CASE NOTES

ANTITRUST—A CITY'S ZONING AND RELATED ACTIONS TO ASSIST AND PROTECT THE PUBLIC INVESTMENT IN URBAN RENEWAL PROJECTS IS SHIELDED FROM ANTITRUST ATTACK AS THE REASONABLE AND NECESSARY CONSEQUENCE OF THE IOWA URBAN RENEWAL LAW.—*Scott v. City of Sioux City* (8th Cir. 1984).*

In 1957, the Iowa legislature passed the Urban Renewal Law,[1] a comprehensive statute designed to arrest the looming physical decay of Iowa urban areas and its attendant social problems.[2] The statute grants very broad powers to local governments to utilize both public and private funds and other resources in an effort to plan, finance, and revitalize the municipality as a unit.[3] The city of Sioux City, Iowa, beginning in the mid-1960's,

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* Editor's note: This casenote was in its final stages of printing when the United States Supreme Court decided the case of *Town of Hallie v. City of Eau Claire*, 53 U.S.L.W. 4418 (U.S. March 27, 1985) (No. 82-1832). As the author of this case note foresaw, the Supreme Court, in *Town of Hallie*, took the opportunity to grant immunity to municipalities even when acting in an anticompetitive manner if the acts are authorized by state law. The Court held that such acts need not be compelled or actively supervised by the state. At the same time, the Court denied certiorari in *Scott v. City of Sioux City* as well as the several other municipal antitrust cases which were pending on its docket. *See Scott v. City of Sioux City*, 53 U.S.L.W. 3698 (U.S. April 2, 1985) (No. 84-360); *Gold Cross Ambulance Co., Inc. v. City of Kansas City*, 53 U.S.L.W. 3698 (U.S. April 2, 1985) (No. 83-138); *Central Iowa Refuse Systems, Inc. v. Des Moines Metro. Area Solid Waste Agency*, 53 U.S.L.W. 3697 (U.S. April 2, 1985) (No. 83-825); *Golden State Transit Corp. v. City of Los Angeles*, 53 U.S.L.W. 3697 (U.S. April 2, 1985) (No. 84-378).

1. *See* Scott v. City of Sioux City, 736 F.2d 1207, 1208 (8th Cir. 1984). *See* IOWA CODE ch. 403 (1983).

2. *See* Scott v. City of Sioux City, 736 F.2d at 1208. *See also* IOWA CODE § 403.2 (1983). Section 403.2 sets forth the declaration of policy for the chapter. *See id.* Provisions constituting all but one section of the Iowa Urban Renewal Law were originally enacted by the 1957 Iowa Acts. 1957 Iowa Acts ch. 197, §§ 1-17, 19. In 1969, an additional provision was appended to the law to permit municipalities to channel incremental increases in taxation realized from urban renewal project efforts into a fund which could be pledged for the payment of municipal obligations incurred for the project. *See* IOWA CODE § 403.19 (1983) (enacted by 1969 Iowa Acts ch. 237, § 2). The remainder of the chapter has been amended since 1957, but the provisions critical to the *Scott* case remain intact. For a general discussion of the approach to downtown business district crises, see Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District*, 55 U. COLO. L. REV. 21, 26-27 (1983) (addressing Sioux City experience).

3. *See* Scott v. City of Sioux City, 736 F.2d at 1212. The statute includes two very broad

launched a methodical program under the Urban Renewal Law to redevelop its flagging downtown business district by improving city facilities and services and attracting private business to the area.[4] As a part of this program, Sioux City assembled real estate and took public bids for the redevelopment of a portion of the downtown area pursuant to chapter 403 of the Iowa Code and entered into a redevelopment agreement with Metro Center, Inc.[5] In the meantime, the plaintiffs, who owned land on the outskirts of the city, were hopeful that plans announced for a possible regional shopping mall adjoining their property would materialize.[6] As it became apparent that only one such retail center could survive in a market of Sioux City's size,[7] the city council passed an interim development ordinance.[8] The ordinance tempora-

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grants of power. *See id.* Section 403.6 of the Iowa Code states that "[e]very municipality shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Chapter." IOWA CODE § 403.6 (1983). Section 403.12 gives public bodies the power to do "any and all things necessary to aid or cooperate in the planning or carrying out of an urban renewal project." IOWA CODE § 403.12 (1983).

4. *See* Scott v. City of Sioux City, 736 F.2d at 1208-09. During this time, the city applied for federal funds to formulate a renewal plan covering 215 acres of the city and to develop a plan for a three-block clearance project known as the Central Business District-East (CBD-E). *Id.* A portion of this area was redeveloped by private parties and the city issued bonds for street, sewer, and parking improvements. *Id.* at 1209. An adjacent area known as Central Business District-West (CBD-W) was also slated for redevelopment with the help of federal funds. *Id.* The redevelopment agreement entered into with Metro Center, Inc. covered property in CBD-W. *Id.*

5. *See id.* The redevelopment contract provided that the city would pursue federal grants for the area, assemble and clear real estate, and provide street lights, sidewalks and other city facilities. *Id.* Metro contracted to purchase real estate in the area, finance and build commercial facilities pursuant to its proposal and procure tenants. *Id.*

6. *See id.* After protracted litigation which was settled prior to trial, General Growth Industries, Inc. altered the location of the proposed mall (presently known as Southern Hills Mall) to a site which was previously zoned to permit a regional shopping center. Reply Brief for Appellants at 2, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984).

