a state administrative agency is a condition of municipal immunity. The requirement of active supervision was originally enunciated in the Midcal case which related to private conduct, not to municipal conduct already subject to political restraints. No such requirement in the view of the Task Force has been imposed as a condition of municipal immunity by the federal cases. To subject municipal ordinances restrictive of competition in the designated fields to veto by a state agency such as the Public Service Commission, Board of Public Works, or the Consumer Protection Division of the Attorney General's office would, in the view of the Task Force, be a measure so intrusive as to nullify many of the benefits of local home rule and would overburden any agency in which such authority was vested.

Although the matter is beyond the charge of the Task Force, the General Assembly may wish to give consideration to the creation for a limited time of either a committee or committees

of the General Assembly or a study commission charged with conducting regulatory review of characteristic types of municipal action impacting competition with a view toward the making of recommendations to the General Assembly concerning any desirable modifications of municipal home rule powers or of state legislation regulating competition.

THE ROLE OF THE ATTORNEY GENERAL

As above noted, the Task Force has been impressed by the substantial costs accruing to municipalities from the defense of antitrust litigation. The Office of the Attorney General has long been accorded authority, at its discretion, to prosecute federal antitrust cases at the request of municipal governments. In the view of the Task Force the Office of the Attorney General should likewise be empowered in its discretion to defend antitrust cases at the request of municipal governments. Aside from the symmetry which results from this proposed legislative change, the Task Force believes that this change will make available to local governments, in appropriate instances, some relief from the fiscal burdens they otherwise would incur in defending antitrust litigation. The General Assembly recently empowered the Attorney General's Office to defend soil conservation districts while declining to require it to do so. In the view of the Task Force any requirement that the Attorney General defend municipalities would in effect constitute a delegation of his constitutional powers to municipalities, unjustifiable either in principle or in practice. The Task Force believes that normal political contraints will induce most Attorneys General to desire to cooperate with municipal governments requesting their services, but believes that the Attorney General should remain free to refuse to defend cases. There are circumstances, for example, in which the magnitude of a case would impose a burden upon the Attorney General's Office which it is not equipped to discharge, or where the challenged municipal activity appears to be ultra vires municipal powers, or where the Attorney General might reasonably wish to seek a financial contribution to the costs of defense from the municipality as a condition to his participation. Accordingly, the legislation recommended by the Task Force is permissive only.

CONCLUSION

In these conclusions and recommendations the Task Force is unanimous.

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HARRY HUGHES
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STATE OF MARYLAND
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July 28, 1982

George Liebmann, Esquire
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Dear George:

Officials of the Maryland Association of Counties and the Maryland Municipal League have shared with me local governments' general concern over the increasing number of assertions that certain traditional functions of local governments are subject to scrutiny under the federal anti-trust laws. I share their concerns. Accordingly, I am creating the Governor's Task Force to Study Local Government Anti-Trust Liability. By this letter, I am appointing you to serve as Chairman of that Task Force.

The creation of the Task Force is a consequence of the weakening of local governments' "State action" defense to federal anti-trust claims resulting from the decision in the case of Community Communications Co. v. Boulder delivered by the Supreme Court of the United States on January 13, 1982. That decision has thrown into question the extent to which local governments are immune from federal anti-trust liability which could result from such traditional governmental activities as solid waste disposal, zoning, urban redevelopment, and taxicab regulation. The extent of that immunity may hinge on the State's delegation of regulatory authority to local government in those areas. The question of local government immunity in the CATV area was clarified with remedial legislation enacted during the last General Assembly session.

Consequently, I am charging the Task Force with the responsibility for identifying those areas of local government operations which are most subject to anti-trust scrutiny and for recommending legislation to preserve, as much as practicable, the "State action" defense in those areas where it is needed and appropriate. The Task Force is to report its findings and recommendations to me by December 1, 1982.

The Task Force is to consult with interested private parties and their representatives and to consider matters brought to its attention by those private parties before submitting its report.

I appreciate your willingness to accept this appointment, and extend my good wishes for a productive work endeavor.

Sincerely,

Harry
Governor

S E N A T E O F M A R Y L A N D

31r0227 No. 629 28

By: Senator Stone (Departmental - Governor's Task Force on Local Government Antitrust Liability)
Introduced and read first time: February 14, 1983
Assigned to: Constitutional and Public Law

A BILL ENTITLED

AN ACT concerning

Local Government Powers - Planning and Zoning

FOR the purpose of specifying that it is the policy of the General Assembly and of this State that free business enterprise and competition be limited by the planning and zoning controls implemented by local government; generally relating to local government powers in regard to planning and zoning; and making provisions of this Act severable.

BY adding to

Article 23A - Corporations - Municipal
Section 2(34)
Annotated Code of Maryland
(1981 Replacement Volume and 1982 Supplement)

BY repealing and reenacting, with amendments,

Article 25A - Chartered Counties of Maryland
Section 5(X)
Annotated Code of Maryland
(1981 Replacement Volume and 1982 Supplement)

BY repealing and reenacting, with amendments,

Article 66B - Zoning and Planning
Section 2.01
Annotated Code of Maryland
(1978 Replacement Volume and 1982 Supplement)

BY adding to

Article 66B - Zoning and Planning
Section 4.01(d)
Annotated Code of Maryland

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

(1978 Replacement Volume and 1982 Supplement)

BY adding to

Article 66D - Maryland-National Capital Park and Planning Commission
Section 7-108.1
Annotated Code of Maryland
(1978 Replacement Volume and 1982 Supplement)

Preamble

WHEREAS, Decisions of the Supreme Court in Community Communications, Inc., vs. the City of Boulder and in City of Lafayette vs. Louisiana Power and Light Company have subjected municipal governments to new unanticipated and, in some respects, unclear liabilities under the federal antitrust laws; and

WHEREAS, Many local governments are potentially liable to suits under the federal antitrust laws in areas that involve valid public policies designed to protect public health and safety, the natural environment, the public fiscal situation, and other valid public areas not always consistent with free competition; and

WHEREAS, The Governor's Task Force on Local Government Antitrust Liability has conducted an examination of principal areas of local government activities potentially exposed to antitrust liability, and has discussed the rationale of various categories of local government activities potentially inconsistent with competition; and

WHEREAS, The General Assembly of Maryland after reviewing the final report of the Task Force and its findings with respect to particular areas of local government activities and after public hearings on the Task Force recommendations, find that it is in the public interest with respect to certain such areas that the power and local governments to supplant or limit competition or both be confirmed in the light of the rationale for such regulations described in the report of the Task Force and its public hearings; and

WHEREAS, It is the purpose of the General Assembly not to grant local governments powers in any substantive areas not otherwise granted them under existing law, and not to restrict local governments from executing powers granted them by existing law, but to confirm existing powers of local governments to supplant competition with respect to the subjects dealt with herein; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article 23A - Corporations - Municipal

2.

The legislative body of every incorporated municipality in this State, except Baltimore City, by whatever name known, shall have general power to pass such ordinances not contrary to the public general or public local laws and the Constitution of Maryland as they may deem necessary in order to assure the good government of the municipality, to protect and preserve the municipality's rights, property, and privileges, to preserve peace and good order, to secure persons and property from danger and destruction, and to protect the health, comfort and convenience of the citizens of the municipality; but nothing in this article shall be construed to authorize the legislative body of any incorporated municipality to pass any ordinance which is inconsistent or in conflict with any ordinance, rule or regulation passed, ordained or adopted by the Maryland-National Capital Park and Planning Commission and the Washington Suburban Sanitary Commission, and nothing in this article shall be taken or construed to affect, change, modify, limit or restrict in any manner any of the corporate powers of the Mayor and City Council of Baltimore which it now has or which hereafter may be granted to it.

In addition to, but not in substitution of, the powers which have been, or may hereafter be, granted to it, such legislative body also shall have the following express ordinance-making powers:

(34) (I) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT THE ORDERLY DEVELOPMENT AND USE OF LAND AND STRUCTURES REQUIRES COMPREHENSIVE REGULATION THROUGH IMPLEMENTATION OF PLANNING AND ZONING CONTROLS.

(II) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT PLANNING AND ZONING CONTROLS SHALL BE IMPLEMENTED BY LOCAL GOVERNMENT.

(III) TO ACHIEVE THE PUBLIC PURPOSES OF THIS REGULATORY SCHEME, THE GENERAL ASSEMBLY RECOGNIZES THAT LOCAL GOVERNMENT ACTION WILL LIMIT FREE BUSINESS ENTERPRISE AND COMPETITION BY OWNERS AND USERS OF PROPERTY.

(IV) IT IS THE POLICY OF THE GENERAL ASSEMBLY AND OF THIS STATE THAT COMPETITION AND ENTERPRISE SHALL BE SO LIMITED FOR THE ATTAINMENT OF THE PURPOSES OF THE STATE POLICY FOR IMPLEMENTING PLANNING AND ZONING CONTROLS AS SET FORTH IN THIS ARTICLE AND ELSEWHERE IN THE PUBLIC LOCAL AND PUBLIC GENERAL LAW.

Article 25A - Chartered Counties of Maryland

5.

The following enumerated express powers are granted to and conferred upon any county or counties which hereafter form a charter under the provisions of Article 11A of the Constitution, that is to say:

(X)

(1) (I) To enact local laws, for the protection and promotion of public safety, health, morals, and welfare, relating to zoning and planning including the power to provide for the right of appeal of any matter arising under such planning and zoning laws to the circuit court except as is provided in § 5(U) of this article. Any decision of the circuit court may be appealed to the Court of Special Appeals.

[(2)] (II) To provide by ordinance that a violation of a zoning law or regulation enacted under this section may be a civil zoning violation. The violation shall be enforced as provided in Article 66B, § 7.01(c) of the Code.

(2) (I) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT THE ORDERLY DEVELOPMENT AND USE OF LAND AND STRUCTURES REQUIRES COMPREHENSIVE REGULATION THROUGH IMPLEMENTATION OF PLANNING AND ZONING CONTROLS.

(II) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT PLANNING AND ZONING CONTROLS SHALL BE IMPLEMENTED BY LOCAL GOVERNMENT.

(III) TO ACHIEVE THE PUBLIC PURPOSES OF THIS REGULATORY SCHEME, THE GENERAL ASSEMBLY RECOGNIZES THAT LOCAL GOVERNMENT ACTION WILL LIMIT FREE BUSINESS ENTERPRISE AND COMPETITION BY OWNERS AND USERS OF PROPERTY.

(IV) IT IS THE POLICY OF THE GENERAL ASSEMBLY AND OF THIS STATE THAT COMPETITION AND ENTERPRISE SHALL BE SO LIMITED FOR THE ATTAINMENT OF THE PURPOSES OF THE STATE POLICY FOR IMPLEMENTING PLANNING AND ZONING CONTROLS AS SET FORTH IN THIS ARTICLE AND ELSEWHERE IN THE PUBLIC LOCAL AND PUBLIC GENERAL LAW.

Article 66B - Zoning and Planning

2.01.

(A) For the purpose of promoting the health, security, general welfare, and morals of the community, the mayor and city council of Baltimore City are hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, off-street parking, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, signs, structures, and land for trade, industry, residence, or other purposes.

(B) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT THE ORDERLY DEVELOPMENT AND USE OF LAND AND STRUCTURES REQUIRES COMPREHENSIVE REGULATION THROUGH IMPLEMENTATION OF PLANNING AND ZONING CONTROLS.

(2) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT PLANNING AND ZONING CONTROLS SHALL BE IMPLEMENTED BY LOCAL GOVERNMENT.

(3) TO ACHIEVE THE PUBLIC PURPOSES OF THIS REGULATORY SCHEME, THE GENERAL ASSEMBLY RECOGNIZES THAT LOCAL GOVERNMENT ACTION WILL LIMIT FREE BUSINESS ENTERPRISE AND COMPETITION BY OWNERS AND USERS OF PROPERTY.

(4) IT IS THE POLICY OF THE GENERAL ASSEMBLY AND OF THIS STATE THAT COMPETITION AND ENTERPRISE SHALL BE SO LIMITED FOR THE ATTAINMENT OF THE PURPOSES OF THE STATE POLICY FOR IMPLEMENTING PLANNING AND ZONING CONTROLS AS SET FORTH IN THIS ARTICLE AND ELSEWHERE IN THE PUBLIC LOCAL AND PUBLIC GENERAL LAW.

4.01.

(D) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT THE ORDERLY DEVELOPMENT AND USE OF LAND AND STRUCTURES REQUIRES COMPREHENSIVE REGULATION THROUGH IMPLEMENTATION OF PLANNING AND ZONING CONTROLS.

(2) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT PLANNING AND ZONING CONTROLS SHALL BE IMPLEMENTED BY LOCAL GOVERNMENT.

(3) TO ACHIEVE THE PUBLIC PURPOSES OF THIS REGULATORY SCHEME, THE GENERAL ASSEMBLY RECOGNIZES THAT LOCAL GOVERNMENT ACTION WILL LIMIT FREE BUSINESS ENTERPRISE AND COMPETITION BY OWNERS AND USERS OF PROPERTY.

(4) IT IS THE POLICY OF THE GENERAL ASSEMBLY AND OF THIS STATE THAT COMPETITION AND ENTERPRISE SHALL BE SO LIMITED FOR THE ATTAINMENT OF THE PURPOSES OF THE STATE POLICY FOR IMPLEMENTING PLANNING AND ZONING CONTROLS AS SET FORTH IN THIS ARTICLE AND ELSEWHERE IN THE PUBLIC LOCAL AND PUBLIC GENERAL LAW.

Article 66D - Maryland-National Capital Park and Planning Commission

7-108.1.

(A) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT THE ORDERLY DEVELOPMENT AND USE OF LAND AND STRUCTURES REQUIRES COMPREHENSIVE REGULATION THROUGH IMPLEMENTATION OF PLANNING AND ZONING CONTROLS.

(B) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE THAT PLANNING AND ZONING CONTROLS SHALL BE IMPLEMENTED BY LOCAL GOVERNMENT.

(C) TO ACHIEVE THE PUBLIC PURPOSES OF THIS REGULATORY SCHEME, THE GENERAL ASSEMBLY RECOGNIZES THAT LOCAL GOVERNMENT ACTION WILL LIMIT FREE BUSINESS ENTERPRISE AND COMPETITION BY OWNERS AND USERS OF PROPERTY.

(D) IT IS THE POLICY OF THE GENERAL ASSEMBLY AND OF THIS STATE THAT COMPETITION AND ENTERPRISE SHALL BE SO LIMITED FOR THE ATTAINMENT OF THE PURPOSES OF THE STATE POLICY FOR IMPLEMENTING PLANNING AND ZONING CONTROLS AS SET FORTH IN THIS ARTICLE AND ELSEWHERE IN THE PUBLIC LOCAL AND PUBLIC GENERAL LAW.

(E) THE POWERS GRANTED TO THE COMMISSION PURSUANT TO THIS SECTION SHALL NOT BE CONSTRUED:

(1) TO GRANT TO THE COMMISSION POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE COMMISSION BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(2) TO RESTRICT THE COMMISSION FROM EXERCISING ANY POWER GRANTED TO THE COMMISSION BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(3) TO AUTHORIZE THE COMMISSION OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

SECTION 2. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect the other provisions or any other application of this Act which can be given effect without the invalid provisions or application, and to this end all the provisions of this Act are declared to be severable.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1983.

S E N A T E O F M A R Y L A N D

31r0448 No. 635 28

By: Senator Stone (Departmental - Governor's Task Force on Local Government Antitrust Liability)
Introduced and read first time: February 14, 1983
Assigned to: Constitutional and Public Law

A BILL ENTITLED

AN ACT concerning

Special Districts and Authorities - Public Policy of the State Regarding Economic Competition

FOR the purpose of specifying that it is the public policy of this State that governmental agencies provided with authority and powers to regulate and engage in the alcoholic beverages industry may exercise such authority and powers in such a manner that free economic competition is supplanted or limited; specifying that it is the public policy of this State that certain industrial development authorities may exercise certain powers in such a manner that free economic competition is supplanted or limited; specifying that it is the public policy of this State that certain housing authorities may exercise certain powers in such a manner that free economic competition is supplanted or limited; specifying that it is the public policy of this State that soil conservation districts may exercise powers in such a manner that free economic competition is supplanted or limited; making stylistic changes; generally relating to the exercise of power and authority which supplants or limits free economic competition by governmental units and agencies; and providing that provisions of this Act are severable.

BY repealing and reenacting, with amendments,

Article 2B - Alcoholic Beverages
Section 1
Annotated Code of Maryland
(1981 Replacement Volume and 1982 Supplement)

BY adding to

Article 41 - Governor - Executive and Administrative Departments
Section 266B(d)
Annotated Code of Maryland

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

(1978 Replacement Volume and 1982 Supplement)

BY repealing and reenacting, with amendments,

Article 41 - Governor - Executive and Administrative Departments
Section 266C(f) and (l)
Annotated Code of Maryland
(1978 Replacement Volume and 1982 Supplement)

BY repealing and reenacting, with amendments,

Article 44A - Housing Authorities
Section 2, 8A, 8B, 8C, and 8D
Annotated Code of Maryland
(1980 Replacement Volume and 1982 Supplement)

BY adding to

Article 44A - Housing Authorities
Section 8(i)
Annotated Code of Maryland
(1980 Replacement Volume and 1982 Supplement)

BY adding to

Article - Agriculture
Section 8-102(e) and 8-306(a)(20) and (21)
Annotated Code of Maryland
(1974 Volume and 1982 Supplement)

BY repealing and reenacting, with amendments,

Article - Agriculture
Section 8-306(a)(17), (18), and (19)
Annotated Code of Maryland
(1974 Volume and 1982 Supplement)

Preamble

WHEREAS, Decisions of the Supreme Court in Community Communications, Inc., vs. the City of Boulder and in City of Lafayette vs. Louisiana Power and Light Company have subjected municipal governments to new unanticipated and, in some respects, unclear liabilities under the federal antitrust laws; and

WHEREAS, Many local governments are potentially liable to suits under the federal antitrust laws in areas that involve valid public policies designed to protect public health and safety, the natural environment, the public fiscal situation, and

other valid public areas not always consistent with free competition; and

WHEREAS, The Governor's Task Force on Local Government Antitrust Liability has conducted an examination of principal areas of local government activities potentially exposed to antitrust liability, and has discussed the rationale of various categories of local government activities potentially inconsistent with competition; and

WHEREAS, The General Assembly of Maryland after reviewing the final report of the Task Force and its findings with respect to particular areas of local government activities and after public hearings on the Task Force recommendations, find that it is in the public interest with respect to certain such areas that the power of local governments to supplant or limit competition or both be confirmed in the light of the rationale for such regulations described in the report of the Task Force and its public hearings; and

WHEREAS, It is the purpose of the General Assembly not to grant local governments powers in any substantive areas not otherwise granted them under existing law, and not to restrict local governments from executing powers granted them by existing law, but to confirm existing powers of local governments to supplant competition with respect to the subjects dealt with herein; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article 2B - Alcoholic Beverages

1.

(A) (1) It is hereby declared as the policy of the State that it is necessary to regulate and control the manufacture, sale, distribution, transportation and storage of alcoholic beverages within this State and the transportation and distribution of alcoholic beverages into and out of this State to obtain respect and obedience to law and to foster and promote temperance.

(2) It is hereby declared to be the legislative intent that such policy will be carried out in the best public interest by empowering the Comptroller of the Treasury, the State Appeal Board, the various local boards of license commissioners and liquor control boards, all enforcement officers and the judges and clerks of the various courts of this State with sufficient authority to administer and enforce the provisions of this article.

(3) The restrictions, regulations, provisions and penalties contained in this article are for the protection, health, welfare and safety of the people of this State.

