UL v. Carteret (S. Plainfield) 28 Aug (1985

Π memo of law in opp. to S. Plainfield's motion to transfer case to Council on Affordable Housing

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On Behalf of the American Civil
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SUPERIOR COURT
OF NEW JERSEY

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, et al.,

Plaintiffs,

v.

THE MAYOR AND COUNCIL OF THE
BOROUGH OF CARTERET, et al.,

Defendants.

CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

NO. C-4122-73

URBAN LEAGUE PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO SOUTH PLAINFIELD'S MOTION TO TRANSFER THIS CASE TO THE COUNCIL ON AFFORDABLE HOUSING

These are among to be heard seeking

~~This is~~ the first motions ~~to~~ transfer of a pending case to the Council on Affordable Housing under Section 16 of the Fair Housing Act, L. 1985, c. 222, ~~to be heard in the state~~. The task is made awkward by the fact that courts are asked to evaluate and possibly limit their own jurisdiction in an important constitutional area that until now has been solely within their province. The Urban League, moreover, is well aware that a decision not to transfer could easily be misunderstood by the Legislature, and the public at large, as a defiance of clear legislative policy to concentrate future fair housing decisionmaking in the Council rather than the courts. It is, therefore, vital that this Court have before it a careful analysis of the structure of the statute and the consequences of a transfer in beginning to develop standards to clarify the meaning of "manifest injustice", which precludes transfer under Section 16.[1]

As will be demonstrated below, existing caselaw on retroactivity and exhaustion, which employs the "manifest injustice" language, makes numerous factors relevant to this determination -- the age, complexity, and advanced stage of the litigation, the number and nature of previous determinations of

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[1] Under the view of the statute presented here and in light of the facts relating to South Plainfield, plaintiffs believe it is unnecessary for the Court to consider the constitutionality of the transfer section, any other specific provision, or the Act as a whole. For this reason, we have not send notice to the Attorney General pursuant to Rule 4:28-4(a). Should the Court believe it necessary to address any constitutional issues, however, plaintiffs would request an opportunity to brief such points.

substantive issues, including whether they were based upon adjudication or voluntary stipulation of parties, the relative degree of administrative and judicial expertise on the remaining issues, ~~the~~ whether there is a need for development of a substantial evidentiary record, the prior conduct of the defendant, the likelihood that agency determinations would differ from judicial determinations, the irreparable harm that might be occasioned by the inevitable delay attendant upon any new administrative process, ~~and by the~~ the irreparable harm that would surely occur in the absence of restraints on development of limited land resources, and, finally, the public interest in prompt resolution of litigation. Denial of ~~South Plainfield's~~ the defendant municipalities' motions to transfer is not only consistent with the legislative intent, but necessary if it is to be given effect, for every one of the relevant factors confirms that transfer would be manifestly unjust to the plaintiffs and the lower income population it represents. The Legislature clearly intended that cases such as this should remain in the courts for prompt resolution of the very few remaining issues.

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FACTS

The Court is thoroughly familiar with most of the sad history of the South Plainfield litigation. We will, therefore, only briefly sketch the key historical facts, emphasizing those added to the formal record through the affidavits submitted with these opposition papers.[2]

On July 23, 1974, 11 years and 45 days before the return date of this transfer motion, the Urban League of Greater New Brunswick and seven individuals (hereafter referred to as the Urban League or the Urban League plaintiffs, although the organization has since been renamed the Civic League) sued South Plainfield and 22 other Middlesex County towns on behalf of all low and moderate income families challenging the municipalities' zoning ordinances as unconstitutionally exclusionary. Judge

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[2] Plaintiffs rely upon the entire record of this proceeding. The essential facts and documents are provided in the Williams Affidavit of October 26, 1984, the Neisser and Williams Affidavits of June 21, 1985, the Williams Affidavit of July 30, 1985, the Neisser Affidavit of August 28, 1985, the Mallach Affidavit and Massaro Certification of August 27, 1985 and the exhibits attached to and incorporated into each of those affidavits. As noted in the Neisser Affidavit of August 28, the Borough has still not provided all the necessary information as to Borough land sales, subdivision of lots enumerated in the May 22, 1984 Judgment, and ownership status of the Morris Avenue site. Plaintiffs believe that these materials will further substantiate the Borough's bad faith, which is one of the factors relevant to a determination of "manifest injustice." Therefore, should the Court have any hesitance about denying the transfer motion on the record presented to date, plaintiffs reserve the right to supplement the record with those materials when provided by the defendant.

Furman certified the class and, after an evidentiary hearing, denied defendants' motion for a severance. Early in 1976, Judge Furman held an extended trial, in which South Plainfield participated, and in May 1976 issued an extensive ruling, finding, inter alia, that South Plainfield's zoning ordinance was unconstitutional. Among other deficiencies, the Court noted that South Plainfield and only one other town (Cranbury) prohibited any new multi-family housing. Urban League of Greater New Brunswick v. Mayor and Council of Carteret, et al., 142 N.J. Super. 11, 28, 35 (Ch. Div. 1976). The Court assigned South Plainfield a fair share obligation of 1,749 units, of which 45 percent were to be affordable to low income households and 55 percent to moderate income households. Id. at 37. The Court found that: "[e]ach municipality has vacant suitable land far in excess of its fair share requirement without impairing the established residential character of neighborhoods. Land to be protected for environmental considerations has been subtracted from vacant acreage totals." Id. Specifically as to South Plainfield, the Court found that: "[t]he borough is overzoned for industry by about 400 acres." Id. at 35.

Judgment requiring rezoning within 90 days to effect the necessary changes was entered on July 9, 1976, 9 years and 59 days before this transfer motion is to be heard. No zoning revision occurred, among other reasons, because in November 1976, the Appellate Division stayed the Judgment pending appeal in response to the motion of the appellants, South Plainfield and

six other towns, and in 1979 the Appellate Division reversed the Judgment in its entirety. On January 20, 1983, the Supreme Court reversed the Appellate Division and remanded to this Court not for trial on constitutional non-compliance "for that has already been amply demonstrated" 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." South Burlington Cty. NAACP v. Mount Laurel Twp., 92 N.J. 158, 350-51, 456 A.2d 390, 488-89 (1983) (hereafter Mount Laurel II).

South Plainfield fully participated in the remand proceedings, although it failed to meet the Court's deadline for responding to plaintiffs' discovery requests, most crucially those describing remaining vacant land in the Borough. Neisser Affidavit of June 21, 1985, Para. 3 and Exhibits A and C. Eventually substantial discovery was had, including depositions of the Borough's planning consultants and Zoning Officer. As a result of their own careful review of the tax assessment rolls, plaintiffs identified two major sites -- the Harris Steel site of 84.8 acres and the Coppola farm of 27 acres -- not originally mentioned in the allegedly "complete" vacant land inventory provided by defendant in response to the Court discovery order. Neisser Affidavit of August 28, 1985, Para. 8. After extensive negotiations between the Urban League attorney, Eric Neisser, its housing and development expert, Alan Mallach, the Borough's Attorney, Patrick Diegnan, and the Borough's planning

consultants, Robert Rosa and James Higgins, the Borough and the Urban League voluntarily entered into a formal signed Stipulation designed to resolve all outstanding issues on May 10, 1984, 1 year, 3 months and 27 days before this motion. Neisser Affidavit of June 21, 1985, Para. 2-4,9 and Exhibits B, E, F.

