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Tracking Boulder: The Potential Antitrust Vulnerability of a City for Enacting a Rent Control Ordinance

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I. INTRODUCTION

In 1982, the Supreme Court held in Community Communications Co. v. Boulder\(^1\) that a municipality may be liable if its actions violate antitrust laws. Under Boulder, a city could be sued for enacting an ordinance that has anticompetitive effects. Commentators expected a flood of litigation against cities to result from the decision;\(^2\) conceivably, after the Boulder ruling, the Sherman Antitrust Act as the "Magna Carta of free enterprise"\(^3\) would afford a cause of action to contractors, developers, and other citizens who feel that a city has slighted their economic interests. Courts have consistently denied this potential class of plaintiffs an equivalent constitutional cause of action since the close of the "Lochner era."\(^4\) In post-Lochner decisions, the Supreme Court decided that courts must carefully refrain from dictating to local legislatures the proper balance to be struck between competing economic and social welfare considerations.\(^5\) This practice of striking down regulatory legislation when it conflicts with laissez-faire economic theory, under the authority of economic substantive due process, is known as "Lochnerizing."\(^6\)

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5. See Ferguson v. Skrupa, 372 U.S. 726 (1963) (courts are not to "substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws."); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (courts will not sit as a "superlegislature to weigh the wisdom of legislation"). See also New Orleans v. Dukes, 427 U.S. 297 (1976), in which the same principles are applied in an action involving a city ordinance.
6. 198 U.S. 45. The practice is considered to be an unwarranted judicial assumption of legislative authority. See G. Gunther, Constitutional Law 502-40 (1979) (thorough discussion of economic substantive due process). The term Lochnerizing is used in its secondary
The conflict between the Boulder holding and the anti-Lochner string of Supreme Court cases poses a dilemma for the federal courts. Following Boulder, an aggrieved party may bring an action against a city if the legislative or administrative decisions of the city result in anticompetitive consequences. Under current antitrust case law, a city violates the antitrust laws every time it decides to displace competition with regulation in order to further some social/welfare goal. If a federal court considered the merits of an antitrust claim against a city according to the existing standards, it would, in effect, force the city to weigh the interests of competition more heavily than any other interests. Arguably, this would amount to the discredited practice of "Lochnerizing." To avoid this conflict, the federal courts should judge antitrust claims against cities according to different standards than those used in current antitrust case law.

One potential source of antitrust litigation against cities is a rent control ordinance. The escalating cost of rental housing combined with the burgeoning tenant population in many metropolitan areas has influenced several cities to enact rent control ordinances. Whether these ordinances place a ceiling on rents, or whether they force a landlord to submit to mediation and arbitration if he raises the rent more than a certain percentage in a year, such ordinances are anticompetitive because they restrict the ability of market forces to set the price.

This comment explores the potential antitrust vulnerability of a city for enacting a rent control ordinance. Using the rent control ordinance of the city of San Jose as an illustration, Part II sets out the pertinent provisions in a typical ordinance and outlines the cause of action that would most likely be asserted against the city based on those provisions. Part III illustrates the intricate maneuvers used to avoid liability under the existing case law as it has developed with regard to private corporations. Part IV proposes a standard, consonant with Boulder, for determining a city's antitrust vulnerability; the comment concludes by recommending a special standard of liability for the city defendant.

II. San Jose's Rent Control Ordinance

The city of San Jose's rent control ordinance will be used illustratively in this comment. Because every city chooses to enact, write,
and enforce its ordinances in different ways, each pattern leads to
different antitrust arguments. The general argument is the same,
however—and this comment’s proposal is not dependent on the par-
ticular manner of writing, enacting, or enforcing ordinances which
has been chosen by San Jose.

San Jose enacted its rent control ordinance in response to the
skyrocketing cost and diminishing supply of rental housing. The or-
dinance provides that if a landlord raises the rent more than eight
percent in a year, the tenant can invoke a specially designed media-
tion/arbitration process. Through this process, a determination is
made as to whether the increased rent is reasonable. The media-
tion/arbitration process must be invoked by the tenant—no auto-
matic action is taken by the city when a landlord increases the rent
more than eight percent and no determination made by the mediator
or arbitrator is effective unless the tenant is a party to the
proceeding.

The cause of action that would be asserted on these facts would
probably be based on section 1 of the Sherman Act. The plaintiff-
landlord would allege that the ordinance was enacted and is enforced
pursuant to a combination or conspiracy between the tenant-citizens
and the city, and thus constitutes an unreasonable restraint of trade.
The landlord would further allege injury to his business, consisting
of deprivation of the profits he would have made if free competition
had not been hindered.

III. A MODEL FOR A DEFENSE UNDER THE PRESENT LAW

Congress has recently barred recovery of money damages in an-
titrust actions against local governments. However, there are many
lesser evils that can result from antitrust litigation, although confined
to injunctive and declaratory relief, that could hit the city hard

11. San Jose, Cal., Mun. Code §§ 17.23.300, 17.23.400 (1979). A landlord is al-
lowed to pass through increased costs attributable to the rental unit. San Jose, Cal., Mun.
Pub. L. 98-544. The statute proscribes damages actions. Thus, a city is no longer in danger of
financial liability. A city may, however, be liable to suit for injunctive or declaratory relief. As
used in this comment, references to “a city’s liability” mean the latter variety.
enough to threaten its fiscal integrity.

The cost of litigating antitrust claims is monumental, largely due to the expense of the discovery process. Discovery is the "heart" of every antitrust case.\textsuperscript{16} The American discovery process, to the extent it is necessary in an antitrust action, is so expensive that many foreign courts believe American courts are "unable to do justice."\textsuperscript{17} Antitrust litigation tends to drag on for years, due to the time it takes attorneys to wade through the discovered documents and to the expertise antitrust lawyers have developed in employing delaying tactics.\textsuperscript{18}

Due to the costly character of antitrust litigation, it benefits a defendant to be able to initially limit the case to some threshold issue. A defendant who can prevail in a motion to dismiss or for summary judgment can prevent much of the cost that makes even winning an antitrust case a tremendous financial loss.