(4) It shall also be the policy of the State to tax alcoholic beverages as provided in this article, and to deny to any political subdivision in this State the power or authority, either by public general law or by public local law, to impose any tax on distilled spirits, beer, wine and all other alcoholic beverages on and after July 1, 1955.

(B) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE TO AUTHORIZE THE EXERCISE OF THE POWERS AND AUTHORITY PROVIDED BY THIS ARTICLE FOR THE PURPOSE OF SUPPLANTING FREE ECONOMIC COMPETITION BY REGULATING OR ENGAGING IN THE SALE OR DISTRIBUTION OF ALCOHOLIC BEVERAGES OR BOTH IN ORDER TO OBTAIN RESPECT AND OBEDIENCE TO LAW, TO FOSTER AND PROMOTE TEMPERANCE, TO PREVENT DECEPTIVE, DESTRUCTIVE, AND UNETHICAL BUSINESS PRACTICES, AND TO PROMOTE THE GENERAL WELFARE OF ITS CITIZENS BY CONTROLLING THE SALE AND DISTRIBUTION OF ALCOHOLIC BEVERAGES.

(2) THE OFFICIALS AND AGENCIES GRANTED POWERS AND AUTHORITY BY THIS ARTICLE TO REGULATE AND ENGAGE IN THE ALCOHOLIC BEVERAGES INDUSTRY MAY SUPPLANT FREE ECONOMIC COMPETITION BY REGULATING AND ENGAGING IN THE SALE OR DISTRIBUTION OF ALCOHOLIC BEVERAGES OR BOTH ON AN EXCLUSIVE BASIS AS PROVIDED IN THIS ARTICLE AND MAY ADOPT AND ENFORCE RULES AND REGULATIONS AUTHORIZED BY THIS ARTICLE NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(3) THE POWERS GRANTED TO ANY OFFICIAL OR AGENCY PURSUANT TO THIS SUBSECTION SHALL NOT BE CONSTRUED:

(I) TO GRANT TO THE OFFICIAL OR AGENCY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE OFFICIAL OR AGENCY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(II) TO RESTRICT THE OFFICIAL OR AGENCY FROM EXERCISING ANY POWER GRANTED TO THE OFFICIAL OR AGENCY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(III) TO AUTHORIZE THE OFFICIAL OR AGENCY OR OFFICERS OF THE AGENCY TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

Article 41 - Governor - Executive and Administrative Departments

266B.

(D) IT IS THE POLICY OF THIS STATE TO PERMIT THE EXERCISE OF THE POWERS GRANTED BY THIS SUBTITLE IRRESPECTIVE OF THE FACT THAT SUCH ACTIVITIES MAY SUPPLANT OR LIMIT FREE ECONOMIC COMPETITION.

266C.

(f)(1) (I) An Authority shall be created and operated, and its powers exercised, solely to accomplish 1 or more of the legislative purposes set forth in this subtitle.

(II) The incorporating county or municipality may utilize the Authority's exercise of its powers to accomplish 1 or more of the legislative purposes.

(2) AN AUTHORITY OR INCORPORATING COUNTY OR MUNICIPALITY MAY EXERCISE ITS POWERS IRRESPECTIVE OF ANY EFFECT ON FREE ECONOMIC COMPETITION.

(1) (1) For the purposes of this subtitle, each county and municipality is deemed to have all of the powers and discretion granted in this section to industrial development authorities, INCLUDING THE POWER TO MAKE LOANS TO PRIVATE ENTERPRISES ENGAGED IN COMPETITION WITH ENTERPRISES NOT RECEIVING THE LOANS.

(2) THE POWERS GRANTED TO BALTIMORE CITY PURSUANT TO THIS SECTION SHALL NOT BE CONSTRUED:

(I) TO GRANT TO BALTIMORE CITY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE CITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(II) TO RESTRICT THE CITY FROM EXERCISING ANY POWER GRANTED TO THE CITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(III) TO AUTHORIZE THE CITY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

Article 44A - Housing Authorities

2.

It is hereby declared, (a) that there exist in the State insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such insanitary or unsafe accommodations; that within the State there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that the aforesaid condition [cause] CAUSES an increase in and spread of disease and crime and [constitute] CONSTITUTES a menace to health, safety, morals and welfare of the residents of the State and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities; (b) that these slum areas cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved, through the operation of private enterprise, and that the construction of housing projects for persons of low income (as herein defined) would therefore not be competitive

with private enterprise; (c) that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be commenced as soon as possible in order to relieve unemployment which now constitutes an emergency; (D) THAT IT IS THE POLICY OF THIS STATE TO SUPPLANT AND LIMIT FREE ECONOMIC COMPETITION IN ORDER TO PROVIDE SAFE, SANITARY, AND DECENT HOUSING FOR THE CITIZENS OF THIS STATE; and the necessity in the public interest for the provisions hereinafter enacted, is hereby declared as a matter of legislative determination.

8.

An authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this article, including the following powers in addition to others herein granted:

(I) (1) TO EXERCISE ITS POWERS AS GRANTED BY THIS ARTICLE, IRRESPECTIVE OF THE FACT THAT SUCH ACTIVITIES MAY SUPPLANT OR LIMIT FREE ECONOMIC COMPETITION.

(2) THE POWERS GRANTED TO AN AUTHORITY PURSUANT TO THIS SUBSECTION SHALL NOT BE CONSTRUED:

(I) TO GRANT TO THE AUTHORITY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE AUTHORITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(II) TO RESTRICT THE AUTHORITY FROM EXERCISING ANY POWER GRANTED TO THE AUTHORITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(III) TO AUTHORIZE THE AUTHORITY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

8A.

(a) It is hereby found and declared that there exists within Montgomery County a critical shortage of decent, safe and sanitary dwelling accommodations available either to rent or purchase which persons of eligible income can afford and that, as a result, such persons are forced to occupy overcrowded and congested dwelling accommodations, or are required to pay an inordinate share of their income for shelter; that the aforesaid conditions necessitate excessive and disproportional expenditures of public funds for public health and safety, fire and accident protection, and other public services and facilities; that there exists within Montgomery County a public emergency caused by, among other things, rapidly escalating construction costs,

operating and maintenance expenses, and the increase in conversions of existing rental facilities to condominium projects; that the problems created by or resulting from these inflationary conditions and conversions are many and serious and include major displacement of large numbers of tenants, including elderly or handicapped individuals, from their dwelling units, scarcity of low and moderate income units on the market when demand for such units is increasing, inadequate numbers of rental units available, planned or under construction to replace the rental units being converted to condominiums and frustration of general plan concepts of balanced housing mix and adequate provision for housing needs of all economic segments of the community; that the shortage of decent, safe and sanitary dwellings cannot wholly be relieved through the operation of private enterprise; and that the construction of housing for persons of eligible income, and/or the expenditure of public funds to assist in securing the production or availability of such housing for the purposes set forth in this subsection are, therefore, not competitive with private enterprise; and that the necessity for such housing and the expenditure of public funds in the public interest, for the purposes stated and the provisions hereinafter enacted, are hereby declared as a matter of legislative determination to be valid public purposes.

(b) (1) In Montgomery County, the public body corporate and politic established pursuant to this article, heretofore known as the housing authority of Montgomery County, shall be known as the Housing Opportunities Commission of Montgomery County and shall have seven commissioners appointed and exercising the powers and duties as set forth in this article.

(2) The County Executive, with the approval of the County Council, shall appoint or remove the commissioners of the Housing Opportunities Commission.

(3) After June 30, 1982, the County Council, prior to approval of each appointment to the Commission, shall conduct a public interview of the County Executive's nominee for appointment to the Commission.

(4) The commissioners shall be appointed for a term of office of five years.

(c) The Housing Opportunities Commission of Montgomery County shall[, in] CONSTITUTE A PUBLIC BODY CORPORATE AND POLITIC, EXERCISING PUBLIC AND ESSENTIAL GOVERNMENTAL FUNCTIONS, AND HAVING ALL THE POWERS NECESSARY OR CONVENIENT TO CARRY OUT AND EFFECTUATE THE PURPOSES AND PROVISIONS OF THIS ARTICLE. IN addition to the powers enumerated in this article, THE COMMISSION SHALL have the authority to exercise all or any part or combination of such powers to provide for housing or housing projects for persons of eligible income; provided, however, that the exercise of such power is pursuant to and in accordance with local law or a contract or contracts with Montgomery County. For purposes of this section, the phrase "persons of eligible income" shall mean persons who individually or as part of a family unit

lack sufficient income or assets (as determined by the Montgomery County Executive or his designee) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings without overcrowding. With respect to the elderly or handicapped or persons and families with other special needs, the meaning of the phrase "persons of eligible income" may be adjusted by the County Executive or his designee, if other criteria are considered more appropriate in achieving the public purposes stated in subsection (a) of this section. The determination of persons of eligible income by the County Executive under this section is conclusive of the matters determined. The County Executive may amend the meaning of "persons of eligible income" by issuing a proposed executive regulation. The regulation will become effective only after a public hearing held in accordance with procedures established by the County Council.

(d) In addition to the powers enumerated in this article and any powers given by Montgomery County by local law, the Housing Opportunities Commission of Montgomery County, in providing housing for persons of eligible income in accordance with subsection (c) above, shall have the following powers:

(1) To make mortgage loans and make rent subsidy payments to persons of eligible income.

(2) To make construction loans and long-term mortgage loans to any person, firm, partnership, association, joint venture, or corporation, public or private, to produce housing for persons of eligible income.

(3) To purchase mortgages secured by housing for persons of eligible income.

(E) (1) IN ADDITION TO THE POWERS ENUMERATED IN THIS ARTICLE, THE HOUSING OPPORTUNITIES COMMISSION MAY EXERCISE ITS POWERS AS GRANTED BY THIS ARTICLE IRRESPECTIVE OF THE FACT THAT SUCH ACTIVITIES MAY SUPPLANT OR LIMIT FREE ECONOMIC COMPETITION.

(2) THE POWERS GRANTED TO THE HOUSING OPPORTUNITIES COMMISSION PURSUANT TO THIS SUBSECTION SHALL NOT BE CONSTRUED:

(I) TO GRANT TO THE COMMISSION POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE COMMISSION BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(II) TO RESTRICT THE COMMISSION FROM EXERCISING ANY POWER GRANTED TO THE COMMISSION BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(III) TO AUTHORIZE THE COMMISSION OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

[(e)] (F) For purposes of this section, the phrase "housing or housing project for persons of eligible income" means any

undertaking or project, or portion thereof, including lands, buildings and improvements, real, mixed and personal properties or interest therein that is planned, acquired, owned, developed, constructed, reconstructed, rehabilitated or improved for purposes of providing dwelling accommodations a substantial portion of which accommodations shall be for persons of eligible income, and such streets, roads, sewer and waterlines and other supporting public and private facilities intended for commercial, educational, cultural, recreational, community or other civic purposes as may be deemed necessary for sound community development. The phrase "substantial portion" means that 50 percent or more of the dwelling accommodations are initially occupied, after financing for such project is provided by the Housing Opportunities Commission, by persons of eligible income, or that 20 percent or more of the dwelling accommodations are for low income persons assisted or who are eligible to be assisted with federal subsidies. If the owners of the project certify to the Housing Opportunities Commission that they will make their best efforts to comply with this section, the "substantial" requirement is considered satisfied for purposes of this section.

[(f)] (G) (1) In this section "assisted family housing" has the definition provided by the Montgomery County government.

(2) The Housing Opportunities Commission shall hold a public hearing on its proposed assisted family housing.

(3) The public hearing shall be publicized by a display advertisement in 2 newspapers of general circulation in Montgomery County at least 15 days prior to the public hearing.

(4) The Housing Opportunities Commission, subsequent to the public hearing, shall issue a report of its finding and conclusions on its proposed assisted family housing which was the subject of the public hearing.

[(g)] (H) (1) Before December 1 of each year, the Housing Opportunities Commission shall issue an annual financial report for the previous fiscal year based on a certified audit.

(2) A summary of the report shall be published in at least two newspapers of general circulation in Montgomery County.

[(h)] (I) (1) The Housing Opportunities Commission shall submit its proposed budget to the Montgomery County Council by May 1 of each year.

(2) The public shall have an appropriate opportunity to comment on the proposed budget of the Housing Opportunities Commission.

(3) The Montgomery County Executive and Council may require and select an independent public accountant or firm certified as such in Maryland to perform an audit of the books of the Housing Opportunities Commission who shall be paid out of the operating budget of the Commission.

8B.

(a) It is hereby found and declared that there exists within Baltimore City a critical shortage of decent, safe and sanitary dwelling accommodations available either to rent or purchase which persons of eligible income can afford and that, as a result, such persons are forced to occupy overcrowded and congested dwelling accommodations, or are required to pay an inordinate share of their income for shelter; that the aforesaid conditions necessitate excessive and disproportionate expenditures of public funds for public health and safety, fire and accident protection, and other public services and facilities; that the shortage of decent, safe and sanitary dwellings cannot wholly be relieved through the operation of private enterprise; and that the construction of housing for persons of eligible income, and/or the expenditure of public funds to assist in securing the production of such housing are, therefore, not competitive with private enterprise; and that the necessity for such construction and the expenditure of public funds in the public interest, for the provisions hereinafter enacted, are hereby declared as a matter of legislative determination to be valid public purposes.

(b) The housing authority of Baltimore City[, in] SHALL CONSTITUTE A PUBLIC BODY CORPORATE AND POLITIC, EXERCISING PUBLIC AND ESSENTIAL GOVERNMENTAL FUNCTIONS, AND HAVING ALL THE POWERS NECESSARY OR CONVENIENT TO CARRY OUT AND EFFECTUATE THE PURPOSES AND PROVISIONS OF THIS ARTICLE. IN addition to the powers enumerated in this article, [shall have the authority] THE HOUSING AUTHORITY IS AUTHORIZED to exercise all or any part or combination of such powers to provide for housing or housing projects for persons of eligible income.

(c) In addition to the powers enumerated in this article and any powers given by local law, the housing authority of Baltimore City, in providing housing for persons of eligible income in accordance with subsection (b) above, shall have the following powers:

(1) Within its area of operation: to make mortgage loans and make rent subsidy payments to persons of eligible income.

(2) Within its area of operation: to make construction loans and long-term mortgage loans to any person, firm, partnership, association, joint venture, or corporation, public or private, to produce housing for persons of eligible income.

(3) Within its area of operation: to purchase and to insure mortgages secured by housing for persons of eligible income.

(D) (1) IN ADDITION TO THE POWERS ENUMERATED IN THIS ARTICLE, THE AUTHORITY MAY EXERCISE ITS POWERS AS GRANTED BY THIS

ARTICLE IRRESPECTIVE OF THE FACT THAT SUCH ACTIVITIES MAY SUPPLANT OR LIMIT FREE ECONOMIC COMPETITION.

(2) THE POWERS GRANTED TO THE AUTHORITY PURSUANT TO THIS SUBSECTION SHALL NOT BE CONSTRUED:

(I) TO GRANT TO THE AUTHORITY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE AUTHORITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(II) TO RESTRICT THE AUTHORITY FROM EXERCISING ANY POWER GRANTED TO THE AUTHORITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(III) TO AUTHORIZE THE AUTHORITY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

[(d)] (E) For purposes of this section, the phrase "housing or housing project for persons of eligible income" means any undertaking or project, or portion thereof, including lands, buildings and improvements, real, mixed and personal properties or interest therein that is planned, acquired, owned, developed, constructed, reconstructed, rehabilitated or improved for purposes of providing dwelling accommodations, a substantial portion of which accommodations shall be for persons of eligible income, and such streets, roads, sewer and waterlines and other supporting public and private facilities intended for commercial, educational, cultural, recreational, community or other civic purposes as may be deemed necessary for sound community development.

[(e)] (F) For purposes of this section, the phrase "persons of eligible income" means persons who individually or as part of a family unit lack sufficient income or assets (as determined by the mayor of Baltimore City or his designee) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings without overcrowding.

8C.

(a) It is found and declared that there exists within Prince George's County (1) a shortage of decent, safe, and adequate housing, and (2) a number of economically depressed areas and housing in need of rehabilitation. As a result, county residents are forced to occupy overcrowded, congested and deteriorated housing and live in depressed neighborhoods. These conditions necessitate excessive and disproportionate expenditures of public funds for public health, safety and welfare protection, and other public services and facilities. The shortage of decent, safe, and adequate housing and the revitalization of depressed neighborhoods and rehabilitation of housing cannot be relieved wholly through the operation of private enterprise. The construction and rehabilitation of housing for Prince George's County residents, and the acquisition and expenditure of public funds to produce such housing,

therefore, are not competitive with private enterprise. A need exists for mortgage credit to be made available for new housing construction and for rehabilitating existing housing because many purchasers and owners of housing are unable to afford mortgage credit at the market rate of interest or obtain mortgage credit because the mortgage credit market is severely restricted. A need exists for the construction and rehabilitation of such housing and the expenditure of public resources and assistance meet the needs and are in the public interest. Accordingly, the provisions of this section are declared as a matter of legislative determination to create a sound housing stock, contribute towards a balanced economy, promote the health, welfare and safety of the residents and therefore be valid public purposes.

(b) The Housing Authority of Prince George's County[, in] SHALL CONSTITUTE A PUBLIC BODY CORPORATE AND POLITIC, EXERCISING PUBLIC AND ESSENTIAL GOVERNMENTAL FUNCTIONS, AND HAVING ALL THE POWERS NECESSARY OR CONVENIENT TO CARRY OUT AND EFFECTUATE THE PURPOSES AND PROVISIONS OF THIS ARTICLE. IN addition to the powers enumerated in this article, [has the authority] THE HOUSING AUTHORITY IS AUTHORIZED to exercise all or any part or combination of such powers to provide housing, housing rehabilitation, housing projects, integrally related commercial structures, and the financing of such housing for county residents; and to acquire and expend public funds for such purposes.

(c) With the approval of the county governing body, the Housing Authority of Prince George's County within its area of operation also has the following powers:

(1) To make construction loans and long-term mortgage loans to any person, firm, partnership, association, joint venture, or private or public corporation to produce housing under the provisions of this section.

(2) To purchase and to insure mortgages secured by such housing.

(3) To finance any housing, housing rehabilitation, or housing project authorized by this section by issuing and selling such types of bonds as it may determine, including bonds on which the principal and interest are payable: (i) exclusively from the income and revenues of the housing project financed with the proceeds of such bonds, or with such proceeds together with a grant from the federal government in aid of such project; (ii) exclusively from the income and revenues of certain designated housing projects whether or not they were financed in whole or in part with the proceeds of such bonds; or (iii) from its revenues generally. Any of such bonds may be secured additionally by pledge of any revenues or a mortgage of any housing project, projects, or other property of the Authority.

(D) (1) IN ADDITION TO THE POWERS ENUMERATED IN THIS ARTICLE, THE AUTHORITY MAY EXERCISE ITS POWERS AS GRANTED BY THIS

ARTICLE IRRESPECTIVE OF THE FACT THAT SUCH ACTIVITIES MAY SUPPLANT OR LIMIT FREE ECONOMIC COMPETITION.

(2) THE POWERS GRANTED TO THE AUTHORITY PURSUANT TO THIS SUBSECTION SHALL NOT BE CONSTRUED:

(I) TO GRANT TO THE AUTHORITY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE AUTHORITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(II) TO RESTRICT THE AUTHORITY FROM EXERCISING ANY POWER GRANTED TO THE AUTHORITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(III) TO AUTHORIZE THE AUTHORITY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

[(d)] (E) For purposes of this section, the phrase "housing, housing rehabilitation, or housing project" means any undertaking or project, or portion thereof, including lands, buildings and improvements, real, mixed and personal properties or interest therein that is planned, acquired, owned, developed, constructed, reconstructed, rehabilitated, or improved for purposes of providing dwelling accommodations, and such streets, roads, sewer and waterlines, and other supporting public and private facilities intended for commercial, educational, cultural, recreational, community or other civic purposes as may be deemed necessary for sound neighborhood development.