7. Brief for Appellees at 11, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984).

8. *See* Scott v. City of Sioux City, 736 F.2d at 1209. *See also* SIOUX CITY, IA., MUNICIPAL CODE ch. 20.05 (1969) (ordinance amending title 20 passed July 22, 1974). Portions of the text of the Interim Development Ordinance are illustrative of its relationship to the goals of urban renewal:

> *Section 20.05.020 Finding of Fact and Legislative Intent.*
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> (a) The City Council makes the following findings of fact:
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> (vii) That it is in the public interest to strengthen and expand and intensify existing areas of commercial development and to prevent further blight and deterioration in furtherance of the established goals and objectives of past and present city councils and various representative and advisory bodies as expressed in council resolutions and in public hearings; to prevent underutilization of existing commercial areas and the considerable public investment in place to serve said areas with necessary basic support services such as utilities, adequate parking, safe and convenient public transportation, streets and highways; to preserve and protect extensive urban re-

rily suspended development in certain critical areas, including the area where the plaintiffs' land was located, to allow the Sioux City planners and their consultants time to determine the best course for the planned expansion.[9] A permanent zoning ordinance enacted in 1976[10] was designed to insure the survival of the downtown business district and did not permit the plaintiffs' land to be used for a regional shopping center or related commercial uses.[11]

In 1979, the plaintiffs brought suit in federal district court challenging Sioux City's zoning actions and the redevelopment contract with the co-defendant Metro Center, Inc.[12] The plaintiffs alleged that the city, through its council members, had conspired with its redeveloper to violate the federal and state antitrust laws[13] in an attempt to block outlying development.[14] The plaintiffs' complaint was later amended to add constitutional claims brought under 42 U.S.C. § 1983[15] alleging violations of equal protection and substantive and procedural due process, and further claiming that the city's actions were equivalent to a taking without just compensation.[16] The damages sought potentially totaled fifteen million dollars, after trebling under the antitrust laws.[17] The municipal defendants asserted state action immu-

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> newal efforts, involving massive public investment already underway, and the reliance upon these investments by the private sector.

See id.

9. *See* Scott v. City of Sioux City, 736 F.2d at 1209. Throughout the course of the planning and development of the Central Business District, Sioux City sought the input of community leaders as well as the advice of professional consultants trained in such fields as traffic and parking design and market impact analysis. *See* Brief for Appellees at 5 nn.1 & 7, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984). One of these studies, prepared by Area Research Studies, a Division of National Area Development Associates, Inc., Chicago, Illinois, strongly recommended primary commitment of resources to the Central Business District. *Id.* at 7.

10. *See id.* at 5. *See also* SIOUX CITY, IA., MUNICIPAL CODE ch. 25 (1969) (ordinance making final amendments passed August 2, 1976).

11. Scott v. City of Sioux City, 736 F.2d at 1209-10.

12. *See id.* at 1210. Metro Center, Inc., a privately held corporation, was headed by co-defendant Howard Weiner who had been a member of the Sioux City Council during 1973 and had assumed a position at Metro shortly after losing a re-election bid. Brief for Appellants at 4, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984). Metro later dissolved and was not a party to the appeal. Scott v. City of Sioux City, 736 F.2d at 1209 n.1.

13. The antitrust statutes serving as the basis for the challenge were the Sherman Act, 15 U.S.C. §§ 1-2 and the Iowa Competition Law, chapter 553 of the Iowa Code. Scott v. City of Sioux City, 736 F.2d at 1210. In their appeal to the Eighth Circuit the appellants did not challenge the lower court's dismissal of the claim brought under the state statute, choosing to confront only the state action question. *Id.* at 1210 n.2.

14. *See id.* at 1210.

15. *See id.*

16. *Id.* at 1216.