The most vital concern of a city involved in an antitrust action, however, is not the potential financial loss. A city's municipal sovereignty is threatened by an antitrust plaintiff's ability to obtain injunctive or declaratory relief which voids the city's laws. The consequence of this ability could be a shift of the power to govern from those elected by the citizens to perform this function, to any persons who wish to file antitrust actions against the city. The resulting uncertainty and inability to order the city's social/welfare goals could cripple local government.

This section will explore the probability that a city could successfully defend an antitrust claim based on its enactment of a rent control ordinance. Special attention will be paid to the ability to prevail at an early stage, in order to minimize the staggering costs of litigating an antitrust action to a conclusion on the merits.

A. Immunity

1. State Action

State action is immune from antitrust law when a state is acting

\textsuperscript{18} Both parties in the recently dismissed Justice Dep't suit against IBM rented warehouses to store the discovered documents, and paid large yearly bonuses to the attorneys to keep them from quitting. After dragging on for 13 years, the suit was dismissed. United States v. International Business Machines, No. 69 Civ 200—Civ No. 72-344 (S.D.N.Y. dismissed 1982).
in its sovereign/governmental role. This immunity flows from constitutional principles of federalism. Private parties can benefit from state action immunity when they act pursuant to a "clearly articulated and affirmatively expressed . . . state policy" and when the activity is "actively supervised by the State."

Until recently it was assumed that a city, as a governmental entity, had immunity analogous to a state's immunity. In 1978, in City of Lafayette v. Louisiana Power & Light Co., Justice Brennan stated for a plurality of the Court that a city is only immune if it is acting pursuant to state policy to displace competition with regulation. Thus, a city's immunity is analogous to that which a private party can claim under the state's immunity; a city does not have sovereign immunity comparable to that of a state.

19. Parker v. Brown, 317 U.S. 341 (1943). This was the original case seeking to find a state agency liable under the antitrust laws. California enacted a statute designed to stabilize the price of raisins. The commissioner named in the suit (Parker) was the head of the agency set up to administer the statute. Although price stabilization is price fixing, a classic per se offense, the Court held that the state was not liable. Principles of federalism compelled the Court to conclude that the state was immune to antitrust liability.

20. Id. at 350-51: 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 officer 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.

21. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (to confer immunity, state policy must be affirmatively expressed and actively supervised). Midcal involved a California statute that compelled liquor wholesalers and distillers to publish price lists and to adhere to them. The Court found the statute invalid because, although the statute provided a clear articulation of state policy, the state did not supervise the activity mandated by the statute.

22. 435 U.S. 389 (1978). In this case, the City of Lafayette originally brought an antitrust suit against the Louisiana Power and Light Company. Louisiana Power and Light counterclaimed, charging the city with the classic offense of tying (sale of a desirable product is conditioned on the buyer also buying a non-desirable product). Louisiana Power and Light alleged that the city contracted to supply customers outside of the city boundaries with gas and water only if the customers would buy electricity from the city instead of Louisiana Power and Light. Apparently the city had the only available supply of water and gas.

23. Id. at 413. The Court did not reach the question of whether the actions of a city required active state supervision, the second criterion in Midcal, or if the policy was clearly articulated, because the Court found no state policy existed.

24. Chief Justice Burger, in his concurring opinion, distinguished a city's proprietary activity from its traditional function activity. The Chief Justice would extend immunity to the city when it has no proprietary interest in the controversial activity, and would not let the city enjoy immunity when it did have a proprietary interest. Id. at 418-26 (Burger, C.J., concurring).
In *Community Communications Co. v. Boulder,*²⁵ a majority of the Court agreed with Justice Brennan’s position.²⁶ In *Boulder,* the Supreme Court held that a city is only immune from antitrust liability when it is acting “in furtherance or implementation of clearly articulated and affirmatively expressed state policy.”²⁷ It is not enough that a state has granted general legislative power to a municipality, the state must have contemplated the displacement of competition with regulation in the specific areas regulated. A grant of general legislative power evinces “mere neutrality,” and is an insufficient showing of state policy.²⁸

California has no statute authorizing municipalities to impose rent control.²⁹ Consequently, a city cannot look to the legislature for a clearly articulated and affirmatively expressed state policy favoring rent control.³⁰ There is, however, one possible way to show state action immunity.

In *Birkenfeld v. City of Berkeley,*³¹ a group of landlords challenged the city of Berkeley’s authority under the California Constitution, to create a rent control provision.³² The California Supreme Court held that the city had the power to impose local rent controls under article XI, section 7 of the California Constitution,³³ which confers on municipalities general local police power.

A city could claim that the California Supreme Court’s holding

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²⁶. This included Justice Blackman, who had dissented earlier in *Lafayette,* 435 U.S. 389, 441 (1978) (Blackmun, J., dissenting).
²⁷. *Boulder,* 455 U.S. at 51-52 n.14. As in *Lafayette,* the *Boulder* Court did not reach the issue of whether active state supervision is required for municipal immunity.
²⁸. *Id.* (emphasis in original).
²⁹. *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 140, 550 P.2d 1001, 130 Cal. Rptr. 465 (1977). The only rent control statute California has is CAL. HEALTH & SAFETY CODE § 50202 (West Supp. 1984). The statute provides that a municipality cannot impose rent control on housing that has been in any way financed by the Dep’t of Housing and Community Dev. or the California Housing Finance Agency. The purpose of this statute is to encourage private developers to build low-cost rental housing by assuring them that the city will not be able to impose rent controls on the housing. The state however, reserves the right to impose controls in the financing contract. The statute is part of California’s plan to ensure sufficient affordable housing, and is not inconsistent with city-imposed rent controls on rental housing not covered by the statute.
³⁰. See *supra* note 27 and accompanying text.
³². Berkeley’s rent control provision was contained in an amendment to the Berkeley City Charter passed by the initiative process. *Id.* at 135, 500 P.2d at 1006, 130 Cal. Rptr. at 470.
³³. CAL. CONST. art. XI, § 7. “[Local Ordinances and Regulations.] A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”
constituted an articulation of state policy by an entity representing California as a sovereign. This argument would follow that in *Bates v. State Bar of Arizona*. In *Bates*, the plaintiffs argued that the Arizona Bar's proscription of attorney price advertising was a restraint of trade. The defendants claimed state action immunity. The challenged rules were promulgated by the Arizona Supreme Court. The Supreme Court in *Bates* held that the Bar was immune under the state action doctrine because the rules it enforced were the clearly articulated and affirmatively expressed policy of the Arizona Supreme Court.

