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Draft of Procedural History Transfer

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PROCEDURAL HISTORY

After 11 years of litigation including an appeal to this Court, see Common Facts section below, the defendant Townships of Cranbury, Monroe, Piscataway, and South Plainfield filed motions in July, August and September 1985 to transfer this action to the Council on Affordable Housing, created by the Fair Housing Act of 1985. P.L. 1985, c.222 (hereafter the Act). After extensive briefing and oral argument,[1] the trial court (Serpentelli, A.J.S.C.) rendered an extensive oral ruling, including findings of fact and conclusions of law, denying all four transfer motions and denying stays of those orders on October 2, 1985. These rulings were incorporated in four parallel orders entered on October 11, 1985, from which the defendants now appeal.

On October 23, 1985, the Appellate Division (Cohen, Petrella, and Ashby, JJ.) unanimously denied Piscataway's motion for stay of the Judgment requiring submission of a compliance plan on October 23. On November 8, however, Judge Serpentelli denied plaintiffs' motion for immediate referral to the Master and granted Piscataway an extension of its compliance submission deadline to December 2, with a possible additional extension to December 23. On November 22, he granted Piscataway's motion for stay

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1 The Attorney General did not brief or otherwise participate in the motions to transfer the Urban League case because Judge Serpentelli made it clear in advance that he would not address any constitutional issues. He denied the Public Advocate's motion to participate as an amicus curiae because its late filing prejudiced the municipalities' ability to respond.

of that order.

On November 13, 1985, this Court granted all four towns' motions for leave to appeal and granted certification before decision in the Appellate Division. On November 22, 1985, Judge Serpentelli adjourned the compliance hearing concerning Cranbury previously scheduled for December 2. Moreover, he granted on that date South Plainfield's motion for stay of further trial court proceedings pending determination of this appeal, although refusing to lift the restraints continued by his October 11, 1985 order.

FACTS

A. Common Facts

The litigation sought to be transferred by the motions under appeal is the oldest Mount Laurel action still pending before the courts of this state.[2] On July 23, 1974, more than 11 years and 4

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2 The Mount Laurel action itself was settled on July 29, 1985. The Allan Deane Co. v. Bedminster litigation was concluded by decision of Judge Serpentelli entered on May 1, 1985. The appeal in the Urban League of Essex County v. Mahwah case, also before this Court in Mount Laurel II has been withdrawn. The Oakwood at Madison v. Madison Township litigation, decided by this Court in 1977, has been in limbo since shortly thereafter when the builder and township filed a settlement agreement with Judge Furman, providing for 1750 total units of which 350 would be lower income units. In 1979, the Township Planning Board granted final subdivision approval for 1200 market units, without requiring simultaneous construction of the lower income units. On May 10, 1985, Judge Serpentelli granted the URban League plaintiffs' motion and enjoined the Township (now known as Old Bridge) from granting more than 120 building permits to Oakwood at Madison, Inc. for market units until a plan for phasing in construction of the lower income units was approved by the Court. The Court joined the Oakwood plaintiffs as defendants in the Old Bridge portion of the Urban League action for this limited purpose. The injunction remains in effect, as Oakwood has still not even proposed a phasing schedule.

months ago, the Urban League of Greater New Brunswick[3] and seven individuals sued, on behalf of themselves and others similarly situated, 23 municipalities in Middlesex County, including appellants herein claiming that each municipality was violating the Constitution in that its zoning ordinance failed to provide a realistic opportunity for the development of low and moderate income housing (referred to jointly hereafter as lower income housing). Judge Furman certified the class and, after an evidentiary hearing, denied defendants' motion for a severance. An extensive trial early in 1976 led to a lengthy opinion on May 4, 1976 and an implementing Judgment on July 9, 1976. Urban League of Greater New Brunswick, et al. v. Mayor and Council of Carteret, et al., 142 N.J. Super. 11 (Ch. Div. 1976). The opinion and ensuing Judgment required rezoning for 1,351 lower income units for Cranbury, 1,356 units for Monroe, 1,333 units for Piscataway, and 1749 units for South Plainfield. The Judgment was stayed by the Appellate Division pending appeal by seven towns, including the current four appellants. In 1979, the Appellate Division reversed Judge Furman's Judgment. 170 N.J. Super. 461 (App. Div. 1979).

In its opinion reversing the Appellate Division and affirming Judge Furman, this Court extensively recited the

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3 Recently, the organization's name was changed to the Civil League of Greater New Brunswick, but for clarity's sake in light of the extended litigation, we will refer to the organization, the individual plaintiff/respondents in this action, and the class they represent as the Urban League respondents.

history and facts of this case. South Burlington Cty. NAACP v. Mount Laurel Twp., 92 N.J. 158, 339-51, 456 A.2d 390, 484-90 (1983) (Mount Laurel II). It remanded to one of the three specially designated Mount Laurel judges not for trial on constitutional non-compliance "for that has already been amply demonsrated" but solely for "determination of region, fair share and allocation and, thereafter, revision of the land use ordinances and adoption of affirmative measures to afford the realistic opportunity for the requisite lower income housing." Id. at 350-351, 456 A.2d at 484-90.

After remand, there were extensive pretrial proceedings involving both traditional discovery and conferences of planners, some of which are described in AMG Realty Co. v. Warren Twp., ___ N.J. Super. ___, ___, A.2d ___(Law Div. 1984)(116 N.J.L.J. 1 (November 21, 1985). There followed a joint 18-day trial in April-May 1984 on region, regional need, fair share allocation, and validity of revised ordinances, in which Cranbury, Monroe, and Piscataway participated. South Plainfield did not participate after the first few days of trial because it signed a Stipulation as to all relevant facts including its fair share, invalidity of existing ordinances, and appropriate rezoning and other action on May 10, 1984, upon which Judge Serpentelli entered summary judgment on May 22, 1984. With regard to Cranbury and Monroe, the trial court issued a letter-opinion dated July 27, 1984 and an implementing Judgment on August 13, 1984, which determined the fair share of Cranbury to be 816 and the fair share of Monroe to

be 774. The Court held the zoning ordinance and land use regulations in each town unconstitutional, directed rezoning of each town within 90 days of the July 27 opinion, and appointed Masters to assist the towns in the revision process. As to Piscataway, the trial judge did not resolve the fair share issues, although Piscataway had participated fully in the trial, but ordered further proceedings set forth below.[4]

B. Compliance Facts As To Cranbury

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4 There are five other towns remaining in the URban League case. Three-- East Brunswick, Plainsboro, and South Brunswick -- were before this Court in Mount Laurel II. Each of them has settled -- a consent order was signed with regard to East Brunswick, providing for _____ units on July __, 1984, and with regard to Plainsboro, providing for 575 units on July __, 1985. The South Brunswick settlement, with a fair share of 1969 units, should be signed shorly. In addition, after this Court's remand, the plaintiffs successfully moved to modify and enforce Judge Furman's 1976 Judgment against North Brunswick and Old Bridge (formerly Township of Madison, the defendant in Oakwood at Madison), which were the only other two towns that had not yet complied with that Judgment. A consent order as to North Brusnwick providing a fair share of ___ was signed in September 1984, the zoning ordinance has been adopted, and the final compliance hearing is scheduled for Decmeber 9, 1985. In July 1984, Old Bridge and the plaintiffs (including two large consolidated builder-plaintiffs) agreed to a consetnt order establishing a fair share of 2135 units through 1990. A Master was appointed in November 1984 and compliance negotiations have been in progress since then. The motion of the Urban League plaintiffs for a court-ordered remedy, filed in July of this year, has been repeatedly adjourned by the trial court in anticipation of further settlement discussions, but is now set for determination on December 6.