17. Plaintiffs' Complaint, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984) (filed January 19, 1979). The recovery available in civil actions under title XV is set forth generally in the Clayton Act of 1914: the successful plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1982).

nity in defense of their conduct, arguing that the state policy, as expressed through the Urban Renewal Law, was a clear articulation and affirmative expression of the state's intent to permit the city to take the actions that it did.[18] After two previous denials of the defendants' motions for summary judgment,[19] Judge Donald E. O'Brien granted the defendants' motion on all claims in light of the Eighth Circuit's then-recent decision in *Gold Cross Ambulance & Transfer v. City of Kansas City*.[20] The plaintiffs appealed, arguing that even if the state action defense were available to Sioux City via the Urban Renewal Law, the actions of the city's officials and its redeveloper had exceeded the bounds of the conduct intended to be protected.[21] The Eighth Circuit Court of Appeals *held*, affirmed.[22] The Iowa Urban Renewal Law contemplated that the city enter into a cooperative public and private business effort to accomplish urban renewal.[23] Sioux City's deliberate actions in zoning to protect a significant urban renewal investment from competition were shielded from the application of the antitrust laws by the principle of state action immunity and did not amount to constitutional violations.[24] Active state supervision was not required because the actions complained of involved the traditional exercise of local legislative power.[25] *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir.), *petition for cert. filed*, 53 U.S.L.W. 3189 (U.S. Sept. 5, 1984) (No. 84-360).

The progenitor of the doctrine of state action immunity is the United States Supreme Court decision of *Parker v. Brown*.[26] In *Parker*, the Court

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Section 553.12(3) of the Iowa Code permits the recovery of double damages. IOWA CODE § 553.12(3) (1983). This statute has now been amended to exempt municipalities when acting with state authorization. *See infra* note 102 and accompanying text.

18. *See* Scott v. City of Sioux City, 736 F.2d at 1210.

19. *See id.* The city's initial motion for summary judgment was rejected in 1982 when the district court, relying upon *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733 (8th Cir.), *cert. denied*, 103 S. Ct. 2122 (1983), found the state action immunity defense inapplicable. Scott v. City of Sioux City, 736 F.2d at 1210. A renewed motion for summary judgment, in which the municipal defendants asserted the Iowa Urban Renewal Law as a basis for the state action exemption, was filed and denied in 1983. *Id.*

20. *See id.* (citing Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983)).

21. *Id.* at 1214.

22. *Id.* at 1208.

23. *Id.* at 1214.

24. *Id.* at 1216.

25. *Id.* at 1214. A recent case relying heavily upon the *Scott* decision is *Reasor v. City of Norfolk*. No. 84-3-N, slip op. (E.D. Va. July 9, 1984). In *Reasor* the district court granted the defendant city's motion for summary judgment on antitrust claims which had been brought to challenge municipal redevelopment actions preventing the erection of a downtown office building. *Id.* at 11. Relying on *Scott*, the *Reasor* court found the necessary authorization in the state redevelopment statutes: "[o]nce the City became financially legally obligated to the redevelopment, the state must have anticipated that the city would use its powers to protect its investment." *Id.* at 14-15.

26. 317 U.S. 341 (1943). A related doctrine which was not dispositive in the *Scott* case is

held that a state-established raisin cooperative, organized to stabilize market prices by setting wholesale prices and quantities, was immune from antitrust scrutiny.[27] The Court could "find nothing in the language of the Sherman Act or in its history which suggest[ed] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[28] The Supreme Court did not again address the immunity doctrine until the mid-1970's when, in a series of cases, it constricted the availability of immunity to private and quasi-private parties.[29]

The Supreme Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*[30] signaled a change in the scope of the federal antitrust laws. The widely accepted assumption that *Parker* exempted both states and their component governments from antitrust liability came to an end in *Lafayette*, wherein the Court held that a city's status as a political subdivision of a state did not itself provide a per se exemption.[31] The City of Lafayette asserted immunity as a defense to an antitrust counterclaim made by utility competitors operating outside the city limits.[32] The Court, in a five to four vote, refused to recognize automatic municipal immunity on the theory that the Sherman Act was intended to protect the public from economic abuse which could possibly be inflicted even by a municipality when acting as the provider of services.[33] The Court, speaking through a four-justice plurality, held that a particular municipal activity would be granted immunity if undertaken "pursuant to state policy to displace competition with regulation or monopoly public service."[34] The proper state authorization could be in-

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the *Noerr-Pennington* doctrine which exempts from the antitrust laws lobbying and other joint efforts by private individuals to obtain legislative or executive action. *See* Scott v. City of Sioux City, 736 F.2d at 1215 n.9 (citing United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961)). *See also* Westborough Mall v. City of Cape Girardeau, 693 F.2d 733 (8th Cir.), *cert. denied*, 103 S. Ct. 2122 (1983); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980); Miracle Mile Assoc. v. City of Rochester, 617 F.2d 18 (2d Cir. 1980).

27. Parker v. Brown, 317 U.S. at 350-51.

28. *Id.*

29. *See, e.g.*, New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978) (state scheme to regulate new retail motor vehicle franchises received benefit of exemption); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (doctrine did apply to disciplinary rule on advertising promulgated by Arizona Supreme Court); Cantor v. Detroit Edison, 428 U.S. 579 (1976) (private utility regulation by state Public Service Commission did not imply exemption for giving customers free light bulbs); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (state action doctrine did not shield fee schedule enforced by state bar association).