In an antitrust action against San Jose, the city could argue that the California Supreme Court is the "ultimate body" interpreting the California Constitution. Thus, the California Supreme Court's interpretation of the constitution, which gave Berkeley the power to regulate rents, constituted an articulation of a state policy which allows the displacement of competition with regulation in the area of rent control. It seems unlikely that this argument would succeed under a strict application of *Boulder*. Undoubtedly, the city of Boulder had the power, under the home-rule provisions of Colorado, to pass ordinances regulating the cable television industry. But a city's constitutional power, as construed by a court, does not demonstrate a clear intent of the policy-making body—the state legislature—to dis-

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35. *Id.* at 359.
36. *Id.* at 360.
37. *Id.* at 362. The Court stated, "The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior."
38. *Id.* at 359-60. The Court stated: "(T)he challenged restraint is the affirmative command of the Arizona Supreme Court . . . . That court is the ultimate body wielding the State's power over the practice of law . . . ."
39. This argument was successful in Hopkinsville Cable T.V. v. Pennroyal Cablevision, Inc., 562 F. Supp. 543 (W.D. Ky 1982). The city of Hopkinsville was being sued, *inter alia*, under §§ 1 and 2 of the Sherman Act. The city claimed state action immunity, *id.* at 545. Purporting to follow *Boulder*, the district court found the city to be immune. The Kentucky Constitution, as interpreted by "Kentucky's highest appellate court," *id.* at 546 (emphasis added), allowed the city to regulate the cable television industry. The district court found this a clear state policy to displace competition with regulation, pursuant to which the municipality acted. *Id.* The municipality thus fell within the *Boulder* test, and was immune to antitrust liability.

40. The *Boulder* Court was careful to distinguish the difference, for antitrust purposes, between a state "allow[ing] municipalities to do what they please," and a state "contemplat[ing]
the displacement of competition in a particular economic area. *Boulder*, 455 U.S. at 55. Boulder had, under the Colorado Constitution, ultimate power in matters within its local sphere. *Id.* at 52. The city's power, in relation to that of the state legislature, is a matter of state law. The city's liability for wielding that power in a manner inconsistent with the federal antitrust law is a matter of federal law. *Id.* at 52 n.15.
place competition with regulation. Although in *Bates* the articulation of policy came from the Arizona Supreme Court, that case is distinguishable because the professional behavior of attorneys is an area over which the court has *policy-making* authority.\(^4\) Rent control, like cable television regulation, is an area of general economic and social interest, for which the state legislature is the sovereign voice.

The power granted to municipalities under the California Constitution to regulate local affairs is exactly the kind of broad grant of general powers that the United States Supreme Court characterized as evincing the state's "mere *neutrality*" regarding a policy favoring regulation over competition.\(^4\) That the California Supreme Court construed the constitutional grant to include the power to regulate the cost of rental housing, means only that the city has that power. It does not provide a proxy statement of the California legislature's policy. Consequently, a logical reading of *Boulder* would not shield a city from liability simply because the city has the power to regulate rents as one of its general constitutional powers.

There is, however, another theory of immunity—the Noerr-Pennington theory—that may shield a city from antitrust attack.

2. **Noerr-Pennington Immunity**

The alleged offense in an action against a city based on enactment or enforcement of a rent control ordinance would be that the city conspired to restrain trade in violation of section 1 of the Sherman Act.\(^4\) The restraint of trade would be price-fixing, defined as "raising, depressing, fixing, pegging, or stabilizing the price of a commodity."\(^4\) A rent control ordinance stabilizes the price of rental housing and is thus susceptible to attack as a restraint of trade.

When a price is "fixed" pursuant to a contract, combination or conspiracy, the parties to the contract, combination or conspiracy are liable under section 1 of the Sherman Act. In a suit against a city, the plaintiff-landlord would allege that the city conspired with the tenant-citizens or with its officers,\(^4\) in enacting and enforcing the rent control ordinance. The city could argue that it is immune from liability for this activity under the Noerr-Pennington doctrine.\(^4\)

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42. *Boulder*, 455 U.S. at 55 (emphasis in original).
43. 15 U.S.C. § 1 (1982). "Every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States ... is declared to be illegal."
45. See infra notes 67-76, p. III, B. *Concert of Action*.
46. The doctrine is named after the original cases in which it was formulated: Eastern
The Noerr-Pennington doctrine is based on the first amendment right to petition the government and on a policy of protection of the political process. It is usually applied to protect parties engaged in joint efforts to influence legislation, which would otherwise subject the parties to liability because the legislation sought by the parties would have an anticompetitive effect on the plaintiff. The principle underlying the doctrine is that individuals have a first amendment right to join together to petition the government which would be heavily burdened if they could incur antitrust liability for so doing. Additionally, governmental bodies rely on individuals to express the people’s wishes. Imposing liability on individuals for participating in this process would impair the political process because individuals would be deterred from providing government with information.

The Noerr-Pennington doctrine also immunizes from liability attempts to invoke administrative and judicial processes because the “right to petition extends to all departments of the Government.” Noerr-Pennington shields all genuine efforts of an individual to invoke governmental processes, even if the sole purpose of the petitioner is anticompetitive. The obvious defects in a city’s claim to Noerr-Pennington immunity are that the city is the governmental body being petitioned, and that the city is not the usual defendant-petitioner. Noerr-Pennington in its classic formulation immunizes the petitioner, not the petitioned body.

The lack of cases addressing the issue of the governmental body’s liability is not surprising. The federal government cannot be sued under the antitrust laws, and neither can state governmental entities acting in their official capacities. Until Boulder, it was assumed that a municipal government acting in an official capacity was


47. See Forro Precision Inc. v. International Business Machines, 673 F.2d 1045, 1059 (9th Cir. 1982); In re Car Rental Antitrust Litigation, 693 F.2d 84 (9th Cir. 1982). See also Noerr, 365 U.S. at 137-38.


