U.L. v. Carteret, Piscataway 1985

- Cover letter to Mr. Townsend re enclosed copies of D-Way's Brief for filing + Brief and Certification of Paley.

Attch: proof of service
Service list

Pgs 39

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December 3, 1985

Mr. Stephen W. Townsend
Clerk
Supreme Court of New Jersey
CN 970
Trenton, New Jersey 08625

Re: A-131 Urban League vs. Carteret (Piscataway)
(#24,787)

Dear Mr. Townsend:

Pursuant to your letters of November 15, 1985, and December 26, 1985, enclosed herewith please find original and nine copies of Piscataway's Brief for filing in this Court, together with nine copies of Piscataway's Brief and Certification of Phillip Lewis Paley, Esq., filed in the Appellate Division.

As instructed in your correspondence, we are arranging for the delivery of Piscataway's Brief to be filed in this Court upon all parties to this action. Proof of Service is attached hereto.

Kindly remit to the undersigned one filed stamped copy of Piscataway's Brief to the Supreme Court, for which we provide an envelope herein.

Very truly yours,

LIONEL J. FRANK

LJF:pmmn
Enclosures
cc: Everyone on the attached service list

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL.,	:	SUPREME COURT OF NEW JERSEY
PLAINTIFFS,	:	DOCKET NO. C-4122-73
VS.	:	24,787
TOWNSHIP OF PISCATAWAY, ET AL.,	:	A-131 September Term 1985 CIVIL ACTION
DEFENDANTS.	:	PROOF OF SERVICE

PATRICIA M. MONTANILE-NORTON hereby certifies and says:

1. I am a legal secretary with the office of Kirsten, Friedman & Cherin, attorneys for the Defendant, Township of Piscataway, in this matter.

2. On December 4, 1985, I personally caused to be delivered by Lawyers Service the following documents to the following named persons:

A. Original and nine copies of Brief to be filed with the Supreme Court together with Appellate Division Brief (nine copies) and Appellate Division Notice of Motion for Leave to Appeal with Exhibits attached (nine copies): Clerk of the Supreme Court, Stephen W. Townsend, Esq., 25 West Market Street, Trenton, New Jersey 08625;

B. Two copies of Brief to be filed with the Supreme Court: Eric Neisser, Esq., and John Payne, Esq., Rutgers Law School, Constitutional Law Clinic, 15 Washington Street, Newark, New Jersey 07102; and

C. Two copies of Brief to be filed with the Supreme Court: Raymond R. Trombadore, Esq., Trombadore and Trombadore, 33 East High Street, Somerville, New Jersey 08876.

3. One copy of the Brief to be filed with the Supreme Court:

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PATRICIA M. MONTANILE-NORTON

DATED: February 4, 1985

I hereby certify that the foregoing statements made by are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to punishment.

Patricia M. Montanile-Norton

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DATED: December 4, 1985

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SUPREME COURT OF NEW JERSEY
DOCKET NO. 24,787

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL.,

Plaintiff,

vs.

THE MAYOR AND COUNCIL OF CARTERET, ET AL.,

Defendants.

Civil Action

TOWNSHIP OF PISCATAWAY'S BRIEF IN SUPPORT OF REVERSAL OF THE TRIAL COURT'S DENIAL OF ITS MOTION TO TRANFER TO THE COUNCIL ON AFFORDABLE HOUSING AND ADDRESSING ISSUES RAISED BY THIS COURT, SUA SPONTE

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

The within summary of the factual background and procedural history of this matter is presented in support of the appeal by the Township of Piscataway from an interlocutory order entered by the Honorable Eugene D. Serpentelli, Judge of the Superior Court of New Jersey, on October 11, 1985. The order denied Piscataway's application to transfer the underlying litigation to the Council on Affordable Housing, an administrative agency created by the Fair Housing Act (hereinafter, the "Act").

Piscataway Township is a municipality of approximately 20 square miles, located in the northwest sector of Middlesex County, in central New Jersey. Clockwise, from the northeast, Piscataway is surrounded by the City of Plainfield, the Borough of South Plainfield, the Township of Edison, the Borough of Highland Park, the City of New Brunswick, the Township of Franklin and the Boroughs of Middlesex and Dunellen. According to the 1980 census, Piscataway's population approximated 42,300 persons; the population density is 2,200 persons per square mile. The number of dwelling units within Piscataway, excluding institutional residences is 12,300.