As a result of these settlements, and a negotiated settlement of one site in Piscataway, most of which required rezoning at higher densities with set-asides of 17-20 percent, a significant amount of lower income housing is now actually in production or has received necessary Planning Board approval.

None of these five towns has moved to transfer the case.

After holding extensive Township Committee meetings with the Master and obtaining some extensions of the Judgment's 90-day deadline for ordinance revision, Cranbury submitted its 135-page "Mount Laurel II Compliance Program for Cranbury Township, New Jersey" at the end of December 1984. The trial court directed the Master to report on the Compliance Program, which he finally did in an 82-page report filed in April 1985. The Court then required the parties to exchange expert reports. The Court made a personal inspection of Cranbury on May 16, 1983. By July 24, 1985, all expert reports were filed and the Urban League plaintiffs requested that the trial court set a firm date for the compliance hearing. As the trial court noted in its oral opinion denying the transfer motion, the delay in the hearing since July was solely because of the Court's heavy docket. Transcript of October 2, 1985 Decision, at __. After denying the transfer motion, Judge Serpentelli scheduled the compliance hearing for December 2, 1985 and a prehearing conference for November 22. The latter conference was cancelled and on November 22 adjourned the compliance hearing with the consent of the parties.

C. Compliance Facts As To Monroe

Monroe's "Mt. Laurel II Compliance Program" was not submitted to the Court until March 29, 1985, after seven months of meetings with the Master and Monroe's specially retained planner. Monroe's mayor did not act on the resolution of submission, adopted 3-2 by the Council, and also refused to authorize payment to the Master, the retained planning firm, and

the Township's own attorney for their services in preparing the compliance plan. As a result, Judge Serpentelli ordered that, should the Township Administrator refuse to endorse such payment, the President of the Council must effect it. That Order of May 13, 1985 has not yet been complied with, although no stay was obtained; however, the Township served a notice of appeal on July 26, 1985. (Appellate Division Docket No. A-5394-84T1). Motions to dismiss that appeal as interlocutory and untimely are currently pending before the Appellate Division.

Monroe's compliance plan proposed a variety of projects including the Whittingham project of which 100 units or about 5 percent were to be lower income units. The trial court directed the Master to review and report on Monroe's plan. While the Township's compliance plan was under consideration by the Master, the Monroe Planning Board and Township Council voted to approve the Whittingham project, without any Mount Laurel set-aside.

On July 25, 1985, this Court provided the Township with two complianced options. First, the trial court gave the Monroe Council another opportunity to vote on the Whittingham project, explaining that if it re-affirmed the project without the 5 percent set-aside, the compliance plan would be void and the Master would be directed to draft her own compliance plan. Second, the Court stated that it would reduce the township's total fair share by 100 units (presumably, the amount that would be lost by the Whittingham extension without a set-aside) if it would voluntarily comply. These directives were embodied in a

written order ultimately signed on August 30, 1985. On August 2, 1985, the Township Council informed the Court in writing that it had unanimously rejected both options. By the terms of its oral order on July 25, confirmed by a separate order also entered on August 30, the Court found the Township's compliance plan inadequate and void and directed the Master to draft a compliance plan by October 7.

Meanwhile, on August 5, 1985, the Township Council adopted a major revision to its zoning ordinance, permitting substantial residential construction without a set-aside or development fee as an option within the general commercial zone, in response to a request by the developer of the Forsgate project. Under the ordinance amendment adopted, that project could build some 700 residential units without a set-aside. Although the Master was known to be considering recommending that the Forsgate project make some contribution to the lower income fair share obligation, the Monroe Planning Board gave overall development approval of that project on Monday, November 18, 1985.

The Master's report is due any day now. As the Court indicated in its ruling on the motions to transfer, after the report is in:

> The Court would have to hold a relatively short compliance hearing thereafter, since the town found at least one of the parcels compliant, and the issues would be those raised by the plaintiffs to the extent that they felt improperly omitted.
>
> If necessary, any Court-ordered revisions would follow, and I would anticipate that this procedure could be accomplished in three to four

months.

Transcript of Judge Serpentelli's Decision on Motions to Transfer, October 2, 1985, at 27. (Copies of this transcript have been provided in the appendices filed by each of the four appellants.)

D. Compliance Facts As To Piscataway

During the Spring 1984 fair share trial, all parties agreed that, because of approvals granted during the eight years since Judge Furman's Judgment, Piscataway no longer had sufficient vacant developable land to accommodate the fair share of 3744 units that would be allocated that Township under the general fair share formula used by the Court. The Court, therefore, did not assign Piscataway a fair share number after the joint 18-day trial but rather directed the Court-appointed expert to prepare an inventory of the available land that was suitable for multi-family development. The expert's report was submitted on November 10, 1984 and the plaintiffs' expert endorsed it without exception. The Township, however, contested each and every site recommended by the Court's expert.

Meanwhile, as a result of repeated Township efforts to approve development inconsistent with the Mount Laurel obligation on the dwindling supply of vacant land, the plaintiffs were forced to bring a number of motions for temporary restraints beginning in May 1984. These resulted in several individual orders, entered June 7 and September 11, 1984, and ultimately, in the Order entered December 11, 1984, which restrained approvals

on any of the sites found suitable by the Court-appointed expert in her November 10 report, pending a full hearing on the report.

After some discovery was had, and a supplemental Court-appointed expert report was submitted on January 18, 1985, the Court held an extended evidentiary hearing comprising most trial days in February 1985 on the suitability of each contested site. On May 16, 1985, the Court held a personal site inspection. On July 23, 1985, a full year after issuing its opinion as to the fair share for Cranbury and Monroe, the Court issued a letter-opinion agreeing with virtually all of the Court-appointed expert's site suitability conclusions, setting Piscataway's fair share at 2215 units, denying requested credits against the fair share, declaring the existing ordinances invalid, appointing the expert as Master, and requiring the Township to rezone within 90 days, or October 23. The Court noted that the Township should need less time for compliance than other towns because the extensive proceedings to that point had already resolved most site-specific issues. On September 17, 1985, after careful review of the township's extensive objections to the proposed form of Judgment, the Court entered Judgment in accordance with its opinion and continued the December 11, 1984 restraints as to all sites found suitable by the Court.

On October 23, 1985, a three-judge panel of the Appellate Division (Judges Cohen, Petrella and Ashby) denied Piscataway's motion for stay of its compliance date pending determination of its motion for leave to appeal. On November 8,

in response to plaintiffs' motion for immediate referral to a Master to compliance formulation and defendants' cross-motion for a two-month extension, Judge Serpentelli extended the time for compliance to December 2, required weekly progress reports to the Master and, should satisfactory progress be made by then, a further extension to December 23, the date requested by the Township. On November 22, Judge Serpentelli granted Piscataway's motion for stay of that order.