30. 435 U.S. 389 (1978).

31. *Id.* at 411.

32. *Id.* at 391-92. The city's competitors charged the city with monopolizing the energy market and with conspiring to restrain trade in the distribution and transmission of electric power by, *inter alia*, refusing to wheel power and by cutting off available power supplies. *Id.* at 392 n.5.

33. *See id.* at 403.

34. *Id.* at 413.

ferred from the legislation if it were found that "the legislature contemplated the kind of action complained of."[35]

Between the rendering of the *Parker* and *Lafayette* decisions, many states, including Iowa, had enacted a variety of laws in order to provide political subdivisions with the authority necessary under the Dillon Rule[36] to carry out municipal functions, including urban renewal.[37] During the same time period, the federal government established and promoted grant programs to help provide financial resources for urban development.[38] In many instances, federally assisted programs stimulated local government activity in areas which were new to government involvement. Urban renewal laws are an example of this changing local government role.[39] Because of this chronological sequence, these laws were not written in the context of any need to meet a *Lafayette* standard in circumstances where government action would be likely to displace or restrict private competitive activity.

In addition, the forty years prior to the 1978 *Lafayette* decision witnessed the expansion of municipal home rule in many states including Colorado[40] and Iowa.[41] Municipal home rule represents a fundamental constitutional change in the relationship between state legislatures and cities, reversing the Dillon Rule and granting plenary powers to local government.[42] The thrust of legislation in a home rule state is directed toward the limitation of existing reservoirs of power, rather than to the delineation of specific grants of power.[43] Statutes drafted in this context prior to the *Lafayette* decision were unlikely to anticipate its requirement that a state's policy to displace competition be "clearly articulated."

The Court's expression of the test in *Lafayette* was reexamined and affirmed in *California Retail Liquor Dealers Association v. Midcal Alumi-*

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35. *Id.* at 415.

36. The proposition that municipalities have only those powers specifically granted to them by state statute, charter, or constitution and those which may be fairly implied from the express powers and those powers deemed essential to the accomplishment of the purposes of the municipality is commonly referred to as "Dillon's Rule." *See* E. McQUILLIN, MUNICIPAL CORPORATIONS § 10.09, at 756 n.6 (3d ed. 1979) (citing 1 J. DILLON, LAW OF MUNICIPAL CORPORATIONS 448-49 (5th ed. 1911)).

37. *See, e.g.*, IOWA CODE §§ 28E, 455 B.75-.83 (1983); MO. REV. STAT. ch. 190 (Vernon 1978); VA. CODE ch. 36 (1980); WIS. STAT. ANN. §§ 66.069(2)(c), 144.07 (West 1981).

38. Sioux City applied for numerous federal grants, primarily through the Department of Housing and Urban Development, to plan and finance its downtown project. Brief for Appellees at 5-7, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984).

39. In 1955 it was estimated that redevelopment statutes were in effect in more than one-half of the jurisdictions in the country. Annot., 44 A.L.R.2d 1417 (1955).

40. *See* COLO. CONST. art. XX.

41. The authority for Iowa municipal home rule is found in the Iowa Constitution. IOWA CONST. art. III § 38A. It was officially incorporated on November 5, 1968. *See id.* In addition, section 364.1 of the Iowa Code is the statutory home rule provision which was added to the Code in 1972. IOWA CODE § 364.1 (1983).

42. *See generally* E. McQUILLIN, MUNICIPAL CORPORATIONS § 9.08 (3d ed. 1979).

43. *See id.*

num, Inc.[44] In *Midcal*, a state statute required wine producers and wholesalers to follow a uniform price schedule or a fair trade contract which they filed with the state.[45] Although the price-fixing was authorized by the state, the state did not review the reasonableness of the prices nor monitor the market effects.[46] A two-prong test for state action immunity was formulated in *Midcal*: "[f]irst, 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."[47] In *Midcal* the Court applied the antitrust laws to a state rather than to a municipality. Although the first prong of its test clearly applies to municipalities via *Lafayette*, the Supreme Court has not yet affirmatively addressed whether active state supervision of municipal activities is required in order for them to be shielded from antitrust liability.[48]

The most recent opinion, issued by the United States Supreme Court in 1982, on the subject of municipal antitrust liability is the landmark case of *Community Communications Co. v. City of Boulder*.[49] In *Boulder*, the Court held that a state constitution's confirmation of home rule powers upon municipalities does not rise to the level of a state policy that is "clearly articulated and affirmatively expressed" and will not, standing alone, be enough to trigger the *Parker* state action exemption.[50] "Mere neutrality" on the part of the state is insufficient.[51] Since the asserted basis of state authorization failed, the Court in *Boulder* did not consider whether the active state supervision requirement of *Midcal* would be applied to municipalities.[52]

The *Boulder* decision left uncertain more questions than it answered. The Court in *Boulder* provided municipalities with no guidance as to the activities protected, but indicated only that the general grant of home rule powers is not enough. On this relatively blank slate, the law is being shaped and refined in the lower federal courts. The Eighth Circuit has developed a broad and flexible approach to the interpretation of statutes which become

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44. 445 U.S. 97 (1980).