Approximately 10% of Piscataway's land area is owned and occupied by Rutgers, the State University, as the largest Rutgers campus in New Jersey. The Piscataway

campus includes 1,700 dormitory rooms, hundreds of single student housing, and 348 units of family housing, similar in appearance and function to garden apartments.

Piscataway is bisected by Route I-287, part of the interstate highway system. Along both sides of the highway, considerable industrial development has taken place during the past twenty years. The existing industrial zoning consists of substantially the same acreage as in 1967, having had fewer than 200 acres added since that time. The combination of industrial, commercial, and residential development has consumed much of Piscataway's land; little vacant land remains within the Township.

In 1976, following an extensive trial involving every municipality within Middlesex County (save the cities of Perth Amboy and New Brunswick), the Honorable David D. Furman, Judge of the Superior Court, rendered an opinion declaring Piscataway's zoning ordinance to be violative of the requirement to provide for housing affordable by lower income households pursuant to Mount Laurel I [Judge Furman's opinion is reflected at 142 N.J. Super. 11 (Ch. Div., 1976)]. Piscataway, together with a number of other defendant municipalities, appealed. In 1979, Judge Furman's decision was reversed by the Appellate Division [170 N.J. Super. 461]; plaintiff appealed that decision to the New Jersey Supreme Court, which, during January, 1983,

reversed and directed a remand of the matter to the Chancery Division of the Superior Court. See 92 N.J. 158 (1983).

Because of its clearly expressed and profound dissatisfaction with the inaction of the State Legislature and local municipalities in establishing provisions for housing within the State affordable by lower income persons, the Supreme Court created a novel procedure for the resolution of housing litigation addressing exclusionary zoning. That approach required the designation of three judges throughout the state to hear all such litigation; subsequently, Judge Serpentelli was selected to hear all cases arising out of central New Jersey.

The Supreme Court's approach vested great discretion in the three Mount Laurel judges to develop a systematic, formulaic approach for the resolution of these cases. Accordingly, shortly after his assignment, Judge Serpentelli designated an expert, Carla Lerman, to assist the Court. In an effort to seek a consensus on a number of relevant planning issues, Ms. Lerman scheduled a series of conferences of the (17 or so) experts retained by all parties to the Urban League lawsuit. These experts met at Judge Serpentelli's courtroom during February and March, 1984, and agreed on a number of approaches to the definition of region, to certain income limitations for qualified lower income persons, and to other factors to be included within the allocation process whereby each

municipality could determine its "fair share". The methodology thus derived is detailed in Judge Serpentelli's opinion in AMG, etc., et al. v. Township of Warren, recently approved for publication. It included a complex statistical analysis featuring, among other things, the use of an eleven county region to determine present need; the use of a commuter-shed region, differing from municipality to municipality, to determine prospective need; and the use of a number of ratios involving employment, job growth and land area, among others, to determine the allocation of need to each municipality.

This methodology did not take into account limitations on available developable vacant land within each municipality, because, according to the expert, sufficient data did not exist to determine the amount of available vacant developable land on a statewide basis. The consensus methodology further failed to consider such factors as the pattern of development within the community and any prospective disruption to that pattern caused by extensive development of high density housing. The methodology was intended to produce an outer limit on each municipality's mandate for Mount Laurel housing; municipalities were then afforded the opportunity to persuade the Court that circumstances existed which would make the strict

application of the consensus methodology number to a particular municipality inappropriate.

As to Piscataway, the number of housing units required by that methodology was 4,192. Of this number 448 units were not to be zoned for immediately, but were to be provided in a two stage process, 224 in 1990 and the remaining 224 in 1996. Therefore, the consensus methodology required Piscataway to zone immediately for 3,744 housing units.

To properly interpret this number, this Court should be aware that the policy of the trial courts in Mount Laurel litigation has been to permit the construction of four dwelling units to sell at market prices for every Mount Laurel dwelling unit selling at controlled prices. Therefore, Piscataway's obligation of 4,192 translates into 20,960 housing units (in the aggregate). Obviously, given Piscataway's existing development of 12,300 dwelling units and population of nearly 43,000, the number of dwelling units would have nearly tripled and the number of residents would have probably doubled.