E. Compliance Facts As To South Plainfield

After the beginning of the joint fair share trial before Judge Serpentelli, South Plainfield and the Urban League plaintiffs signed a Stipulation on May 10, 1984, which included all facts necessary for the Court to determine fair share, ordinance invalidity, and the appropriate remedy. The Borough and plaintiffs expressly stipulated that both the Court's general formula for fair share allocation, which would have assigned South Plainfield 1725 lower income units, and the Urban League plaintffs' expert's formula, which would have assigned South Plainfield only 1523, were "reasonable." However, the parties agreed that there was "insufficient vacant developable land suitable for deveopment of low and moderate income housing to meet the full fair share resulting from either methodology" and therefore stipulated

The Stipulation identified (by block and lot number) only eight specific sites as suitable for multi-family development with a set-aside. Based on the acreage estimates provided by the

Borough, the number of units that would be constructed in South Plainfield would be at most 603. One of these sites known as Elderlodge, had been the subject of a separate lawsuit, challenging in part on Mount Laurel grounds, a Board of Adjustment denial of a senior citizen apartment project.

Based on the Stipulation, plaintiffs moved for summary judgment. The Judgment in all critical aspecs tracks the language of the Stipulation; it even specifies the block and lot numbers of the land to be rezoned. On a number of contested points, however, the Judgment was amended to reflect the defendant's objections, most importantly by extending the time for enactment of the necessary ordinances to October 4, 1984. During the intervening 133-day period, plaintiffs reviewed drafts of the proposed zoning and affordable housing ordinances and provided defendants with detailed input to permit passage of compliant ordinances well within the time required by the Court. Instead, in response to a September 25, 1984 inquiry by the Court, the South Plainfield attorney informed the Court on October 4, 1984 that no ordinance revisions would be approved until complete revision of the Master Plan. On October 2, 1984, the South Plainfield Board of Adjustment granted Elderlodge a variance to build senior citizen bhousing without any set-aside.

Pursuant to the Urban League plaintiffs' October 1984 motion for restraints in light of these devvelopments, the Court entered an Order on December 13, 1984 consolidating the Elderlodge and Urban League matters, preventing vesting of any rights as to the

Elderlodge plaintiff, and directing adoption of compliant ordinances by January 31, 1985. South Plainfield violated that Order, as it had violated the prior Judgment. No ordinances were passed in January nor at the March 11, 1985 public hearing on second reading. Rather, because the plaintiffs had suggested a few modifications of the ordinances to comply with the Stipulation, the Council referred the matter back to the Planning Board.

In June 1985, while awaiting further Planning Board and Council action, the Mount Laurel plaintiffs learned of the defendant's sale of several municipally owned parcels identified by block and lot number in the Judgment and attempted Planning Board approval of two-family homes on those lands, approvals clearly inconsistent with the required but delayed rezoning of those parcels. Pursuant to plaintiff's further motion for restraints, the trial court entered an Order on July 3, 1985, requiring final adoption of the zoning and affordable housing ordinances by July 30, 1985, and restraining issuance of building permits and sale of Borough-owned land. On July 18, 1985 , South Plainfield filed its motion to transfer, seeking hearing on short notice which the trial court denied. Upon the express advice of its attorney, the Council then intentionally violated Paragraph 1 of the July 3 and July 19 Orders by not adopting any form of zoning or affordable housing ordinances, but instead tabling the ordinances pending this Court's consideration of this transfer motion. Transcript of July 29, 1985 South Plainfield Council

meeting, t 14. After the Court, at its August 2nd hearing on plaintiffs' motion for immediate appointment of a Master, reiterated its willingness to stay the effectiveness of the ordinances until decision of the transfer motion, the south Plainfield Borough Council finally adopted the ordinances under protest on August 7, 1985, more than 10 months after the deadline set in the Judgment of May 22, 1984.

Although the July 3d Order's ban on sales of municipally owned property remained in effect, see Order of August 9, 1985, the Borough adopted a "time of essence" resolution on August 12, 1985 requiring contract purchasers of Borough-owned land to report the full purchase price by August 22. This resolution applied to one contract purchaser of the bulk of a specified Judgment site, who had already contracted for resale of the property to an experienced Mount Laurel developer, and was forced to deposit the full $1.27 million purchase price although the Borough was barred from transferring title.

When the trial court denied the transfer motion herein sought to be appealed, the zoning and affordable housing ordinances of South Plainfield, adopted on August 7, 1985, went into effect. See Order of October 11, 1985 Para. 3. On November 12, 1985, Judge Serpentelli was scheduled to hold the compliance hearing for South Plainfield. However, at the very last minute, the owner of the largest site within the Judgment, Harris Structural Steel Co., sought leave to intervene to object to the rezoning of its site, although its papers revealed that it had

participated at Council meetings and met with Borough officials since at least March 1985. On the morning of the scheduled compliance hearing, they brought in documentation as to its claim that part of the site was unbuildable that was not in either the moving or responding parites. As a result, the hearing was adjourned to December 4, to give them time to present their data to the parties and, at the Court's request, for the parties to attempt settlement of the remaining compliance issues. On November 19, the Borough attorney informed the Urban League attorneys that there was no possibility of settlement On November 22, Judge Serpentelli granted South Plainfield's motion to stay further trial court proceedings pending determination of this appeal, believing that he was bound by this Court's earlier grant of a stay in the Bernards Township appeal.

F. The Fair Housing Act

On July 2, 1985, Governor Kean signed the Fair Housing Act, P.L. 1985, c. 222, into law (hereafter "the Act"). The Act establishes an administrative mechanism as a method of resolving exclusionary zoning disputes. The express purpose of the Act is to provide a "comprehensive planning and financing mechanism which satisfies the constitutional obligation enunciated by the Supreme Court in Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II"), Sec. 2(c), namely the municipal obligation to provide a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families.

To effectuate the purposes of the Act, Section 5(a) establishes the Council on Affordable Housing (hereafter "the Council"), an administrative body with the power to mediate and review exclusionary zoning disputes. Trial courts are granted discretion under the Act to transfer an ongoing exclusionary zoning lawsuit to the Council, if, as in the present instance, the case was filed prior to May 3, 1985. The trial court may decline to transfer such a case to the Council if doing so would result in manifest injustice to any party to the litigation. Section 16(a).[5]

If a case is transferred to the Council an entirely new and extended administrative proceeding is commenced. This process first requiries the municipality to formulate a housing element to its Master Plan, which addresses the need for lower income housing, and ordinance revisions that would accommodate that need. Section 7(c), 10, 11. The Council then reviews the housing element and ordinances. If there are objections, for example, by developers or public interest groups that have filed or are planning to file litigation, then the Council must undertake mediation. If mediation fails, the matter is referred to the Office of Administrative Law (OAL) for full evidentiary hearing and resolution as a contested case under the Administrative Procedures Act, including review by the Council.

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5 In the official print of the statute, the second subsection of Section 16 is designated "b" but the first has no designation. For clarity's sake, however, we refer throughout this brief to the first subsection as "a."

This proceeding is governed by a timetable defined by several provisions of the Act and by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. This timetable is set out in Table A on the next page. This timetable is roughly the same as sety forth in footnote 6 on page 17 of Judge Skillman's opinion in Morris County Fair Housing Council v. Boonton Twp., et al., No. 6001-78 P.W. (Law Div., October 28, 1985))(hereafter Morris County).