In that Stipulation, approved unanimously by the Borough Council, see Transcript of July 29, 1985 South Plainfield Council Meeting, Exhibit A to Neisser Affidavit of August 28, 1985, at 37-39 and 46, the Borough expressly stipulated that the so-called Lerman methodology, which would have given South Plainfield a fair share of 1725 lower income units, and Mr. Mallach's methodology, which would have resulted in a fair share of 1523 units, "are both generally reasonable approaches to the fair share issues remanded to this Court by the Supreme Court." Stipulation, Exhibit F to Neisser Affidavit of June 21, 1985, Paras. 1,2. However, the parties agreed that there is "insufficient vacant developable land suitable for development of low and moderate income housing to meet the full fair share resulting from either methodology," specifically incorporating the defendant's position as provided in discovery that "[a]s of February 1984, there were only 641 vacant acres remaining in the Borough, of which a significant proportion were in floodplains, in an environmentally sensitive swampland, or in the midst of substantial existing industrial or commercial development [and] much of the remaining developable land is in small lots of less than 3 acres." The parties then agreed that "[i]n light of the

remaining land, the fair share obligation of South Plainfield should be reduced to 900 units, to be allocated as 280 units of present need by 1990 and 620 units of prospective need by 1990." Stipulation, Para. 2.

There is no question that the fair share number of 900 was a compromise, of benefit to both parties primarily because it would avoid an extended and costly trial that could lead to a less favorable ruling for either party. As Mr. Neisser explains, the plaintiffs at the very end reduced their original demand for 1000 units to 900, in part because of their conclusion that only the 553-603 lower units that could be accommodated on the eight specified sites[3] were actually likely to be produced. An additional fair share obligation was required only to insure a maximum Mount Laurel effort in the relatively speculative event that redevelopment were to occur, substantial new land were to become available through demolition or fire, or substantial subsidy funds were to become available. Neisser Affidavit of August 28, 1985, Para. 6. It appears, however, that the

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[3] Mr. Neisser's Affidavit of August 28, 1985 shows that the eight sites specified in the Stipulation could yield a maximum of 553-603 units, depending on the size of the Morris Avenue site development. Para. 5 and Exhibit B. The plaintiffs discovered in June 1985 that the Borough had initially misrepresented the acreage in the Pomponio Avenue site as being only 25 acres when it is in fact 32 acres. See Neisser Affidavit of June 21, 1985, Paras. 6-9. When that adjustment is made, the maximum possible units would be either 574 or 624. Neisser Affidavit of August 28, 1985, Exhibit B. The fair share "cushion" in the Stipulation described in text readily allows accommodation of this "new-found" fair share capacity.

plaintiffs may have, in fact, underestimated the Borough's capacity for further development. As the Mayor of South Plainfield recently explained at a public meeting of the Council:

> THE MAYOR: Councilman Woskey, just for a point of information, this town can accept a lot more than the units that were called for. Don't kid yourself. we went around, Bill went around with one of the Planners, right, Mr. Administrator?
>
> MR. DE SABATO: Yes.
>
> THE MAYOR: And so did our Planner and large portions of certain areas like on the south side or on the north side near the lake, et cetera, we told them that there were no sewers there; you can't build there. All right. We told them no, you can't build on New Brunswick Avenue. That is all a waterway. Don't kid yourself. This town can with high density accept a lot more homes. He can go into an area such as Gary Park and say okay, I now zone this so that you can build 12 units on an acre of land. And they can be built. There are homes there. They can be torn down. People can decide to tear them down and build 12, 15 units on an acre of land. This is not just for existing vacant land. We are talking about someone coming in and rezoning all of South Plainfield. They can turn around and rezone one of the vacant factories and say, okay, let's make that an apartment complex, and put four, 500 people in it. They can do a lot more than what we were able to get them down to at 900, 200 immediate and 990 total. Believe me, Michael. If you were there and saw all the parcels that the Planner came up with, and we said, oh, this couldn't be done because there is no sewers there, this can't be done because it is wet, this can't be done because there is no roads there. All right. We snowed them down to 900.[4]

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[4] At present, plaintiffs will treat this statement merely as political puffery. However, because of the accumulating evidence of bad faith and misrepresentation -- including the already documented original misrepresentation as to the acreage of the Pomponio Avenue site and the ownership of the Morris Avenue site, the Borough's failure to identify the 85 acre Harris Steel site and the 27 acre Coppola farm in original discovery which was stated to be complete, the six sales of Borough owned land within lots expressly identified in the Judgment and Planning Board approval of nonconforming development on such land, the Board of Adjustment's attempted approval of the Elderlodge project in October 1984 without the set-aside required by the May 22 Judgment, and the intentional violation of all deadlines for compliance in this Court's Judgment of May 22, 1984, and Orders of December 13, 1984 and July 3 and 19, 1985 -- the plaintiffs

Transcript of July 29, 1985 South Plainfield Council Meeting, Exhibit A to Neisser Affidavit of August 28, 1985, at 56-57.

In addition, the specification of sites for inclusionary developments and the nature of municipal contributions to lower income housing were also the subject of compromise. Plaintiffs expressly gave up their claim for rezoning of several entirely suitable sites, which defendants strenuously asserted were unacceptable for political purposes and would make stipulation of the facts impossible. Neisser Affidavit of August 28, 1985, Para. 10 and Exhibit D, Para. 18. Plaintiffs also gave up their request for municipal contribution of the land for the Pomponio Avenue and Frederick Avenue sites, and construction of necessary roads at the Pomponio Avenue, Universal Avenue and Frederick Avenue sites. Neisser Affidavit of June 21, 1985, Paras. 4,8 and Exhibit B, at 3; Neisser Affidavit of August 28, 1985, Para. 10 and Exhibit D, Paras. 14-16. Plaintiffs also modified their position as to the nature of the rezoning requirement for vacant lots over three acres. Neisser Affidavit of June 21, 1985, Para. 8 and Exhibit B; Transcript of July 29, 1985 Borough Council Meeting, at 46; Neisser Affidavit of August 28, 1985, Para. 10.

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reserve the right to seek further discovery and to move to modify the Judgment, if appropriate, based upon fraud in the inducement for the Stipulation and violations of the Rules of Professional Conduct and the previous Disciplinary Rules and court interpretations, including RPC 3.3 -- Candor Toward the Tribunal, RPC 4.1 -- Truthfulness in Statements to Others, and their predecessor Rules.