The 4,192 number was based, in part, on consideration of an income factor as an augmentation to the basic formula. The assumption underlying the use of household income was that, the higher the municipal median household income, the greater the evidence of past exclusion

of lower income persons. In Piscataway's case the median income ratio, based upon census data determined by the trial court to be reliable in all respects, was 102%;in other words, 49% of those households living in Piscataway in 1980 had a household income below the median household income of Piscataway's region. Clearly, this statistic does not represent strong evidence of past exclusion as to Piscataway.

The consensus methodology analysis did not include consideration of any housing units constructed prior to 1980 as a "credit" (offset) against the obligation to be imposed upon the Township. Piscataway had argued vociferously that its 3,400 garden apartment units, virtually all of which were built between 1960 and 1980, should be considered as reflecting Piscataway's attempt to meet its Mount Laurel obligation. Piscataway's contention was that the failure to incorporate some feature within the methodology which would provide recognition for past performance discriminated against those municipalities that had made a good faith effort to meet its social and moral obligation to lower income persons. This position was not accepted by the Court.

The trial of Piscataway's case, together with Cranbury, Monroe, South Plainfield and other municipalities, commenced on April 30, 1984, and consumed 19 trial days.

The focus of that trial was to determine the fair share number for each municipality. It soon became apparent, as to Piscataway, that its contentions as to lack of suitable vacant land were sound. The testimony presented at trial demonstrated that Piscataway had approximately 1800-1900 vacant acres of land, of which no more than 1100 was suitable for residential development at any density. The vacant acreage not suitable for residential development was unsuitable because of environmental constraints or appurtenant industrial development. Of the approximately 1100 suitable acres, a number of the parcels constituting that acreage consist of working farms and plant nurseries, which Piscataway contended should be excluded from consideration, in light of the strong emphasis in Mount Laurel II to preserve existing agricultural uses.* Piscataway also pointed out that approximately 250 acres of the remaining acreage had been previously (and voluntarily) rezoned by Piscataway to accommodate high density residential development, that rezoning having taken place after 1977.

The Court ultimately concluded that the development of the 1100 vacant acres which were deemed suitable for residential development could not produce substantially

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* Piscataway's arguments were not accepted by the Court.

more than 2200 Mount Laurel units, despite the higher number produced by the methodology. Therefore in early June, 1984, the trial court concluded that it should hear testimony on a site specific basis as to the suitability of each site of vacant land within the municipality; accordingly, it commissioned Ms. Lerman to prepare an analysis of each vacant site within Piscataway, addressing the suitability of each site for high density residential development at specific densities.

During November, 1984, the trial court received written recommendations from Ms. Lerman. In the aggregate, Ms. Lerman identified approximately 40 suitable sites ranging in area from 2.8 acres to 110 acres and recommended appropriate development densities for each site. Ms. Lerman's conclusions, in sum, were that just under 1100 acres of vacant land was suitable for high density residential development at an approximate average density of 10 units to the acre. During February, 1985, the parties were permitted to present evidence before the Court to refute or bolster Ms. Lerman's contentions as to suitability. Following that hearing, on July 23, 1985, Judge Serpentelli rendered a written opinion* concluding that the fair share

* A Judgment conforming to this Opinion was executed on September 17, 1985.

number for Piscataway was 2,215*, rather than the 4,192 required by the strict application of the consensus methodology.

On July 2, 1985, twenty-one days prior to Judge Serpentelli's opinion addressing Piscataway, the Fair Housing Act was signed into law. Pursuant to Section 16(a)** of that Act, "any party" to any exclusionary housing litigation might apply to the trial court for leave to transfer the pending litigation to the Council on Affordable Housing. Commencing in late July, therefore, Piscataway and other municipalities similarly situated began coordination with Judge Serpentelli in order to schedule motions for transfer. Because of vacation schedules and other commitments, argument addressing Piscataway's application was not heard until October 3, 1985. Judge Serpentelli denied Piscataway's application (together with similar motions brought by Monroe, South Plainfield, Cranbury and Warren).

Thereafter, Judge Serpentelli executed an Order

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* 2,215 Mount Laurel units translates into 11,075 housing units, a virtual doubling of the existing number, and somewhere between 25,000 to 30,000 people, a population increase of at least 60%.