8D.

(a) (1) In this section the following words have the meanings indicated.

(2) "Housing or housing project" means any undertaking or project, or a portion of it, including lands, buildings, and improvements, real, mixed, and personal properties, or an interest in them that is planned, acquired, owned, developed, constructed, reconstructed, rehabilitated, or improved for the purpose of providing dwelling accommodations for persons of eligible income, streets, roads, sewerage, and waterlines, and other supporting public and private facilities intended for commercial, educational, cultural, recreational, community, or other civic purposes as may be deemed necessary for sound community development.

(3) "Persons of eligible income" means persons who individually or as part of a family unit lack sufficient income or assets to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings without overcrowding.

(b) (1) The Board of County Commissioners of Washington County shall:

(i) Adopt all policies, rules, regulations, or amendments that are necessary for the implementation of federally or State assisted housing programs; and all policies, rules, regulations, and amendments that are necessary for the implementation of locally funded housing programs undertaken pursuant to this article;

(ii) Establish an upper income limit. In the case of special projects, the commission may establish exceptions to the upper income limits; and

(iii) Review and approve all projects proposed by the housing authority of Washington County prior to commencement of the project.

(2) This subsection shall be inapplicable if its application would disqualify this State or any county from receiving any federal funds.

(c) The housing authority of Washington County, in addition to the powers enumerated in this article and provided by local law, subject to the authority of the Board of County Commissioners as set forth in subsection (b) of this section, may:

(1) Make mortgage loans and make rent subsidy payments to persons of eligible income;

(2) Make construction loans and long-term mortgage loans to any person, firm, partnership, association, joint venture, or corporation, public or private, to produce housing for persons of eligible income; or

(3) Waive income limits for persons 65 years or older.

(D) (1) IN ADDITION TO THE POWERS ENUMERATED IN THIS ARTICLE, THE AUTHORITY MAY EXERCISE ITS POWERS AS GRANTED BY THIS ARTICLE IRRESPECTIVE OF THE FACT THAT SUCH ACTIVITIES MAY SUPPLANT OR LIMIT FREE ECONOMIC COMPETITION.

(2) THE POWERS GRANTED TO THE AUTHORITY PURSUANT TO THIS SUBSECTION SHALL NOT BE CONSTRUED:

(I) TO GRANT TO THE AUTHORITY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE AUTHORITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(II) TO RESTRICT THE AUTHORITY FROM EXERCISING ANY POWER GRANTED TO THE AUTHORITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(III) TO AUTHORIZE THE AUTHORITY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

Article - Agriculture

8-102.

(E) IT IS THE POLICY OF THIS STATE THAT THE ACTIVITIES RELATED TO SOIL CONSERVATION WHICH ARE AUTHORIZED BY THIS TITLE SHALL BE PURSUED IRRESPECTIVE OF THE FACT THAT SUCH ACTIVITIES MAY SUPPLANT OR LIMIT FREE ECONOMIC COMPETITION.

8-306.

(a) A soil conservation district constitutes a political subdivision of the State, and a public body corporate and politic, exercising public powers. The supervisors may:

(17) Approve or disapprove plans for clearing, grading, transporting, or otherwise distributing soil pursuant to § 8-1104(a) of the Natural Resources Article and to adopt general criteria and specific written recommendations concerning the control of erosion and siltation of pollution associated with these activities; [and]

(18) Recommend a fee system to cover the cost of reviewing the grading and sediment control plans. Any recommended fee shall take effect upon enactment by the local governing body. Any fees collected pursuant to this system shall be supplementary to county and State funds and may not (i) be used to reduce county or State funds, and (ii) exceed the cost of reviewing the plans; [and]

(19) Sue and be sued in the name of the district; have a seal which shall be judicially noticed; have perpetual succession unless terminated; make and execute contracts and other instruments necessary or convenient to the exercise of its powers; and adopt, amend, and repeal, rules and regulations not inconsistent with this title, to effectuate its purposes and powers; AND

(20) PROVIDE CONTRACTING SERVICES, EQUIPMENT, AND SUPPLIES TO LANDOWNERS; ESTABLISH PRICES FOR THE SALE OF THESE ITEMS; AND PROMULGATE ANY RULE OR REGULATION NECESSARY TO IMPLEMENT THESE POWERS; AND

(21) SUPPLANT OR LIMIT FREE ECONOMIC COMPETITION IN THE EXERCISE OF ANY POWER SPECIFIED IN THIS TITLE; PROVIDED THAT THE POWERS GRANTED TO A DISTRICT PURSUANT TO THIS PARAGRAPH SHALL NOT BE CONSTRUED:

(I) TO GRANT TO THE DISTRICT POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE DISTRICT BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(II) TO RESTRICT THE DISTRICT FROM EXERCISING ANY POWER GRANTED TO THE DISTRICT BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(III) TO AUTHORIZE THE DISTRICT OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

SECTION 2. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect the other provisions or any other application of this Act which can be given effect without the invalid provisions or application, and to this end all the provisions of this Act are declared to be severable.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1983.

S E N A T E O F M A R Y L A N D

31r2950 No. 645 28

By: Senator Miller (Departmental - Task Force on Local Government Antitrust Liability)
Introduced and read first time: February 15, 1983
Assigned to: Judicial Proceedings

A BILL ENTITLED

AN ACT concerning

Attorney General - Representation in Antitrust Matters

FOR the purpose of permitting the Attorney General to represent, in his discretion, political subdivisions of this State, their employees, officers, and agents in proceedings brought under the federal and State antitrust laws; permitting the Attorney General to render advice relating to the antitrust laws to political subdivisions and their employees, officers, and agents; and providing that a political subdivision, its employees, officers, and agents, may select counsel of their choice.

BY adding to

Article 32A - Department of Law
Section 12J
Annotated Code of Maryland
(1976 Replacement Volume and 1982 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article 32A - Department of Law

12J.

THE ATTORNEY GENERAL MAY REPRESENT AND RENDER ADVICE TO ANY POLITICAL SUBDIVISION OF THIS STATE, ITS EMPLOYEES, OFFICERS, OR AGENTS IN STATE AND FEDERAL ANTITRUST LAW MATTERS, INCLUDING DEFENDING THEM IN ANY ACTION OR ADMINISTRATIVE PROCEEDING. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO DEPRIVE ANY POLITICAL SUBDIVISION OR ITS EMPLOYEES, OFFICERS, OR AGENTS OF THE RIGHT TO SELECT COUNSEL OF THEIR OWN CHOICE AT THEIR OWN EXPENSE.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1983.

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

S E N A T E O F M A R Y L A N D

31r0228 No. 770 28

By: Senator Stone (Departmental - Task Force on Local Government Antitrust Liability)
Introduced and read first time: February 21, 1983
Assigned to: Constitutional and Public Law

A BILL ENTITLED

AN ACT concerning

Local Government Powers - Public Policy of the State Regarding Economic Competition

FOR the purpose of providing that it is the public policy of this State that counties and municipalities regulate and engage in certain activities and business enterprises, notwithstanding that such action may supplant competition with monopoly public service; providing that local government shall have certain authority to supplant or limit economic and business competition and free enterprise; specifying that certain local governments of this State have certain such powers in regard to port use and development, public transportation, water and sewerage systems, waste collection services and waste disposal services, the granting of franchises and concessions on public property, and economic development and redevelopment; generally relating to the powers of counties and municipalities; and making provisions of this Act severable.

BY adding to

Article 23A - Corporations - Municipal
Section 2A
Annotated Code of Maryland
(1981 Replacement Volume and 1982 Supplement)

BY adding to

Article 25 - County Commissioners
Section 3D
Annotated Code of Maryland
(1981 Replacement Volume and 1982 Supplement)

BY adding to

Article 25A - Chartered Counties of Maryland

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

Section 5A
Annotated Code of Maryland
(1981 Replacement Volume and 1982 Supplement)

BY adding to

Article 25B - Home Rule for Code Counties
Section 13B
Annotated Code of Maryland
(1981 Replacement Volume and 1982 Supplement)

BY adding to

The Charter of Baltimore City
Article II - General Powers
Section (57)
(1981 Replacement Volume, as amended)

Preamble

WHEREAS, Decisions of the Supreme Court in Community Communications, Inc., vs. the City of Boulder and in City of Lafayette vs. Louisiana Power and Light Company have subjected municipal governments to new unanticipated and, in some respects, unclear liabilities under the federal antitrust laws; and

WHEREAS, Many local governments are potentially liable to suits under the federal antitrust laws in areas that involve valid public policies designed to protect public health and safety, the natural environment, the public fiscal situation, and other valid public areas not always consistent with free competition; and

WHEREAS, The Governor's Task Force on Local Government Antitrust Liability has conducted an examination of principal areas of local government activities potentially exposed to antitrust liability, and have discussed the rationale of various categories of local government activities potentially inconsistent with competition; and

WHEREAS, The General Assembly of Maryland after reviewing the final report of the Task Force and its findings and after public hearings, find that it is in the public interest with respect to certain areas that the power of local governments to supplant or limit competition or both be confirmed in the light of the rationale for such regulations described in the report of the Task Force and its public hearings; and

WHEREAS, The Task Force has made further recommendations subsequent to its final report and has recommended that the General Assembly address at this time certain local government activities which currently seem to be exercised by a plurality of local governments in Maryland and that further study be

accomplished with respect to other activities where confirmation of local government powers to limit or supplant competition may be appropriate; and

WHEREAS, It is the purpose of the General Assembly not to grant local governments powers in any subs.antive areas not otherwise granted them under existing law, and not to restrict local governments from executing powers granted them by existing law, but to confirm existing powers of local governments to supplant competition with respect to the subjects dealt with herein; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article 23A - Corporations - Municipal

2A.

(A) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH MUNICIPAL CORPORATION TO SUPPLANT COMPETITION IN THE AREA OF PUBLIC TRANSPORTATION IN ORDER TO PROVIDE FOR ADEQUATE, ECONOMICAL AND EFFICIENT DELIVERY OF TRANSPORTATION SERVICES; TO PROTECT ITS CITIZENS FROM INCONSISTENT AND EXCESSIVE PRICES; TO PROVIDE NECESSARY AND DESIRED SERVICES IN ALL AREAS OF THE MUNICIPALITY; TO ENABLE THE MUNICIPALITY TO PROVIDE PUBLIC TRANSPORTATION IN ORDER TO CONSERVE ENERGY AND REDUCE AIR POLLUTION, CONGESTION, TRAFFIC HAZARDS AND ACCIDENTS; TO ENCOURAGE THE USE OF PUBLIC TRANSPORTATION BY THE CONTRIBUTION BY THE MUNICIPALITY OF CAPITAL AND OPERATING FUNDS TO ENABLE TRANSPORTATION TO BE PROVIDED AT THE LOWEST COST TO ALL CITIZENS, ESPECIALLY THE INDIGENT; AND TO PROMOTE THE GENERAL WELFARE BY CONDUCTING A COMPREHENSIVE TRANSPORTATION SYSTEM.

(2) EACH MUNICIPAL CORPORATION HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES FOR A TRANSPORTATION SYSTEM ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES AND TO ESTABLISH RULES, REGULATIONS AND LICENSING REQUIREMENTS TO GOVERN THE OPERATION OF THE FRANCHISES AND TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE; TO CONDUCT A PUBLIC TRANSPORTATION SYSTEM ON AN EXCLUSIVE BASIS, INCLUDING THE ESTABLISHMENT OF RULES, REGULATIONS, AND RATES, NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(B) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH MUNICIPAL CORPORATION TO SUPPLANT COMPETITION IN THE AREA OF WATER AND SEWERAGE SYSTEMS AND WASTE COLLECTION SERVICES AND WASTE DISPOSAL SERVICES IN ORDER TO ASSURE DELIVERY OF ADEQUATE, ECONOMICAL, AND EFFICIENT SERVICES TO ITS CITIZENS, TO AVOID DUPLICATION OF FACILITIES, TO PROVIDE FOR THE HEALTH AND SAFETY OF ITS CITIZENS, TO CONTROL DISEASE, TO PREVENT BLIGHT AND OTHER ENVIRONMENTAL DEGRADATION, TO PROMOTE THE GENERATION OF ENERGY AND THE RECOVERY OF USABLE RESOURCES FROM WASTE, TO UTILIZE EFFICIENTLY THE PUBLIC RIGHT-OF-WAY; TO

PROTECT LIMITED NATURAL RESOURCES FOR THE BENEFIT OF THE CITIZENS OF THE MUNICIPALITY, TO LIMIT WASTE, NOXIOUS ODORS AND UNSIGHTLY GARBAGE AND DECAY; AND TO PROMOTE THE GENERAL HEALTH AND WELFARE BY PROVIDING FOR ADEQUATE WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES.

(2) (I) EACH MUNICIPAL CORPORATION HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES OR ENTER INTO CONTRACTS FOR WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS TO ANY PERSON, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES AND CHARGES, AND TO ESTABLISH RULES, REGULATIONS, AND LICENSING REQUIREMENTS, AND TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(II) IN THE EVENT THAT ANY MUNICIPAL CORPORATION HAS THE ENABLING AUTHORITY GRANTED BY ANY OTHER LAW TO OPERATE WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES, SUCH SYSTEMS AND SERVICES SHALL BE OPERATED BY THE MUNICIPALITY WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(C) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH MUNICIPAL CORPORATION TO SUPPLANT COMPETITION IN THE AREA OF PORT REGULATION UNDERTAKEN BY A BOARD OF PORT WARDENS PURSUANT TO SECTION 23A(I) OF ARTICLE 23A, TO PROVIDE FOR SAFE HARBORS, FREE OF CONGESTION AND NAVIGATIONAL HAZARDS, TO PROVIDE BENEFITS TO MUNICIPAL CITIZENS BY PROTECTING MARINE LIFE AND WILDLIFE, AND TO AVOID WATER POLLUTION AND EROSION.

(2) EACH MUNICIPAL CORPORATION HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES OR ENTER INTO CONTRACTS FOR THE PLACEMENT, ERECTION OR CONSTRUCTION OF STRUCTURES WITHIN OR ON THE WATERS OF THE MUNICIPALITY, INCLUDING BUT NOT LIMITED TO THE ISSUING OF LICENSES FOR WHARVES OR PIERS, OR THE ISSUING OF PERMITS FOR MOORING PILES, FLOATING WHARVES, BUOYS OR ANCHORS NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(D) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH MUNICIPAL CORPORATION TO SUPPLANT COMPETITION IN THE AWARD OF CONCESSIONS ON, OVER OR UNDER PROPERTY OWNED, OR LEASED, BY THE MUNICIPALITY AND IN THE LEASING OR SUBLEASING OF PROPERTY OWNED OR LEASED BY THE MUNICIPALITY IN ORDER TO UTILIZE PROPERLY THE ASSETS OF THE MUNICIPALITY FOR THE BEST PUBLIC PURPOSE; TO PROVIDE NECESSARY OR DESIRABLE GOVERNMENTAL SERVICES AT THE LOWEST POSSIBLE COST; TO PROTECT THE PUBLIC FROM UNSCRUPULOUS BUSINESS PRACTICES AND EXCESSIVE PRICES; TO PROVIDE FOR THE ACCESSIBILITY TO PUBLIC PROPERTY BY AS MANY CITIZENS AS POSSIBLE; AND TO PROMOTE THE GENERAL WELFARE BY UTILIZING PUBLIC PROPERTY FOR THE BENEFIT OF THE CITIZENS OF THE COMMUNITY.

(2) EACH MUNICIPAL CORPORATION SHALL HAVE THE AUTHORITY TO SUPPLANT COMPETITION BY GRANTING ONE OR MORE FRANCHISES FOR ANY CONCESSION ON, OVER OR UNDER PROPERTY OWNED OR

LEASED BY THE MUNICIPALITY ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO CONTROL PRICES AND RATES FOR SUCH FRANCHISES; TO ESTABLISH RULES AND REGULATIONS TO GOVERN THE OPERATION OF THE FRANCHISES, TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE; AND TO LEASE OR SUBLEASE PUBLICLY OWNED OR LEASED LAND, IMPROVEMENTS TO LAND, OR BOTH ON TERMS TO BE DETERMINED BY THE MUNICIPALITY WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(E) THE POWERS GRANTED BY ANY MUNICIPAL CORPORATION PURSUANT TO THIS SECTION SHALL NOT BE CONSTRUED:

(1) TO GRANT TO SUCH MUNICIPALITY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO SUCH MUNICIPALITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(2) TO RESTRICT SUCH MUNICIPALITY FROM EXERCISING ANY POWER GRANTED TO SUCH MUNICIPALITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(3) TO AUTHORIZE SUCH MUNICIPALITY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

Article 25 - County Commissioners

3D.

(A) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE THE COUNTY COMMISSIONERS OF EACH COUNTY TO SUPPLANT COMPETITION IN THE AREA OF PUBLIC TRANSPORTATION IN ORDER TO PROVIDE FOR ADEQUATE, ECONOMICAL, AND EFFICIENT DELIVERY OF TRANSPORTATION SERVICES; TO PROTECT ITS CITIZENS FROM INCONSISTENT AND EXCESSIVE PRICES; TO PROVIDE NECESSARY AND DESIRED SERVICES IN ALL AREAS OF THE COUNTY; TO ENABLE THE COUNTY TO PROVIDE PUBLIC TRANSPORTATION IN ORDER TO CONSERVE ENERGY AND REDUCE AIR POLLUTION , CONGESTION, TRAFFIC HAZARDS AND ACCIDENTS; TO ENCOURAGE THE USE OF PUBLIC TRANSPORTATION BY THE CONTRIBUTION BY THE COUNTY OF CAPITAL AND OPERATING FUNDS TO ENABLE TRANSPORTATION TO BE PROVIDED AT THE LOWEST COST TO ALL CITIZENS, ESPECIALLY THE INDIGENT; AND TO PROMOTE THE GENERAL WELFARE BY CONDUCTING A COMPREHENSIVE TRANSPORTATION SYSTEM.

(2) THE COUNTY COMMISSIONERS OF EACH COUNTY HAVE THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES FOR A TRANSPORTATION SYSTEM ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES, TO ESTABLISH RULES, REGULATIONS, AND LICENSING REQUIREMENTS TO GOVERN THE OPERATION OF THE FRANCHISES, TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE, AND TO CONDUCT A PUBLIC TRANSPORTATION SYSTEM ON AN EXCLUSIVE BASIS, INCLUDING THE ESTABLISHMENT OF RULES, REGULATIONS, AND RATES, NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(B) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE THE COUNTY COMMISSIONERS OF EACH COUNTY TO SUPPLANT COMPETITION IN THE AREA OF WATER AND SEWERAGE SYSTEMS

AND WASTE COLLECTION SERVICES AND WASTE DISPOSAL SERVICES IN ORDER TO ASSURE DELIVERY OF ADEQUATE, ECONOMICAL, AND EFFICIENT SERVICES TO ITS CITIZENS, TO AVOID DUPLICATION OF FACILITIES, TO PROVIDE FOR THE HEALTH AND SAFETY OF ITS CITIZENS, TO CONTROL DISEASE, TO PREVENT BLIGHT AND OTHER ENVIRONMENTAL DEGRADATION, TO PROMOTE THE GENERATION OF ENERGY AND THE RECOVERY OF USABLE RESOURCES FROM WASTE, TO UTILIZE EFFICIENTLY THE PUBLIC RIGHT-OF-WAY; TO PROTECT LIMITED NATURAL RESOURCES FOR THE BENEFIT OF THE CITIZENS OF THE COUNTY, TO LIMIT WASTE, NOXIOUS ODORS, UNSIGHTLY GARBAGE, AND DECAY; AND TO PROMOTE THE GENERAL HEALTH AND WELFARE BY PROVIDING FOR ADEQUATE WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES AND WASTE DISPOSAL SERVICES.