TABLE A

Minimum Timetable for Cases Transferred to Council on Affordable Housing under L. 1985, c. 222, §16(a)

Date	Event
July 2, 1985	Effective date of statute
November 2, 1985	Filing by municipalities of resolution of participation
May 1, 198[6] (§8)	Promulgation of procedural rules by Council
August 1, 1986 of need and	Council determination of regions, estimation promulgation of guidelines and criteria (§7)
January 1, 1987 Council must file	Municipality in litigation transferred to housing element and fair share plan (§16)
--	Mediation
--	Hearing
-- unless	Initial decision by Administrative Law Judge extended by Director of OAL (§15(d))
July 1, 1987 accepting with	Council issues final decision accepting, conditions, or rejecting municipal plan (N.J.S.A. 52:14B-12(c))
August 15, 1987	Municipality receiving Council approval adopts implementing ordinances
September 1, 1987 conditional	Municipality receiving Council denial or approval may submit revised plan (§14(b))
Within an unspecified time thereafter	Council accepts or rejects revised plan

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6 If all members of the Council are confirmed prior to January 1, 1986, this date and all dates hereafter could be earlier. §§8, 9(a)).

Although the statute is ambiguous or inconsistent in some respects,[7] it is apparent that the administrative process would consume nearly two full years for cases transferred under Section

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7 There is, as noted on Table A, an inconsistency between Section 16*a(, which suggests that tyransferred towns have until January 1, 1987 to file their housing elements with the Council, and Section 19, which suggests that mediation must be completed in transferred cases by October 2, 1986, 15 months after the Act's effective date.

It is also unclear what action would trigger mediation and review in cases transferred under 16(a). Section 15(a) requires the Council to engage in mediation only if an objection to a petition for substantive certification is filed or a request for mediation and review is made "pursuant to Section 16 of this act." However, there is no requirement that transferred towns file a petition for substatnive certification -- Section 13 suggests that they have six years after filing their housing element -- and only Section 16(B), applicable to cases filed after May 3, 1985, expressly bestows on parties the right to request mediation and review.

In addition, it is unclear what steps on Table A are included within the statutyory six-month period for "mediation and review." The major steps under the statute are: mediation by the Council, hearing and decision by the Administrtative Law Judge, review and final decision by the Council, municipal revision in case of Council denial or conditional approval, and Council review of a revised plan.

The Urban League respondents believe that the most logical reading of the statute is that transferred towns would have until January 1, 1987 to file their housing elements with the Council (either directly under Section 16 or through a court extension of the time under Section 19 to remedy the inconsistency), that parties in cases transferred under Section 16(a) may request mediation and review, that the six-month time period in Section 19 would begin to run from the filing of the housing element or request for mediation, whichever occurs later, that the first three steps of the process -- through Council review and final decision -- must be completed in those six months, and that the time for submission and review of revised plans begins after those six months. We would brief these and other points of technical statutory construction, in part addressed by Judge Serpentelli's oral ruling and Judge Skillman's opinion, were this Court to grant leave to appeal, which respondents believe is inappropriate for the reasons set forth below. The Urban League plaintiffs' full brief to Judfge Serpentelli on these and other points is reproduced in Cranbury's Appendix to the motion for leave.

16(a), assuming, contrary to all experience, that the Administrative Law Judge would not require an extension of the statutory 90-day period to conduct a complete hearing on all issues and render a written decision.[8]

The end of the administrative process need not, however, mark the beginning of compliance by the municipality with its constitutional obligations. The Council appears to have only the power to determine whether a municipality's proposed housing element and fair share plan are acceptable. Sec. 14. It has no explicit statutory power to compel a municipality to take any action. Compare L. 1985, c. 222, § 14 with New Jersey Law Against Discrimination, N.J.S.A. 10:4-5 et seq., and with Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. It is well established that agencies cannot exercise remedial powers not expressly delegated to them by the Legislature. A.A. Mastrangelo, Inc. v. Commissioner of the Dept't of Environmental Protection, 90 N.J. 666, 684 (1982); In re Jamesburg High School Closing,83 N.J. 540, 549 (1980); Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 598 (1970). Thus, even

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8 In his ruling on these motions, Judge Serpentelli concluded, based on a number of statutory interpretations, that the process would take until September 1, 1987, assuming no extensions of time are granted. Transcript of October 2, 1985 Decision, at 15-20. Judge Skillman, making somewhat different assumptions, also found that the process would not end before September 1, 1987, if no extensions were granted. Morris County, supra, at 15-18. Respondents here assume that it would take until August 15, 1987 for those municipalities receiving initial Council approval and until at least October 15, 1987 for those receiving a Council denial or conditional approval, again assuming no extensions.

if plaintiffs prevail at every step of the administrative process and the Affordable Housing Council determines that the municipality's proposed housing element and fair share plan re unacceptable, plaintiffs would still not be able to secure any affirmative remedy from the Council. Plaintiffs' only recourse at that point would be to recommence judicial proceedings.[9]

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9 The statute is ambiguous as to what judicial proceedings would occur after proceedings before the Council. Ordinarily, final administrative decisions are appealable to this Court. N.J.S.A. 52:14B-14; Rule Governing Appellate Practice 2:2-3(a)(2). However, Section 156(b) of the statute states that exhaustion of the administrative remedy is required before the litigant is "entitled to a trial on his[sic] complaint" and Section 17 describes the evidentiary impact of a substantive certification and the role of the Council in a trial of an exclusionary zoning case. Moreover, Section 18 specifies that the exhaustion requirement expires if the municipality fails to meet certain deadlines, has its petition rejected by the Council, or refuses to make the changes required by a conditional approval. Finally, Section 19 permits application for relief from the exhaustion requirement if the Council's mediation and review process takes more than six months.

Section 18 clearly indicates that towns may not appeal to this Court if their housing element is rejected by the Council. This approach is entirely consistent with the Supreme Court's admonition in Mount Laurel II, discussed in Point I below, that towns not be allowed to appeal until they have a compliance ordinance. 92 N.J. at 214, 290, 456 A.2d at 418, 458. Parties objecting to a substantive certification, on the other hand, presumably would have a right to appeal to this Court, because once the certification is final, it is presumptively binding upon the trial court and the burden of overcoming it is substantial.

Again, this Court need not resolve this difficult statutory interpretation question on this motion. It is sufficient to note that in the case of both an approved and a rejected municipal petition for certification, there will be substantial additional court proceedings before a final judgment of compliance.

ARGUMENT

Introduction --

The questions are statutory, but the context is constitutional. The Legislature expressly intended that the new process provide a comprehensive mechanism for implementation of Mount Laurel's constitutional obligation to produce an appropriate share of lower income housing. Thus, all ambiguities, lacunae, and inconsistencies in the statute, whether with regard to timing, definitions, credits and the like, must be resolved in favor of constitutionally adequate interpretations. Likewise, with transfer. Transfer of the oldest remaining Mount Laurel case, which is on the verge of conclusion, to an inexperienced and immediately backlogged agency -- without binding law of the case, power to restrain development on limited remaining land, a mandate to include builder-remedy plaintiffs in the fair share plan, and ability to expedite the statutory timeframe drafted for complete adjudication -- would not only be manifestly unjust, under the settled law of the state which was adopted by the Legislature, but also blatantly unconstitutional.