The Stipulation provided for rezoning of only eight specific sites. Based on the acreage estimates provided by the Borough, one of which has since been shown to be incorrect, the number of units that would be constructed in South Plainfield would be at most 2367-2417, of which only 553-603 would be low and moderate income. Thus, the statement by Mr. Santoro in his Certification in Support of Motion to Transfer Action to Council on Affordable Housing, that under the Stipulation and Judgment "the Borough of South Plainfield shall be required to allow for the construction of up to 4500 new residential housing units", Para. 3, which figure was repeatedly referred to throughout the discussion of this matter at the Borough Council meeting on July 29, 1985, Transcript, e.g., at 29,33,34,55, is clearly incorrect. Indeed, in a telephone conversation on July 15, 1985, Mr. Neisser told Mr. Santoro that the Stipulation and Judgment would only produce, and the parties were aware at the time of the Stipulation that it would only produce, approximately 500 or 550 lower income units, that 100-150 of those would be in the senior citizens project and thus only some 400 would be in higher density inclusionary projects, which would therefore have a total of approximately 2000 units. Mr. Neisser suggested to Mr. Santoro that he call Mr. Diegnan, the prior Borough Attorney, to confirm these facts and the reason for the 900 number, if not satisfied by doing the mathematical calculation. Neisser Affidavit of August 28, 1985, Para. 7. Although plaintiffs believe that the Court can determine the falsity of Mr. Santoro's statement simply by mathematical

calculations from the Stipulation and Judgment, we are prepared to present appropriate testimony as to this one disputed issue of fact should the Court deem it necessary to decision of this motion because "the conduct of defendant" is a factor to be considered in determining "manifest injustice".[5]

Based on the Stipulation, plaintiffs moved for summary judgment. The Judgment in all critical aspects tracks the language of the Stipulation. 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 and resolutions from 90 to 120 days,

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[5] Mr. Santoro's knowledge of the falsity of the statement may also be relevant to this factor. Cf. RPC 3.3(a)(1),(4). Mr. Santoro's Certification, sworn on July 18, states that he is "fully familiar with the litigation of this matter." Id., Para. 1. Because he was not personally involved in the negotiation and execution of the Stipulation and proceedings leading to the entry of the Judgment, this must mean that he has reviewed all the documents in the file and either consulted with Mr. Diegnan and members of the Council, who were personally involved, or relied upon my statements on July 15. To the degree he consulted with others, it is possible that his statement is a good faith repetition of hearsay from another. However, he was put on notice as to the possible falsity of the statement by his conversation with Mr. Neisser on July 15th.

We note in passing that the Santoro Certification contains two other, more minor inaccuracies -- it claims that the Judgment requires zoning for "900 'least cost' housing units by 1990 and designates seven sites in the Borough to accommodate such zoning." Para. 3. At no point does the Judgment, or the underlying Stipulation, refer to "least cost" housing and at no time was that concept discussed. Moreover, the Judgment and Stipulation expressly set forth eight sites to be rezoned. For the same reason noted here, the references to "least cost" housing in the August 9, 1985 Order drafted by Mr. Santoro, are incorrect, although we assume not affecting our substantive rights.

because of the "summer schedule" (of 1984) of the Council. See Neisser Affidavit of August 28, 1985, Para. 11. Ms. Lerman reported to the Court on May 30, 1984, and thus the Judgment's deadlines began to run from June 4, 1984. Passage of the necessary ordinances was therefore required by October 4, 1984, over 11 months before the return date of this transfer motion.

In July 1984, Mr. Rosa, the Borough's planning consultant, provided Mr. Neisser with drafts of the proposed zoning and affordable housing ordinances. Although he was about to leave on vacation, Mr. Neisser immediately consulted extensively with Mr. Mallach and had a long telephone conversation with Mr. Rosa on the evening of July 26, 1984, providing him with details of the plaintiffs' concerns and objections and the reasons for them. A new draft was provided on August 22, 1984. The remaining objections of the plaintiffs were conveyed to defendants in Mr. Neisser's September 5, 1984 letter to Mr. Rosa. Neisser Affidavit of August 28, 1985, Paras. 12; Williams Affidavit of October 26, 1984, Para. 11 and Exhibits G-1, G-2. Thus, the defendant had all necessary input from the plaintiffs to permit passage of compliant ordinances well within the time required by the Judgment.

On September 25, this Court wrote Mr. Diegnan, the Borough Attorney, asking him to inform the Court of the expected completion date of the Court-ordered revision of the zoning ordinances. By letter dated October 4, the Judgment's deadline for compliance, Mr. Diegnan informed the Court that no zoning

ordinances revisions would be approved until complete revision of the Master Plan. On October 8, Angelo Dalto, attorney for Elderlodge, informed the Court that on October 2nd the South Plainfield Board of Adjustment had granted Elderlodge's original application for a variance to build senior citizne housing without any set-aside, and accordingly requested dismissal of the Elderlodge action. On October 11, this Court again wrote Mr. Diegnan reiterating the September 25 request for a specific time limit and noting that the Judgment's deadline had already passed, and on October 15, this Court wrote Mr. Dalto refusing to dismiss the Elderlodge action as requested and instructing municipal officials to take no action to authorize construction of the Elderlodge project pending resolution of the issue. On October 22, Mr. Diegnan responded by saying that the next scheduled meeting of the Mayor and Council was November 12, 1984. Williams Affidavit of October 26, 1984, Paras. 7,9,11 and Exhibits E,F,H,I,J,M.

Pursuant to the plaintiffs' October 1984 motion for restraints in light of these developments, 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. After the matter was recommended by the Planning Board in January, Council consideration was set for

March 11, 1985. By letter dated March 8 and communicated by phone on March 11, plaintiffs reminded the defendant of a few minor deviations in the proposed ordinances from those agreed to by Mr. Rosa at a meeting with plaintiffs in November 1984. The Borough needlessly referred the matter back to the Planning Board, which favorably recommended all but two changes, and did so again in May when the plaintiffs brought a technical error to the Borough Attorney's attention. No further action occurred until the plaintiffs learned of the defendant's sale of municipally owned parcels within the Judgment and attempted Planning Board approval of development on those lands inconsistent with the required rezoning. Pursuant to plaintiffs' further motion for restraints, this Court entered its Order of July 3, later modified on July 19, requiring final adoption of the zoning and affordable housing ordinances by July 30, 1985. Plaintiffs informed defendant that it considered the versions of the ordinances transmitted to us by letter dated July 9 to be acceptable and in compliance with the Judgment. On July 22, 1985, South Plainfield filed this motion to transfer, seeking hearing on short notice which this Court denied. Upon the express advice of counsel, Transcript of July 29, 1985 Borough Council meeting, at 14, 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.[6] After the Court,

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[6] Mr. Santoro's recommendation to the Council at the July 29

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, 10 months and 3 days after the deadline set in this Court's Judgment of May 22, 1984.

Although the July 3rd Order's ban on sales of municipally owned property remains in effect, see Order of August 9, the Borough issued a "time of essence" notice to Larry Massaro, the contract purchaser of a substantial part (24 acres) of the Pomponio Avenue site, who has already contracted for re-sale of the property to an experienced Mount Laurel developer. Massaro Certification, Paras.3,5,7. Mr. Massaro delivered the entire $1,270,318 purchase price to the Borough on August 23, 1985, and he and the residential developer stand ready, as they have since May 15, 1985, to proceed with all necessary applications for construction of the Mount Laurel project specified in Paragraph

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meeting to table the ordinances was "based upon the fact that the motion is still pending and that the Court has not deemed it convenient or whatever to hear that motion before tonight." Transcript at 14. Although he had accurately informed the Council earlier that the Court had refused to hear the motion on short notice, id. at 9, he failed to inform the Council that he had only served and filed the motion on July 22, even though the Legislature passed the Act on June 27 in precisely the form requested by the Governor on April 22, and the Governor had signed it, thereby putting it into effect, on July 2, and that he could have set down a motion for hearing without Court permission upon providing the adversary with the regular 14 days' notice set forth in the Court rules. Rule 1:6-3. Denville, for example, filed its motion to transfer on July 8.