** This Court has surely noted that the first paragraph of §16 is not explicitly labelled §16(a), but, for ease of reference, this brief will address that first paragraph as §16(a).

(dated October 11, 1985) conforming to his ruling. On October 23, 1985, Piscataway sought leave to appeal Judge Serpentelli's order and sought a stay of all trial court proceedings before the Appellate Division. Piscataway's application was lodged for filing with the Appellate Division, but its concurrent application for an emergent stay was denied.

In the interim, Piscataway, having been under an obligation to present a compliance plan per the Judgment as to Piscataway dated September 17, 1985, sought an extension of time from the trial court. Judge Serpentelli granted that application.

Thereafter, on November 13, 1985, this Court entered an Order granting Piscataway's application for leave to appeal and directly certifying the appeal. Piscataway then joined with South Plainfield in applying to Judge Serpentelli for a stay of trial court proceedings pending the Supreme Court's review of the appeal; those applications were granted on Friday, November 22, 1985. No written order has yet emanated from that ruling.

LEGAL ARGUMENT

I.

THE MEANING OF "MANIFEST INJUSTICE", AS USED IN THE FAIR HOUSING ACT, IS DERIVED FROM THIS COURT'S DECISION IN GIBBONS v. GIBBONS; THE TRIAL COURT'S FAILURE TO APPLY THE GIBBONS STANDARD WAS A CLEAR MISTAKE OF LAW WHICH REQUIRES REVERSAL

The Fair Housing Act (hereinafter "Act") L. 1985, c. 222, is the Legislature's response to this Court's plea for legislative action to satisfy the constitutional obligation to provide realistic opportunities for housing for lower income families. See Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158 (1983) (hereinafter "Mount Laurel II"). In establishing the Council on Affordable Housing (hereinafter "Council"), §5(a) of the Act, the Legislature clearly opted for an administrative scheme "for the resolution of existing and future disputes involving exclusionary zoning" through the "mediation and review process" there established (§3, emphasis added). Clearly, the Legislature's preference for mediation and review pursuant to the administrative framework set up in §14 and §15 of the Act, and the use of the language "existing" in §3, demonstrate the legislative intent that the Act should apply to existing disputes.

The standard of "manifest injustice" which appears in Section 16(a) of the Act has previously been interpreted

by our courts in other statutory enactments in a similar context (that is, relating to whether a statute should be given retroactive effect). In Gibbons v. Gibbons, 86 N.J. 515 (1981), this Court established a two part test for analyzing whether "manifest injustice" is demonstrated:

> The essence of this inquiry is whether the affected party relied, to his or her prejudice, on the law that is now changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively." 86 N.J. at 523, 524.

For two reasons, no Mount Laurel plaintiff can show that by simply filing suit it either relied on established law or that any reliance by it produced such "deleterious and irrevocable" consequences as to constitute manifest injustice.* First, between the time of filing suit and this Court's decision in Mt. Laurel II, a period of five years, the Appellate Division rendered an opinion which failed to uphold plaintiff's advocated position. Urban League of Greater New Brunswick et al. v. Mayor and Council of the Borough of Carteret, et al., 170 N.J. Super., 461 (App. Div. 1979). Second, until this Court's decision in

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* On the contrary - Mount Laurel defendants have relied on pre-existing law now changed by Mount Laurel II. This reliance forms the basis for the manifest injustice implicit in the application of the consensus methodology, particularly where the bulk of a municipality's lands have been developed consistent with pre-Mount Laurel II zoning standards and no adversary has challenged the propriety of that earlier zoning, for example, by asserting that a municipality has over-zoned for industry to keep out housing. Piscataway exemplifies this situation.

Mt. Laurel II, presently available judicial remedies for successful plaintiffs had either not been sanctioned to the extent addressed by that decision or did not earlier exist.

In addition, the Act specifically guarantees the availability of certain comprehensive administrative mechanisms to insure realistic opportunities to meet each region's present and prospective needs for lower income housing. Given this statutory structure, unless a plaintiff can demonstrate that (a) either the Council chooses to ignore its statutory functions and constitutional obligations or (b) that because of some unique set of circumstances it is impossible for a plaintiff to obtain any practical relief if transfer was ordered,* manifest injustice is not established. Neither of the plaintiffs suing Piscataway can establish sufficient reliance under Gibbons, supra, to prove any manifest injustice to deny transfer under Section 16(a) of the Act.