I THE FAIR HOUSING ACT MUST BE CONSTRUED TO INSURE COMPLIANCE BY ALL MUNICIPALITIES WITH THE CONSTITUTIONAL MANDATE TO PROVIDE THEIR FAIR SHARE OF LOWER INCOME HOUSING

Appellants speak repeatedly of the need for judicial deference to legislative action. We wholeheartedly agree that this Court, in Mount Laurel II, urged legislative action and anticipated deference to any constitutionally adequate legislative solution. We also agree that over the long haul a carefully crated administrative process can accommodate both affordable housing goals and sound planning concerns. Having accepted these propositions, however, this Court should not rush to the simplistic conclusion, posited by appellants, that the four Urban League towns before the Court must be transferred now to the Affordable Housing Council in order to square with the legislative intent. On the contrary, allowing these cases to remain in the special Mount Laurel court is the only solution consistent with the legislation.

By way of preface, it should be clearly understood that the Fair Housing Act does not preclude a substantial judicial role in the resolution of affordable housing disputes. On the contrary, the Act explicitly provides decisionmaking roles for both the Council and the courts. Even as to new cases, which are intended to be brought first before the Council, exhaustion of administrative remedies is not required if the municipality has not taken the first, voluntary step by submitting a fair housing plan to the Council; in this situation, the dispute may begin in the superior Court. Sec. ____. Moreover, cases that do begin in the Council may revert to the court should the municipality fail to pursue its administrative remedies vigorously or in a timely

manner, Secs. 18-19, and all disputes that cannot be resolved satisfactorily within the administrative system are ultimately subject to judicial review at either the trial or appellate level.

Against this backdrop of judicial involvement in future cases, it is not at all surprising that the Legislature also provided that some existing cases might stay in the courts rather than be transferred to start over again in the Council. Nothing in the Fair Housing Act suggests that the courts are an incompetent forum for resolution of affordable housing disputes, even though the Legislature and the Supreme Court could each reasonably conclude that an administrative forum was preferable under many circumstances.

The key to a full understanding of the legislative intent is to recognize that the Legislature sought to solve two problems simultaneously. First, it sought to create a permanent mechanism for resolving fair housing disputes, one that would be applicable long after any existing cases had been resolved. Second, it sought to provide a fair transitional mechanism for reviewing those disputes already in the judicial system and accommodating them where possible to the newly created permanent mechanisms.

At the outset, it bears noting that Mount Laurel II's oft-quoted language about deference to the Legislature does not deal one way or the other with the problems of transition created and resolved by this legislation. At the time that the Chief Justice wrote for a unanimous Court in 1983, the Legislature had ignored

for almost eight years the constitutional mandate of Mount Laurel I, which had also urged the desirability of legislative action. Mount Laurel II could thus extol, but not reasonably predict, a legislative response. Certainly, there is nothing in the opinion that justifies a crude, mechanical approach to transition that rides roughshod over the interests of lower income housing advocates in existing cases; indeed, there would be a substantial constitutional cloud over any such approach.

Happily, the Legislature did not fashion a crude approach. Instead, it recognized three distinct classes of fair housing disputes, and treated each of them separately in terms of their transitional impact. Most importantly, it distinguished between disputes arising before and after the Act, thus recognizing that transitional problems needed careful attention. As to disputes arising after the effective date of the Act, which by definition pose no transitional problems, it required, of course, full application of the new mechanisms created by the Act, beginning with initial exhaustion of administrative remedies. Sec. 16(b). But it then drew a further distinction between cases filed within sixty days of the passage of the Act and those that were filed longer ago than that. As to the recently filed cases, the Legislature has required transfer, in effect conclusively presuming that there would be no significant transition problems involved. Sec. 16(b). This is a reasonable presumption, because in that sixty-day period it would be a miracle if anything more than the filing of an answer had occurred, and there obviously

could not have been detrimental reliance on the old rules. Judge Skillman has recently applied this aspect of the Fair Housing Act to require transfer of a case involving Roseland Borough to the Fair Housing Council. See Morris County, supra and Judge _____ has similarly transferred under Section 16(a) a brand new casse against Cherry Hill.

Finally, there are the "older" cases, those filed more than sixty days before the Act, which the Legislature obviously though could create serious transitional inequities. The Urban League case now before the Court is in this category. Here, and only here, the Legislature provides for application of a "manifest injustice" standard to determine which cases would be transferred and which would not. Section 16(a). Unlike the new cases and the "sixty-day" cases covered by Sec. 16(b), the Legislature did not sanction a mechanical rule for the older (Sec. 16(a)) cases. Such a mechanical rule was proposed by the Assembly minority, which suggested that all pending cases should be transferred to the Council.[10] Read against this unsuccessful attempt to impose a mechanical rule, the manifest injustice standard ultimately chosen by the Legislature can only rationally mean that the Legislature intended that some of the cases known to exist in June, 1985, when the Legislature adopted the Act would remain in the courts. Transfer (and hence the manifest injustice standard) can only apply to existing cases, since all newly-filed cases

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10 See Minority Statement to Assembly Municipal Government Committee, etc.

must begin in the Council anyway; "horrible hypos" conjured up to suggest the unlikely situations that the Legislature could have meant are irrelevant if those cases did not actually exist when the legislation was under consideration. And since the manifest injustice standard is placed by the Legislature in a section that classifies the cases by age, it must have contemplated that the oldest cases, those well along towards resolution, would be those in which manifest injustice could most plausibly be shown.

Thus, the Legislature provided for individualized judicial evaluation of the circumstances under which transfer would be appropriate in the oldest cases. Self-evidently, the Legislature recognized that some of these cases would be so far advanced that it would be pointless, grossly inefficient, or just plain unfair to require them to start over before a new agency. Just as evidently, it recognized that there would be cases more than sixty days old that could reasonably and efficiently be transferred to the new forum. Individualized attention assures that cases appropriate for transfer will be transferred without doing unnecessary damage to cases inappropriate to transfer.

It is important to describe some examples of how the manifest injustice standard can work in these older cases. First, there will be cases filed a few months before the Act's effectiveness which were no further along than those filed within 60 days and thus automatically transferred under Section 16(b)'s rationale. These clearly should be treated the same as 16(b) cases.

Second would be cases that were filed 6 or 8 or 10 months or even a year before the Act, in which substantial discovery activity may have occurred, but no trial has been hekld and no substantive determinations of fair share or ordinance invalidity have occurred. Arguably a court could find that such cases should be transferred, because the discvoery would not be wasted but rather could be used before the Council and Administrative Law Judge, and no substantive determinations had yet been made. Thus no rights or even significant expectations would have vested.

Third, there might be some even older cases, which were originally brought as arbitrary and capricious challenges to particular Planning Board or Board of Adjustment decisions, but which were remanded by the court for reconsideration in light of Mount Laurel II and only recently returned to court for full Mount Laurel scrutiny.[11] Although substantially older than those in the first two categories, these cases, too, might well be thought appropriate for transfer because no court determinations of Mount Laurel issues had yet occurred.