3(C) of the Judgment. Massaro Certification, Paras. 3,6,9. As the Affidavits of both Alan Mallach and Larry Massaro confirm, the present time is an unusually favorable time for residential construction in New Jersey and the delays necessarily attendant upon a transfer to the Affordable Housing Council might well jeopardize the likelihood of this or any other Mount Laurel developments within the remaining 5 years of South Plainfield's current fair share cycle.

The only actions remaining for full compliance with the Judgment and issuance of an order of repose for South Plainfield are: a) modification of the zoning ordinance to specify the block and lot numbers affected by the new provisions; b) review of the adopted zoning and affordable housing ordinances by the Court-appointed expert; c) Council adoption of the resolution required by Paragraph 6 of the Judgment committing the Borough to apply for, and to encourage and assist private developers to apply for, any available funding for rehabilitation or subsidization of new construction or rental of housing units; d) a report to the Court and plaintiffs, pursuant to Paragraph 9 of the Judgment, describing action taken by the Borough with regard to development of the senior citizens housing project on the Morris Avenue site as set forth in Paragraphs 3(F) and 4 of the Judgment; and e) appropriate modification of the Judgment to require rezoning or municipal contributions: i) to compensate for any low income units lost through those municipal land sales and development approvals inconsistent with the Judgment that the Court

determines it would be inequitable to undo, and ii) in light of the likelihood of development of the Morris Avenue site, given private ownership of some of the parcels, or otherwise.

ARGUMENT

To assist the Court in the determination of this first transfer motion, plaintiffs will initially outline how the statute intends the administrative process to work and the relationships established between that process and the litigation process. Then we will seek to explicate the consequences of a "transfer" under Section 16(a), ~~and as a result~~ from which flows the meaning of the "manifest injustice" standard. Finally, we will argue why transfer of the litigation concerning South Plainfield would be manifestly unjust to the Urban League plaintiffs and the class of lower income persons they represent under either possible view of the consequences of a transfer. [Revise after putting the whole brief together]

THE STATUTORY SCHEME

The Administrative Process

The Fair Housing Act was enacted as "a comprehensive planning and implementation response" to the "constitutional obligation to provide a realistic opportunity for a fair share of the region's present and prospective needs for housing for low and moderate income families." Secs. 2(a),(c),(d). It calls for a centralized state-wide administrative process to determine housing regions, ~~and~~ state and regional housing needs, and the adequacy of local authorities' fair share determinations and zoning policies ~~to~~ in satisfaction of their constitution obligation.

This statutory context is important, particularly in the light of some defendants' careless reading of the Act as "saving" them from Mount Laurel. If the Act did that, it would surely be unconstitutional,

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~~meet that obligation~~. The Act is intended to be a "mechanism... which satisfies the constitutional obligation enunciated by the Supreme Court." Sec. 3.

To accomplish ~~these~~ into constitutional goals, the statute creates a Council on Affordable Housing (hereafter Council), which is obligated to determine housing regions, estimate the present and prospective need for lower income housing on the state and regional level, adopt "criteria and guidelines" for determination of the municipal fair share of the regional need, and then review the adequacy of municipal "housing elements" proposed to meet the local fair share obligation. Secs. 7(a),(b),(c), 10, 14. The Council has no power to mandate municipal participation in the process. Rather, a municipality must first adopt a "resolution of participation." Sec. 9(a). It must then file a "housing element" and a "fair share housing ordinance ...which implements the housing element". Id. The housing element and ordinance may employ a number of techniques to satisfy the fair share obligation including high densities to support mandatory set-asides, donation of municipally owned or condemned land, tax abatements, use of state or federal subsidies, and a regional contribution agreement, by which the obligated township subsidizes the development of lower income units in another township in the region to satisfy up to one-half of the sending township's fair share. Secs. 11(a),(c),12.

Even after the township files a housing element, however, no action need be taken by the township or the Council. If the

municipality chooses, however, it may, at any time during the six-year period that a housing element is in existence, "petition the council for a substantive certification of its element and ordinances." Sec. 13. The Council has no power to require submission of such a petition. If no objection to substantive certification is filed by any person within 45 days of public notice of the petition, the Council must issue substantive certification if it finds that the fair share plan "is consistent with the rules and criteria adopted by the council and not inconsistent with achievement" of the regional low income housing need. Sec. 14(a). If the Council does not consider the plan satisfactory, it may deny the petition or approve it on conditions, in which case the municipality can refile its petition within 60 days and still obtain substantive certification. Sec. 14(b). Once certification is granted, the municipality has 45 days to adopt its fair share housing ordinance. Id.

If an objection is made to certification, the council shall engage in a "mediation and review process". Sec. 15(a). If mediation is unsuccessful, the matter is transferred to the Office of Administrative Law as a contested case. Sec. 15(c). The evidentiary hearing and the administrative law judge's initial decision area to be made within 90 days, unless the time is extended by the Director of Administrative Law for "good cause shown." Sec. 15(c). Thereafter, pursuant to the Administrative Procedure Act, objections to the initial decision may be

presented to the Council,[7] which must "adopt, reject or modify" the initial decision within 45 days or the initial decision automatically becomes the final decision of the agency. N.J.S.A. 52:14B-10(c).

Relation of Administrative Process to Litigation

The legislation recognizes both that the new administrative process will affect pending litigation and that administrative decisions will be appealed to the courts for review. It thus contains a complex series of provisions defining the interrelationship between this new administrative procedure and the existing judicial framework for resolving exclusionary zoning disputes.

1. If no litigation is pending.

If no case is pending, the town may choose either to adopt a resolution of participation or not, thereafter to file a housing element or not, and finally to petition for certification or not, as it wishes. If it goes through the entire process and receives substantive certification, then in any subsequent court

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7 Under the Administrative Procedure Act, such an appeal goes to "the head of the agency." N.J.S.A. 52:14B-10(c). It is unclear whether under this statutory scheme that would be the Council itself or the Executive Director of the Council. The statute indicates that a multi-person body could be the "head" because it refers to decisions by "the head of the agency or a majority thereof." Id.

proceeding the certification has a presumption of validity, and the complainant has the burden of proof by clear and convincing evidence that the local plan does not in fact provide the required realistic opportunity for the fair share. ~~and~~ In any such judicial proceed the Council is joined as a party with power to present to the court its reasons for granting certification. Secs. 18(a) and (c). If the town has not completed the process but has, before suit is of obtaining substantive certification, instituted, adopted a resolution of participation in a timely fasion, i.e., within 4 months of the effective date of the Act, Sec. 9(a), or November 2, 1985, then a plaintiff must exhaust the review and mediation process of the Council. Sec. 16(b).