(2) (I) THE COUNTY COMMISSIONERS OF EACH COUNTY HAVE THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES OR ENTER INTO CONTRACTS FOR WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS TO ANY PERSON, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES AND CHARGES, TO ESTABLISH RULES, REGULATIONS, AND LICENSING REQUIREMENTS, AND TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(II) IN THE EVENT THAT ANY COUNTY HAS THE ENABLING AUTHORITY GRANTED BY ANY OTHER LAW TO OPERATE WATER AND SEWAGE SYSTEMS, WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES, SUCH SYSTEMS AND SERVICES SHALL BE OPERATED BY SUCH COUNTY WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(C) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE THE COUNTY COMMISSIONERS OF EACH COUNTY TO SUPPLANT COMPETITION IN THE AWARD OF CONCESSIONS ON, OVER OR UNDER PROPERTY OWNED OR LEASED BY THE COUNTY, AND IN THE LEASING OR SUBLEASING OF PROPERTY OWNED OR LEASED BY THE COUNTY IN ORDER TO UTILIZE PROPERLY THE ASSETS OF THE COUNTY FOR THE BEST PUBLIC PURPOSE; TO PROVIDE NECESSARY OR DESIRABLE GOVERNMENTAL SERVICES AT THE LOWEST POSSIBLE COST; TO PROTECT THE PUBLIC FROM UNSCRUPULOUS BUSINESS PRACTICES AND EXCESSIVE PRICES; TO PROVIDE FOR THE ACCESSIBILITY TO PUBLIC PROPERTY BY AS MANY CITIZENS AS POSSIBLE; AND TO PROMOTE THE GENERAL WELFARE BY UTILIZING PUBLIC PROPERTY FOR THE BENEFIT OF THE CITIZENS OF THE COMMUNITY.

(2) THE COUNTY COMMISSIONERS OF EACH COUNTY HAVE THE AUTHORITY TO SUPPLANT COMPETITION BY GRANTING ONE OR MORE FRANCHISES FOR ANY CONCESSION ON, OVER OR UNDER PROPERTY OWNED OR LEASED BY THE COUNTY ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO CONTROL PRICES AND RATES FOR SUCH FRANCHISES, TO ESTABLISH RULES AND REGULATIONS TO GOVERN THE OPERATION OF THE FRANCHISES, TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE, AND TO LEASE OR SUBLEASE PUBLICLY OWNED OR LEASED LAND IMPROVEMENTS TO LAND OR BOTH ON TERMS TO BE DETERMINED BY THE COUNTY WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(D) THE POWERS GRANTED TO ANY COUNTY PURSUANT TO THIS SECTION SHALL NOT BE CONSTRUED:

(1) TO GRANT TO SUCH COUNTY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO SUCH COUNTY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(2) TO RESTRICT SUCH COUNTY FROM EXERCISING ANY POWER GRANTED TO SUCH COUNTY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(3) TO AUTHORIZE SUCH COUNTY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW OR OTHERWISE.

Article 25A - Chartered Counties of Maryland

5A.

(A) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH CHARTERED COUNTY TO SUPPLANT COMPETITION IN THE AREA OF PUBLIC TRANSPORTATION IN ORDER TO PROVIDE FOR ADEQUATE, ECONOMICAL, AND EFFICIENT DELIVERY OF TRANSPORTATION SERVICES; TO PROTECT ITS CITIZENS FROM INCONSISTENT AND EXCESSIVE PRICES; TO PROVIDE NECESSARY AND DESIRED SERVICES IN ALL AREAS OF THE COUNTY; TO ENABLE THE COUNTY TO PROVIDE PUBLIC TRANSPORTATION IN ORDER TO CONSERVE ENERGY AND REDUCE AIR POLLUTION, CONGESTION, TRAFFIC HAZARDS AND ACCIDENTS; TO ENCOURAGE THE USE OF PUBLIC TRANSPORTATION BY THE CONTRIBUTION BY THE COUNTY OF CAPITAL AND OPERATING FUNDS TO ENABLE TRANSPORTATION TO BE PROVIDED AT THE LOWEST COST TO ALL CITIZENS, ESPECIALLY THE INDIGENT; AND TO PROMOTE THE GENERAL WELFARE BY CONDUCTING A COMPREHENSIVE TRANSPORTATION SYSTEM.

(2) EACH CHARTERED COUNTY HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES FOR A TRANSPORTATION SYSTEM ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES, TO ESTABLISH RULES, REGULATIONS, AND LICENSING REQUIREMENTS TO GOVERN THE OPERATION OF THE FRANCHISES, TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE, AND TO CONDUCT A PUBLIC TRANSPORTATION SYSTEM ON AN EXCLUSIVE BASIS, INCLUDING THE ESTABLISHMENT OF RULES, REGULATIONS, AND RATES, NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(B) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH CHARTERED COUNTY TO SUPPLANT COMPETITION IN THE AREA OF WATER AND SEWERAGE SYSTEMS AND WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES IN ORDER TO ASSURE DELIVERY OF ADEQUATE, ECONOMICAL, AND EFFICIENT SERVICES TO ITS CITIZENS, TO AVOID DUPLICATION OF FACILITIES, TO PROVIDE FOR THE HEALTH AND SAFETY OF ITS CITIZENS, TO CONTROL DISEASE, TO PREVENT BLIGHT AND OTHER ENVIRONMENTAL DEGRADATION, TO PROMOTE THE GENERATION OF ENERGY AND THE RECOVERY OF USABLE RESOURCES FROM WASTE, TO UTILIZE EFFICIENTLY THE PUBLIC RIGHT-OF-WAY; TO PROTECT LIMITED NATURAL RESOURCES FOR THE BENEFIT OF THE CITIZENS OF THE COUNTY, TO LIMIT WASTE, NOXIOUS ODORS, AND UNSIGHTLY GARBAGE AND DECAY; AND TO PROMOTE THE GENERAL HEALTH AND WELFARE BY PROVIDING FOR ADEQUATE WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES.

(2) (I) EACH CHARTERED COUNTY HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES FOR WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS TO ANY PERSON, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES AND CHARGES, AND TO ESTABLISH RULES, REGULATIONS, AND LICENSING REQUIREMENTS AND TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(II) IN THE EVENT THAT A CHARTERED COUNTY HAS THE ENABLING AUTHORITY GRANTED BY ANY OTHER LAW TO OPERATE WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES OR WASTE DISPOSAL SERVICES, SUCH SYSTEMS AND SERVICES SHALL BE OPERATED BY SUCH COUNTY WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(C) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH CHARTERED COUNTY TO SUPPLANT COMPETITION IN THE AWARD OF CONCESSIONS ON, OVER OR UNDER PROPERTY OWNED OR LEASED BY THE COUNTY AND IN THE LEASING OR SUBLEASING OF PROPERTY OWNED OR LEASED BY THE COUNTY IN ORDER TO UTILIZE PROPERLY THE ASSETS OF THE COUNTY FOR THE BEST PUBLIC PURPOSE; TO PROVIDE NECESSARY OR DESIRABLE GOVERNMENTAL SERVICES AT THE LOWEST POSSIBLE COST; TO PROTECT THE PUBLIC FROM UNSCRUPULOUS BUSINESS PRACTICES AND EXCESSIVE PRICES; TO PROVIDE FOR THE ACCESSIBILITY TO PUBLIC PROPERTY BY AS MANY CITIZENS AS POSSIBLE; AND TO PROMOTE THE GENERAL WELFARE BY UTILIZING PUBLIC PROPERTY FOR THE BENEFIT OF THE CITIZENS OF THE COMMUNITY.

(2) EACH CHARTERED COUNTY HAS THE AUTHORITY TO SUPPLANT COMPETITION BY GRANTING ONE OR MORE FRANCHISES FOR ANY CONCESSION ON, OVER OR UNDER PROPERTY OWNED OR LEASED BY THE COUNTY ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO CONTROL PRICES AND RATES FOR SUCH FRANCHISES; AND TO ESTABLISH RULES AND REGULATIONS TO GOVERN THE OPERATION OF THE FRANCHISES AND TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE; AND TO LEASE OR SUBLEASE PUBLICLY OWNED OR LEASED LAND, IMPROVEMENTS TO LAND OR BOTH ON TERMS TO BE DETERMINED BY THE COUNTY WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(D) THE POWERS GRANTED BY ANY COUNTY PURSUANT TO THIS SECTION SHALL NOT BE CONSTRUED:

(1) TO GRANT TO SUCH COUNTY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO SUCH COUNTY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(2) TO RESTRICT SUCH COUNTY FROM EXERCISING ANY POWER GRANTED TO SUCH COUNTY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(3) TO AUTHORIZE SUCH COUNTY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

13B.

(A) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH CODE COUNTY TO SUPPLANT COMPETITION IN THE AREA OF PUBLIC TRANSPORTATION IN ORDER TO PROVIDE FOR ADEQUATE, ECONOMICAL, AND EFFICIENT DELIVERY OF TRANSPORTATION SERVICES; TO PROTECT ITS CITIZENS FROM INCONSISTENT AND EXCESSIVE PRICES; TO PROVIDE NECESSARY AND DESIRED SERVICES IN ALL AREAS OF THE COUNTY; TO ENABLE THE COUNTY TO PROVIDE PUBLIC TRANSPORTATION IN ORDER TO CONSERVE ENERGY AND REDUCE AIR POLLUTION, CONGESTION, TRAFFIC HAZARDS, AND ACCIDENTS; TO ENCOURAGE THE USE OF PUBLIC TRANSPORTATION BY THE CONTRIBUTION BY THE COUNTY OF CAPITAL AND OPERATING FUNDS TO ENABLE TRANSPORTATION TO BE PROVIDED AT THE LOWEST COST TO ALL CITIZENS, ESPECIALLY THE INDIGENT; AND TO PROMOTE THE GENERAL WELFARE BY CONDUCTING A COMPREHENSIVE TRANSPORTATION SYSTEM.

(2) EACH CODE COUNTY HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES FOR A TRANSPORTATION SYSTEM ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES, TO ESTABLISH RULES, REGULATIONS, AND LICENSING REQUIREMENTS TO GOVERN THE OPERATION OF THE FRANCHISES, TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE, AND TO CONDUCT A PUBLIC TRANSPORTATION SYSTEM ON AN EXCLUSIVE BASIS, INCLUDING THE ESTABLISHMENT OF RULES, REGULATIONS, AND RATES, NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(B) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH CODE COUNTY TO SUPPLANT COMPETITION IN THE AREA OF WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES AND WASTE DISPOSAL SERVICES IN ORDER TO ASSURE DELIVERY OF ADEQUATE, ECONOMICAL, AND EFFICIENT SERVICES TO ITS CITIZENS, TO AVOID DUPLICATION OF FACILITIES, TO PROVIDE FOR THE HEALTH AND SAFETY OF ITS CITIZENS, TO CONTROL DISEASE, TO PREVENT BLIGHT AND OTHER ENVIRONMENTAL DEGRADATION, TO PROMOTE THE GENERATION OF ENERGY AND THE RECOVERY OF USABLE RESOURCES FROM WASTE, TO UTILIZE EFFICIENTLY THE PUBLIC RIGHT-OF-WAY; TO PROTECT LIMITED NATURAL RESOURCES FOR THE BENEFIT OF THE CITIZENS OF THE COUNTY, TO LIMIT WASTE, NOXIOUS ODORS, AND UNSIGHTLY GARBAGE AND DECAY; AND TO PROMOTE THE GENERAL HEALTH AND WELFARE BY PROVIDING FOR ADEQUATE WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES.

(2) (I) EACH CODE COUNTY HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES OR ENTER INTO CONTRACTS FOR WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES, AND WASTE DISPOSAL SERVICES ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS TO ANY PERSON, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES AND CHARGES AND TO ESTABLISH RULES, REGULATIONS, AND LICENSING REQUIREMENTS AND TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(II) IN THE EVENT THAT ANY CODE COUNTY HAS THE ENABLING AUTHORITY GRANTED BY ANY OTHER LAW TO OPERATE WATER AND SEWERAGE SYSTEMS, WASTE AND COLLECTION SERVICES, OR WASTE

DISPOSAL SERVICES, SUCH SERVICES SHALL BE OPERATED BY SUCH COUNTY WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(C) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE TO AUTHORIZE EACH CODE COUNTY TO SUPPLANT COMPETITION IN THE AREA OF PORT REGULATION TO PROVIDE FOR SAFE HARBORS, FREE OF CONGESTION AND NAVIGATIONAL HAZARDS, TO PROVIDE BENEFITS TO COUNTY CITIZENS BY PROTECTING MARINE LIFE AND WILDLIFE AND TO AVOID WATER POLLUTION AND EROSION.

(2) EACH CODE COUNTY HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES OR CONTRACTS FOR THE PLACEMENT, ERECTION OR CONSTRUCTION OF STRUCTURES WITHIN OR ON THE WATERS OF THE COUNTY, INCLUDING BUT NOT LIMITED TO THE ISSUING OF LICENSES FOR WHARVES OR PIERS OF THE ISSUING OF PERMITS FOR MOORING PILES, FLOATING WHARVES, BUOYS OR ANCHORS, NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(D) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE EACH CODE COUNTY TO SUPPLANT COMPETITION IN THE AWARD OF CONCESSIONS ON, OVER OR UNDER PROPERTY OWNED OR LEASED BY THE COUNTY AND IN THE LEASING OR SUBLEASING OF PROPERTY OWNED OR LEASED BY THE COUNTY IN ORDER TO UTILIZE PROPERLY THE ASSETS OF THE COUNTY FOR THE BEST PUBLIC PURPOSE; TO PROVIDE NECESSARY OR DESIRABLE GOVERNMENTAL SERVICES AT THE LOWEST POSSIBLE COST; TO PROTECT THE PUBLIC FROM UNSCRUPULOUS BUSINESS PRACTICES AND EXCESSIVE PRICES; TO PROVIDE FOR THE ACCESSIBILITY TO PUBLIC PROPERTY BY AS MANY CITIZENS AS POSSIBLE; AND TO PROMOTE THE GENERAL WELFARE BY UTILIZING PUBLIC PROPERTY FOR THE BENEFIT OF THE CITIZENS OF THE COMMUNITY.

(2) EACH CODE COUNTY HAS THE AUTHORITY TO SUPPLANT COMPETITION BY GRANTING ONE OR MORE FRANCHISES FOR ANY CONCESSION ON, OVER OR UNDER PROPERTY OWNED OR LEASED BY THE COUNTY ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO CONTROL PRICES AND RATES FOR SUCH FRANCHISES; AND TO ESTABLISH RULES AND REGULATIONS TO GOVERN THE OPERATION OF THE FRANCHISES AND FOR THE ENFORCEMENT THEREOF; AND TO LEASE OR SUBLEASE PUBLICLY OWNED OR LEASED LAND IMPROVEMENTS TO LAND OR BOTH ON TERMS TO BE DETERMINED BY THE COUNTY OR COUNTIES WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(E) THE POWERS GRANTED BY ANY COUNTY PURSUANT TO THIS SECTION SHALL NOT BE CONSTRUED:

(1) TO GRANT TO SUCH COUNTY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO SUCH COUNTY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(2) TO RESTRICT SUCH COUNTY FROM EXERCISING ANY POWER GRANTED TO SUCH COUNTY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(3) TO AUTHORIZE SUCH COUNTY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

The Charter of Baltimore City

Article II - General Powers

(57)

(A) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE BALTIMORE CITY TO SUPPLANT COMPETITION IN THE AREA OF PUBLIC TRANSPORTATION IN ORDER TO PROVIDE FOR ADEQUATE, ECONOMICAL, AND EFFICIENT DELIVERY OF TRANSPORTATION SERVICES; TO PROTECT ITS CITIZENS FROM INCONSISTENT AND EXCESSIVE PRICES; TO PROVIDE NECESSARY AND DESIRED SERVICES IN ALL AREAS OF THE CITY; TO ENABLE THE CITY TO PROVIDE PUBLIC TRANSPORTATION IN ORDER TO CONSERVE ENERGY AND REDUCE AIR POLLUTION, CONGESTION, TRAFFIC HAZARDS, AND ACCIDENTS; TO ENCOURAGE THE USE OF PUBLIC TRANSPORTATION BY THE CONTRIBUTION BY THE CITY OF CAPITAL AND OPERATING FUNDS TO ENABLE TRANSPORTATION TO BE PROVIDED AT THE LOWEST COST TO ALL CITIZENS, ESPECIALLY THE INDIGENT; AND TO PROMOTE THE GENERAL WELFARE BY CONDUCTING A COMPREHENSIVE TRANSPORTATION SYSTEM.

(2) BALTIMORE CITY HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES FOR A TRANSPORTATION SYSTEM ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES, TO ESTABLISH RULES, REGULATIONS, AND LICENSING REQUIREMENTS TO GOVERN THE OPERATION OF THE FRANCHISES, AND FOR THE ENFORCEMENT OF ANY SUCH MEASURE, AND TO CONDUCT A PUBLIC TRANSPORTATION SYSTEM ON AN EXCLUSIVE BASIS, INCLUDING THE ESTABLISHMENT OF RULES, REGULATIONS, AND RATES, NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(B) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE BALTIMORE CITY TO SUPPLANT COMPETITION IN THE AREA OF WATER AND SEWERAGE SYSTEMS AND WASTE COLLECTION SERVICES AND WASTE DISPOSAL SERVICES IN ORDER TO ASSURE DELIVERY OF ADEQUATE, ECONOMICAL, AND EFFICIENT SERVICES TO ITS CITIZENS, TO AVOID DUPLICATION OF FACILITIES, TO PROVIDE FOR THE HEALTH AND SAFETY OF ITS CITIZENS, TO CONTROL DISEASE, TO PREVENT BLIGHT AND OTHER ENVIRONMENTAL DEGRADATION, TO PROMOTE THE GENERATION OF ENERGY AND THE RECOVERY OF USABLE RESOURCES FROM WASTE, TO UTILIZE EFFICIENTLY THE PUBLIC RIGHT-OF-WAY, TO PROTECT LIMITED NATURAL RESOURCES FOR THE BENEFIT OF THE CITIZENS OF THE CITY, TO LIMIT WASTE, NOXIOUS ODORS, AND UNSIGHTLY GARBAGE AND DECAY; AND TO PROMOTE THE GENERAL HEALTH AND WELFARE BY PROVIDING FOR ADEQUATE WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES AND WASTE DISPOSAL SERVICES.

(2) (I) BALTIMORE CITY HAS THE AUTHORITY TO GRANT ONE OR MORE FRANCHISES OR ENTER INTO CONTRACTS FOR WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES AND WASTE DISPOSAL SERVICES ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS TO ANY PERSON, TO IMPOSE FRANCHISE FEES, TO ESTABLISH CERTAIN RATES AND CHARGES, TO ESTABLISH RULES, REGULATIONS, AND LICENSING REQUIREMENTS, AND TO PROVIDE FOR THE ENFORCEMENT OF ANY SUCH MEASURE NOTWITHSTANDING ANY ANTICOMPETITIVE EFFECT.