49. Id. at 137.


51. The “sham” exception to Noerr-Pennington excludes activities that are not a genuine effort to invoke governmental processes, such as a baseless lawsuit. Id. at 404 U.S. 508.

52. See supra note 51.

53. See supra notes 47-52 and accompanying text.


55. See supra notes 19-20 and accompanying text.
also immune,\textsuperscript{56} without resorting to the Noerr-Pennington doctrine. The question of a city’s antitrust vulnerability must now be addressed because \textit{Boulder} held that a city is \textit{not} immune to such a suit.

In \textit{Miracle Mile Associates v. City of Rochester}\textsuperscript{57} the Second Circuit found that the city defendant was immune from suit under Noerr-Pennington.\textsuperscript{58} The court did not discuss the derivation of city immunity from the \textit{Noerr} line of cases holding individual petitioners immune. In contrast, in \textit{In re Airport Car Rental Antitrust Litigation},\textsuperscript{59} the federal district court indicated in dicta that individuals named as part of a conspiracy could be found immune from liability under Noerr-Pennington, while a municipality named as part of the same conspiracy could remain unprotected.\textsuperscript{60}

The plaintiffs in an antitrust suit against the city of San Jose based on its enactment of the Chapter 17.23 rent control ordinance,\textsuperscript{61} could argue that the ordinance is the product of a conspiracy or combination between tenant-citizens and the city council of San Jose and it has the purpose and effect of restraining the landlord’s ability to extract the highest market price from the lease of his rental units.\textsuperscript{62} Alternatively, the plaintiff-landlords could claim a conspiracy in the enforcement of the ordinance. The San Jose ordinance is particularly vulnerable to claims of an enforcement conspiracy because the ordinance cannot be enforced until an injured tenant files a complaint and participates in the arbitration proceedings.\textsuperscript{63}

A tenant-citizen could claim immunity under Noerr-Pen-

\textsuperscript{56} See \textit{supra} notes 21-25 and accompanying text.
\textsuperscript{57} 617 F.2d 18 (2d Cir. 1980).
\textsuperscript{58} The plaintiffs in \textit{Miracle Mile} alleged that the city entered into a series of baseless administrative proceedings in order to delay and frustrate the plaintiff’s development of a shopping mall. \textit{Id.} at 19. The court found that the proceedings were not baseless, because the city had a legitimate interest in the welfare of its citizens, so the sham exception to Noerr-Pennington did not apply. \textit{Id.} at 21; see \textit{supra} note 50. The court did not reach the issue of the city’s liability under the state action doctrine, since it found the city immune under Noerr-Pennington. \textit{Miracle Mile} at 20. Thus, it is unimportant that this case predates \textit{Boulder}.
\textsuperscript{60} “There is . . . no necessary or logical relationship between the imposition of liability on those who advocate anticompetitive activities and on those who participate in them.” \textit{Id.} at 584.
\textsuperscript{61} See \textit{supra} notes 8-13 and accompanying text.
\textsuperscript{62} When an ordinance is enacted by initiative of the voters, like Berkeley’s rent control ordinance, the claimed conspiracy would be among the tenant-voters. In Subscription Television, Inc. v. Southern Cal. Theatre Owners, 576 F.2d 230, 232 (9th Cir. 1978), the court held that initiative action taken by voters was immune under Noerr-Pennington.
\textsuperscript{63} SAN JOSE, CAL., MUNI. CODE § 17.23.430 (1979).
nnington for his actions in soliciting rent control provisions and in invoking their enforcement. A city's response to citizen-tenant petitioning activities should also be shielded by a complementary immunity.

The city could argue that if the alleged offense consists of a governmental body's response to a citizen's exercise of his right to petition the government, the governmental body must be protected from liability or the citizen's right to petition the government is rendered meaningless. A citizen's right of access to the government is protected so the government can be informed of the citizen's wishes. If the city has no reciprocal Noerr-Pennington immunity protecting its reaction to citizen petitions, a citizen's petitions would be ineffective because the city would fear antitrust liability for any responsive legislation or enforcement. Accordingly, the city of San Jose should be immune to liability for enacting or enforcing its rent control ordinance.

Federal courts, however, may refuse to extend Noerr-Pennington immunity to the city because this might negate the Boulder holding that a city is not immune to antitrust liability under the state action doctrine. It is likely that a federal court would find that extending Noerr-Pennington immunity to cities would allow them to evade the Boulder ruling. If the district court hearing the rent control case were to follow this view, the city would then have to carry the expense of defending the merits of the claim.

B. Concert of Action

In order to succeed with a Sherman Act section 1 claim, it is necessary to prove some contract, combination, or conspiracy. Unilateral anticompetitive actions do not violate section 1. No contract is

64. See supra notes 47-53 and accompanying text.
66. This theory is not necessarily accurate. Noerr-Pennington immunity extended to petitioned cities would only shield actions of the city taken in response to citizen petitioning. Any other contract, combination or conspiracy engaged in by the city would render it liable — this would not be true if the city were protected by state action immunity; see supra notes 46-49 and accompanying text.
implicated in this situation because the city has not contracted with anyone. This leaves possible allegations of combination or conspiracy.

Plaintiffs could allege a combination or conspiracy between either 1) the city and its citizens; 2) the city and its officers; or, 3) the city's officers and citizens; in enacting and/or enforcing its rent control ordinance. A city's first line of defense should be that the allegations of conspiracy must fail for lack of "duality."

Duality, and thus concerted action, demands that there be two parties. The city could claim that there was no duality here, analogizing to the intracorporate conspiracy cases. The city could argue that plaintiff's claims correspond to that of a claim of conspiracy between a corporation and its officers, and between a corporation and its shareholders. "Since a corporation has no way of acting except through officers and employees, the officers and employees are part of the same economic unit as the corporation for antitrust purposes." Thus, a corporation cannot conspire with its officers and employees because an antitrust conspiracy requires at least two economic units.

Similarly, a city is a "municipal corporation." Its citizens are akin to a private sector corporation's shareholders. Just as shareholders can only act through the corporation, citizens can only act through the city. Further, just as the corporation can only act through its officers and employees, the city can only act through its officials and employees. When citizens act through the city which in turn acts through its officials and employees, there is no duality of action. All of the actors function as one unit. There is no conspiracy, and consequently no section 1 violation.