45. *See id.* at 99.

46. *See id.* at 100.

47. *Id.* at 105 (citing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978)).

48. In *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 51-52 n.14 (1982), the Supreme Court specifically declined to decide this issue. *See infra* notes 53 & 93-96 and accompanying text.

49. 455 U.S. 40 (1982). Boulder's then existing cable television franchisee challenged a city ordinance which placed a temporary moratorium on the expansion of franchise services pending the adoption of a model ordinance and the invitation of competing bids. *Id.* at 45-46. The city defended on the basis of the Colorado Constitution's grant of home rule power to municipalities, a provision which establishes the supremacy of such ordinances to state law. *Id.* at 43-44.

50. *Id.* at 53-56.

51. *See id.* at 55.

52. *See id.* at 51-52 n.14.

the subject of allegedly anticompetitive activity. As one commentator has recently noted, the legislative authority relied upon by many municipalities is "seldom written with antitrust challenges in mind," and, in fact, often pre-dates the relevant Supreme Court decisions.[53] The Eighth Circuit Court of Appeals has had the occasion in five cases since 1982 to attempt to answer the practical questions remaining after *Boulder*.[54] *Scott v. City of Sioux City* represents a high-water mark in the analysis of the application of the antitrust laws and state action immunity to the functions of local government.

The Eighth Circuit Court of Appeals' recent state action analysis began in 1982 when it considered *Westborough Mall v. City of Cape Girardeau*,[55] wherein developers commenced an action challenging zoning activities of the city related to the construction of a shopping center.[56] The court of appeals reversed the district court and held that *Parker* immunity could not be afforded to the municipal defendants as a matter of law.[57] "Even if zoning in general can be characterized as 'state action,' . . . a conspiracy to thwart normal zoning procedures and to directly injure plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy."[58] The plaintiffs' complaint withstood a motion for summary judgment and the case was remanded for a jury determination as to the existence of any conspiracy.[59] Thus, general zoning powers, alone, may not constitute a clear state mandate sufficient to displace competition.[60]

Despite a similarity of circumstances, *Westborough Mall* is clearly distinguishable from *Scott* in two respects: (1) there was no comprehensive scheme in *Westborough Mall* comparable to that in *Scott*, namely, Sioux City's redevelopment plan under the Iowa Urban Renewal Law; and (2) the cooperative action between Sioux City and the developer in *Scott* was admittedly motivated by a desire to shelter the city's own redevelopment pro-

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53. Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 444 (1981).

54. *See* Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984); Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983); Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983); Westborough Mall v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982); Mason City Center Assoc. v. City of Mason City, 671 F.2d 1146 (8th Cir. 1982).

55. 693 F.2d 733 (8th Cir. 1982). In this case, the plaintiffs had expressed interest in developing a shopping mall and applied for the required zoning change, which was granted. *Id.* at 737. The reversion of this zoning to a residential classification was the basis of the plaintiffs' conspiracy allegations. *Id.* at 739.

56. *See id.* at 736.

57. *Id.* at 746.

58. *Id.*

59. *See id.* at 745. On remand, a jury verdict in favor of the municipal defendants was entered on November 9, 1983. Telephone interview with Clerk of United States District Court, Eastern District of Missouri (February 1984).

60. *See* Westborough Mall v. City of Cape Girardeau, 693 F.2d at 746.

ject from competition.[61]

In *Gold Cross Ambulance & Transfer v. City of Kansas City*,[62] the Eighth Circuit found sufficient state authorization to trigger *Parker* immunity in a comprehensive Missouri statute expressly authorizing local government ambulance service.[63] The statute not only clearly authorized a regulation limiting service to the single-operator designated by the city, but also showed that the "legislature contemplated the kind of action complained of," that is, the restraint on competing ambulance services was a "necessary and reasonable consequence of engaging in the authorized activity."[64] The *Gold Cross* court also found that the active state supervision requirement, enunciated by the Supreme Court in *Midcal*, was not meant to be imposed upon municipalities in this context since such a requirement is "intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions. . . ."[65] Since municipal officials must generally account to the electorate, their actions need not be supervised by the state in order to prevent abuse.[66]

In *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*,[67] the validity of actions by a metropolitan agency in requiring all solid waste generated in its geographic area to be deposited at its landfill site was subjected to antitrust challenges by a competing landfill operator.[68] The challenge was unsuccessful as the Eighth Circuit found sufficient authorization in the statutes allowing cooperative sanitary disposal projects to be established and financed.[69] The opinion formulated the two-part immunity test applicable to municipal conduct: "[f]irst, the state legislature must have authorized the challenged municipal activity. Second, and more important, the legislature must have intended to displace competition with regulation or some form of monopoly service."[70] Furthermore, the necessary intent to be ascribed to the legislature may be inferred even when the statute is wholly silent.[71] Drawing upon this precedent, the court turned to

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61. *See* Scott v. City of Sioux City, 736 F.2d at 1215. *See also* Mason City Center Assoc. v. City of Mason City, 671 F.2d 1146 (8th Cir. 1982) (developer of competing shopping center challenged zoning activities but city did not defend on basis of urban renewal state authorization).