(II) IN THE EVENT THAT BALTIMORE CITY HAS THE ENABLING AUTHORITY GRANTED BY ANY OTHER LAW TO OPERATE WATER AND SEWERAGE SYSTEMS, WASTE COLLECTION SERVICES AND WASTE DISPOSAL SERVICES, SUCH SYSTEMS AND SERVICES SHALL BE OPERATED BY THE CITY WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(C) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THE STATE TO AUTHORIZE BALTIMORE CITY TO SUPPLANT COMPETITION IN THE AWARD OF CONCESSIONS ON, OVER OR UNDER PROPERTY OWNED OR LEASED BY THE CITY AND IN THE LEASING OR SUBLEASING OF PROPERTY OWNED OR LEASED BY THE CITY IN ORDER TO UTILIZE PROPERLY THE ASSETS OF THE CITY FOR THE BEST PUBLIC PURPOSE; TO PROVIDE NECESSARY OR DESIRABLE GOVERNMENTAL SERVICES AT THE LOWEST POSSIBLE COST; TO PROTECT THE PUBLIC FROM UNSCRUPULOUS BUSINESS PRACTICES AND EXCESSIVE PRICES; TO PROVIDE FOR THE ACCESSIBILITY TO PUBLIC PROPERTY BY AS MANY CITIZENS AS POSSIBLE; AND TO PROMOTE THE GENERAL WELFARE BY UTILIZING PUBLIC PROPERTY FOR THE BENEFIT OF THE CITIZENS OF THE COMMUNITY.

(2) BALTIMORE CITY HAS THE AUTHORITY TO SUPPLANT COMPETITION BY GRANTING ONE OR MORE FRANCHISES FOR ANY CONCESSION ON, OVER OR UNDER PROPERTY OWNED, OR LEASED, BY THE CITY ON AN EXCLUSIVE OR NONEXCLUSIVE BASIS, TO CONTROL PRICES AND RATES FOR SUCH FRANCHISES; TO ESTABLISH RULES AND REGULATIONS TO GOVERN THE OPERATION OF THE FRANCHISES AND FOR THE ENFORCEMENT THEREOF; AND TO LEASE OR SUBLEASE PUBLICLY OWNED OR LEASED LAND, IMPROVEMENTS TO LAND OR BOTH ON TERMS TO BE DETERMINED BY THE CITY WITHOUT REGARD TO ANY ANTICOMPETITIVE EFFECT.

(D) (1) IT HAS BEEN AND SHALL CONTINUE TO BE THE POLICY OF THIS STATE TO AUTHORIZE BALTIMORE CITY TO SUPPLANT COMPETITION WITH RESPECT TO RESIDENTIAL, COMMERCIAL, INDUSTRIAL, AND ECONOMIC DEVELOPMENT AND REDEVELOPMENT TO ENSURE THE STABILITY AND VITALITY OF URBAN AREAS.

(2) IN ORDER TO ACHIEVE THIS PUBLIC PURPOSE BALTIMORE CITY HAS BEEN GRANTED THE AUTHORITY TO LIMIT OR SUPPLANT FREE COMPETITION AND BUSINESS ENTERPRISE BY LIMITING OR CONTROLLING THE TYPES AND NUMBER OF USERS OR PROJECTS IT WILL AUTHORIZE, PROMOTE, ASSIST, OR PERMIT IN EXERCISING ITS POWERS TO UNDERTAKE, PROMOTE, AND REGULATE, AND OTHERWISE CONTROL RESIDENTIAL, COMMERCIAL, INDUSTRIAL, AND ECONOMIC DEVELOPMENT AND REDEVELOPMENT, INCLUDING BUT NOT LIMITED TO ACQUIRING, LEASING, SELLING OR DISPOSING OF, AND CONTROLLING LAND, STRUCTURES, AND OTHER PROPERTY AND BORROWING MONEY, AND MAKING LOANS OR PROVIDING OTHER FORMS OF FINANCIAL ASSISTANCE AND GUARANTEES.

(E) THE POWERS GRANTED TO BALTIMORE CITY PURSUANT TO THIS SECTION SHALL NOT BE CONSTRUED:

(1) TO GRANT TO BALTIMORE CITY POWERS IN ANY SUBSTANTIVE AREA NOT OTHERWISE GRANTED TO THE CITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW;

(2) TO RESTRICT THE CITY FROM EXERCISING ANY POWER GRANTED TO THE CITY BY OTHER PUBLIC GENERAL OR PUBLIC LOCAL LAW OR OTHERWISE; NOR

(3) TO AUTHORIZE THE CITY OR ITS OFFICERS TO ENGAGE IN ANY ACTIVITY WHICH IS BEYOND THEIR POWER UNDER OTHER PUBLIC GENERAL LAW, PUBLIC LOCAL LAW, OR OTHERWISE.

SECTION 2. AND BE IT FURTHER ENACTED, That it is not the purpose or intent of the General Assembly to create any presumption regarding any activities of local governments not addressed in this legislation. This legislation shall not be construed or interpreted to mean that it is the public policy of this State that such other activities of local governments not included in this Act may not be exercised in a manner which would supplant or limit economic competition.

SECTION 3. AND BE IT FURTHER ENACTED, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason, the invalidity shall not affect the other provisions or any other application of this Act which can be given effect without the invalid provisions or application, and to this end all the provisions of this Act are declared to be severable.

SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1983.

23 pgs

COMMUNITY COMMUNICATIONS COMPANY, INC., Petitioner,

v

CITY OF BOULDER, COLORADO, et al.

— US —, 70 L Ed 2d 810, 102 S Ct

[No. 80-1350]

Argued October 13, 1981. Decided January 13, 1982.

Decision: Ordinance enacted by home-rule municipality prohibiting expansion of cable television operator's business, held not to be "state action" eligible for exemption from federal antitrust laws.

SUMMARY

The assignee of a permit granted by a city ordinance to conduct a cable television business within the city limits filed suit in the United States District Court for the District of Colorado, alleging that the city violated § 1 of the Sherman Act (15 USCS § 1) when it enacted an "emergency" ordinance prohibiting the assignee for three months from expanding its business to areas of the city not currently served by it so that the city council could draft a model cable television ordinance and invite new businesses to enter the market under the terms of that ordinance, even though the city is a "home-rule" municipality which is granted extensive powers of self-government in local and municipal matters by the constitution of the state in which the city is located. The District Court held that the city's moratorium ordinance was not exempt from federal antitrust laws under the "state action" doctrine of an earlier decision of the United States Supreme Court and issued a preliminary injunction (485 F Supp 1035). The United States Court of Appeals for the Tenth Circuit reversed, holding that the city's action satisfied the criteria for an exemption from antitrust liability (630 F2d 704).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by BRENNAN, J., joined by MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., it was held that the moratorium ordinance was not exempt from antitrust scrutiny under the "state action" doctrine, the direct delegation of powers to the city through a home-rule amendment in the

state constitution not rendering the ordinance an act of government performed by the city acting as the state in local matters.

STEVENS, J., concurred, emphasizing that the holding that the city's action was not exempt from the antitrust laws was not tantamount to a holding that the antitrust laws have been violated.

REHNQUIST, J., joined by BURGER, Ch. J., and O'CONNOR, J., dissented, expressing the view that the question addressed in the case was not whether state and local governments are exempt from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are preempted by the Sherman Act under the operation of the Federal Constitution's supremacy clause, and that the presumption is that preemption is not to be found absent the clear and manifest intention of Congress that the federal act should supersede the police powers of the states.

WHITE, J., did not participate.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — home-rule municipality — exemption from federal antitrust laws

1a-1c. A city which has been granted powers of self-government in local and

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54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 15

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade §§ 48:81 et seq.

15 USCS §§ 1 et seq.

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 9

L Ed Index to Annos, Municipal Corporations; Restraints of Trade and Monopolies

ALR Quick Index, Municipal Corporations; Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

ANNOTATION REFERENCES

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws. 12 ALR Fed 329.

Validity and construction of municipal ordinances regulating community antenna television service (CATV). 41 ALR3d 384.

municipal matters by a "home-rule" amendment in the constitution of the state in which it is located does not enjoy an exemption from federal antitrust liability in regard to its enactment of an "emergency" ordinance prohibiting a cable television business from expanding its business for three months to areas not currently served by it so that the city council can draft a model cable television ordinance and invite new businesses to enter the market under the terms of that ordinance, the direct delegation of powers to the city through the home-rule amendment not rendering the ordinance an act of government performed by the city acting as the state in local matters so as to make the ordinance a "state action" eligible for exemption. (Rehnquist, J., Burger, Ch. J., and O'Connor, J., dissented from this holding.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 11 — city ordinance — exemption from antitrust scrutiny

2. A city's ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the state itself in its sovereign capacity, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy.

Constitutional Law § 47 — sovereign authority — cities, counties, and other bodies

3. All sovereign authority within the geographical limits of the United States resides either with the government of the United States, or with the states of the union; there may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in subordination to, one or the other of these.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 9 — federal antitrust laws — state action exempt

4. When a municipality's action is challenged as anticompetitive and the municipality claims that its action is exempt from liability under the federal antitrust laws as a state action, the requirement for such a claim of clear articulation and affirmative expression by the state of the policy being implemented by the municipality's action is not satisfied when the state's position is one of mere neutrality respecting the municipal action challenged as anticompetitive.

Restraints of Trade, Monopolies, and Unfair Trade Practices §§ 11, 64 — federal antitrust laws — municipalities as "persons" covered

5. The federal antitrust laws, like other federal laws imposing civil or criminal sanctions upon "persons," apply to municipalities as well as to other corporate entities.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 11 — federal antitrust laws — state action exemption — state's subdivisions

6. When the state itself has not directed or authorized an anticompetitive practice, the state's political subdivisions in exercising their delegated power must obey the antitrust laws.

SYLLABUS BY REPORTER OF DECISIONS

Respondent city of Boulder is a "home rule" municipality, granted by the Colorado Constitution extensive powers of self-government in local and municipal matters. Petitioner is the assignee of a permit granted by a city ordinance to conduct a cable television business within the city limits. Originally, only limited service within a certain area of the city could be provided by petitioner, but improved technology offered petitioner an opportunity to expand its business into other areas, and also offered opportunities to potential competitors, one of whom expressed interest in obtaining a permit to provide competing

service. The City Council then enacted an "emergency" ordinance prohibiting petitioner from expanding its business for three months, during which time the Council was to draft a model cable television ordinance and to invite new businesses to enter the market under the terms of that ordinance. Petitioner filed suit in Federal District Court, alleging that such a restriction would violate § 1 of the Sherman Act, and seeking a preliminary injunction to prevent the city from restricting petitioner's proposed expansion. The city responded that its moratorium ordinance could not be violative of the antitrust laws because, inter alia, the city enjoyed antitrust immunity under the "state action" doctrine of Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307. The District Court held that the Parker exemption was inapplicable and that the city was therefore subject to antitrust liability. Accordingly, the District Court issued a preliminary injunction. The Court of Appeals reversed, holding that the city's action satisfied the criteria for a Parker exemption.

Held: Boulder's moratorium ordinance is not exempt from antitrust scrutiny under the Parker doctrine.

(a) The ordinance cannot be exempt from such scrutiny unless it constitutes either the action of the State itself in its sovereign capacity or municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy.

(b) The Parker "state action" exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under the Federal Constitution. But this principle is inherently limited: Ours is a "*dual* system of government," Parker, supra, at 351, 87 L Ed 315, 63 S Ct 307, which has no place for sovereign cities. Here, the direct delegation of powers to the city through the Home Rule Amendment to the Colorado Constitution does not render the cable television moratorium ordinance an "act of government" performed by the city acting as the State in local matters so as to meet Parker's "state action" criterion.

(c) Nor is the requirement of "clear articulation and affirmative expression" of a state policy fulfilled here by the Home Rule Amendment's "guarantee of local autonomy," since the State's position is one of mere neutrality respecting the challenged moratorium ordinance. This case involves city action in the absence of any regulation by the State, and such action cannot be said to further or implement any clearly articulated or affirmatively expressed state policy.

(d) Respondents' argument that denial of the Parker exemption in this case will have serious adverse consequences for cities and will unduly burden the federal courts is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws, which laws apply to municipalities not acting in furtherance of clearly articulated and affirmatively expressed state policy.

630 F2d 704, reversed and remanded.

Brennan, J., delivered the opinion of the Court, in which Marshall, Blackmun, Powell, and Stevens, JJ., joined. Stevens, J., filed a concurring opinion. Rehnquist, J., filed a dissenting opinion, in which Burger, C. J., and O'Connor, J., joined. White, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL.

Harold R. Farrow argued the cause for petitioner.

Thomas P. McMahon argued the cause for the State of Alaska, et al., as amicus curiae, by special leave of court.

Jeffrey H. Howard argued the cause for respondents.

OPINION OF THE COURT

Justice Brennan delivered the opinion of the Court.

[1a] The question presented in this case, in which the District Court for the District of Colorado granted preliminary injunctive relief, is whether a "home rule" municipality, granted by the state constitution extensive powers of self-government in local and municipal matters, enjoys the "state action" exemption from Sherman Act liability announced in Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943).

I

Respondent City of Boulder is organized as a "home rule" municipality under the Constitution of the State of Colorado.[1] The City is thus entitled to exercise "the full right of self-government in both local and municipal matters," and with respect to such matters the City Charter and ordinances supersede the laws of the State. Under that Charter, all municipal legislative powers are exercised by an elected City Council.[2] In 1964 the City Council enacted an ordinance granting to Colorado Televents, Inc., a 20-year, revocable, non-exclusive permit to conduct a cable television business within the City limits. This permit was assigned to petitioner in 1966, and since that time petitioner has provided cable television service to the University Hill area of Boulder, an area where some 20% of the City's population lives, and where, for geographical reasons, broadcast television signals cannot be received.

From 1966 until February 1980, due to the limited service that could be provided with the technology then available, petitioner's service consisted essentially of retransmissions of programming broadcast from Denver and Cheyenne, Wyo. Petitioner's market was therefore confined to the University Hill area. However, markedly improved technology became available in the late 1970s, enabling petitioner to offer many more channels of entertainment than could be provided by local broadcast television.[3] Thus presented

1. The Colorado Home Rule Amendment, Colo Const, Art XX, § 6, provides in pertinent part:

"The people of each city or town of this state, having a population of two thousand inhabitants . . ., are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

"Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

. . . . . .

"It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters. . . .

"The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

2. Boulder, Colo., Charter § 11 (1965 rev ed).

3. The District Court below noted:

"Up to late 1975, cable television throughout the country was concerned primarily with retransmission of television signals to areas which did not have normal reception, with some special local weather and news services originated by the cable operators. During the late 1970's however, satellite technology impacted the industry and prompted a rapid, almost geometric rise in its growth. As earth stations became less expensive, and 'Home

with an opportunity to expand its business into other areas of the City, petitioner in May 1979 informed the City Council that it planned such an expansion. But the new technology offered opportunities to potential competitors, as well, and in July 1979 one of them, the newly formed Boulder Communications Company (BCC),[4] also wrote to the City Council, expressing its interest in obtaining a permit to provide competing cable television service throughout the City.[5]

The City Council's response, after reviewing its cable television policy,[6] was the enactment of an "emergency" ordinance prohibiting petitioner from expanding its business into other areas of the City for a period of three months.[7] The City Council announced that during this moratorium it planned to draft a model cable television ordinance and to invite new businesses to enter the

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Box Office' companies developed, the public response to cable television greatly increased the market demand for such expanded services.

"The 'state of the art' presently allows for more than 35 channels, including movies, sports, FM radio, and educational, children's, and religious programming. The institutional uses for cable television are fast increasing, with technology for two-way service capability. Future potential for cable television is referred to as 'blue sky', indicating that virtually unlimited technological improvements are still expected." 485 F Supp 1035, 1036–1037 (D Colo 1980).

4. BCC was a defendant below, and is a respondent here.

5. Regarding this letter, the District Court noted that "BCC outlined a proposal for a new system, acknowledging the presence of [petitioner] in Boulder but stating that '(w)hatever action the City takes in regard to [petitioner], it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit.'" 485 F Supp, at 1037.

6. "The . . . City Council . . . initiat[ed] a review and reconsideration of cable television in view of the many changes in the industry since . . . 1964. . . . Accordingly, they hired a consultant, . . . and held a number of study meetings to develop a governmental response to these changes. The primary thrust of [the consultant's] advice was that the City should be concerned about the tendency of a cable system to become a natural monopoly. Much discussion in the City Council centered around a supposed unfair advantage that [petitioner] had because it was already operating in Boulder. Members of the Council, and the City Manager, expressed fears that [petitioner might] not be the best cable operator for Boulder, but would nonetheless be the only operator because of its head start in the area. The Council wanted to create a situation in which other cable companies could make offers and not be hampered by the possibility that [petitioner] would build out the whole area before they even arrived." 485 F Supp, at 1037.

7. The preamble to this ordinance offered the following declarations as justification for its enactment:

". . . cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant [them] permission to use the public right-of-way in providing that service; and

". . . the present permittee, [petitioner], has indicated that it intends to extend its services in the near future . . .; and

". . . the City Council finds that such an extension . . . would result in hindering the ability of other companies to compete in the Boulder market; and

". . . the City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits . . . [within] 3 months, and finds that an extension of service by [petitioner] would result in a disruption of this application and evaluation process; and

". . . the City Council finds that placing temporary geographical limitations upon the operations of [petitioner] would not impair the present services offered by [it] to City of Boulder residents, and would not impair [its] ability . . . to improve those services within the area presently served by it." Boulder, Colo., Ordinance No. 4473 (1979).

Boulder market under its terms, but that the moratorium was necessary because petitioner's continued expansion during the drafting of the model ordinance would discourage potential competitors from entering the market.[8]

Petitioner filed this suit in the United States District Court for the District of Colorado, and sought, inter alia, a preliminary injunction to prevent the City from restricting petitioner's proposed business expansion, alleging that such a restriction would violate § 1 of the Sherman Act.[9] The City responded that its moratorium ordinance could not be violative of the antitrust laws, either because that ordinance constituted an exercise of the City's police powers, or because Boulder enjoyed antitrust immunity under the Parker doctrine. The District Court considered the City's status as a home rule municipality, but determined that that status gave autonomy to the City only in matters of local concern, and that the operations of cable television embrace "wider concerns, including interstate commerce . . . [and] the First Amendment rights of communicators." 485 F Supp 1035, 1038–1039 (1980). Then, assuming arguendo that the ordinance was within the City's authority as a home rule municipality, the District Court considered City of Lafayette v Louisiana Power & Light Co., 435 US 389, 55 L Ed 2d 364, 98 S Ct 1123 (1978), and concluded that the Parker exemption was "wholly inapplicable," and that the City was therefore subject to antitrust liability. 485 F Supp, at 1039.[10] Petitioner's motion for a preliminary injunction was accordingly granted.

On appeal, a divided panel of the United States Court of Appeals for the Tenth Circuit reversed. 630 F2d 704 (1980). The majority, after examining Colorado law, rejected the District Court's conclusion that regulation of the cable television business was beyond the home rule authority of the City. Id., at 707. The majority then addressed the question of the City's claimed Parker exemption. It distinguished the present case from City of Lafayette on the ground that, in contrast to the municipally operated revenue-producing utility companies at issue there, "no proprietary interest of the City is here involved." Id., at 708. After noting that the City's regulation "was the only control or active supervision exercised by state or local government, and . . . represented the only expression of policy as to the subject matter." id., at 707, the majority held that the City's actions therefore

8. The Council reached this conclusion despite BCC's statement to the contrary, see n 5, supra.

9. 15 USC § 1 [15 USCS § 1]. Section 1 of the Sherman Act provides, in pertinent part, that "Every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States . . ., is declared to be illegal."