Although Section 16(b) says exhaustion is required before a litigant is "entitled to a trial on his complaint", in fact the proper avenue for judicial review of a final administrative determination is by appeal to the Appellate Division. N.J.S.A. 52:14B-14; Rule Governing Appellate Practice 2:2-3(a)(2). Trial will occur in court, then, only if the municipality or Council fail to meet deadlines for completion of the administrative process. For example, if the municipality does not adopt a resolution of participation on time, no exhaustion is required. Sec. 16(b). If the municipality has timely adopted a resolution of participation but fails to file the required housing element and fair share ordinance in a timely fashion, the exhaustion requirement automatically expires. Sec. 18. If the muncipality has filed on time both the resolution of participation and the housing element, but the Council has not completed its review and

mediation process within six months of receipt of a request by a party who has instituted litigation, the party may file a motion in court to be relieved of the exhaustion requirement. Sec. 19.[8] In cases where review and mediation requests are filed within nine months after the Act takes effect, i.e. before April 2, 1986, the six-month completion ~~date does not begin to run until that date.~~ deadline is measured from April 2, 1986, and does not expire until October 2, 1986. Id. Finally, trial would occur in court if the Council denies substantive certification or grants it upon conditions that the municipality does not accept. Sec. 18.[9]

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[8] It is not clear from Section 19 what parts of the process are included in the six month limit. There are four steps in the statute's administrative process. First, Section 15(b) requires a meeting of the Council, municipality and any objectors to mediate the dispute. If that fails, Section 15(c) requires transfer to the Office of Administrative Law as a contested case, and hearing and initial decision within 90 days unless extended by the Director of Administrative Law for unspecified "good cause." Third, the Administrative Procedure Act sets a 45 day limit, again subject to extension, for "head of agency" review of the initial decision. N.J.S.A. 52:14B-10(c). See note 7 supra. Finally, Section 13(b) provides that "[i]n conducting its review" the Council may deny a petition for certification or condition it upon changes in the housing element or ordinances, and then the town has 60 days to refile its petition with the necessary changes in which case the Council may still grant substantive certification. It is unclear whether the six-month limit in Section 19 on the "review and mediation process for a municipality" refers only to the first step -- mediation; to the first three steps, in which case 45 days would be available for mediation; or to all four steps, which literally could not occur within 180 days.

We believe that the second interpretation is likeliest because "review and mediation" is more than simple mediation, the Administrative Procedure Act specifically directs the head of the agency to "review...the record submitted by the administrative law judge," N.J.S.A. 52:14B-10(c), 45 days seems a sufficient time to determine if mediation will be successful, town re-filing is optional and not part of the initial review process, and in any case the statute should not be construed to provide an unworkable or meaningless time schedule.

[9] The normal method for judicial review of a final

Clearly these provisions are designed primarily as a threat -- of a court trial leading to a judicial ruling without a presumption of validity as to the local determinations -- to insure that appropriate steps are in fact taken in a timely fashion to resolve the dispute in the administrative forum. Indeed, the legislation expressly states a "preference" for resolution of both present and future disputes through the mediation and review process in the Act, rather than litigation. Sec. 3.

2. If litigation was pending less than 60 days before the effective date of the statute.

The Act treats very recently filed litigation the same as litigation filed after the adoption of the Act. Quite simply if the municipality adopts a resolution of participation within four months of the

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administrative decision is, as noted in text, by appeal to the Appellate Division and normally both parties to a proceeding have the same right. However, it appears that the Fair Housing Act denies municipalities the opportunity to go to the Appellate Division if certification is denied or conditioned, and instead requires reversion of the case to the trial court. Section 16 requires exhaustion of the review and mediation process before "being entitled to a trial on his[sic] complaint." Section 18 specifies two situations when the exhaustion requirement imposed by Section 16 automatically expires. The second is "if the council rejects the municipality's request for substantive certification or conditions its certification upon changes which are not made within the period established in this act." Sec. 18. Thus if exhaustion is not required, the litigant gets a trial on the complaint. This provision is in accord with the direction in Mount Laurel II that only fully adjudicated and compliant ordinances are appealable. 92 N.J. at 214, 290, 456 A.2d at 418, 458.

Act's effectiveness, the recent litigant must exhaust the review and mediation process. Section 9(a). No exceptions are stated in the Act, although presumably the usual exceptions to the exhaustion requirement would be applicable in an appropriate situation. See the most recent discussion of exceptions to the exhaustion requirement in the Supreme Court opinion in Abbott v. Burke, 100 N.J. ___ (S.Ct. July 23, 1985)(slip op. at 31-36).

The rationale for this provision is, obviously, that litigation that was commenced because of the impending passage of the legislation, anticipated by all after the April 22, 1985 conditional veto message of the Governor, should not thereby avoid the intended administrative exhaustion requirement. This provision makes perfect sense because in no case would any determination of substance -- e.g., region, regional need, fair share allocation, invalidity of current zoning ordinances, site suitability or remedy -- have been made within 60 days of filing. Indeed, it would be an advanced case if the Answer had been filed or initial discovery requests had been served within that time period.

3. If litigation was pending more than 60 days before the effective date of the statute.

This brings us to the type of case before the Court now -- one in which the litigation was commenced prior to the eve of legislation. As to these cases, the statute simply states that:

> any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation.

Section 16(a).[10]

The Act does not state precisely what is transferred (existing pleadings and record, prior rulings of court, power of court to issue interim relief, etc.) nor does it identify the procedural consequences of a transfer. Unfortunately, the provisions that do exist only tend to cloud and confuse the question.

The Act does not require the municipality to petition for certification, but simply states that if the municipality fails to file its housing element and fair share plan with the Council within five months of transfer or of promulgulation of the Council's criteria and guidelines under Section 7, whichever occurs later, "jurisdiction shall revert to the Court." Sec. 16(a). Unlike Section 16(b), the Act does not specify that a party may or must file a notice to request review and mediation under Sections 14 and 15. Thus, it is unclear even whether the provision in Section 19, permitting a party to move for relief from the exhaustion requirement within 6 months of "receipt of a request of a party," is applicable. Thus as literally written,

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[10] Although the printed version of the statute refers to this subsection simply as "16," the following subsection is labelled "(b)" and thus plaintiffs assume that the omission of and "(a)" was inadvertent. We shall refer to this subsection as 16(a) for clarity's sake.

the statute only provides that by August 1, 1986,[11] 11 months from now, the Council must adopt its criteria and guidelines and that the muncipality must file a document with the Council by January 1, 1987, containing the matters specified in Section 10.[12]

If the statute is read literally: a) nothing further happens unless within the next six years the municipality determines that it is in its best interest to petition for substantive certification; or b) the litigant files a new lawsuit as to which the right to request review and mediation under Section 16(b) and

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[11] The statute literally provides that the Council must adopt criteria and guidelines within seven months after the confirmation of the last appointee or January 1, 1986 which is earlier. Sec. 7. However, because the Governor has already failed to meet the first deadline in the statute, to nominate the members within 30 days of effectiveness, which was August 1, 1985, and as it is anticipated that the Legislature will have only a brief special session on August 28 to consider teacher salaries and an environmental bill and another brief one starting on September 9 or 12, Star Ledger, August 23, 1985, at 1. col.5, it is unlikely that all members will be confirmed by the end of the calendar year. Thus, we proceed on the assumption that the Council's obligation will date from January 1, 1986.

[12] It is not clear whether a litigant would be allowed to challenge in court the procedural adequacy of the submission in order to invoke the reversion provision of Section 16(a). For example, could a court decide that a 2-page municipal submission entitled "housing element" with single sentences under each heading called for by Section 10 and a fair share plan that simply states that no zoning ordinance revisions are necessary to achieve the fair share is a "failure to file a housing element and fair share plan" within the meaning of Section 16(b)? Some court review might be necessary to preserve the court's own jurisdiction, especially if the statute is construed not to require a town that gets a transfer to petition for substantive certification and not to permit a litigant to request review and mediation with the attendant time limit and avenue for relief under Section 19.

the right to move in court under Section 19 for relief from exhaustion if the administrative process is delayed clearly attach. It is hard to imagine that the Legislature intended that, after transfer and timely filing of a housing element and fair share plan, either nothing would happen or the litigant would be forced to file a brand new lawsuit with the attendant filing costs and service delays, not to mention possible loss of vested law-of-the-case adjudications.