If the shareholders, officers, or employees of the corporation act in furtherance of private rather than corporate goals, the shareholders, officers or employees become separate economic units—not

68. A conspiracy is a form of concerted action.
69. "You must have two entities to have a conspiracy." Timken Roller Bearing Co. v. United States, 341 U.S. 593, 606 (1951) (Jackson, J., dissenting).
70. An intracorporate conspiracy is a conspiracy between a parent corporation and a subsidiary, Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951), or a corporation and its officers or employees, Schwimmer v. Sony Corp. of Am., 677 F.2d 946, 953 (2d Cir. 1982); or a corporation and its shareholders, Goldlawr, Inc. v. Shubert, 276 F.2d 614, 617 (3d Cir. 1960).
merely levels of the same corporate unit. Accordingly, duality and conspiracy are possible.\textsuperscript{79} Because there is no reason to believe that the city's officers are acting other than in the interests of the city when they enact a rent control ordinance, the single-unit theory should apply between the city and the city officers and employees and should make duality and conspiracy impossible. However, tenant-citizens, in advocating and in calling upon the city to enforce a rent control ordinance, are pursuing private goals. For example, the tenant wants a rent control ordinance so that he personally will not have to pay large rent increases. The tenant \textit{may} want rent control because it is a generally beneficial measure, but he \textit{certainly} wants it because it benefits him. Because the tenant-citizen is acting in furtherance of a private goal as well as the municipal goal, he is capable of conspiring with the city to create and to enforce a rent control ordinance to the detriment of the plaintiff-landlord's business. Thus, under this analysis, the city could still be liable for violating section 1 of the Sherman Act, if the other elements of the offense are met.

Yet, there is an additional argument for denying concert of action. Usually, when a city enacts and enforces an ordinance, it can argue forcefully that it is not acting in concert with outside parties; rather, it is unilaterally imposing its governmental will for the public good.\textsuperscript{74} Unfortunately, San Jose's ordinance specifically provides that the landlord-tenant mediation/arbitration process can not take place unless the affected tenant participates; the ordinance is only enforced at the tenant's behest.\textsuperscript{75} Arguably, this amounts to a provision that the ordinance will only be enforced through a tenant-city conspiracy. Under San Jose's ordinance, the tenant and the city conspire to in-

\textsuperscript{73} H. & B. Equip. Co., Inc. v. Int'l Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Morton Bldgs. of Neb., Inc. v. Morton Bldgs., Inc., 531 F.2d 910, 917 (8th Cir. 1976).

\textsuperscript{74} Cf. Mason City Center Assoc. v. City of Mason City, 671 F.2d 1146, 1149. In this case the city council voted unanimously to deny plaintiff - developer's application for a zoning change which he needed in order to build a shopping center in Mason City's suburbs. The council openly, and in writing, supported the downtown mall of the other named defendants who were rivals of plaintiff. The council members denied plaintiff's request for a zoning change because they believed a downtown mall would be better for the city, and insisted that this was a unilateral conclusion. The court agreed, finding that there was no contract, combination or conspiracy—and thus no violation.

\textsuperscript{75} Cf. also Enrico's Inc. v. Rice, 551 F. Supp. 511, 513 (N.D. Cal. 1982). This case addressed the question of whether a California statute violated the Sherman Act, after an earlier court had already decided that there was no state action immunity. The court decided that there was no violation because there was no duality—each plaintiff was unilaterally required to comply with the statute.

\textsuperscript{75} "No determination made under the provisions of this Chapter shall be effective with respect to any rental unit unless the tenant of such unit is a party to the proceeding." \textit{San Jose, Cal., Mun. Code} § 17.23.430 (1979).
jure the landlord's business by restricting the profits he is able to make. Thus, the city can be liable for violating section 1 if the other elements of the offense are met.76

C. The Merits

1. Which Rule Applies—Per se or Rule of Reason?77

The plaintiffs in a suit against the city grounded on a rent control ordinance might claim that the per se rule applies because the offense is maximum price-fixing,78 a classic per se offense. In addition, the plaintiffs might contend that the city was guilty of resale price maintenance, another per se offense.

A close inspection, however, shows that the facts of this claim do not fit the classic model. First, there is no horizontal price fixing arrangement involved because the city is not a competitor of the landlords, as a per se violation of horizontal maximum price fixing requires.79 The recognized vertical per se price fixing offense involves resale price maintenance. Resale price maintenance occurs when a manufacturer or distributor of goods stipulates a price to his buyer at which the buyer must sell the goods to the buyer's customers.80 To have resale price maintenance, there must be a resale to a third party.81 In this case, there is no "resale;" the only "sale" is

76. It is ironic that provisions included by San Jose in order to prevent rent controls from being imposed unless the tenant was enough disturbed by a rent increase to invoke and to carry through the mediation/arbitration process, provide such a useful tool to plaintiff-landlords in pursuing their suit.

77. The difference between the per se rule and the rule of reason is cogently explained in Continental T.V., Inc. v. G.T.E. Sylvania, Inc. 433 U.S. 36, 49-50 (1977):

Since the early years of this century a judicial gloss on [section 1] has established the “rule of reason” as the prevailing standard of [antitrust] analysis. [citation omitted]. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Per se rules of illegality are appropriate only if they relate to conduct that is manifestly anticompetitive. See also Arizona v. Maricopa County Medical Soc’y, 457 U.S. 332 (1982) (statement of the per se rule; “[O]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint in unreasonable.”). Id. at 344.

78. Maximum price fixing is a per se offense, Albrecht, 390 U.S. at 151-53; Maricopa, 457 U.S. at 346-47.

79. Horizontal maximum price fixing exists when a group of competitors fix a ceiling on the price to be changed for their goods and services. Maximum price fixing is considered a per se offense because the theoretical “maximum” price usually indicates the actual minimum price, and because price setting interferes with market forces whether the price set is a minimum or maximum. See generally Maricopa, 457 U.S. 332.