62. 705 F.2d 1005 (8th Cir. 1983).

63. *Id.* at 1014. *See* MO. REV. STAT. ch. 190 (Vernon 1978).

64. Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d at 1012-13.

65. *Id.* at 1014.

66. *See id. See also infra* note 86 and accompanying text.

67. 715 F.2d 419 (8th Cir. 1983).

68. *See id.* at 420-21. The competing operator, Central Iowa Refuse Systems, Inc., brought the action against the defendant agency, its members, Polk County, and fifteen municipalities, including the City of Des Moines. *Id.* at 420.

69. *See id.* at 425-26.

70. *Id.* at 425.

71. *See id.* at 426. The notion that legislative intent, may, and of necessity, often must be inferred was recognized by the United States Supreme Court in the *Lafayette* decision:

the facts presented in the *Scott* case in 1984.

The *Scott* decision is an important example of the well-founded reluctance on the part of the federal courts to impose the potential of antitrust treble damages upon the workings of representative government, particularly when the plaintiffs' complaint challenges actions which appear reasonably related to the governmental function in question. The plaintiffs in *Scott* alleged that the city council had conspired with a former councilman, who had become the president of the downtown developer, Metro Center, Inc., to agree to zone the plaintiffs' land in such a way as to prohibit its development while encouraging the rehabilitation of the downtown district in which Metro was involved.[72] The defendants conceded that city officials were concerned about the prospects of a competing regional center, that said officials and co-defendant Weiner, president of the developer, agreed that an all-out effort to support the downtown central business district should be made, and that private discussions were conducted on the subject.[73] Sioux city claimed that the Urban Renewal Law entitled it not only to engage in such discussions, but also to take affirmative action in the form of land use restrictions in an effort to achieve such a result.[74] The Eighth Circuit Court of Appeals, in an opinion rendered by Judge Heaney, agreed.[75] In applying the state authorization prong of the immunity test, the court found that chapter 403 clearly authorized the city to "zone or rezone any part of the

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> [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 . . . [a] district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 393-94 (1978) (quoting lower court opinion). The Eighth Circuit has refused to interpret this and other language of the Supreme Court to invoke a standard that the legislature must compel the allegedly anticompetitive activity. *See, e.g.*, Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d at 1012 n.11. *See also* Areeda, *supra* note 53, at 445-46.

72. *See* Scott v. City of Sioux City, 736 F.2d at 1210.

73. Brief for Appellees at 13, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984). At the hearing on the second motion for summary judgment, the municipal defendants' counsel, Mr. Lance Coppock, stated:

> [O]ne of the reasons we feel that this case is right for summary judgment is we concede that we did everything . . . they say we did . . . . The depositions of all of the defendants are in the record. They concede that they were trying to protect the downtown . . . . [T]hey had started years ago and [were] committed to developing this downtown. And they weren't about to let anything happen that would undercut their investment.

Transcript of Hearing on Motions for Summary Judgment and Change of Venue at 11, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984) (held April 21, 1983).

74. Brief for Appellees at 26, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984).

75. *See* Scott v. City of Sioux City, 736 F.2d at 1214. The appellate panel was composed of Chief Judge Lay, Judge Heaney, and Judge Bowman. *Id.* at 1208.

municipality or public body"[76] and to enter into a redevelopment agreement with Metro and the resulting negotiations by contracting parties.[77] While the statute did not expressly state that action may be taken to limit competition, the affirmative grants of power embodied within chapter 403 were very broad and by their terms did not limit the activities to the geographical boundaries of the urban renewal area alone.[78] But, as Judge Heaney noted, "the more difficult question is whether the Iowa legislature intended to sanction the specific zoning ordinances complained of here."[79] The court reaffirmed its stand that the necessary legislative intent to displace competition may be inferred and would be sufficient if the legislature contemplated the anticompetitive activities.[80] Given the importance afforded the goals of urban renewal by the legislature and the concomitant broad powers granted to municipalities, the *Scott* court concluded that the legislature contemplated the type of ordinances enacted by the city in this case.[81] A key reason for inferring this legislative intent was that the legislature had authorized municipalities to partially fund urban development through loans, tax levies, and municipal bonds.[82] In Sioux City, at least thirty million dollars of public funds were committed to the development of the city's downtown.[83] The broad grant of powers and the ability to finance with public monies constituted evidence sufficient to infer that the legislature had contemplated that the city "would use its delegated powers, including the power to zone and rezone, to protect that commitment."[84]

In following the course established by the Eighth Circuit in *Gold Cross* and *Central Iowa Refuse*, the *Scott* court found the *Midcal* requirement of active state supervision to be inapplicable in the municipal context since the requirement that the activity be clearly authorized by the state served that purpose.[85] Active state supervision is not required when parties are municipal officials engaged in functions traditionally performed by local governments.[86] The question of whether state supervision is required when a mu-

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76. *Id.* at 1212. For a full text of these powers, see IOWA CODE §§ 403.6(8) and 403.12(1)(h) (1983).