The only possible ways out of this apparently inadvertent lacuna are:

1) for the Court to construe a municipality's motion to transfer under Section 16(a) as a commitment to petition the Council promptly for substantive certification if transfer is granted or, more directly, as rendering the timely filing of its housing element and fair share plan the effective equivalent of such a petition; or

2) to construe Section 16(a) as conferring upon the plaintiff in a transferred action the same right to request review and mediation as is explicitly afforded plaintiffs in Section 16(b).

The former approach seems less plausible because nowhere else does the Act mandate filing of a petition for certification or provide a penalty for not filing. The second approach makes more sense because the statute already explicitly grants a litigant who is forced to exhaust administrative remedies under Section 16(b) a right to request mediation -- indeed the Section

requires such a request -- and provides a remedy if the mediation process is not completed in a timely manner. Sec. 19. Moreover, this interpretation has some textual support. Section 15(a) specifies that the Council must engage in the mediation and review process either if an objection is filed to a petition for certification or "(2)if a request for mediation and review is made pursuant to section 16 of this act." (Emphasis added.) The failure to limit the citation to 16(b) suggests that the Legislature may simply have inadvertently omitted recitation in 16(a) of the right to seek mediation that is expresssly stated in 16(b). The Legislature's ability to make precise subsection citations is shown by the Assembly amendment to Section 16(b) itself. In addition, as noted earlier,[13] Section 16(a) is in fact listed simply as 16 in the enacted version of the statute.

Although the second approach -- reading Sections 15(a)(2) and 16(a) to give litigants in transferred cases the right to request mediation and review -- seems more logical, it would create a further interpretation problem. Under Section 7 and 16, the Council has seven months from the date of the last appointee's confirmation or January 1, 1986, whichever is later, to promulgate its criteria and guidelines and a municipality allowed to transfer a case must file its housing element and fair share plan within five months from that promulgation. Most likely, these dates would be August 1, 1986 for promulgation and

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13 See note 10 supra.

January 1, 1987 for town filing.[14] If a request for mediation and review could then be immediately filed,[15] the Council would have at least six months, or until July 1, 1987, to complete that process. See note 8 supra for the question of what parts of the administrative process are within the "review and mediation process" to which the six-month limit applies. On the other hand, if Section 15(a)(2 and 16(a) were read to permit plaintiffs in transferred cases to seek mediation and review and then invoke Section 19 relief in case of delayed administrative processing, it would appear that the provision in Section 19, which permits the six-month period for Section 19 relief for cases in which the request is filed within nine months of enactment of the Act to begin running at the end of those nine months, would apply. If that is the case, a transferred plaintiff's motion for Section 19 relief from exhaustion could be filed by October 2, 1986, 15 months from the effective date, which would be almost a full 3 months before the town's housing element is even due to be filed under Section 16(a) and 9 months before the motion could be brought under that approach.

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14 See note 11 supra.

15 Normally a town must provide public notice when filing a petition for certification and the Council must allow 45 days for objections to be filed. Sec.14. It is unclear whether this additional 45 day delay would be required when formal petition is not required and the Council already has an objector in the form of the transferred litigant.

Whatever the resolution of this quandary, one thing is quite clear -- the absolute minimum time that would be expended before any action is required is October 2, 1986, almost 13 months from when this transfer motion is to be heard. Even under that scenario, however,the court hearing the Section 19 motion would have discretion to deny relief from the exhaustion requirement, simply allowing more extended mediation and review proceedings, or, indeed, resolving the above quandary in the municipality's favor by allowing until July 1, 1987, 22 months from now, when the motion for Section 19 relief could be brought under the alternative timetable of Section 16(a). Even if the administrative process were completed October 1986, but the Council denied or conditionally approved certification, the municipality would have another 60 days to refile and then the Council would have some unspecified additional time to review the new filing. Sec. 14(b). Thus,under any realistic view of this statute, a transfer now would mean a delay at least until some time in the first half of 1987.

THE CONSEQUENCES OF TRANSFER AND THE MEANING OF MANIFEST INJUSTICE

Even if it were clear what procedural steps could or would occur upon transfer, and under what time limits, it is important to consider what substantive proceedings would occur after transfer to determine whether the transfer would be manifestly unjust. Clearly, in a case brought within 60 days of the Act's effectiveness, in which exhaustion is always required and no substantive determinations will have occurred, the entire case with all issues will be before the Council. But in older cases, where substantive determinations may already have occurred and substantial evidentiary records already compiled, one needs to determine what issues and materials would be before the Council upon transfer.[16]

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[16] We note that in a technical sense transfer is not literally possible at this time, because there is no Council, the Governor not having nominated and the Senate therefore not having considered any members, and there are no offices available nor employees empowered to take custody of the materials not to mention process the case. The motion to transfer the case is thus literally premature. If the Court had not granted South Plainfield a stay of its compliance ordinances' effectiveness pending determination of this motion, we would have urged the Court to deny the motion as premature and continue with proceedings in court until a Council that could accept a transferred case exists. Under the special circumstances, we agree that prompt determination of the motion is crucial. Should the Court be inclined to grant transfer, we would argue that transfer could not take effect until, at a minimum, the Council's members are all confirmed, employees appointed and offices established, and thus that the Court would have continuing jurisdiction and an obligation to move forward with the normal proceedings until such time as a transfer to the Council is literally feasible, for it would be manifestly unjust to refer plaintiffs, especially ones on the verge of obtaining a final judgment after 11 years of litigation, to a nonexistent remedy.

Two major options exist: either the Council starts over and the Council redetermines everything without regard to the prior court record and the rulings that constitute the law of the case, or the Council is empowered only to deal with those issues in the case that remain unresolved at the time of transfer and to do so in light of the existing record and prior rulings. Plaintiffs do not think it crucial for the Court to resolve this important statutory construction issue in this case because, as argued below, it is clear that a transfer of the litigation as to South Plainfield would under either view of the subsequent proceeding be manifestly unjust to the plaintiffs and the class of lower income households they represent. Nevertheless, we believe that the history, structure and language of the Act, when read against existing law, indicate that, if a case with prior substantive rulings can be transferred at all, the Council could determine only the issues remaining at the time of transfer. Indeed, this appears to be the view held by South Plainfield, which in its notice of motion to transfer and proposed order requests only that "the defendant, Borough of South Plainfield, be...permitted to transfer the matter of the adoption of defendant's proposed Ordinances 1009 and 1010 to the Council on Affordable Housing." Proposed Order, Para. 1; Notice of Motion, Para. 1.[17]

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[17] In contrast, Washington Township, in the transfer motion to be heard by Judge Skillman on September 9, has specifically requested that he order "that all previous Orders and Judgments of this Court inconsistent with the transfer of this matter to the Council on Affordable Housing, shall be declared superceded by this Court."