Moreover, as argued by Piscataway in its Appellate Division brief, Judge Serpentelli applied inappropriate criteria in denying Piscataway's application for transfer.

* As, for example, where a municipality has infrastructure capacity sufficient to accommodate a Mount Laurel development but whose capacity might be consumed by intervening non-residential development during the pendency of Council deliberations.

Specifically, Judge Serpentelli's analysis stressed the facility and expedition of "the provision of a realistic oportunity for low and moderate income housing", which criterion, although included in Senate Bills Nos. 2046 and 2334, was eliminated from the Act. Judge Serpentelli failed to apply the enacted statutory language and failed to give proper deference to the legislative determination as to how best to satisfy the constitutional obligation of Mt. Laurel II. New Jersey Sports and Exposition Authority v. McCrane, 61 N.J. 1, app. dism., 409 U.S. 943 (1972).

The failure to apply the standards of Gibbons, supra, in determining whether any party would suffer manifest injustice by transfer of litigation to the Council was a clear mistake of law and requires reversal.

II.

THE BUILDER'S MORATORIUM APPLIES IN ALL CASES.*

The Act contains an administrative framework addressing the implementation of the constitutional obligations delineated in Mt. Laurel II. The Legislature clearly contemplated that it would take some time for the Council to organize and carry out its duties. It therefore imposed rigid time schedules for determining housing regions (§7(a)), estimating present and prospective need for low and moderate income housing at the State and regional level (§7(b)), and adopting "criteria and guidelines (§7(c)) to permit municipalities to prepare and file housing elements and adopt appropriate ordinances for submission to and review by the Council (§9(a)). Consistent with this time schedule, a moratorium on builder's remedies "in any exclusionary zoning litigation which has been filed on or after January 20, 1983" was imposed to coincide with the time frame in which a municipality must prepare and file a housing element (§28).

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* Piscataway addresses this point pursuant to the directive of this Court contained within a letter from Stephen Townsend, Clerk of the Supreme Court, dated 11/15/85. The Court should note, however, that Piscataway has been sued by only one developer-plaintiff (Gerickont) whose complaint was filed after the commencement of the trial in Piscataway's case. Under the guidelines established in J.W. Field Co., Inc., et al. v. Franklin Township, et al., L-6583-84 PW, that plaintiff, which did not participate in the trial phase, is estopped from entitlement to a builder's remedy in any event.

The power of the Legislature to impose moratoria which have a substantial relationship to the public welfare is unquestioned in this State. Cappture Realty v. Bd. of Adjustment of Elmwood Park, 133 N.J. Super. 216, 221 (App. Div. 1975). Measures restricting development by preserving the status quo, so that state agencies may organize and begin implementing administrative remedies, are clearly appropriate. Toms River Affiliates v. Dept. of Environmental Protection, 140 N.J. Super. 135 (App. Div. 1976). The moratorium imposed by §28 of the Act falls into these categories. It is both reasonable and rationally related to the legislative end to be achieved. Schiavone Construction Company v. Hackensack Meadowlands Development Commission, 98 N.J. 258, 264-265 (1985). It is reasonable because it coincides with the anticipated start-up time needed to allow the Council to function and to permit the municipalities to file housing elements. It is rational because it provides a mechanism designed to enable municipalities to meet their constitutional obligations in an orderly manner, fair both to the low income persons to be housed and to the municipalities involved.

For example, the Act requires consideration of the established pattern of development in each community (§7(b))(2)(a)); Piscataway, a community substantially developed at a population density approximating 2 1/2 times the state-

wide average in this, the most densely populated state in the United States, would be entitled to show that its past pattern of development does not reasonably permit future development at densities produced by the consensus methodology or by Judge Serpentelli's judgment of July 23, 1985.

Since the moratorium on builders remedies is reasonable in duration and consistent with both the internal structure and the overall objectives of the Act, and since it is rationally related to achieving those overall objectives without depriving any party of a "vested" right,* the legislative intent must be recognized and the moratorium honored. Schiavone Construction Co. v. Hackensack Meadowlands Development Commission, 98 N.J. 258, 264-265 (1985).