80. Albrecht, 390 U.S. at 151.

from the landlord to the tenant. Because there is no resale, there is no resale price maintenance and no per se offense.\textsuperscript{82}

Moreover, a city's imposition of rent controls differs fundamentally from the classic price fixing violation. Unlike the classic private industry case, the city itself does not benefit from the restraint.\textsuperscript{83} If a case does not fit a classic mold, the per se rule does not apply.\textsuperscript{84}

However, that there is no per se offense does not mean that there is no violation of the antitrust laws. Rent control ordinances interfere with the competitive forces that set market prices, and thus constitute "restraints of trade."\textsuperscript{85} However, because this is not a per se violation, the issue is whether it is an unreasonable restraint under the rule of reason.\textsuperscript{86}

2. \textit{Application of the Rule of Reason}

Under the rule of reason, the court will examine the purpose and effects of the alleged restraining practice and balance its benefits against its anticompetitive effects to decide whether the restraint is "unreasonable." However, as the Supreme Court recently made clear in National Society of Professional Engineers v. United States,\textsuperscript{87} not all beneficial goals and effects may be weighed together

\textsuperscript{82} Id.

\textsuperscript{83} Even in National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978) (see discussion infra note 87 and accompanying text), where the restraint was allegedly imposed to benefit the public, the Society planned to benefit from the restraint by aggrandizing the reputation of Society engineers.

\textsuperscript{84} In order to apply a per se rule, the courts must have enough "experience with a particular kind of restraint [to enable them] to predict with confidence that the rule of reason will condemn it." Maricopa Medical, 457 U.S. at 344; see supra note 77. See also White Motor Co. v. United States, 372 U.S. 253 (1963). In White Motor, discussing vertical division of territories, the Court stated:

We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' [Northern Pac. R.R. v. United States, 356 U.S. 1, 51] and therefore should be classified as per se violations of the Sherman Act.

\textit{Id.} at 263.

Due to the lack of cases discussing a city's liability for passing an ordinance with adverse competitive effects, the courts do not have the necessary experience with this "offense" to deal with it under the per se label. Also, there is no parallel from the private sector — it is difficult to imagine a situation where a corporation would have the motive and power to impose a philanthropic price fixing scheme on persons with whom it has no commercial connection. Since a city-imposed ordinance parallels no classic private restraint, there is no basis for employing the per se rule.


\textsuperscript{87} 435 U.S. 679 (1978).
in the equation. Whether the per se or rule of reason test is imposed, the courts will only look at "the competitive significance of the restraint," and not at whether or not the policy is in the public interest. Only pro-competitive goals and effects will justify an anticompetitive practice; the courts will not consider evidence of extra-economic policies.

It is difficult to conceive of a single argument that a city could make that its rent control ordinance is pro-competitive. While the city has a beneficial goal—the protection of the health, safety, and welfare of the citizens of San Jose—this goal is not admissible under the National Society of Professional Engineers test because it has nothing to do with competition. Because the beneficial goal and the advantageous effects of the city's rent control ordinance are irrelevant to an antitrust analysis, the city would probably be found liable under the rule of reason test.

IV. MODEL FOR A NEW STANDARD WHEN THE DEFENDANT IS A CITY

A. Why is There a Need for a New Standard?

Although it may be possible for a city to prevail when it is sued for enacting or enforcing a rent control ordinance, it can do so only by concocting elaborate, strangulated arguments. The problem is that this process is time consuming and therefore more expensive. In addition, such arguments are tenuous and therefore fragile. Furthermore, when avoiding antitrust liability depends on such convoluted theorizing, the judicial process becomes an exercise in deception. The best chance for accepting most of the arguments a city could make would be sympathy on the part of the district judge which was generated by a feeling that Boulder was wrongly decided.

Yet, when the defendant is a city, it should be valid for a court to consider the legitimate governmental goals of the city to assess the city's liability. The city's liability should not depend on the ability of its attorney to torture an argument borrowed from private sector an-

88. Id. at 692.
89. Id.
91. See supra notes 87-89 and accompanying text.
92. See generally supra pt. III. See supra notes 19-42 and accompanying text (state action immunity); notes 43-66 and accompanying text (Noerr-Pennington immunity); notes 67-76 accompanying text (no duality).
93. See, e.g., Pennyroyal Cablevision, Inc., 562 F. Supp. 543. See also supra note 39 and accompanying text.
titrust litigation into a shape acceptable to the district judge. There should be overt recognition that an antitrust suit against a city is different from an antitrust suit against a private corporation. A city is supposed to pursue social/welfare goals, whereas a private corporation is supposed to pursue economic goals and leave the protection of social/welfare interests to the government.\footnote{Hoskins, supra note 2, at 684-85: The "competitive yardstick" test is applicable to analyze competitive conduct of private corporations, but it is inapplicable to analyze the social welfare conduct of municipalities. See also National Soc'y of Eng'rs, 435 U.S. at 692. The reason for the competitive yardstick test is that neither private industry nor the courts are equipped to make social policy decisions because that is a matter that should be left to the discretion of the legislative branch of government. In Fashion Originators Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941), the Court said: "[T]he combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'" Id. at 465-66 (quoting Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899)).}

This situation—an antitrust suit against the city for enacting and enforcing a rent control ordinance—provides ample basis for creating a new standard.

B. Basis for a New Standard of Liability

In Boulder, the Court concluded its opinion by observing that "[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."\footnote{Equal protection cases challenging city ordinances show that it is the function of the city legislature to provide for the public welfare. In such an attack against the city of New Orleans, the Court recited its familiar formula that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations in areas that neither affect fundamental rights nor proceed along suspect lines." City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). This passage demonstrates the Court's assumption that the deferential standard of review applied to state and federal statutes is extended to city ordinances. This is true because the federal, state, and city legislatures, not the courts, are the bodies charged with formulating social policy.}

This statement signifies the Court's recognition that an antitrust suit against a city differs from a suit against a private defendant. The difference is that a city has a legitimate concern with social/welfare objectives, whereas a private defendant does not.\footnote{Boulder, 455 U.S. at 56-57, n.20, (quoting City of Lafayette, 435 U.S. at 417 n.48).} The Court in Boulder did not, then, intend to preclude the possibility of using a special standard of liability when a city is the defendant.