77. *See* Scott v. City of Sioux City, 736 F.2d at 1212.

78. *See id.*

79. *Id.*

80. *See id.* at 1211.

81. *See id.* at 1213.

82. *See id. See also* IOWA CODE §§ 403.6(5), (8), 403.9 (1983).

83. *See* Scott v. City of Sioux City, 736 F.2d at 1213. An affidavit of the city treasurer filed in connection with the action showed that $14,853,699 of federal grant funds, $12,734,454 from the proceeds of the sale of municipal bonds, and $2,467,938 miscellaneous city funds were expended in the Central Business District. Affidavit of City Treasurer, Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984) (filed April 21, 1983).

84. Scott v. City of Sioux City, 736 F.2d at 1213.

85. *See id.* at 1214.

86. *See id.* The Eighth Circuit has not yet had to reach the issue of active state supervision in the context of a non-traditional function because each activity to date—ambulance ser-

nicipality is operating outside the parameters of traditional functions was not reached because zoning in the context of urban renewal was found to fit the mold of traditional health, safety, and welfare activities.[87] The *Scott* court recognized that it was possible even under the sweeping statutes then in effect for municipal officials to be subject to suit under the antitrust laws.[88] Nevertheless, administrative errors, "policy bias,"[89] or decisions made by elected officials in the course of their duties did not constitute proper subjects for application of the antitrust laws.[90]

The *Scott* decision takes the state action immunity defense a step beyond the precedents of the Eighth Circuit. In both *Gold Cross* and *Central*

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vice, solid waste disposal, and urban renewal—has been found to be a traditional governmental function. *See supra* note 54. It has been noted elsewhere that enforcing such a requirement in the municipal context seems illogical:

> 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.

Community Communications Co. v. City of Boulder, 455 U.S. at 71 n.6 (Rehnquist, J., dissenting). *See also*, P. AREEDA, ANTITRUST LAW § 212.2a, at 47 (Supp. 1982) ("Thus, requiring state authorization for local conduct is analagous to requiring active state supervision of private conduct; [state authorization] tests whether challenged local activity is truly state action and therefore entitled to immunity.").

87. *See* Scott v. City of Sioux City, 736 F.2d at 1214.

88. *See id.* at 1214-15.

89. "Policy bias" is a term coined by Philip Areeda in his law review article cited herein. *See* Areeda, *supra* note 53. Professor Areeda suggests that an agreement over issues of policy among public officials and private persons cannot constitute a conspiracy. Areeda, *supra* note 53, at 451. As the *Scott* court noted:

> Antitrust immunity is meaningless in this context unless it extends to the Council's proper dealings with Metro Center prior to the Council's official zoning action. The Iowa Urban Renewal Law authorized Sioux City's joint endeavor with Metro Center to redevelop the City's decaying commercial district. Metro Center thus had legitimate reason to discuss with Council members the effect a regional shopping center would have on their joint project.

Scott v. City of Sioux City, 736 F.2d at 1215.

90. *See* Scott v. City of Sioux City, 736 F.2d at 1215-16. The assertion of conclusory allegations of the existence of a conspiracy will not be sufficient to support antitrust claims. *Id.* at 1215. The *Scott* opinion states:

> The purpose of state action immunity is to allow states and municipalities with state authorization to pursue health and welfare goals without threat of antitrust liability. That purpose would be frustrated in this case if the mere label 'conspiracy' were enough to warrant an antitrust trial.

Id. See also Impro Products, Inc. v. Herrick, 715 F.2d 1267 (8th Cir. 1983).

As to the plaintiffs' constitutional claims, the *Scott* court found no independent basis for them. Scott v. City of Sioux City, 736 F.2d at 1216-17. The ordinances had a rational basis (the preservation of downtown urban renewal) and were within the powers of the city granted to it by the state. *Id.* at 1216. Since Mr. Scott had never applied for a building permit nor claimed the outlay of any funds for preparation of his property, he could not proceed on any entitlement theory of harm done to his land interest. *Id.* at 1217. Finally, the taking without just compensation claim was predicated upon mere diminution of market value, which has consistently been held insufficient to constitute a taking. *Id.*