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* This Court does not consider the builder's remedy a "vested right" but rather an interim remedy. 92 N.J. at 352.

III.

TRANSFER APPLICATIONS UNDER §16 SHOULD BE TREATED CONSISTENTLY TO EFFECTUATE THE LEGISLATIVE INTENT

The State Legislature clearly intended to resolve existing and future disputes involving exclusionary zoning through the mediation and review process provided in §14 and §15 of the Act - not through litigation.

Those disputes encompassed within §16(b) of the Act are to be resolved pursuant to the mediation and review process, by the plain language of the Act. As argued in Point I of this brief, cases under Section §16(a) should also be transferred to the Council for adminstrative resolution unless a plaintiff can demonstrate reliance on prior law which would result in consequences so deleterious and irrevocable that it would be unfair to apply the Act retroactively. Gibbons v. Gibbons, supra at 523-524. As discussed in Point I, plaintiffs cannot show the necessary reliance to preclude transfer of both existing cases brought against Piscataway. Assuming, however, a factual setting in which sufficiently adverse consequences exist, such that one plaintiff qualifies for transfer and another does not, appropriate deference to the legislative intent and interpretation of the Act to avoid an unreasonable result requires that both actions be transferred to the Council. Planned Parenthood of New York City, Inc. v. State, Dept. of

Institutions and Agencies, 75 N.J. 49 (1977).

Permitting both the Courts and the Council to resolve Mount Laurel grievances will only produce inconsistent results because of the different approaches employed and the different criteria and guidelines followed by each tribunal. For instance, the determination of housing regions by the Council in §7(a) of the Act, and the factors to be utilized in adopting criteria and guidelines under §7(c), not required to be considered or utilized by the Court, will produce different municipal fair share numbers and require inconsistent planning and zoning on the municipal level. Similarly, the approaches of litigation verses mediation and review, as well as the legislative intent to stay the builder's remedy under §28, evidence irreconcilable methods of approaching and resolving these controversies in a single municipality. Such unreasonable results are to be avoided where a reasonable result consistent with the clearly identified purposes of the Act as a whole are equally possible. City of Clifton v. Passaic County Bd. of Taxation, 28 N.J. 411 (1959); Elizabeth Federal Savings and Loan Assn'n v. Howell, 24 N.J. 488 (1957).

IV.

THE FAIR HOUSING ACT IS NOT FACIALLY INVALID

It has been clearly established by this Court that in considering an attack upon the constitutionality of legislation, "every possible presumption favors the validity of an act of the Legislature." New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972). Although reasonable persons might differ as to how best to achieve the constitutional obligation imposed by Mount Laurel II, courts must defer to the legislative remedy. Id.

The legislative remedy in this case is the enactment of the Act with its comprehensive administrative procedures carefully designed and crafted to give effect to a constitutional mandate. On its face, the legislature's response to this Court's invitation for legislative action appears appropriate and reasonable to achieve the desired remedial action. In the event, however, that any individual section of the Act might carry with it a consitutional infirmity, the legislative intent is that the remaining sections be given full effect (§32). See Morris County Fair Housing Council, et al., v. Boonton Twp., et al., ___ N.J. Super. _____ (Ch. Div. 1985) (slip opn. of Skillman, J.S.C., at 13), in which the Court discusses corollaries to the presumption of the validity of legislation under constitutional attack.

A. Moratorium on Builder's Remedies.

As discussed in Point II, moratoria which bear a substantial relationship to the public health, welfare and safety, which are reasonable in duration and rationally related to the legislative end to be achieved, will be upheld. Cappture Realty, supra at 221; Schiavone Construction Co., supra at 264-265. The moratorium on builders' remedies (§28) fits these criteria. First, it is limited in duration, coinciding with the deadline for a municipality to submit its housing element and fair share ordinance (§9(a)). Second, it helps facilitate the implementation of the Act by affording an effective transition period between pending litigation and administrative proceedings before the Council.

Finally, because the builder's remedy is not a "vested right", Morin v. Becker, supra at 470-471 (1957), but simply one of many interim judicial remedies utilized to achieve the desired constitutional end, there is no constitutional infirmity stemming from a moratorium relating to that remedy.