Indeed, such a standard is foreshadowed by the Court's citation in the same passage: "Compare, e.g., National Society of Profes-
sional Engineers v. United States [citation omitted] . . . (considering the validity of anticompetitive restraint imposed by private agreement), with Exxon Corp. v. Governor of Maryland [citation omitted] . . . (holding that anticompetitive effect is an insufficient basis for invalidating a state law)."97 This citation indicates that the Court believes it appropriate to recognize the right and obligation of local governments to pursue social/welfare goals—objectives that are not appropriate to weigh when the rule of reason test is applied in a case involving a private defendant.98

A special standard of liability for a defendant city is predicated on the notion, recognized by the Court in Boulder,99 that a city has legitimate governmental objectives that may justify the possible anticompetitive effects of its ordinances. National Society of Professional Engineers,100 often considered to be the biggest threat to a city because of its purely competitive approach,101 actually supports consideration of social goals where the defendant is a city.

In National Society of Professional Engineers, the Court refused to look at anything other than "the competitive significance of the restraint" because it was not the function of a private industry or of the courts to decide whether a policy is or is not in the public interest.102 In that case, the defendants argued that the Society's rules, which restrained trade by not allowing engineers to compete on the basis of price, were justified because they served the public interest.103 The Court responded that it is the function of the legislative branch and not that of the judiciary or of the Society to decide to displace competition with regulation in the interest of the public welfare.104

In considering the potential liability of a city for enacting a rent control ordinance,105 the courts are concerned with the functions of the legislative branch of local government. It therefore follows from the rationale of National Society of Professional Engineers that a

98. See supra notes 86-91 and accompanying text. See also Vanderstar, supra note 2, at 400-01.
99. See supra notes 95-98 and accompanying text.
101. See supra notes 85-91 and accompanying text. See Hoskins, supra note 2, at 685; Vanderstar, supra note 2, at 390.
103. Id. at 695-96.
104. Id.
105. If a city is justified in enacting an ordinance in its legislative capacity, it can hardly be held liable for enforcing the same ordinance in its administrative capacity. Therefore, if it is not liable for enacting an ordinance, it will not be liable for enforcing it.
city's legitimate governmental goals are important to an analysis of the city's potential liability.

C. The New Standard

Under this standard, the court would assess the city's liability under a two step analysis. The court must first determine the nature of the goal pursued by the city. If the city's goal is economic, the existing standard of liability should apply. The federal government has evinced its view that the public's economic interest will be best served by protecting competition through its enacting and maintaining antitrust laws. The decision of the federal government is, of course, binding on a city.

However, if the city's goal includes general health, safety or welfare factors, the court's inquiry would proceed to step two: an examination of whether the restraint on competition ancillary to the legitimate goal is rationally related to the accomplishment of that goal. If there is a rational relationship, it should be sufficient to justify the restraint. Any attempt to employ a balancing test would involve weighing the worthiness of the city's goal against the harm of the ancillary anticompetitive restraint; the court would then be judging the wisdom of the city's legislative choice. This is exactly the practice the Court has condemned, under whatever guise it has been presented by hopeful plaintiffs, since the close of the Lochner era.

In National Society of Professional Engineers, the Supreme Court specifically rejected the notion that the judiciary is equipped to decide when the public health, safety, and welfare justify a displacement of competition with regulation. Because it is the proper function of the city government, and not of the courts, to determine whether benefits to the public welfare outweigh the harms to compe-

106. It may be wise for cities to make legislative findings and to declare the city's purpose in the ordinance in order to escape liability. See How to Lower Your Antitrust Risk, 9 CURRENT MUN. PROB. 270, 271 (1982).
107. Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).
108. U.S. CONST. art. VI (supremacy clause).
109. This inquiry would resemble the equal protection/rational basis test as applied in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (the state's chosen scheme must be reasonably designed to further the purpose identified by the state).
110. See Boulder, 455 U.S. at 67-68 (Rehnquist, J., dissenting).
111. See supra note 4 and preceding text.
112. This event took place when Nebbia v. New York, 291 U.S. 502, was decided in 1934.
113. See supra notes 98-104 and accompanying text.
tition caused by a particular ordinance, the city should not be liable for enacting the ordinance as long as the competitive restraint is rationally related to accomplishment of the legitimate goal.\footnote{114. The rational relationship standard would also reduce the heavy costs of antitrust litigation, see supra notes 15-18 and accompanying text, because the number of elements necessary to prove would be reduced.}

The court must have some test for differentiating between an economic goal and a public welfare goal,\footnote{115. "Public welfare goal" and "social goal" are used interchangeably with "health/safety/welfare goal."} otherwise it would always be possible to disguise an economic goal as a health/safety/welfare goal. The court must first distinguish the city's \textit{goal} from the \textit{means} it chooses to implement that goal. The goal may be the public welfare even though the means are economic.

A city with an economic goal intends to promulgate an economic policy because it believes that a particular economic policy is desirable in itself. A city using economic means to reach a public policy objective believes that the goal can be best accomplished through an economic scheme.

When the \textit{goal} is economic, the city must contend with the full blast of the antitrust laws because Congress has already decided that competition is the desirable economic policy.\footnote{116. See supra notes 106-108 and accompanying text.} However, when only the \textit{means} are economic, the city should be entitled to the protection of the proposed new standard.\footnote{117. See supra note 4. See also Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 470 (1981) ("It is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature.").} The common theme linking modern constitutional law cases is that, when a legislative body enacts a rule designed to further a legitimate goal, and the means chosen are reasonably designed to effectuate that goal, a court cannot question the legislative choice.\footnote{118. See supra notes 113-114 and accompanying text.} This theme persists when the court is adjudicating an antitrust dispute.\footnote{119. See supra notes 113-114 and accompanying text.}

The standard of liability that is applied to find an economic goal is different from the standard that is applied if the goal is one of the public welfare and is implemented by economic means. Similarly, under the equal protection component of the Constitution,\footnote{120. U.S. CONST. amends. V, XIV.} a finding that a legislature acted with a discriminatory \textit{purpose} will result in the application of the "strict scrutiny" test.\footnote{121. Washington v. Davis, 426 U.S. 229 (1976). In this case, black police candidates who had failed the police examination sued the District of Columbia, claiming that use of the
the legislature was pursuing a legitimate goal, the discriminatory effect of a law only merits minimal scrutiny. The discriminatory impact of the law is evidence of discriminatory purpose, but if it can be shown that the legislature intended to serve legitimate ends, the law will not be invalidated.