Finally, there are cases such as the Urban League action, in which a complete trial has been held, or summary judgment granted, in which constitutional determinations of region,

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11 The Elderlodge case against South Plainfield consolidated with this action was originally of this nature. As a result both of consolidation and of its having gone to judgment and virtually through compliance, Elderlodge itself, of course is no longer appropriate for transfer.

regional need, fair share allocation, fair share obligation, and ordinance invalidity have been made. These, we submit, are the ones that the Legislture intended not be transferred to a new forum. This is because transfer would either require wasteful re-litigation of all issues before the Council, with a retroactive intrusion on vested rights, or would needlessly delay the completion by an expert forum of almost entirely adjudicated actions.[12]

HERE WE NEED SOME TRANSITION that says we're very far along-- we have extensive factual determinations and legal rulings based on contested evidentiary presentations and full briefing, we can finish in a few months (and when you're done laughing we should also say--) some housing is already in the pipeline, we have outstanding restraints, there are builders clearly entitled to BR, unless towns can prove not sound planning, we have a court intimately familiar with the towns plans, needs, and available sites, and, in contrast, a brand-new agency with no expertise, a

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12 The statute does not address whether the Council would reconsider all issues previously litigated in a transferred case or accept all prior decisions as law of the case and merely determine the remaining issues of compliance. We believe the statute does not address the question quite simply because the Legislature did not intend that cases in which substantive determinations had already been made would be transferred. In any case, the Court need not address this issue here, if it concludes that transfer of cases with substantive determinations is possible at all, because it would be manifestly unjust to transfer this action under either view of the Council's role.

substantial immediate backlog,no special procedure for expedited hearing of cases only requiring compliance determinations, no clear authority to issue restraints, and no clear mandate to issue builder-=remedy.

THus under settled law, transfer would be manifestly unjust or unconstitutional -- unless the COurt were to construe the statute to provide BR, eliminate moratorium, assure collateral estoppel on facts and application of law of the case, assure continued development restraints, and expedited administration consdieration of cases with only compliance issues remaining.

A. Builder Remedy Authority

B. Moratorium

C. Collateral Estoppel and Law of the Case

D. Credits

E. Interim Development Restraints

F. Expedited Administration Consideration of Compliance Issues

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A.____

B._____

C. Collateral Estoppel and Law of the Case -- 11/23 draft

The term "manifest injustice" is most prominently used in retroactivity law. As this Court has clarified: "The courts of this State have long followed a general rule of statutory construction that favors prospective application of statutes." Gibbons v. Gibbons, 86 N.J. 515, 521 (1981). There are, of course, exceptions where the Legislature has expressly stated an intent to apply it retroactively, or implicitly indicated it because "retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation." Id. at 522. Likewise, retroactive effect is generally given to a statute because of the reasonable expectation of the parties. Id. at 522-23. However:

> [E]ven if a statute may be subject to retroactive application, a final inquiry must be made. That is, will retroactive application result in "manifest injustice" to a party adversely affected by such an application of the statute? The essence of this inquiry is whether the affected party relied, to his or her prejudice, on the law that is now to be 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?

Id. at 523-24. Because of the preference for prospective application and the likelihood that retroactive application would prejudice settled expectations reasonably relied upon, courts generally apply procedural rules retroactively, but rarely apply substantive changes retroactively. See, e.g., Farrell v. Violator Division of Chemetron Corp., 62 N.J. 111, 299 A.2d 394

(1973); Feuchtbaum v. Constantini, 59 N.J. 167, 280 A.2d 161 (1971); Townsend v. Great Adventure, 178 N.J. Super. 508, 429 A.2d 601 (App. Div. 1981); Newark v. Padula, 26 N.J. Super. 251, 97 A.2d 735 (App. Div. 1953); 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION Secs. 41.04, 41.06 (4th ed. 1973).

The Legislature clearly intended procedural retroactivity in some pending cases. All cases under Section 16(b), brought within 60 days of the Act's effectiveness, must be transferred to the Council, and thus subjected to the newly created procedures of the Act.

There is no indication, however, that the Legislature wanted the Fair Housing Act applied retroactively as to substantive determinations -- that is, that towns for which the fair share obligation and invalidity of existing zoning ordinances have already been adjudicated could have the Council redetermine those matters. The statute does not directly determine regions, regional need, municipal fair share, or the adequacy of compliance plans. Rather, it creates a procedure, with a few basic guidelines, and directs the Council to come up with criteria to be used to gauge municipal determinations. It does not reject any particular court ruling or definition of fair share. It does not purport to impose a new one. It does not require all pending cases to be sent to the Council for such a determination, but only those brought on the eve of legislation -- in which almost certainly no substantive rulings will have been made. Rather, it clearly leaves jurisdiction in the court to

exercise discretion as to which cases that are older, including those that have already been partially adjudicated by the Court, are to be transferred. In exercising this discretion, courts should look to the long-standing rule that statutes are generally not to be applied retroactively and especially not to disrupt vested rights to the prejudice of parties who have reasonably relied on existing law. Likewise, under the doctrine of primary jurisdiction "when the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their rights." Boss, supra, 95 N.J. at 40. Thus, plaintiffs submit that Section 16(a) must be construed to bar transfer of any case in which judicial determination of litigants' rights have been made -- i.e. factual determinations made and law of the case created -- as to any of the key issues -- region, regional need, fair share allocation methodology, municipal fair share, invalidity of existing zoning ordinance, site suitability, or overall remedy.

This conclusion is bolstered by Rule 4:25-1(b), the rule concerning pretrial orders, which is one of the few other places in which the civil law in New Jersey relies on the "manifest injustice" standard.[13] The rule provides:

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13 The term is also used in Rule 3:21-1, concerning withdrawal of guilty pleas, and in caselaw construing 3:22-1 relating to petitions for post-conviction relief. See, e.g., State v. Cummins, 168 N.J. Super. 429, 433 (Law. Div. 1979). Because of the substantially different policies and consequences applicable in the criminal context, we do not believe that the use of the term in that context has much significance for the issues before this Court.

> When entered, the pretrial order becomes part of the record, supersedes the pleadings where inconsistent therewith, and controls the subsequent course of action unless modified at or before the trial or pursuant to R.4:9-2 to prevent manifest injustice.

Manifest injustice could be avoided only if collateral estoppel and law of the case were to be applicable to transfers of pending court cases in which hearings and trials have been held and substantive determinations made. Then, the parties would not be subjected to deleterious disruption of reasonably relied upon determinations, burdened with cumbersome new administrative procedures to vindicate clearly established rights, or deprived of the reasonable reliance upon the pretrial order's determination of issues to be adjudicated. Moreover, the new agency, certain to be immediately overburdened with a massive backlog of complex cases and not yet expert in any aspect of this area of law, would not needlessly be required to utilize its limited resources to duplicate fully adjudicated matters.

There is precedent for this approach. This Court has already noted that:

> it is consistent with this constitutional philosophy to apply to administrative agencies, in appropriate situations, judicial rules conducive to the ends of intergovernmental compatibility and harmony, such as res judicata, collateral estoppel, the single-controvery doctrine and the like. Decisions have stressed that the policy considerations which support these judicial doctrines -- namely, finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness -- have an important place in the administrative field....It seems evident that such principles, while basically judicial in origin, have especial relevance for administrative adjudications.