The issues of what happens after transfer and what is manifest injustice precluding a transfer are obviously interwined. Plaintiffs believe that the caselaw compels the conclusion that it would be unlawful and manifestly unjust to require a litigant who has through extended and expensive litigation produced a substantial evidentiary record and secured settled rights through adjudication of key issues on liability or remedy to begin anew before a newly created administrative tribunal. From this one could conclude either: a) that the statute bars transfer of any case in which adjudication of a key issue of liability or remedy, such as municipal fair share or ordinance invalidity, has been completed; or b) that transfer is not totally barred in such cases but upon transfer those rulings may not be reopened and the earlier record is controlling. If one takes the latter view, then one must consider whether it would be manifestly unjust to transfer such an extensively litigated case even though the administrative agency would address only unresolved disputes in light of the existing record and law of the case.

Resolution of these related issues depends upon the interaction and impact of two strands of existing law that employ the "manifest injustice" standard -- the law on when new statutes may be applied retroactively and the law on exhaustion of administrative remedies in prerogative writ actions -- as well as

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the related law concerning primary jurisdiction.[18]

Retroactivity law

"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 stated an intent to apply it retroactively expressly, or where it has done so implicitly because "retroactive acpplication may be necessary to make the statute workable or to give it the most sensible interpretation." Id. at 522. Likewise, retroactive effect is given to a statute that is ameliorative or curative, for example, in reducing the maximum period of detention, or because of the reasonable expectation of the parties. Id. at 522-23. Finally:

> [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

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[18] Although the law of primary jurisdiction does not directly use the language "manifest injustice," it is essential to consider it both because of its close relationship to the exhaustion requirement and because it is directly applicable to the situation before the court in a transfer motion, as explained below.

prejudice settled expectations reasonably relied upon, courts generally apply procedural rules retroactively, but rarely apply substantive changes retroactively to disrupt vested rights. 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).

Exhaustion of Administrative Remedies

The Supreme Court has also clearly ruled that "the preference for exhaustion of administrative remedies is one of convenience, not an indispensable pre-condition.' ... In any case amenable to administrative review, however, upon a defendant's timely petition, the trial court should consider whether exhaustion of remedies will serve the interests of justice." Abbott v. Burke, 100 N.J._ __,___ (Sup.Ct. July 23, 1985)(slip op. at 32). The interests furthered by an exhaustion requirement are:

> (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts.

Id. at ___(slip op. at 32-33). However, as the Court in Abbott and earlier exhaustion cases explained:

> [t]he exhaustion doctrine is not an absolute. Exceptions exist when only a question of law need be resolved ... when the administrative remedies would be futile ... when irreparable harm would result... when jurisdiction of the agency is doubtful... or when an overriding public interest calls for a prompt judicial decision.

Id. at ___ (slip op. at 33).

The Supreme Court has summarized this set of doctrines concerning administrative exhaustion in a court rule regarding exhaustion in actions in lieu of prerogative writs, the form of action in which almost all Mount Laurel lawsuits have been brought:[19]

> Except when manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be undertaken as long as there is available a right of review before an administrative agency which has not been exhausted.

R. 4:69-5.

Primary Jurisdiction

Probably even more pertinent to the present situation than the caselaw on exhaustion of administrative remedies is the related doctrine of primary jurisdiction:

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[19] By a fluke of history, this action, Urban League v. Carteret, was actually brought as an equity action in Chancery, rather than as an action in lieu of prerogative writ. Nevertheless, because almost every case since Mount Laurel II, and most before it, have been brought in the latter mode, it is reasonable to assume that the Legislature was thinking about the rules relevant to that mode in adopting the "manifest injustice" language. Of course, whatever interpretation of the "transfer" and "manifest injustice" provisions prevails, clearly it must apply to all pending actions without regard to the form in which they were brought.

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial intereference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.'
>
> ... We do not imply that the agency may enlarge or contract the legal rights of the parties. When the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their rights. New Jersey Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); cf. Farmingdale Realty Co. v. Borough of Farmingdale, 55 N.J. 103, 112-13 (1969)(taxpayer whose building had been taxed twice could recover refund without exhausting administrative remedies); Nolan v. Fitzpatrick, 9 N.J. 477 (1952)(exhaustion of administrative remedies not required when sole issue is county's legal duty to appropriate funds for commission). But when the determination of the legal issue must be preceded by the taking of the necessary evidence and the making of the necessary factual findings,' it is best done by the administrative agency specifically equipped to inquire into the facts.

Boss v. Rockland Elec. Co., 95 N.J. 33, 40-41 (1983).

In Boss, the Court found that the Board of Public Utility Commissioners had a direct statutory mandate and substantial administrative expertise on the very factual issue before the Court and this issue required development of a substantial evidentiary record before determination. The Court thus directed the trial court to refer those factual issues to the Board, leaving undisturbed pending final disposition the trial court's previous preliminary injunction to preserve the status quo.

The approach taken in Boss is also, consistent with the State Agency Transfer Act, N.J.S.A. 52:14D-1 et seq., which provides for inter-agency transfers. Indeed, the Act specifies that a transfer does not undo previous actions of the original decisionmaker: "The transfer shall not affect any order... made ...by the agency prior to the effective date of the transfer; but such orders... shall continue with full force and effect until amended or repealed pursuant to law; ... nor shall the transfer affect any order or recommendation made by, or other matters or proceedings before the agency." N.J.S.A. 52:14D-6,7.

The doctrine of primary jurisdiction is more directly applicable here than that of exhaustion of administrative remedies for the simple reason that Section 16(a) expressly contemplates transfer of an existing, older action from a court, which the Act does not deny has had primary jurisdiction until now, to an administrative agency, and for reversion of jurisdiction to the court should the administrative process not be pursued or completed in a timely fashion. Section 16(b), in contrast, expressly refers to exhaustion of administrative remeides because it addresses cases not yet filed, or only filed in anticipation of the requirement's imposition. Indeed, as initially written, Section 16(a) required "no exhaustion of the review and mediation procedures" unless the specified determination was made, but the language was changed pursuant to the Governor's conditional veto message to eliminate all references to "exhaustion" and the subsection now speaks only of

"transfer".

It is against this substantial background of well-established law that one must view the statutory language barring "transfer" of a "case" that would cause "manifest injustice."

First, it seems clear that the Legislature did not intend retroactive impairment of vested substantive rights. 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. 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. In the alternative, if transfer is permitted even though substantive determinations have been made, any transfer must, to prevent impairment of vested rights, be expressly limited to determination of the issues remaining unresolved at the time of transfer, in light of the existing record and prior court rulings.[20]

If one adopts the latter approach -- that the transfer of cases with substantive adjudications is permitted by Section 16(b), although limited to the resolution of the outstanding issues in light of the existing record -- the Court would still have to consider whether it would be manifestly unjust to apply the new administrative procedure to the remaining issues in old and partially adjudicated cases.