Petitioner also alleged, inter alia, that the City and BCC were engaged in a conspiracy to restrict competition by substituting BCC for petitioner. The District Court noted that although petitioner had gathered some circumstantial evidence that might indicate such a conspiracy, the evidence was insufficient to establish a probability that petitioner would prevail on this claim. 485 F Supp, at 1038.

10. The District Court also held that no per se antitrust violation appeared on the record before it, and that petitioner was not protected by the First Amendment from all regulation attempted by the City. 485 F Supp, at 1039–1040.

satisfied the criteria for a Parker exemption, id., at 708.[11] We granted certiorari, 450 US 1039, 68 L Ed 2d 236, 101 S Ct 1756 (1981). We reverse.

II

A

Parker v Brown, supra, addressed the question whether the federal antitrust laws prohibited a State, in the exercise of its sovereign powers, from imposing certain anticompetitive restraints. These took the form of a "marketing program" adopted by the State of California for the 1940 raisin crop; that program prevented appellee from freely marketing his crop in interstate commerce. Parker noted that California's program "derived its authority . . . from the legislative command of the state," 317 US, at 350, 87 L Ed 315, 63 S Ct 307, and went on to hold that the program was therefore exempt, by virtue of the Sherman Act's own limitations, from antitrust attack:

> "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. 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." 317 US, at 350–351, 87 L Ed 315, 63 S Ct 307.

The availability of this exemption to a State's municipalities was the question presented in City of Lafayette, supra. In that case, petitioners were Louisiana cities empowered to own and operate electric utility systems both within and beyond their municipal limits. Respondent brought suit against petitioners under the Sherman Act, alleging that they had committed various antitrust offenses in the conduct of their utility systems, to the injury of respondent. Petitioners invoked the Parker doctrine as entitling them to dismissal of the suit. The District Court accepted this argument and dismissed. But the Court of Appeals for the Fifth Circuit reversed, holding that a "subordinate state governmental body is not ipso facto exempt from the operation of the antitrust laws," 532 F2d 431, 434 (1976) (footnote omitted), and directing the District Court on remand to examine "whether the state legislature con-

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11. The majority cited California Retail Liquor Dealers Assn. v Midcal Aluminum, Inc., 445 US 97, 63 L Ed 2d 233, 100 S Ct 937 (1980), as support for its reading of City of Lafayette, and concluded "that City of Lafayette is not applicable to a situation wherein the governmental entity is asserting a governmental rather than a proprietary interest, and that instead the Parker-Midcal doctrine is applicable to exempt the City from antitrust liability." 630 F2d, at 708.

The dissent urged affirmance, agreeing with the District Court's analysis of the antitrust exemption issue. Id., at 715–718 (Markey, C.J., United States Court of Customs and Patent Appeals, sitting by designation, dissenting). The dissent also considered the City's actions to violate "[c]ommon principles of contract law and equity," id., at 715, as well as the First Amendment rights of petitioner and its customers, both actual and potential, id., at 710–714. The petition for certiorari did not present the First Amendment question, and we do not address it in this opinion.

templated a certain type of anticompetitive restraint," ibid.[12]

This Court affirmed. In doing so, a majority rejected at the outset petitioners' claim that, quite apart from Parker, "Congress never intended to subject local governments to the antitrust laws." 435 US, at 394, 55 L Ed 2d 364, 98 S Ct 1123. A plurality opinion for four Justices then addressed petitioners' argument that Parker, properly construed, extended to "all governmental entities, whether state agencies or subdivisions of a State, . . . simply by reason of their status as such." Id., at 408, 55 L Ed 2d 364, 98 S Ct 1123. The plurality opinion rejected this argument, after a discussion of Parker, Goldfarb v Virginia State Bar, 421 US 773, 44 L Ed 2d 572, 95 S Ct 2004 (1975), and Bates v State Bar of Arizona, 433 US 350, 53 L Ed 2d 810, 97 S Ct 2691, 51 Ohio Misc 1, 5 Ohio Ops 3d 60 (1977).[13] These precedents were construed as holding that the Parker exemption reflects the federalism principle that we are a nation of *States*, a principle that makes no accommodation for sovereign subdivisions of States. The plurality opinion said that:

"Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. Parker's limitation of the exemption to 'official action directed by a state,' is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." 435 US, at 412–413, 55 L Ed 2d 364, 98 S Ct 1123 (footnote omitted; citations omitted).

The opinion emphasized, however, that the state as sovereign might sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability. Under the plurality's standard, the Parker doctrine would shield from antitrust liability municipal conduct engaged in "pursuant to state policy to displace competition with regulation or monopoly public service." Id., at 413, 55 L Ed 2d 364, 98 S Ct 1123.

12. The Court of Appeals described the applicable standard as follows:
"[I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. 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 act in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, . . . the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. . . . A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent." 532 F2d, 434–435 (footnote omitted; citations omitted).

13. The Chief Justice, in a concurring opinion, focused on the nature of the challenged activity rather than the identity of the parties to the suit. 435 US, at 420, 55 L Ed 2d 364, 98 S Ct 1123. He distinguished between "the proprietary enterprises of municipalities," id., at 422, 55 L Ed 2d 364, 98 S Ct 1123 (footnote omitted), and their "traditional government functions," id., at 424, 55 L Ed 2d 364, 98 S Ct 1123, and viewed the Parker exemption as extending to municipalities only when they engaged in the latter.

This was simply a recognition that a State may frequently choose to effect its policies through the instrumentality of its cities and towns. It was stressed, however, that the "state policy" relied upon would have to be "clearly articulated and affirmatively expressed." Id., at 410, 55 L Ed 2d 364, 98 S Ct 1123. This standard has since been adopted by a majority of the Court. New Motor Vehicle Board of California v Orrin W. Fox Co., 439 US 96, 109, 58 L Ed 2d 361, 99 S Ct 403 (1978); California Retail Liquor Dealers Assn. v Midcal Aluminum, Inc., 445 US 97, 105, 63 L Ed 2d 233, 100 S Ct 937 (1980).[14]

B

[2] Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see Parker, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see City of Lafayette, Orrin W. Fox Co., and Midcal. Boulder argues that these criteria are met by the direct delegation of powers to municipalities through the Home Rule Amendment to the Colorado Constitution. It contends that this delegation satisfies both the Parker and the City of Lafayette standards. We take up these arguments in turn.

(1)

[1b] Respondent's Parker argument emphasizes that through the Home Rule Amendment the people of the State of Colorado have vested in the City of Boulder *"every power* theretofore possessed by the legislature . . . in local and municipal affairs."[15] The power thus possessed by

14. In Midcal we held that a California resale price maintenance system, affecting all wine producers and wholesalers within the State, was not entitled to exemption from the antitrust laws. In so holding, we explicitly adopted the principle, expressed in the plurality opinion in City of Lafayette, that anticompetitive restraints engaged in by state-municipalities or subdivisions must be "clearly articulated and affirmatively expressed as state policy" in order to gain an antitrust exemption. Midcal, 445 US, at 105, 63 L Ed 2d 233, 100 S Ct 937. The price maintenance system at issue in Midcal was denied such an exemption because it failed to satisfy the "active state supervision" criterion described in City of Lafayette, 435 US, at 410, 55 L Ed 2d 364, 98 S Ct 1123, as underlying our decision in Bates v State Bar of Arizona, 433 US 350, 53 L Ed 2d 810, 97 S Ct 2691, 51 Ohio Misc 1, 5 Ohio Ops 3d 60 (1977). Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the "clear articulation and affirmative expression" criterion, we do not reach the question whether that ordinance must or could satisfy the "active state supervision" test focused upon in Midcal.

15. Denver Urban Renewal Authority v Byrne, —— Colo ——, ——, 615 P2d 1374, 1381 (1980), quoting Four-County Metropolitan Capital Improvement District v Board of County Commissioners, 149 Colo 284, 294, 369 P2d 67, 72 (1962) (emphasis in original). The Byrne Court went on to state that "by virtue of Article XX, a home rule city is not inferior to the General Assembly concerning its local and municipal affairs." —— Colo, at ——, 615 P2d, at 1382. Petitioner strongly disputes respondent's premise and its construction of Byrne, citing City and County of Denver v Sweet, 138 Colo 41, 48, 329 P2d 441, 445 (1958), City and County of Denver v Tihen, 77 Colo 212, 219–220, 235 P 777, 780–781 (1925), and 2 E. McQuillin, The Law of Municipal Corporations, § 9.08a, at 538 (1979), as contrary authority. But it is not for us to determine the correct view on this issue as a matter of state law. Parker affords an exemption from federal antitrust laws, based upon Congress' intentions respecting the scope of those laws. Thus the availability of the Parker exemption is and must be a matter of federal law.

Boulder's City Council assertedly embraces the regulation of cable television, which is claimed to pose essentially local problems.[16] Thus, it is suggested, the City's cable television moratorium ordinance is an "act of government" performed by the City *acting as the state* in local matters, which meets the "state action" criterion of Parker.[17]

[3] We reject this argument: it both misstates the letter of the law and misunderstands its spirit. The Parker state action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a *"dual* system of government," Parker, supra, at 351, 87 L Ed 315, 63 S Ct 307 (emphasis added), which has no place for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with

> "the Government of the United States, or [with] the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." United States v Kagama, 118 US 375, 379, 30 L Ed 228, 6 S Ct 1109 (1886) (emphasis added).

The dissent in the Court of Appeals correctly discerned this limitation upon the federalism principle: "We are a nation not of 'city-states' but of States." 630 F2d, at 717. Parker itself took this view. When Parker examined Congress' intentions in enacting the antitrust laws, the opinion noted that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature.* . . . [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress." 317 US, at 350–351, 87 L Ed 315, 63 S Ct 307 (emphasis added). Thus Parker recognized Congress' intention to limit the state action exemption based upon the federalism principle of limited state sovereignty. City of Lafayette, Orrin W. Fox Co., and Midcal reaffirmed both the vitality and the intrinsic

16. Boulder cites the decision of the Colorado Supreme Court in Manor Vail Condominium Assn. v Vail, —— Colo ——, ——, ——, 604 P2d 1168, 1171–1172 (1980), as authority for the proposition that the regulation of cable television is a local matter. Petitioner disputes this proposition and respondent's reading of Manor Vail, citing in rebuttal United States v Southwestern Cable Co., 392 US 157, 168–169, 20 L Ed 2d 1001, 88 S Ct 1994 (1968), holding that cable television systems are engaged in interstate communication. In this contention, petitioner is joined by the State of Colorado, which filed an amicus brief in support of petitioner. For the purposes of this decision we will assume, without deciding, that respondent's enactment of the moratorium ordinance under challenge here did fall within the scope of the power delegated to the City of Boulder by virtue of the Colorado Home Rule Amendment.

17. Respondent urges that the only distinction between the present case and Parker is that here the "act of government" is imposed by a home rule city rather than by the state legislature. Under Parker and Colorado law, the argument continues, this is a distinction without a difference, since in the sphere of local affairs home rule cities in Colorado possess every power once held by the state legislature.

limits of the Parker state action doctrine. It was expressly recognized by the plurality opinion in City of Lafayette that municipalities "are not themselves sovereign," 435 US, at 412, 55 L Ed 2d 364, 98 S Ct 1123, and that accordingly they could partake of the Parker exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy, id., at 413, 55 L Ed 2d 364, 98 S Ct 1123. The Court adopted this view in Orrin W. Fox Co., supra, at 109, 58 L Ed 2d 361, 99 S Ct 403, and Midcal, supra, at 105, 63 L Ed 2d 233, 100 S Ct 937. We turn then to Boulder's contention that its actions were undertaken pursuant to a clearly articulated and affirmatively expressed state policy.

(2)

Boulder first argues that the requirement of "clear articulation and affirmative expression" is fulfilled by the Colorado Home Rule Amendment's "guarantee of local autonomy." It contends, quoting from City of Lafayette, supra, at 415, 55 L Ed 2d 364, 98 S Ct 1123, that by this means Colorado has "comprehended within the powers granted" to Boulder the power to enact the challenged ordinance, and that Colorado has thereby "contemplated" Boulder's enactment of an anticompetitive regulatory program. Further, Boulder contends that it may be inferred, "from the authority given" to Boulder "to operate in a particular area"—here, the asserted home rule authority to regulate cable television—"that the *legislature* contemplated the kind of action complained of." (Emphasis supplied.) Boulder therefore concludes that the "adequate state mandate" required by City of Lafayette, supra, at 415, 55 L Ed 2d 364, 98 S Ct 1123, is present here.[12]

[4] But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here. The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged, "we are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City." 630 F2d, at 707. Indeed, respondent argues that as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act. Cf. City of Lafayette, supra, at 414 and n. 44, 55 L Ed 2d 364, 98 S Ct 1123. Thus on respon-

12. Respondent also contends that its moratorium ordinance qualifies for antitrust immunity under the test set forth by The Chief Justice in his City of Lafayette concurrence, see n 13, supra, because the challenged activity is clearly a "traditional government function," rather than a "proprietary enterprise."

dent's view, Boulder can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

III

[5, 6] Respondent argues that denial of the Parker exemption in the present case will have serious adverse consequences for cities, and will unduly burden the federal courts. But this argument is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws.[19] Those laws, like other federal laws imposing civil or criminal sanctions upon "persons," of course apply to municipalities as well as to other corporate entities.[20] Moreover, judicial enforcement of Congress' will regarding the state action exemption renders a State "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." City of Lafayette, 435 US, at 416, 55 L Ed 2d 364, 98 S Ct 1123. As was observed in that case,

> Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. Parker and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws. . . . [A]s-

19. Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." United States v Topco Associates, Inc., 405 US 596, 610, 31 L Ed 2d 515, 92 S Ct 1126 (1972).

20. See City of Lafayette, supra, at 394–397, 55 L Ed 2d 364, 98 S Ct 1123.

We hold today only that the Parker v Brown exemption was no bar to the District Court's grant of injunctive relief. This case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants. As we said in City of Lafayette, "[i]t may be that certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." 435 US, at 417 n 48, 55 L Ed 2d 364, 98 S Ct 1123. Compare e.g., National Society of Professional Engineers v United States, 435 US 679, 687–692, 55 L Ed 2d 637, 98 S Ct 1355 (1978) (considering the validity of anticompetitive restraint imposed by private agreement) with Exxon Corp. v Governor of Maryland, 437 US 117, 133, 57 L Ed 2d 91, 98 S Ct 2207 (1978) (holding that anticompetitive effect is an insufficient basis for invalidating a state law). Moreover, as in City of Lafayette, 435 US, at 401–402, 55 L Ed 2d 364, 98 S Ct 1123, we do not confront the issue of remedies appropriate against municipal officials.

suming that the municipality is authorized to provide service on a monopoly basis, these limitations on municipal action will not hobble the execution of legitimate governmental programs. Id., at 416–417, 55 L Ed 2d 364, 98 S Ct 1123 (footnote omitted).

[1c] The judgment of the Court of Appeals is reversed, and the action remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice White took no part in the consideration or decision of this case.

SEPARATE OPINIONS

Justice Stevens, concurring.

The Court's opinion, which I have joined, explains why the City of Boulder is not entitled to an exemption from the antitrust laws. The dissenting opinion seems to assume that the Court's analysis of the exemption issue is tantamount to a holding that the antitrust laws have been violated. The assumption is not valid. The dissent's dire predictions about the consequences of the Court's holding should therefore be viewed with skepticism.[1]

In City of Lafayette v Louisiana Power & Light Co., 435 US 389, 55 L Ed 2d 364, 98 S Ct 1123, we held that municipalities' activities as providers of services are not exempt from the Sherman Act. The reasons for denying an exemption to the City of Lafayette are equally applicable to the City of Boulder, even though Colorado is a home-rule State. We did not hold in City of Lafayette that the City had violated the antitrust laws. Moreover, that question is quite different from the question whether the City of Boulder violated the Sherman Act because the character of their respective activities differs. In both cases, the violation issue is separate and distinct from the exemption issue.

A brief reference to our decision in Cantor v Detroit Edison Co., 428 US 579, 49 L Ed 2d 1141, 96 S Ct 3110, will identify the invalidity of the dissent's assumption. In that case, the Michigan Public Utility Commission had approved a tariff that required the Detroit Edison Company to provide its customers free light bulbs. The company contended that its light bulb distribution program was therefore exempt from the antitrust laws on the authority of Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307. See 428 US, at 592, 49 L Ed 2d 1141, 96 S Ct 3110. The Court rejected the company's interpretation of Parker and held that the plaintiff could proceed with his antitrust attack against the company's program. We surely did not suggest that the members of the Michigan Public Utility Commission who had authorized the program under attack had thereby become parties to a violation of the Sherman Act. On the contrary, the

1. Compare Cantor v Detroit Edison Co., 428 US 579, 615, 49 L Ed 2d 1141, 96 S Ct 3110 (Stewart, J., dissenting) (the Court's holding "will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of 'the prospect of massive treble damage liabilities'") (quoting Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 NYUL Rev 693, 728 (1974)). See also United States Railroad Retirement Bd. v Fritz, 449 US 166, 176 n 10, 66 L Ed 2d 368, 101 S Ct 453.

plurality opinion reviewed the Parker case in great detail to emphasize the obvious difference between a charge that public officials have violated the Sherman Act and a charge that private parties have done so.[2]

It would be premature at this stage of the litigation to comment on the question whether petitioner will be able to establish that respondents have violated the antitrust laws. The answer to that question may depend on factual and legal issues that must and should be resolved in the first instance by the District Court. In accordance with my belief that "the Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies," 428 US, at 603, 49 L Ed 2d 1141, 96 S Ct 3110 (opinion of Stevens, J.), I offer no gratuitous advice about the questions I think might be relevant. My only observation is that the violation issue is not nearly as simple as the dissenting opinion implies.

Justice Rehnquist, with whom The Chief Justice and Justice O'Connor join, dissenting.

The Court's decision in this case is flawed in two serious respects, and will thereby impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act, 15 USC § 1 et seq. [15 USCS §§ 1 et seq.]. First, the Court treats the issue in this case as whether a municipality is "exempt" from the Sherman Act under our decision in Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943). The question addressed in Parker and in this case is not whether State and local governments are exempt from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are preempted by the Sherman Act under the operation of the Supremacy Clause. Second, in holding that a municipality's ordinances can be "exempt" from antitrust scrutiny only if the enactment furthers or implements a "clearly articulated and affirmatively expressed state

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2. See 435 US, at 585–592, 49 L Ed 2d 1141, 96 S Ct 3110 (opinion of Stevens, J.). The point was made explicit in two passages of the plurality opinion. In a footnote, the plurality stated:

"The cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State), on the other hand." Id., at 591 n 24, 49 L Ed 2d 1141, 96 S Ct 3110.

The point was repeated in the text:

"The federal statute proscribes the conduct of persons, not programs, and the narrow holding in Parker concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activities implementing that program is unknown and unknowable because no such charges were made. [footnote omitted]" Id., at 601, 49 L Ed 2d 1141, 96 S Ct 3110.

The footnote omitted in the above quotation stated:

"Indeed, it did not even occur to the plaintiff that the state officials might have violated the Sherman Act; that question was first raised by this Court." Id., at 601 n 42, 49 L Ed 2d 1141, 96 S Ct 3110.

See Bates v State Bar of Arizona, 433 US 350, 361, 53 L Ed 2d 810, 97 S Ct 2691, 51 Ohio Misc 1, 5 Ohio Ops 3d 60 ("[O]bviously, Cantor would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party.").

policy," ante, at ——, 70 L Ed 2d 819, the Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business. As I read the Court's opinion, a municipality may be said to *violate* the antitrust laws by enacting legislation in conflict with the Sherman Act, unless the legislation is enacted pursuant to an affirmative state policy to supplant competitive market forces in the area of the economy to be regulated.