An analogous test can be developed to distinguish between a purposeful economic restraint or economic goal and an economic restraint ancillary to a legitimate goal. If an ordinance appears to be an economic regulation and has only economic effects, it can be characterized as an economic ordinance. In that case the city's liability will be judged by the existing antitrust standard.

Conversely, if some valid health, safety or welfare objective appears in the legislative history, declaration of legislative purpose, or effects of the regulation, the regulation should be classified as a health/safety/welfare ordinance. The new standard is designed for this situation.

D. Application of the New Standard

The city's goal in enacting a rent control ordinance is usually a public welfare goal. If a city imposed rent control simply because the city officials thought that regulating rents was a better economic system than allowing rents to be set by competition, the city would be asserting an economic goal. However, it is more probable that a city would impose rent controls in order to enable its citizens to obtain affordable housing. Therefore, the city would be using an economic means to reach a public health, safety and welfare goal.

examination unfairly discriminated against black candidates. The plaintiffs produced evidence showing that a disproportionate number of black candidates failed the test. The Supreme Court stated that the purpose of the equal protection component of the Constitution was to ensure that legislators do not act with a discriminatory purpose. The Court held that discriminatory effects of a law are not enough to invalidate the law, and that the plaintiff must show discriminatory purpose.

122. Mobile v. Bolden, 446 U.S. 55 (1980); Personnel Adm'r. of Mass. v. Feeney, 442 U.S. 256 (1979). In Bolden, the black citizens of Mobile brought a class action against the city, alleging that the practice of electing the city commissioners at large unfairly diluted the black vote. In Feeney, the plaintiff was a woman who had failed to obtain a civil service position because preference was given to a male veteran pursuant to a Massachusetts law favoring veterans. In both cases, the plaintiffs lost because their complaints involved discriminatory effects and failed to show discriminatory purpose.

124. See supra notes 106-08 and accompanying text.
125. See supra notes 109-10 and accompanying text.
Shelter is one of the fundamental necessities of human existence. In the last decade and a half there has been an increased concern regarding the ability of city dwellers to obtain adequate housing. It is this concern that has led cities to promulgate rent control ordinances. When a city decides it is necessary to provide for the public shelter, a reasonable means of accomplishing that goal is to impose rent controls.

A necessary concomitant circumstance to rent control is that it creates a competitive restraint because it does not allow the market mechanism to set the rental price. However, this restraint is reasonable if rent control is a rational method of accomplishing the city's legitimate goal of providing shelter for its citizens. Therefore, the city has not violated the antitrust laws under the new standard of liability. This result is consonant with existing antitrust case law, and comports with the courts' goal of judicial restraint.

E. The New Standard is Congruent with Underlying Antitrust Policy

The new standard is consistent with the policy underlying the antitrust laws. The antitrust laws were created to deal with economic problems in the private sector. Courts recognize that the antitrust laws are "aimed primarily at combinations having commercial objectives and should be applied sparingly to organizations that . . . have some other objectives . . . ." Thus, the proposed rational relationship test would not impinge on the purpose of the antitrust laws, because it would only protect legitimate governmental bodies in carrying out their legitimate governmental objectives.

127. A. H. Maslow, Motivation and Personality 39-43 (2d ed. 1970). Shelter is comprehended in Maslow's "safety need" as one of the lowest level basic needs.


130. See J. Dukeminier & J. Krier, supra note 128, at 202: "[C]ontrols are a subject about which reasonable people might differ, and in such circumstances courts are inclined to defer to legislative judgments."

131. See supra notes 95-104 and accompanying text.

132. See supra note 5 and accompanying text.

133. See supra notes 78-86 and accompanying text.

V. Conclusion

Because the Supreme Court decisively found in Boulder that a municipality could be liable for violating the antitrust laws, cities have been vulnerable to antitrust attack. One possible basis for attack is a city's enactment and enforcement of a rent control ordinance.

It would be difficult for a city to avoid liability if it had to fight an antitrust suit with arguments extrapolated from case law involving a private corporation, because these arguments become elaborate and tenuous when applied to cities. Furthermore, the corporation analysis would not allow a city to justify the anticompetitive effect of the ordinance by emphasizing the ordinance's beneficial public welfare goal. Because a city should prevail when it is acting to further the public health, safety, or welfare, a new standard of antitrust liability is needed in cases when the defendant is a city.

A "rational relationship" test would protect the city from liability when it is acting in the interests of its citizens and would comport with the purpose and history of the antitrust laws. Under this test, a court would first distinguish the objective of the city policy under attack. If the goal was economic, the existing standard of liability would apply. If the goal was to further the public health, safety, or welfare, the court's inquiry would be confined to examining whether the competitive restraint ancillary to the legitimate goal is rationally related to accomplishing that goal.

A city which enacts a rent control ordinance is ordinarily attempting to advance the legitimate goal of providing shelter for its citizens. Rent control ordinances are reasonable measures to adopt for this purpose, and the restraint on the landlords' ability to recover competitively set profits is a necessary corollary to a rent control ordinance. Therefore, a city should not be subject to antitrust liability for enacting a rent control ordinance.

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135. See supra notes 94-96 and accompanying text.

136. After this comment was completed, the California Supreme Court decided a case in which it enunciated a test for municipal liability similar to that proposed in this comment. Fisher v. City of Berkeley, 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. (1984).

In Fisher, Berkeley landlords challenged Berkeley's rent control ordinance on several grounds. No antitrust issue was raised at the trial or at the lower appellate level. 37 Cal. 3d at 710 (Bird, C.J., concurring). Also, the issue was not raised by a party, but by amicus curiae. Nevertheless, the California Supreme Court held that it was not precluded from addressing the issue. Fisher, 37 Cal. 3d at 654.

The California Supreme Court's ruling of course, is not decisive of this issue of federal law because the California Court cannot bind a federal court on a federal question. The California Supreme Court opinion, however, may have some persuasive value.

Fisher was subsequently granted certiorari by the United States Supreme Court. 105 S. Ct. 2356 (1985).