City of Hackensack v. Winner, 82 N.J. 1, __, 410 A.2d 1146, 1161-62 (1980). The Court recognized that differences in the functions of administrative agencies and courts preclude mechanical or complete application of all judicial doctrines. Id. at __, 410 A.2d at 1160. Moreover, Hackensack involved conflict between two administrative bodies and not, as here, between a court and a new agency. The rationale for applying court doctrines of collateral estoppel and law of the case are even stronger here.

In any case, all of the policies that this Court has articulated as relevant are fully applicable here. Precluding relitigation of region, regional need, fair share, and ordinance invalidity upon transfer to the administrative agency would insure finality and repose and prevent needless litigation, duplication, and unnecessary time delays and expense -- factors which weighed heavily upon this Court in Mount Laurel II. It would also avoid confusion and uncertainty -- and assure basic fairness, namely that those who reasonably relied upon previous rulings and spent 11 years reaching the verge of closure not be forced to start all over again.[14]

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14 Quite apart from the fairness factor determining the applicability of collateral estoppel, it seems evident that the doctrine of equitable estoppel, see, e.g. 405 Monroe Co. v. Asbury Park, ___ N¶J¶ (196), barring municipalities from avoiding their own voluntary stipulations based on alleged procedural defects, would apply to towns like South Plainfield which stipulated as to all facts before the Court necessary to all legal determinations. Indeed, in towns such as Piscataway and South Plainfield where the fair share determinations have also resolved all significant site suitability issues, there appears no justification for any delay or duplication necessitated by a transfer.

Application of collateral estoppel and law of the case would minimize, although admittedly not eliminate conflict, the last factor of importance. Conflicting rulings between the courts and the Council are, however, as already noted, built into this statute-- for it is clear that some pending cases will remain in the courts while disputes involving other, perhaps even neighboring municipalities, will go to a new agency governed by new guidelines. A transfer to the Council with binding law of the case and collateral estoppel would, however, minimize conflicts. The Council could not reconsider fair share and ordinance invalidity, but could develop compliance plans and remedies in a manner consistent with how it is handling other cases in which it also has responsibility for the initial determinations. Thus, a transfer to complete cases with substantial compliance issues remaining, with binding law of the case and collateral estoppel, might, subject to other considerations discussed herein, eliminate the manifest injustice that would otherwise result.

D. CREDITS ---- 11/23 Draft

One fundamental problem that would be posed by transfer to the Council with authority to re-determine fair share is the statutory provision for "credits" against the fair share. Section 7(c)(1) of the Act provides:

> Municipal fair share shall be determined after crediting on a one to one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program

specifically intended to provide housing for low and moderate income households.

Because the number of credits directly affects the size of the fair share that a municipality must still satisfy, careful construction of this provision is crucial to insure vindication of the constitutional mandate.

At least four plausible interpretations present themselves. The first is a literal reading -- that all units currently in existence that meet the statute's definition of low and moderate income housing can be credited against the fair share. The definitions, found in Sections 4(c) and (d), specify that units qualify if they are "affordable...and occupied or reserved for occupancy" by the relevant households. Because of the use of the disjunctive, it would be appear that, literally read, Section 7(c)(1) permits credit for every existing unit that is affordable to and currently occupied by a qualified household, even if there are no legal controls, for example on sale price or rent level, to insure its reservation exclusively for such households should the present occupant leave.

In affidavits filed with the trial court as part of respondents' opposition to these transfer motions, Alan Mallach, the Urban League's planning and housing development expert, analyzed the effect of such a literal reading. He explained that the provision's fatal flaw is that it allows existing housing to count toward meeting the current unmet need for more housing, which by definition is the need that remains after all existing

housing has been acccounted for. He concluded that, under any of the widely accepted fair share formulations, the total number of credits state-wide under a literal interpretation of Section 7(c)(1) -- 295,020 units, would exceed the total present and prospective need for lower income housing -- 278,808, 254,081, or 217,727 under the three most widely used methodologies. Similarly the potential credits under 7(c)(1) would exceed the regional need relevant to Middlesex County (using a four-county region based on PMSA rather than the 11-county region utilized by the trial court in determining the fair share in this case). Mallach Affidavits of August 27, 1985 and September __, 1985, Para. 5-9, and Appendix A, 3-7. The defendants/appellants did not present any contrary evidence. Clearly, a literal construction would render the provision unconstitutional, for the Legislature certainly cannot eliminate a constitutional obligation by mathematical sleight-of-hand.

The second interpretation, suggested by Judge Skillman after concluding that a literal reading would almost certainly be unconstitutional, Morris County, supra, at 34-35, is that credits can only be provided for units that are both affordable to and legally reserved for occupancy solely by qualified households. Id. at 36. This approach would, of course, require judicial surgery on the statute, by modifying two key definitions in the Act. This would be accomlished by dropping "occupied or" from the definitions of low and moderate income in Section 4, thus leaving an express requirement that units be affordable to and reserved

for occupancy only by qualified households.[15] But even after such surgery, this interpretation would only minimize but not eliminate the illogic of comparing previously met with currently unmet need.

The third and fourth interpretations would eliminate that basic error. The third, again suggested by Judge Skillman's opinion, is that the definition of need, against which credits would be applied, could be expanded beyond that previously used in determining fair share. Judge Skillman suggested, Morris County, supra, at 36, expanding present need to include not only households presently occuping substandard housing, but also those paying a disproportionate percentage of their income for standard housing, generally referred to as "financial need." See, e.g. AMG, supra, at __. Judge Skillman also suggested that present need might be defined as of an earlier date. Thus, for example, if all existing standard units occupied by lower income households were to be counted as credits, then the base need against which these units are to be credited might be the need since the year in which the first of those credited units was built or occupied by qualified households. Calculating financial need households and/or need as of the date of the first eligible

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15 Because the definitions of lower income housing in Section 4 fail to require legal reservation of the units for qualified households through sale and rental controls or otherwise, they indicate a fundamental, facial constitutional defect affecting the entire statute. Thus, judicial surgery, dropping the words "occupied or" from the two definitions, will almost certainly be necessary to save the entire Act, quite apart from the credit problem posed in Section 7(c)(1).

occupant would be extremely difficult, if not impossible, given the inadequacy of reliable statistical data state-wide or on a regional and municipal basis for such calculations. Thus the broadened need interpretation eliminates the conceptual illogical of the first two approaches but poses almost insuperable practical problems.

The fourth interpretation, urged by the Urban League respondents, is that "current" units which must be credited under 7(c)(1) are not all those currently in existence, but only those that were currently developed, meaning developed during the fair share period being considered. It is clear from Section 13 of this Act, providing for six year repose, and the requirement that a fair share housing element be part of the master plan, which must be revised every six years under the Municipal Land Use Law, that the Legislature has essentially adopted this Court's concept of six-year fair shares.[16] In light of this, it seems logical to conclude that "current" means during the current six-year fair share period. Also the second clause of 7(c)(1), which expressly refers to construction and acquisition of housing units, strongly suggests that "current" units were meant to refer to those currently developed -- by construction, acquisition, or

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16 The provision in Section 23 for phasing of a large municipal fair share is not inconsistent with this view. This Court discussed the need for phasing in Mount Laurel II in appropriate cases and Section 23 explicitly provides a 6-year phase in for municipalities with fair shares of under 1000, which will clearly be the bulk of municipalities state-wide, including Cranbury, Monroe, and South Plainfield in this litigation.

subsidization -- not simply those currently in existence. Moreover, the Legislature can reasonably be expectedto have known that lower courts were construing this Court's decision to provide credits against municipal fair shares only where the units were developed during the period used for defining present need. Of course, to insure a constitutional meaning for "credits," the definitions of low and moderate income in Section 4 must, as noted above,[17] be read to require legal controls to reserve the units exclusively for qualified households. When limited to controlled and currently developed units, the "credit" provision is entirely reasonable and consistent with the constitutional mandate, as already interpreted by the lower courts.