I

Preemption and exemption are fundamentally distinct concepts. Preemption, because it involves the Supremacy Clause, implicates our basic notions of federalism. Preemption analysis is invoked whenever the Court is called upon to examine "the interplay between the enactments of two *different* sovereigns—one federal and the other state." Handler, Antitrust—1978, 78 Colum L Rev 1363, 1379 (1978). We are confronted with questions under the Supremacy Clause when we are called upon to resolve a purported conflict between the enactments of the federal government and those of a State or local government, or where it is claimed that the federal government has occupied a particular field exclusively, so as to foreclose any state regulation. Where preemption is found, the state enactment must fall without any effort to accommodate the State's purposes or interests. Because preemption treads on the very sensitive area of Federal-State relations, this Court is "reluctant to infer preemption," Exxon Corp. v Governor of Maryland, 437 US 117, 132, 57 L Ed 2d 91, 98 S Ct 2207 (1978), and the presumption is that preemption is not to be found absent the clear and manifest intention of Congress that the federal act should supersede the police powers of the States. Ray v Atlantic Richfield Co., 435 US 151, 157, 55 L Ed 2d 179, 98 S Ct 988 (1978).

In contrast, exemption involves the interplay between the enactments of a single sovereign—whether one enactment was intended by Congress to relieve a party from the necessity of complying with a prior enactment. See, e. g., National Broiler Marketing Ass'n v United States, 436 US 816, 56 L Ed 2d 728, 98 S Ct 2122 (1978) (Sherman Act and Capper-Volstead Act); United States v Philadelphia National Bank, 374 US 321, 350–355, 10 L Ed 2d 915, 83 S Ct 1715 (1963) (Clayton Act and Bank Merger Act of 1960); Silver v New York Stock Exchange, 373 US 341, 357–361, 10 L Ed 2d 389, 83 S Ct 1246 (1963) (Sherman Act and Securities Exchange Act). Since the enactments of only one sovereign are involved, no problems of federalism are present. The court interpreting the statute must simply attempt to ascertain congressional intent, whether the exemption is claimed to be express or implied. The presumptions utilized in exemption analysis are quite distinct from those applied in the preemption context. In examining exemption questions, "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." Silver v New York Stock Exchange, supra, at 357, 10 L Ed 2d 389, 83 S Ct 1246.

With this distinction in mind, I think it quite clear that questions involving the so-called "state action"

doctrine are more properly framed as being ones of preemption rather than exemption. Issues under the doctrine inevitably involve state and local regulation which, it is contended, are in conflict with the Sherman Act.

Our decision in Parker v Brown, supra, was the genesis of the "state action" doctrine. That case involved a challenge to a program established pursuant to the California Agricultural Prorate Act, which sought to restrict competition in the State's raisin industry by limiting the producer's ability to distribute raisins through private channels. The program thus sought to maintain prices at a level higher than those maintained in an unregulated market. This Court assumed that the program would violate the Sherman Act were it "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," and that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce." 317 US, at 350, 87 L Ed 315 63 S Ct 307. In this regard, we noted that "[o]ccupation of a legislative field by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws." Ibid. We then held, however, that "[w]e find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. 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 350–351, 87 L Ed 315, 63 S Ct 307.

This is clearly the language of federal preemption under the Supremacy Clause. This Court decided in Parker that Congress did not intend the Sherman Act to override state legislation designed to regulate the economy. There was no language of "exemption," either express or implied, nor the usual incantation that "repeals by implication are disfavored." Instead, the Court held that state regulation of the economy is not necessarily preempted by the antitrust laws even if the same acts by purely private parties would constitute a violation of the Sherman Act. The Court recognized, however, that some state regulation is preempted by the Sherman Act, explaining that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." Id., at 351, 87 L Ed 315, 63 S Ct 307.

Our two most recent Parker doctrine cases reveal most clearly that the "state action" doctrine is not an exemption at all, but instead a matter of federal preemption.

In New Motor Vehicle Bd. v Orrin W. Fox Co., 439 US 96, 58 L Ed 2d 361, 99 S Ct 403 (1978), we examined the contention that the California Automobile Franchise Act conflicted with the Sherman Act. That Act required a motor vehicle manufacturer to secure the approval of the California New Motor Vehicle Board before it could open a dealership within an existing franchisee's mar-

ket area, if the competing franchisee objected. By so delaying the opening of a new dealership whenever a competing dealership protested, the Act arguably gave effect to privately initiated restraints of trade, and thus was invalid under Schwegmann Bros. v Calvert Distillers Corp., 341 US 384, 95 L Ed 1035, 71 S Ct 745, 44 Ohio Ops 395, 60 Ohio L Abs 81, 19 ALR2d 1119 (1951). We held that the Act was outside the purview of the Sherman Act because it contemplated "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." Id., at 109, 58 L Ed 2d 361, 99 S Ct 403. We also held that a state statute is not invalid under the Sherman Act merely because the statute will have an anticompetitive effect. Otherwise, if an adverse effect upon competition were enough to render a statute invalid under the Sherman Act, "the States' power to engage in economic regulation would be effectively destroyed." Id., at 111, 58 L Ed 2d 361, 99 S Ct 403 (quoting Exxon Corp. v Governor of Maryland, 437 US, at 133, 57 L Ed 2d 91, 98 S Ct 2207). In New Motor Vehicle Bd., we held that a state statute could stand in the face of a purported conflict with the Sherman Act.

In California Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc., 445 US 97, 63 L Ed 2d 233, 100 S Ct 937 (1980), we invalidated California's wine-pricing system in the face of a challenge under the Sherman Act. We first held that the price-setting program constituted resale price maintenance, which this Court has consistently held to be a "per se" violation of the Sherman Act. Id., at 102–103, 63 L Ed 2d 233, 100 S Ct 937. We then concluded that the program could not fit within the Parker doctrine. Although the restraint was imposed pursuant to a clearly articulated and affirmatively expressed state policy, the program was not actively supervised by the State itself. The State merely authorized and enforced price-fixing established by private parties, instead of establishing the prices itself or reviewing their reasonableness. In the absence of sufficient state supervision, we held that the pricing system was invalid under the Sherman Act. Id., at 105–106, 63 L Ed 2d 233, 100 S Ct 937.

Unlike the instant case, Parker, Midcal, and New Motor Vehicle Bd. involved challenges to a state statute. There was no suggestion that a State *violates* the Sherman Act when it enacts legislation not saved by the Parker doctrine from invalidation under the Sherman Act. Instead, the statute is simply unenforceable because it has been preempted by the Sherman Act. By contrast, the gist of the Court's opinion is that a municipality may actually violate the antitrust laws when it merely enacts an ordinance invalid under the Sherman Act, unless the ordinance implements an affirmatively expressed state policy.[1] Ac-

1. Most challenges to municipal ordinances undoubtedly will be made pursuant to § 1. One of the elements of a § 1 violation is proof of a contract, combination, or conspiracy. It may be argued that municipalities will not face liability under § 1, because it will be difficult to allege that the enactment of an ordinance was the product of such a contract, combination, or conspiracy. The ease with which the ordinance in the instant case has been labelled a "contract" will hardly give municipalities solace in this regard.

cording to the majority, a municipality may be liable under the Sherman Act for enacting anticompetitive legislation, unless it can show that it is acting simply as the "instrumentality" of the State.

Viewing the Parker doctrine in this manner will have troubling consequences for this Court and the lower courts who must now adapt antitrust principles to adjudicate Sherman Act challenges to local regulation of the economy. The majority suggests as much in footnote 20. Among the many problems to be encountered will be whether the "per se" rules of illegality apply to municipal defendants in the same manner as they are applied to private defendants. Another is the question of remedies. The Court understandably leaves open the question whether municipalities may be liable for treble damages for enacting anticompetitive ordinances which are not protected by the Parker doctrine.[2]

Most troubling, however, will be questions regarding the factors which may be examined by the Court pursuant to the Rule of Reason. In National Society of Professional Engineers v United States, 435 US 679, 695, 55 L Ed 2d 637, 98 S Ct 1355 (1978), we held that an anticompetitive restraint could not be defended on the basis of a private party's conclusion that competition posed a potential threat to public safety and the ethics of a particular profession. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." Id., at 696, 55 L Ed 2d 637, 98 S Ct 1355. Professional Engineers holds that the decision to replace competition with regulation is not within the competence of private entities. Instead, private entities may defend restraints only on the basis that the restraint is not unreasonable in its effect on competition or because its pro-competitive effects outweigh its anticompetitive effects. See Continental T.V., Inc. v G.T.E. Sylvania, Inc., 433 US 36, 53 L Ed 2d 568, 97 S Ct 2549 (1977).

Applying Professional Engineers to municipalities would mean that an ordinance could not be defended on the basis that its benefits to the community, in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects. A local government would be disabled from displacing competition with regulation. Thus, a municipality would violate the Sherman Act by enacting restrictive zoning ordinances, by requiring business and occupational licenses, and by granting exclusive franchises to utility services, even if the city determined that it would be in the best interests of its inhabitants to displace competition with regulation. Competition simply does not and cannot further the interests that lie behind most social welfare legislation. Although state or local enactments are not invalidated by the Sherman Act merely because they

2. It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages to compensate any person "injured in his business or property." Section 4 of the Clayton Act, 15 USC § 15 [15 USCS § 15], is mandatory: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained." See Lafayette v Louisiana Power & Light Co., 435 US 389, 442–443, 55 L Ed 2d 364, 98 S Ct 1123 (1978) (Blackmun, J., dissenting).

may have anticompetitive effects, Exxon Corp. v Governor of Maryland, 437 US, at 133, 57 L Ed 2d 91, 98 S Ct 2207, this Court has not hesitated to invalidate such statutes on the basis that such a program would violate the antitrust laws if engaged in by private parties. See California Liquor Dealers Ass'n v Midcal Aluminum, Inc., 445 US, at 102–103, 63 L Ed 2d 233, 100 S Ct 937 (resale price maintenance); Schwegmann Bros. v Calvert Corp., 341 US 384, 95 L Ed 1035, 71 S Ct 745, 44 Ohio Ops 395, 60 Ohio L Abs 81, 19 ALR2d 1119 (1951) (same). Cf. Parker v Brown, 317 US, at 350, 87 L Ed 315, 63 S Ct 307 (Court assumed the stabilization program would violate the Sherman Act if organized and effected by private persons). Unless the municipality could point to an affirmatively expressed state policy to displace competition in the given area sought to be regulated, the municipality would be held to violate the Sherman Act and the regulatory scheme would be rendered invalid. Surely, the Court does not seek to require a municipality to justify every ordinance it enacts in terms of its pro-competitive effects. If municipalities are permitted only to enact ordinances that are consistent with the pro-competitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed. See Exxon Corp. v Governor of Maryland, supra, at 133, 57 L Ed 2d 91, 98 S Ct 2207. This country's municipalities will be unable to experiment with innovative social programs. See New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932) (Brandeis, J., dissenting).

On the other hand, rejecting the rationale of Professional Engineers to accommodate the municipal defendant opens up a different sort of Pandora's Box. If the Rule of Reason were "modified" to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the Lochner era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected. Instead of "liberty of contract" and "substantive due process," the pro-competitive principles of the Sherman Act will be the governing standard by which the reasonableness of all local regulation will be determined.[3] Neither the Due Process Clause nor the Sherman Act authorizes federal courts to invalidate local regulation of the economy simply upon opining that the municipality has acted unwisely. The Sherman Act should not be deemed to authorize federal courts to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v Skrupa, 372 US 726, 730, 10 L Ed 2d 93, 83 S Ct 1028, 95 ALR2d 1347 (1963). The federal courts have not been appointed by the Sherman Act to sit as

3. During the Lochner era, this Court's interpretation of the Due Process Clause complemented its antitrust policies. This Court sought to compel competitive behavior on the part of private enterprise and generally forbade government interference with competitive forces in the market place. See Strong, The Economic Philosophy of Lochner: Emergence, Embarrassment and Emasculation, 15 Ariz L Rev 419, 435 (1973).

a "superlegislature to weigh the wisdom of legislation." Lincoln Federal Labor Union v Northwestern Iron & Metal Co., 335 US 525, 535, 93 L Ed 212, 69 S Ct 251, 6 ALR2d 473 (1949).

Before this Court leaps into the abyss and holds that municipalities may *violate* the Sherman Act by enacting economic and social legislation, it ought to think about the consequences of such a decision in terms of its effect both upon the very antitrust principles the Court desires to apply to local governments and on the role of the federal courts in examining the validity of local regulation of the economy.

Analyzing this problem as one of federal preemption rather than exemption will avoid these problems. We will not be confronted with the anomaly of holding a municipality liable for enacting anticompetitive ordinances.[4] The federal courts will not be required to engage in a standardless review of the reasonableness of local legislation. Rather, the question simply will be whether the ordinance enacted is preempted by the Sherman Act. I see no reason why a different rule of preemption should be applied to testing the validity of municipal ordinances than the standard we presently apply in assessing state statutes. I see no reason why a municipal ordinance should not be upheld if it satisfies the Midcal criteria: the ordinance survives if it is enacted pursuant to an affirmative policy on the part of the city to restrain competition and if the city actively supervises and implements this policy.[5] As with the case of the State, I agree that a city may not simply authorize private parties to engage in activity that would violate the Sherman Act. See Parker v Brown, 317 US, at 351, 87 L Ed 315, 63 S Ct 307. As in the case of a State, a municipality may not become "a participant in a private agreement or combination by others for restraint of trade." Id., at 351–352, 87 L Ed 315, 63 S Ct 307.

Apart from misconstruing the Parker doctrine as a matter of "exemption" rather than preemption, the majority comes to the startling conclusion that our Federalism is in no way implicated when a municipal ordinance is invalidated by the Sherman Act. I see no principled basis to conclude, as does the Court, that municipal ordinances are more susceptible to invalidation under the Sherman Act than are state statutes. The majority concludes that since municipalities are not States, and hence are not "sovereigns", our notions of federalism are not implicated when federal law is applied to invalidate otherwise constitutionally valid municipal legislation. I find

4. Since a municipality does not violate the the antitrust laws when it enacts legislation preempted by the Sherman Act, there will be no problems with the remedy. Preempted state or local legislation is simply invalid and unenforceable.

5. The Midcal standards are not applied until it is either determined or assumed that the regulatory program would violate the Sherman Act if it were conceived and operated by private persons. See Parker v Brown, 317 US, at 350, 87 L Ed 315, 63 S Ct 307; California Liquor Dealers Ass'n v Midcal Aluminum, 445 US, at 102–103, 63 L Ed 2d 233, 100 S Ct 937. A statute is not preempted simply because some conduct contemplated by the statute might violate the antitrust laws. See Seagram & Sons v Hostetter, 384 US 35, 45–46, 16 L Ed 2d 336, 86 S Ct 1254 (1966). Conversely, reliance on a state statute does not insulate a private party from liability under the antitrust laws unless the statute satisfies the Midcal criteria.

this reasoning remarkable indeed. Our notions of federalism are implicated when it is contended that a municipal ordinance is preempted by a federal statute. This Court has made no such distinction between States and their subdivisions with regard to the preemptive effects of federal law. The standards applied by this Court are the same regardless of whether the challenged enactment is that of a State or one of its political subdivisions. See, e.g., City of Burbank v Lockheed Air Terminal, Inc., 411 US 624, 36 L Ed 2d 547, 93 S Ct 1854 (1973); Huron Portland Cement Co. v Detroit, 362 US 440, 4 L Ed 2d 852, 80 S Ct 813, 78 ALR2d 1294 (1960). I suspect that the Court has not intended to so dramatically alter established principles of Supremacy Clause analysis. Yet, this is precisely what it appears to have done by holding that a municipality may invoke the Parker doctrine only to the same extent as can a private litigant. Since the Parker doctrine is a matter of federal preemption under the Supremacy Clause, it should apply in challenges to municipal regulation in similar fashion as it applies in a challenge to a state regulatory enactment. The distinction between cities and States created by the majority has no principled basis to support it if the issue is properly framed in terms of preemption rather than exemption.

As with the States, the Parker doctrine should be employed to determine whether local legislation has been preempted by the Sherman Act. Like the State, a municipality should not be haled into federal court in order to justify its decision that competition should be replaced with regulation. The Parker doctrine correctly holds that the federal interest in protecting and fostering competition is not infringed so long as the state or local regulation is so structured to ensure that it is truly the government, and not the regulated private entities, which is replacing competition with regulation.

II

By treating the municipal defendant as no different from the private litigant attempting to invoke the Parker doctrine, the Court's decision today will radically alter the relationship between the States and their political subdivisions. Municipalities will no longer be able to regulate the local economy without the imprimatur of a clearly expressed state policy to displace competition.[6] The decision today effectively destroys the "home rule" movement in this country, through which local governments have obtained, not without persistent state opposition, a limited autonomy over matters of local concern.[7] The municipalities that stand most to lose by the decision today are those with the most autonomy. Where the State is totally disabled from enacting legislation dealing with matters of local concern, the municipality will be defenseless from challenges to its

6. The Court understandably avoids determining whether local ordinances must satisfy the "active state supervision" prong of the Midcal test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.

7. Seeing this opportunity to recapture the power it has lost over local affairs, the State of Colorado, joined by 22 other States, has supported petitioner as amicus curiae. It is curious, indeed, that these States now seek to use the Supremacy Clause as a sword, when they so often must defend their own enactments from its invalidating effects.

regulation of the local economy. In such a case, the State is disabled from articulating a policy to displace competition with regulation. Nothing short of altering the relationship between the municipality and the State will enable the local government to legislate on matters important to its inhabitants. In order to defend itself from Sherman Act attacks, the home rule municipality will have to cede its authority back to the State. It is unfortunate enough that the Court today holds that our Federalism is not implicated when municipal legislation is invalidated by a federal statute. It is nothing less than a novel and egregious error when this Court uses the Sherman Act to regulate the relationship between the States and their political subdivisions.

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APPLICATION OF THE ANTITRUST LAWS TO LOCAL GOVERNMENTS

Maryland Association of Counties

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APPLICATION OF THE ANTITRUST LAWS TO LOCAL GOVERNMENTS*

Introduction

Within the last four years, the United States Supreme Court has ruled that local governments are not automatically exempt from the antitrust laws under the state action doctrine because of their status as local governments. Community Communications Co., Inc. v. City of Boulder, ___U.S.___, 70 L.Ed 2d 810 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). While these two cases clearly state that the antitrust laws are applicable to local governments, many questions are left unresolved. This paper is designed to identify some of the more important questions regarding the application of the antitrust laws to local governments, and to review recent case law applying the antitrust laws to local governments. This paper does not purport to describe every antitrust issue regarding local government, nor does it purport to answer every question raised.

The State Action Doctrine

The Boulder and Lafayette cases limited the application

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of the state action doctrine to exempt local governments from the antitrust laws. However, it by no means ruled that the state action doctrine is never applicable to local governments. To properly understand the application of the state action doctrine to local governments, a review of its development is necessary.

Development of the State Action Doctrine

The state action doctrine was originally enunciated by the Supreme Court in Parker v. Brown, 317 U.S. 341 (1943). That case made clear that the state action doctrine was based on the federal constitution and principles of federalism. The Court stated:

> 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.

Parker v. Brown, supra, 317 U.S. at 351. In applying this principle to the federal antitrust laws, the Court reviewed the Sherman Act, 15 U.S.C., §1 et. seq., and found that, ". . . nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from

activities directed by its legislature." Id. at 350-351.

Parker v. Brown was originally construed broadly by the lower courts. With regard to local governments, the lower courts often equated local government conduct with state action and therefore held local government entities exempt from the antitrust laws because of their status as governmental entities. E.g., E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir.), cert. denied, 358 U.S. 947 (1966); Murdock v. City of Jacksonville, 361 F. Supp. 1083 (M.D. Fla. 1973).