Iowa Refuse, the cities were engaged in providing essential services to their citizens in the context of state regulation of a city enterprise.[91] The *Scott* decision, while focusing upon no less a traditional purpose, represents an extension of the doctrine to city processes which involve comprehensive planning and judgment of a different nature. The Eighth Circuit declined to review the pre-*Lafayette* legislation with the hindsight of the Supreme Court's literal interpretation of statutory language. It would seem that city officials are allowed to operate within the broad parameters of a statute designed to allow them to actively promote city growth and prosperity and to take actions unrelated to a particular physical enterprise or system, which limits competition, without immediate fear of antitrust sanctions. The *Scott* decision softens the blow of *Boulder* in that it solidifies the Eighth Circuit position that fair inferences of legislative intent are sufficient.[92] This is a wise course of action acknowledging the importance of local control of municipal affairs. The Iowa Urban Renewal Law is available to every municipality in Iowa as a means of restoring city vitality. Such laws potentially affect every citizen and should not be frustrated by mechanical application of antitrust principles developed to regulate activities in the private sector.

The United States Supreme Court, by granting certiorari in *Town of Hallie v. City of Eau Claire*,[93] has expressed a probable desire to further clarify its views as to the applicability of the state action exemption to municipalities.[94] In *Hallie*, the Seventh Circuit addressed facts analagous to those in *Gold Cross* and *Central Iowa Refuse*, holding that under the Wisconsin statute, a city may require annexation before providing sewage treatment services even if the result is a monopoly on sewage treatment.[95] The *Hallie* court also squarely held that the active state supervision requirement does not apply to the political subdivisions of states which are performing a traditional municipal function.[96]

Legislative concern has mounted on the local and national levels over the threat to local treasuries posed by antitrust treble damages. Legislation

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91. *See supra* notes 63-64 & 68-70 and accompanying text.

92. *See supra* notes 85-86 and accompanying text.

93. 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 3508 (1984). Oral argument before the Supreme Court was held in the *Hallie* case on November 26, 1984. 53 U.S.L.W. 3411 (1984).

94. Petitions for certiorari in two of the key Eighth Circuit cases in the area are among the oldest on the Supreme Court docket. The *Gold Cross* petition was filed July 25, 1983. Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir.), *petition for cert. filed*, 53 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-130). The *Central Iowa Refuse* petition was filed November 18, 1983. Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3441 (U.S. Nov. 18, 1983) (No. 83-825). The *Scott* appellants filed their petition for certiorari on September 7, 1984. Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir.), *petition for cert. filed*, 53 U.S.L.W. 3189 (Sept. 7, 1984) (No. 84-360).

95. *See* Town of Hallie v. City of Eau Claire, 700 F.2d at 383.

96. *See id.* at 384.

was proposed in both the House and Senate Judiciary Committees of Congress in an attempt to define the remedies available to antitrust plaintiffs.[97] A House committee drafted limitations as part of an appropriations bill which would prohibit federal agencies from prosecuting such cases against local governments.[98] Suggested proposals included elimination of treble damages and limiting available remedies to injunctive relief alone.[99] This flurry of activity resulted in the recently enacted Local Government Antitrust Act of 1984[100] which does in fact limit antitrust plaintiffs to injunctive relief against municipalities and bars treble damage actions.[101] In Iowa, an amendment to the Iowa Competition Law specifically targeting the antitrust threat to municipalities was passed in 1984.[102]

Recent legislation serves to eliminate the troublesome threat of antitrust treble damage suits against local government. The Supreme Court in *Hallie* has the opportunity to apply the practical logic of the *Scott* analysis in order to give complete immunity to municipalities acting pursuant to state authority in carrying out governmental functions.

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97. 1 Credit Markets 28, p. 1, 37 (July 9, 1984). Representative Peter W. Rodino of New Jersey, Chairman of the House Judiciary Committee, announced that his committee will begin drafting legislation to protect local officials from antitrust suits. *Id.* Alternatives being considered include injunctive relief alone or the imposition of actual damages without tripling. *Id.*

98. *See id.* The rider was offered by Representative Martin O. Sabo of Minnesota and received more than 300 votes before the electronic voting system broke down. *Id.*

99. *See id.* Senator Strom Thurmond of South Carolina introduced a measure attached to a Senate appropriations bill which permitted only injunctive relief in suits against municipalities. *Id.*

100. H.R. 6027, 98th Cong., 2d Sess., 130 Cong. Rec. H12289 (1984).

101. *See id.*

102. 1984 Iowa Acts ch. 1020. This legislation amends the Iowa Competition Law to exempt municipalities from its provisions as follows:

> 553.6 *Exemptions*
>
> This chapter shall not be construed to prohibit:
>
> . . .
>
> 5. The activities of a city or county, or an administrative or legal entity created by a city or county, when acting within its statutory or constitutional home rule powers and to the same extent that the activities would not be prohibited if undertaken by the State.

Id. The amendment further provides that punitive damages may not be awarded against a city or county or legal entity created by a city or county. *Id.*