B. There is No Conflict Between the Transfer Required In §16(b) and the Court's Power Under R. 4:69-5.

Exclusionary zoning litigation arising under §16(b) of the Act requires exhaustion of the review and mediation process. This is consistent with the legislative intent that the Council have primary jurisdiction for the

administration of Mount Laurel housing obligations in accordance with sound regional planning considerations in the State (§4(a)). Similarly, R. 4:69-5 states that "[e]xcept where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 (prerogative writ actions) shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted." §16(b) and R. 4:69-5 are consistent in acknowledging the primary jurisdiction of the administrative tribunal.

When determining whether a court or an administrative agency should initially exercise jurisdiction over a dispute arguably within the power of either to resolve, this Court has consistently held that the administrative remedy must be first exhausted. Patrolmen's Benevolent Ass'n v. Montclair, 70 N.J. 130, 135 (1976); Woodside Homes, Inc. v. Morristown, 26 N.J. 529, 540-541 (1958). The legislature clearly intends that Mount Laurel cases be resolved in the first instance by the Council. This intent must be effectuated in all but the most unique and compelling circumstances. Only in those cases where the requirements of the Act are not being followed by the Council, or where it is impossible for a particular party to obtain any practical relief*, would the application of the extraor-

* See footnote, p. 13.

dinary provisions of R. 4:69-5 be appropriate. This construction of the Act effectuates the legislative intent, avoids inconsistent results by the Council and Court, and does not infringe upon the prerogative writ jurisdiction of the Court. Fischer v. Twp. of Bedminster, 5 N.J. 534 (1950). As this Court stated in New Jersey Board of Higher Education v. Shelton College, 90 N.J. 470, 478 (1982), "a challenged statute will be construed to avoid constitutional defects if the statute is 'reasonably susceptible' of such construction."

c. Regions

The Council was assigned the responsibility in §7(a) to determine housing regions and defined the parameters of its consideration in §4(b). These parameters are consistent with the Act's approach of accomplishing the Mount Laurel obligation in accordance "with sound regional planning considerations..." §4(a)

Any present attack on the definition of "housing region" is premature. First, the State's housing regions have not yet been determined by the Council. Second, the Legislature is presumed to have acted in a reasonable manner and on the basis of adequate factual data. Hutton Pk. Gardens v. West Orange Town Council, 68 N.J. 543 (1975).

Third, the regions defined by §4(b) of the Act are

consistent with those regions proposed by an agency generally recognized as expert in this area, The Center for Urban Policy Research of Rutgers, The State University. Rutgers Report I at 5, 58-61. This suggests that the regions to be established by the Council will be constructed to achieve the constitutional ends mandated by Mount Laurel.

Under these circumstances any attack upon the statutory definition of "housing region" is not yet appropriate.

D. Credits

Plaintiffs attack the "credit" mechanism provided in the Act, whereby municipalities will be "entitled to an offset to its fair share for each current unit of low and moderate income housing of adequate standard", in accordance with criteria and guidelines to be adopted by the Council. §7(c)(1).

Piscataway respectfully argues that such crediting is not only justified, but essential in determining a municipality's fair share obligation. Piscataway is one of those municipalities which affirmatively sought to attract all segments of society - even prior to Mount Laurel I. Its governing body had adopted inclusionary zoning ordinances with substantial acreage devoted to high density housing. One-third of the existing housing units, for example, are garden apartments. It would be a travesty to "penalize" Piscataway by ignoring its past actions to provide a variety of housing while "rewarding" those municipalities which

to accept only housing of low density and high cost.*

In any event, as already argued supra, there should be no presumption that the Council will adopt criteria and guidelines which are not intended to resolve each municipality's fair share obligation in a constitutionally appropriate manner.

E. Delays Inherent in Any New Regulatory Scheme

In another context, this Court has recognized the practical difficulties in implementing a comprehensive legislative scheme which requires the establishment of an administrative agency, and has "exercised... restraint in the timing of required accomplishment of a constitutional goal, without abandoning its eventual enforcement." Robinson v. Cahill, 64 N.J. 449, 474-475 (1976).

Although it will take some time for the Council to be fully functional and capable of engaging in the mediation and review process provided in §15 of the Act, the Legislature has imposed rigid time schedules on the Council for adoption of criteria and guidelines to commence and complete the process (as discussed in greater detail in Point II).