The Narrowing of the State Action Doctrine

Beginning in the mid-1970's, the Supreme Court rendered a series of decisions which narrowed the application of the state action doctrine. Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (minimum fee schedule for attorneys enforced by Virginia State Bar did not qualify for state action immunity because of inadequate state involvement); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (electric utility's free light bulb program did not qualify for state action immunity despite approval by Michigan Public Service Commission because of absence of a state policy to displace competition for the sale of light bulbs); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (ban on lawyer advertising qualifies for state action immunity because it was mandated and actively supervised by

the Arizona Supreme Court); New Motor Vehicles Board v. Orrin W. Fox Co., 439 U.S. 96 (1978) (regulation of location of new car dealers qualifies for state action immunity because it is required by statute and actively enforced by a state board).

The development of the state action doctrine in these cases was finally crystalized into a two part test enunciated by the Supreme Court in California Retail Liquors Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

Id. at 105. (citation omitted)

In Midcal, the Court found that the first part of the test was satisfied by California's statute for wine pricing requiring the filing of price schedules and forbidding sales at prices other than those on the price schedule. However, the program failed the second test because of the lack of state supervision over the prices.

Application of the State Action Doctrine to Local Government

The Supreme Court first considered the application of the state action doctrine to local governments in City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). In that case,

the court clearly rejected the concept that local governments are exempt from antitrust scrutiny by virtue of their status as governmental entities. "Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them." 435 U.S. at 412. Rather, a local government may receive antitrust immunity only when it pursues state policy.

> We therefore conclude that the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.

435 U.S. at 413.

In Community Communications Co. v. City of Boulder, ____ U.S. ____, 70 L. Ed. 2d 810 (1982), the Court reemphasized that the state action doctrine is triggered only by state policy, not the policy of a local government.

> It was expressly recognized by the plurality opinion in City of Lafayette that municipalities "are not themselves sovereign," and that accordingly they could partake of the Parker exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy.

70 L. Ed. at 821. (Citations omitted). The Court expressly held that Boulder's status as a home rule city did not enable it to act as the state in local matters and trigger the state action doctrine through its own policies.

In both Lafayette and Boulder, the cities' attempts to place themselves within the state action immunity doctrine failed because of their failure to show that they were acting in furtherance of a clearly articulated and affirmatively expressed state policy.

The Standard of Clearly Articulated and Affirmatively Expressed State Policy

As set forth above, the Supreme Court set forth a two part test for the application of the state action doctrine to private activity in Midcal. The first part of the test is that ". . . the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." 445 U.S. at 105. In Lafayette and Boulder, the Supreme Court applied the same test to activities of local governments. Despite the use of the same words in describing this test as applied to private activity and the activity of local governments, a close reading of Boulder and Lafayette and of opinions by lower courts suggests that the standard applied to the activities of local governments may be less stringent than the standard as applied to private activities.

In Lafayette, the Supreme Court suggested that state authorization for a local government to act in a particular way may be a sufficient expression of state policy to bring it within the state action doctrine. 435 U.S. at 14. This contrasts with Parker v. Brown, supra, where it is stated that, ". . . a state does not

give the immunity to those who violate the Sherman Act by authorizing them to violate it . . ." 317 U.S. at 351.

In Lafayette, the Court described the degree of specificity needed in the state's expression of a policy to displace competition as follows:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit. . . . We agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

435 U.S. at 415 (citations omitted).

Several lower courts have read this language as imposing a lower standard for local governments to qualify for state action immunity than for private entities.

> City of Lafayette does announce a standard of state action immunity that protects activities "contemplated" by the state legislature, but confers this immunity only on state subdivisions. That a municipality should have to make a smaller showing than a private party is only natural, for the municipality is already a limited sovereign, exercising, to the extent conferred by the state, an array of governmental features and powers.

United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471, 484 (N.D. Ga. 1979); quoted with approval, Highfield Water

Co. v. Public Service Commission, 488 F. Supp. 1176 (D. Md. 1980); accord, Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 1026 (S.D. Tx. 1981).

It is clear from Boulder that in order to qualify for antitrust immunity under the state action doctrine, a local government must act pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. However, Lafayette states that a local government need not point to express authorization from the state for the specific activity in which it engages. The local government need only demonstrate that its specific activities were contemplated by the legislature.

At this point in the development of the law, it is not clear how the Boulder and Lafayette statements interact. However, it would appear that the Supreme Court has left some room for local governments to adapt state policies displacing competition to their local needs.

The State Supervision Requirement

The second part of the two part test enunciated in Midcal for application of the state action doctrine is that the policy must be actively supervised by the state itself. 445 U.S. at 105. However, whether a local government must be supervised by

the state in order to qualify for state action immunity remains an open question. In Boulder, the Supreme Court expressly reserved the question of whether state supervision over local governments is necessary. ". . .we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in Midcal." 70 L. Ed. 2d at 819 n. 14.

In both Lafayette and Boulder, the Supreme Court has used language which could be read in support of the proposition that a state could delegate the supervision necessary for its policy to displace the antitrust laws to local governments as the state's instrumentality. ". . . a State may frequently choose to effect its policies through the instrumentality of its cities and towns." Boulder, supra, 70 L. Ed. 2d at 819. "The Parker doctrine . . . preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws . . ." Lafayette, supra, 435 U.S. at 415.

One lower court has expressly found the state supervision test to have been met by the supervision of a city.

> . . . we are satisfied that the action of Kansas City in enforcing it ordinance through its Director of Health, Physicians Advisory Board, and Medical Advisor constitutes active state supervision since its regulation of ambulance service is exercised under the authorization and direction of state policy.

Gold Cross Ambulance v. City of Kansas City, 1982-2 Trade Cases, ¶64,758 at 71,678 (W.D. Mo. 1982).

However, another court has expressly rejected this position.

> Although the defendant argues that such active supervision is provided by its own Board of Directors, the defendant's Board of Directors is not a state agency, but a political subdivision of the state. Therefore, supervision of the defendant by its own Board of Directors cannot constitute supervision by the state.

Grason Electric Co. v. Sacramento Municipal Utility District, 526 F. Supp. 276, 280 (E.D. Cal. 1981). Moreover, other courts have identified active state supervision as a requirement for local governments to qualify for state action immunity. Corey v. Look, 461 F.2d 32, 37 (1st Cir. 1981); Guthrie v. Genesee County, 494 F. Supp. 950, 956 (W.D. N.Y. 1980).

At this point, it is unclear whether local governments must meet the state supervision test in order to qualify for state action immunity. It is also unclear whether supervision of a state policy by a local government would satisfy the test.

The Governmental - Proprietary Distinction

The opinion in Lafayette referred to thus far was a plurality opinion only. Chief Justice Burger concurred in the

judgment, but upon different reasoning as set forth in a separate opinion. In that opinion, the Chief Justice saw the issue in Lafayette as, ". . . whether the Sherman Act reaches the proprietary enterprises of municipalities." 435 U.S. at 422. The Chief Justice concluded that it does. The clear implication in the Chief Justice's opinion was that in his view, the antitrust laws do not reach the governmental activities of municipalities.

In Boulder, the majority made reference to the Chief Justice's opinion in Lafayette only in a footnote, 70 L.Ed. 2d at 821, n. 18, but did not address this issue. However, the activities of Boulder which were found not to be exempt from the antitrust laws were clearly governmental. Therefore, the Supreme Court has rejected a rule that governmental activities of local governments are automatically exempt from the antitrust laws.

The lower courts have generally not made the question of whether the activities of the local government under consideration are governmental or proprietary essential to their analysis of the availability of the state action doctrine. One court has expressly rejected the Chief Justice's distinction between governmental and proprietary activities. Highfield Water Co. v. Public Service Commission, supra, 488 F. Supp. at 1189. Other courts have characterized a local government's activities to buttress a conclusion regarding the applicability of the state action doctrine reached through analysis of whether the local government is acting pursuant to state policy. E.g., Pueblo Aircraft Service v. City

of Pueblo, 1982-1 Trade Cases ¶64,668 (10th Cir. 1982); Cedar-Riverside Associates, Inc. v. United States, 459 F. Supp. 1290, 1298-1299 (D. Minn. 1978); aff'd on other grounds, 606 F.2d 254 (8th Cir. 1979).

Thus, although the role of the distinction between governmental and proprietary activities of local governments in state action analysis is not yet settled, it would appear that it is not central to the question of whether antitrust immunity is available to local governments. However, the courts may look to the nature of the local government's activities as a supplement to the analysis of whether the local government is acting pursuant to a state policy to displace competition.

Application of Substantive Antitrust Law to Local Governments

Another question expressly reserved in both Lafayette and Boulder is whether the substantive standards for determining liability under the antitrust laws as have traditionally been applied to private parties will be the same when applied to local governments. Lafayette, 435 U.S. at 417 n. 48; Boulder 70 L. Ed. 2d at 822 n. 20. However, it is unlikely that the substantive standards of the antitrust laws as applied to local government will be materially different than those standards applied to private parties.

Once before, the Supreme Court has reserved the question of whether substantive antitrust law as developed for general business activities would be applicable to a particular type of defendant. Goldfarb v. Virginia State Bar, supra, 421 U.S. at 787-788, n. 17 (application of the antitrust laws to "learned professions"). In subsequent cases involving the professions, the Supreme Court has applied substantive antitrust law in a manner virtually indistinguishable from application of the antitrust laws to regular business activity.

> Contrary to its name, the rule [of reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978). Most recently in this area, the Supreme Court has applied the per se rule prohibiting price fixing agreements to agreements among doctors to set maximum prices. Arizona v. Maricopa County Medical Society, ____ U.S. ____ 73 L. Ed. 2d 48 (1982).

Despite reservation of the question of whether usual substantive antitrust law standards are applicable to local governments by the Supreme Court, it is unlikely that application of the antitrust laws to local governments will be materially different from the application of those laws to usual business activities.

The Availability of an Award of Damages Against Local Governments

The Supreme Court has also reserved the question of remedies appropriate against local governments for violations of the antitrust laws. Lafayette, 435 U.S. at 401-402; Boulder 70 L. Ed. 2d at 822 n. 20. Generally, under §4 of the Clayton Act, a prevailing plaintiff in an antitrust case ". . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys fee." 15 U.S.C. §15.

The dissenters in Lafayette were critical of the reservation of this question by the plurality opinion.

> The court indicates that the remedy of treble damages might not be "appropriate" in antitrust actions against a municipality. But the language of §4 of the Clayton Act is mandatory on its face; . . .And the legislative history . . . demonstrates that Congress has understood the treble-damages provision to be mandatory and has refused to change it. The Court does not say on what basis a district court could possibly disregard this clear statutory command.

Lafayette, 435 U.S. at 440, n. 30 (citations omitted).

One district court has expressly rejected the position of a state subdivision that it ought not to be required to pay treble damages, precisely because of the mandatory language in §4 of the Clayton Act. Grason Electric Company v. Sacramento Municipal Utility District, supra, 526 F. Supp. at 281-282.

Despite reservation of the question by the Supreme Court in both Boulder and Lafayette, it is likely that treble damages, costs, and attorney's fees will be awarded against local governments if they are found to have violated the antitrust laws.

Application of the State Action Doctrine to Specific Local Government Activities

Local government defendants have asserted the state action doctrine in a number of cases. In some cases, the state action doctrine was found to be applicable, but in others it was found to be inapplicable. Some representative cases are listed below.

A. Public Utility Services

1. Electricity and gas

City of Lafayette v. Louisiana Power & Light Company, 435 U.S. 389 (1978) (state action doctrine inapplicable to city's conduct in operating its electric utility company because of lack of state policy).

Grason Electric Company v. Sacramento Municipal Utility District, 526 F. Supp. 276 (E.D. Cal. 1981) (state action doctrine inapplicable to utility district's activities because of lack of state policy or state supervision).

City of Mishawaka v. American Electric Power Company, Inc. 465 F. Supp. 1320 (N.D. Ind. 1979) aff'd in part and rev'd in part on other grounds 616 F.2d 976 (7th Cir. 1980) cert. den. 449 U.S. 1096 (1981) (state action doctrine applicable to city's annexation of territory adjacent to its boundaries for its utility services because it is authorized by Indiana statute).

2. Water

Shrader v. Horton, 471 F. Supp. 1326 (W.D. Va. 1979) aff'd on other grounds, 626 F. 2d 1163 (4th Cir. 1980) (state action doctrine applicable to county ordinance requiring connection to public water system, because mandatory connection was authorized by state statute).

Highfield Water Company v. Public Service Commission, 488 F. Supp. 1176 (D. Md. 1980) (state action doctrine applicable to state takeover of private water system because the takeover was contemplated by the Maryland legislature).

Community Builders, Inc. v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981) (state action doctrine applicable to city's division of territory because it was authorized by Arizona statute).

3. Trash Collection

Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981) vacated and remanded 71 L. Ed. 2d 640 (1982) (state action doctrine applicable to city ordinance establishing monopoly over local garbage collection and waste disposal because it is a customary area of local concern long reserved to state and local governments. This decision was vacated and remanded by the Supreme Court for reconsideration in light of Boulder).

B. Public Health Services

City of Fairfax v. Fairfax Hospital Association, 562 F.2d 280 (4th Cir. 1973) vacated and remanded, 435 U.S. 992, vacated and remanded, 598 F.2d 835 (4th Cir. 1978) (district court's finding of applicability of state action doctrine to county acquisition and lease of hospital reversed because it was done pursuant to county rather than state policy and because of lack of state compulsion. This decision was remanded by the Supreme Court to the Fourth Circuit and by the Fourth Circuit to the District Court for reconsideration in light of Lafayette).

Gold Cross Ambulance v. City of Kansas City, 1982-2 Trade Cases, ¶64,758 (W.D. Mo. 1982) (In one of the few cases decided after Boulder, the state action doctrine was found to be applicable to Kansas City policy allowing only one ambulance company to operate in the City because the City's activity was authorized by state policy regulating ambulances and there is active supervision both by the state and by the city).

Health Care Equalization Committee of Iowa Chiropractic Society v. Iowa Medical Society, 501 F. Supp. 970 (S.D. Iowa 1980) (state action doctrine found inapplicable to alleged participation in boycott by State Commissioner of Public Health because, if proven, the allegations would support a finding that the Commissioner acted outside of his statutory mandate).

C. Transportation Services

1. Airports

Pueblo Aircraft Service, Inc. v. City of Pueblo, 1982-1 Trade Cases, ¶64,668 (10th Cir. 1982) (state action doctrine found applicable to city's dealings with fixed based operator in operation of municipal airport because of state statute authorizing cities to acquire and operate airports and because operation of the airport is a governmental function).

Pinehurst Airlines, Inc. v. Resort Air Services, Inc., 476 F. Supp. 543 (M.D. N.C. 1979) (state action doctrine held to be inapplicable to county board and county airport because of lack of state policy).

Guthrie v. Genessee County, 494 F. Supp. 950 (W.D. N.Y. 1980) (state action doctrine found inapplicable to county in its alleged conspiracy to eliminate plaintiff as competitor because state statute did not contemplate anticompetitive conduct).

2. Mass Transit

Crocker v. Padnos, 483 F. Supp. 229 (D. Mass. 1980), (state action doctrine applicable to city, its mayor and the city transit authority regarding allegations they conspired

to drive plaintiff transit company out of relevant market because they had acted pursuant to state policy displacing competition).

3. Shipping

Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. 711 (D. D.C. 1979) (state action doctrine applicable to PRMSA, a state agency, which monopolized Puerto Rican shipping pursuant to state statute).

Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority, 451 F. Supp. 157 (S.D. N.Y. 1978) (state action doctrine inapplicable to PRMSA in its leasing of a ship to others for foreign trade unrelated to Puerto Rico because it was outside the policy of the state legislation).

E. Parking Lot Operations

Corey v. Look, 641 F.2d 32 (1st Cir. 1981) (state action doctrine inapplicable to city's restraints in parking lot operations because of lack of state policy).

F. Cable Television Regulation

Community Communications Company v. City of Boulder, ____ U.S. ____, 70 L. Ed. 2d 810 (1982) (state action doctrine inapplicable to home rule city's moratorium on expansion of cable television company because of lack of state policy. No automatic state action exemption for home rule cities).

Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991 (S.D. Tex. 1981) (state action doctrine inapplicable to city's role in conspiracy regarding cable television because of lack of state policy displacing competition. However, defendants were granted judgment n.o.v. because of lack of evidence of causation).

G. Recreational Facilities

Kurek v. Pleasure Driveway and Park District of Peoria, Illinois, 557 F.2d 580 (7th Cir. 1977) vacated and remanded, 435 U.S. 992 (1977) original judgment reinstated 583 F.2d

378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1978) (state action doctrine inapplicable to municipal park district's alleged attempt to coerce golf pro shop concessionaires to fix prices because it was not done pursuant to state policy displacing competition).

Duke & Co. v. Foerster, 521 F.2d 1277 (3rd Cir. 1975) (state action doctrine inapplicable to actions of municipal corporation operating Pittsburgh Civic Arena in boycotting beverage manufacturer because of lack of state policy displacing competition).

Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (state action doctrine inapplicable to D.C. Armory Board's exclusive lease of RFK Stadium to the Washington Redskins because of lack of policy displacing competition).

H. Land Use Regulation

1. Shopping Centers

Mason City Center Associates v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979) (state action doctrine inapplicable to agreement between the City, the City Council, and private developers to prevent construction of a regional shopping center because anticompetitive agreements are not contemplated by state zoning statute. Subsequently, the jury's finding that there was no anticompetitive agreement was affirmed, 671 F.2d 1146 (8th Cir. 1982).

Miracle Mile Associates v. City of Rochester, 1979-2 Trade Case, ¶62,735 (W.D. N.Y. 1979) aff'd on other grounds, 617 F.2d 18 (2d Cir. 1980) (state action doctrine applicable to city's attempt to prevent or delay construction of regional shopping center because its actions were taken pursuant to state policy displacing competition with regulation).

2. Zoning

Stauffer v. Town of Grand Lake, 1981-1 Trade Cases, ¶64,029 (D. Col. 1980), (state action doctrine found inapplicable despite the satisfaction of both of the Midcal tests because zoning commissioners acted to

promote their own competitive position as landowners and therefore exceeded the scope of their authority. However, in a subsequent unpublished opinion dated December 15, 1980, the Commissioners are found to enjoy quasi-judicial immunity).

Whitworth v. Perkins, 559 F.2d 378 (5th Cir. 1977) (district court's finding of state action exemption vacated and remanded because of inadequate analysis of state action doctrine).

Nelson v. Utah County, 1978-1 Trade Cases ¶62,128 (D. Utah 1977) (state action doctrine inapplicable to county's adoption of zoning ordinance because its activities were not compelled by the state).

3. Urban Redevelopment

Schiessle v. Stephens, 525 F. Supp. 763 (N.D. Ill. 1981) (state action doctrine inapplicable to village trustees' alleged adoption of sham redevelopment plan because a sham plan was not authorized by state statute nor was the plan actively supervised by the state).

Cedar-Riverside Associates, Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), aff'd on other grounds, 606 F.2d 254 (8th Cir. 1979) (state action doctrine inapplicable to alleged conspiracy of the city and its redevelopment authority because state urban renewal statute did not authorize municipalities to conspire with private parties in restraint of trade).

I. Prisons

Jordan v. Mills, 473 F. Supp. 13 (E.D. Mich. 1979) (state action doctrine applicable to state prison officials' operation of prison store because operation of prison is a traditional state governmental function).

Jackson v. Taylor, No. 82-0905 (D. D.C. May 24, 1982) (state action doctrine applicable to D.C. prison officials' alleged conspiracy to fix the price of local telephone calls from the prison because operation of prison is a traditional state governmental function).