E. INTERIM RESTRAINTS - 11/23 Draft

An administrative scheme that is so structured that its invocation would preclude effective relief on a constitutional claim is clearly unconstitutional. Likewise, under any definition, transfer to a process that would permit dissipation of the resources essential to meaningful relief at its conclusion is manifestly unjust. It is, thus, crucial for this Court to determine whether either the courts or the Council would have authority to issue restraints against development approvals or construction in instances where the limited remaining vacant

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17 See page __ and note __ supra.

land, severage, water or road capacaity might preclude effective relief by the time the administrative process is concluded.

Council authority is questionable. In re Uniform Adm'n Procedure Rules, 90 N.J. 85, ___ A.2d __ (1982), invalidated the administrative regulation concerning emergency relief because it appeared to give the administrative law judges, rather than the heads of the agencies, binding authority in that regard. The revised rule -- N.J.A.C. 1:1-9.6 (1985) -- clearly provides authority in the agency head and detailed procedures governing emergncy relief "where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case." 1:1-9.6(a). However, this power is conditioned by the introductory clause "Where authorized by law." Id. It is, thus likely that the procedure of the rule is to be followed and relief granted only when the underlying law establishing the agency authorizes such relief.

This view of the administrative rules is consistent with this Court's longstanding view that where the courts are in doubt as to what the Legislature intended, "in situations where such an important public policy matter is involved the proper course for the judicial branch of the government to follow is to deny the power and to assume that if the legislative brnach desires [the agency to have the authority, it will bestow it in unmistabkeable terms." Burlington Cty. Evergreen Park Metnal Hosp. v. Coooper, 56 N.J. 579, 599 (1970); see also A. A. Mastrangelo v. Comm'r of the Depart't of Envrieon Protec.) 90

N¶J. 66 (1982); In Re JamesBurge High School Closing, 83 N.J. 540 (1980); N.J. Guild of Hearing Aid Dispenser s. Long, 75 N.J. 544 (1978).

Here there is substantial that the Legislature intended the Council to have the authority to issue restraints. No mention is made in the statute. The Council has no affirmative powers to do anything -- it can only approve or reject a substantive certification petition. The matter reverts to court either if the process fails or if certification is granted. It thus appears that the Council is powerless to issue necessary development restraints when a municipality has limited remaining land or infrastructure.

The matter is different with regard to the courts. Courts hearing appeals from final administrative determinations clearly have power to provide interim relief pending the conclusion of the judicial review process. Rule 2:9-7 specifically grants such power to this Court both in appeals as of right from final agency decisions, governed by Rule 2:2-3(a)(2), and in cases in which permission is sought to appeal interlocutory administrative decisions under Rules 2:2-4 and 2:5-6. See also Sampson v. Murray, 415 U.S. 61, 73-74 (1974); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942). In addition, in extraordinary cases, a court may enjoin an administrative proceeding. Rule 4:52-6 and Mutual Home Dealers Corp. v. Comm'r of Banking and Ins., 104 N.J. Super. 25 (Ch. Div. 1968). The rules do not directly address, however, whether courts may enjoin defendants to maintain the status quo pending completion of an administrative process.

Both logic and caselaw indicate that courts should have the power to do so. If a reviewing court can grant interim relief pending its review of a final or interlocutory administrative decision, to insure that its final decision will be effective and meaningful to the prevailing party, then it would appear logical that it should also have power to grant such relief pending completion of the administrative process. If the municipality does not file its housing element and fair share plan on time or the review and mediation process takes too long or if the Council denies or conditions certification, a transferred case will revert to the trial court.[18] Thus, it would appear logical that the trial court should have authority to issue temporary restraints to prevent irreparable harm to the plaintiff obligated to exhaust the new administrative remedy.

In Boss v. Rockland Electric Co., supra, this Court expressly left in effect, pending completion of administrative factual determination of the scope of an electric utility's easement, a trial court's preliminary injunction against the removal of trees from the affected property that had been issued 3 1/2 years before the Court's opinion. 95 N.J. at 33, 37, 42-43, ___ A¶2d at __.. Likewise, the federal Supreme Court, in FTC v. Dean Foods Co., 384 U.S. 597, 599-601 (1966), held that the court with ultimate jurisdiction to review the agency's orders had power to grant a temporary injunction to prevent disappearance of

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18 See discussion at pp. __-__ supra.

one of the entities whose merger the agency sought to challenge, because the disappearance would have rendered the agency and the court "incapable of implementing their statutory duties by fashioning effective relief." Sampson v. Murray, 415 U.S. 61, 76-77, 84 (1974).

The Fair Housing Act does not directly address the issue, although there are some relevant indicators. On the one hand, it appears that transfer was intended to divest a court of jurisdiction.[19] Yet the administrative process was designed as "a comprehensive planning and implementation response to this constitutional obligation," Sec. 2(c), and there are a number of instances in which jurisdiction "reverts" to the court. Moreover, Section 23(d), which involves court jurisdiction to order phasing provides:

> In entering the phase-in order, the court shall consider whether or not it is necessary to condition the phase-in order upon a phase-in schedule for the construction of other development in the municipality to minimize an imbalance between available housing units and available jobs, or to prevent the sites which are the most appropriate or the only possible sites for the construction of low and moderate income housing from being used for other purposes, or to prevent limited public infrastructure capacities from being entirely utilized for other purposes.

It would seem at best odd if the Legislature expected the courts to address this issues when considering a phase-in order, even in the context of a municipal petition for declaratory judgment on its fair share plan, but not in the context of Council

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19 Section 16(a) states that if the municipality fails to file its housing element on time, "jurisdiction shall revert to the court."

consideration of such a plan.

END RESTRAINTS AS OF 11/23

WHAT FOLLOWS IS WHAT"S LEFT OF PRIOR DRAFT _- which will be used/modified in part.

This case is the oldest pending Mount Laurel action and one of only two pending cases involving more than one municipal defendant.[20] There are eight towns without a final judgment of compliance remaining in this action, of which two have signed consent orders, one more is on the verge of signing such an order, and five remain in active litigation, including these four appellants. In various towns, including Cranbury, Monroe, and South Plainfield, the matter has been consolidated with a number of later-filed developer suits against the same townships. Thus, the Urban League case is certainly the largest and most complex of any pending action. The main action has been twice fully tried, and once reviewed fully through the entire appellate

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20 The Public Advocate's Moprris County Fair Housing Council suit originally involved 27 but notw involves only two towns. See Judge Skillman's opinion, at 48-55.