* Put differently, where a municipality can show substantial past development, a divergent housing stock and a relatively low household median income, it makes little sense to define that municipality as exclusionary merely because a novel statistical construct says it is, particularly where the construct is designed for towns just starting to develop.

It is the achievement of the constitutional obligation expressed in the Mount Laurel decisions which is the goal of the Act. A necessary and reasonable delay in the start-up of the administrative mechanism to achieve that goal results in no per se violation of any underlying constitutional right. Robinson v. Cahill, supra.

Between the time suit was first filed against Piscataway and this Court's decision in Mount Laurel II, the Appellate Division rendered an opinion adverse to the plaintiff. Urban League of Greater New Brunswick et al. v. Mayor and Council of the Borough of Carteret, et al., 170 N.J. Super., 461 (App. Div. 1979). Piscataway was entitled to rely upon that decision as representing the law of the case until this Court's reversal in Mount Laurel II. Therefore, the time frame for considering any delay inherent in the start-up of the Council should be balanced against those delays (if any) which commenced in 1983, when plaintiffs' constitutional rights were finally adjudicated.

The Council, if given time to organize as envisioned by the Legislature, will accomplish the legislative goal of providing reasonable opportunities for the provision of affordable housing, consistent with proper planning standards, and consistent with the interest of all municipalities in providing a high quality of life for their citizenry.

is under challenge is so intrinsic to the Act that, if it is found to be invalid, the whole statute must fall. It is therefore respectfuly submitted that the legislative intent as expressed in §32 should be effectuated.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the constitutional challenges to the Act posed by the Urban League should be rejected, and that the Court should consider the merits of Piscataway's appeal. As to the merits, the Supreme Court should reverse Judge Serpentelli's decision denying Piscataway's motion to transfer this litigation to the Council and order such transfer directly.

Respectfully submitted,

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Dated: December 3, 1985

F. Repose

It has long been a firm policy of our courts to encourage the conclusion of litigation, whether through settlement or through the finality of some adjudicative process, where possible. Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 35 (1957). Specifically with reference to Mount Laurel actions, this Court has stated that:

> [J]udgments of compliance should provide that measure of finality suggested in the Municipal Land Use Law, which requires the reexamination and amendment of land use regulations every six years. Compliance judgments in these cases therefore shall have res judicata effect, despite changed circumstances, for a period of six years, the period to begin with the entry of the judgment by the trial court. In this way, municipalities can enjoy the repose that the res judicata doctrine intends, free of litigious interference with the normal planning process. 92 N.J. at 291-292.

§22 of the Act reflects the Legislature's acknowledgement and adoption of this position; that legislative intent should be given maximum effect. Board of Ed. of City of Asbury Park v. Hoek, 38 N.J. 213 (1962).

Once a final resolution of a Mount Laurel proceeding is effected, whether through settlement, court order, or mandate of the Council, municipalities are en-

titled, at the very least, to some degree of stability, so that it may implement those requirements imposed upon it in a rational, non-chaotic manner.

V.

§32 EVINCES THE LEGISLATURE'S INTENT THAT ANY SECTIONS OF THE ACT FOUND TO BE INVALID SHALL NOT EFFECT THE VIABILITY OF THE REMAINING SECTIONS.

§32 of the Act provides:

> If any part of this act shall be held invalid, the holding shall not affect the validity of remaining parts of this act. If a part of this act is held invalid in one or more of its applications, the act shall remain in effect in all valid applications that are severable from the invalid application.

This Court has clearly stated that the legislative intent to save the remaining portions of a statute found in part to suffer from a constitutional infirmity should be effectuated where possible. Chamber of Commerce of U.S. v. State, 89 N.J. 131 (1982). Where the objectionable section of a statute can be excised without substantial impairment to its principal object, and where the remaining sections are still viable, a severability clause will be enforced. Inganamort v. Borough of Fort Lee, 72 N.J. 412 (1977). See also Affilidated Distillers Brands Corp. v. Sills, 60 N.J. 342 (1972).

The Legislature clearly expressed its intent that the Act "remain in effect in all valid applications that are severable from the invalid application" (§32). There has been no persuasive argument made that any one section which