The Gibbons standard of manifest injustice used by the Fair Housing Act explicitly contemplates that injustice and unfairness

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[20] This interpretation coincides with the common sense meaning of transfer. When referring to transference of a case, one does not normally think of merely transferring an empty file folder but rather of transmitting all documents in the record. See also N.J.S.A. 52:14D-8("All files, books, papers, records... are transferred to the agency to which such transfer is made.")

can flow from procedural delay as well as substantive changes in the rules. One of the prominent cases relied upon by Justice Pashman in Gibbons to describe manifest injustice in the setting of retroactivity was Kruvant v. Cedar Grove, 82 N.J. 435 (1980), a land use case very similar to the South Plainfield litigation in a number of significant respects. In Kruvant, a variance had been sought for a multiple family development in a single family zone which the court found to be unsuitable for single family development. After eight years, four trials, and three ordinance amendments that the trial court characterized as "repeated improper zoning," id. at 444, 414 A.2d at 13, the Supreme Court concluded that the municipality simply did not want this multi-family housing and that the trial court properly ignored yet another zoning amendment, which had been adopted after the expiration of a 90-day deadline set by the trial court for final municipal action. The Court noted that normally the time of decision rule requires courts to apply the law in effect at the time of decision if the legislature indicated that the modification was to be applied retroactively to pending cases. Id. at 440. But the Court explained:

> However, the principle is not inexorable. . . . Where a court has set a reasonable time limitation within which a municipality must act and that condition has not been met, a municipality may not simply ignore a court order and interfere with the judicial process. . . . In view of the extended proceedings, the unquestioned propriety of the trial court's 90-day restriction, and the property owner's satisfaction of the requirements for a variance, the equities warrant and judicial integrity justifies the inapplicability of the time of decision rule. Cf. Oakwood at Madison v. Madison Tp., 72 N.J. 481, 549, 550 (1977).

Id. at 442, 445, 414 A.2d at 12-13, 14.

Thus, it is clear that the defendant's conduct in the period preceding the transfer motion, including particularly delays needlessly incurred and court orders improperly ignored, must be considered by the court in determining whether the equities and judicial integrity justify imposition of a newly enacted procedure upon a protracted and nearly completed action.

Similarly, in deciding whether transfer would be manifestly unjust in a particular case, the court must consider the various other factors addressed in determining whether to excuse exhaustion or avoid transfer to an administrative agency with primary jurisdiction: whether the administrative agency has particular expertise concerning the issues to be resolved, whether the agency decision may satisfy the parties and thus obviate resort to the courts, whether only questions of law remain to be resolved, whether there is a need to create a substantial evidentiary record and make extensive findings of fact for appellate review, whether the administrative remedies would be futile under the circumstances, whether jurisdiction of the agency is doubtful,[21] whether an overriding public interest calls for a prompt judicial decision, and whether irreparable harm would result.

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[21] See pp. 32-41 supra for discussion of whether the Council has any jurisdiction over court cases in which substantive rulings have already been made.

Before seeking to apply these factors to South Plainfield, it is important to explicate one aspect of the last factor -- the risk of irreparable harm during the administrative process. Mount Laurel courts have recognized that, at times, the dwindling supply of vacant land or of sewerage capacity requires interim restraints to insure that the municipality will be able to implement the compliance remedy ultimately ordered by the Court, that is, to prevent irreparable injury to plaintiff's probable right to rezoning of sufficient land to insure a realistic opportunity for construction of lower income housing. In this very action, for example, this Court has entered such restraints in Piscataway and South Plainfield, to a lesser degree in Old Bridge. Should the Court conclude that transfer of this or any similar litigation were appropriate in general under the standards set forth by the retroactivity and exhaustion caselaw, it would still have to determine whether the court still had jurisdiction to continue its restraining order pending final administrative determination.

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 the Appellate Division 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 directly. 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 remedy.

Both logic and caselaw indicate that they do. 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.[22] 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, the New Jersey Supreme Court expressly left in effect, pending completion of administrative factual determination of the scope of an electric

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22 See discussion at pp. 24-30 supra.

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 Supreme Court's opinion. 95 N.J. at 33, 37, 42-43. 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 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 point and it appears to have intended that transfer divest a court of all jurisdiction.[23] But the fact that the administrative process was designed as "a comprehensive planning and implementation response to this constitutional obligation," Sec. 2(c), suggests that the statute could be read to permit such court restraints if transfer were imposed.

However, court restraints against any construction on most vacant sites pending conclusion of a two-year administrative process could raise significant "taking" questions. The landowners would be unable to take advantage either of permitted

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

uses under the existing zoning or of the proposed rezoning to comply with the constitutional obligation. Having no economically meaningful option for the land, they would be able to argue that the regulatory process had amounted to a taking of their land. See, e.g., Golden v. Planning Bd. of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), and Orleans Builders & Developers v. Byrne, 180 N.J. Super. 432, 453 A.2d 200 (App. Div. 1982), and cases cited therein, for discussion of when a moratorium on construction amounts to a compensable taking. Yet a court injunction creating a compensable taking would appear inconsistent with the direct legislative mandate that "Nothing in this act shall require a municipality to raise or expend municipal revenues in order to provde low and moderate income housing." Sec. 11(d).

To avoid the risk either of irreparable harm to the plaintiff and nullification of the agency's mandate or of creating a compensable taking through an extended moratorium on construction, the court should rule that transfer is always barred if a temporary restraint against development is in effect or would be required pending completion of the administrative process.

TRANSFER OF THE FEW REMAINING LEGAL ISSUES CONCERNING SOUTH PLAINFIELD, WHICH DO NOT REQUIRE DEVELOPMENT OF AN EVIDENTIARY RECORD, WOULD BE MANIFESTLY UNJUST TO THE LOWER INCOME POPULATION REPRESENTED BY PLAINTIFFS DURING THE PAST 11 YEARS OF LITIGATION, BECAUSE THE SUPREME COURT HAS ALREADY AFFIRMED THE RULING OF LIABILITY, THE DEFENDANT HAS STIPULATED TO ALL FACTS NECESSARY TO ADJUDCATION OF THE REMAINING DETERMINATIONS BUT THEN HAS VIOLATED THREE COURT-ORDERED DEADLINES, THEREBY STRETCHING ITS NONCOMPLIANCE UNTIL THE STATUTE WAS ENACTED, THE DEFENDANT HAS ALREADY ADOPTED ALL NECESSARY ORDINANCES AND THUS THE ONLY EFFECT OF TRANSFER WOULD BE TO DELAY THE IMPLEMENTATION OF PLAINTIFFS' VESTED RIGHTS FOR NEARLY TWO YEARS, THEREBY RISKING LOSS OF THE SUBSTANTIAL CURRENT OPPORTUNITIES FOR DEVELOPMENT.

Based upon the interpretation of the statute set forth above, the Court should deny South Plainfield's motion outright for two separate reasons. As argued above, no case in which judicial adjudications of liability or remedy have already been made and no case in which interim restraints against development must be continued or imposed pending the extended administrative process may be transferred under Section 16(a) of the Fair Housing Act. Here, based on a voluntary Stipulation, the Court has already adjudicated plaintiffs' rights as to region, fair share, ordinance invalidity, site suitability for rezoning and the necessary remedial measures. Moreover, because of the limited vacant land remaining in light of defendant's actions since the July 1976 Judgment, the Court has already found it necessary to restrain development in South Plainfield and given the Borough's bad faith in selling land and approving developments inconsistent with the Judgment, continuation of such restraints would be essential to preserve any Mount Laurel opportunity.

There is, moreover, a third reason peculiar to this litigation. The "case" in which the litigation concerning South Plainfield has occurred, Urban League, et al. v. Mayor and Council of Carteret, et al., No. C4122-73, is a single judicial action involving originally 23 municipal defendants and at present eight, including South Plainfield, as to which no final judgment has been entered. Although the statute expressly permits "any party to the litigation" to file a motion, the transfer is of "the case," not just some part of, or a few litigants in, the case. The Legislature, in drafting that language, clearly was contemplating litigation against a single town, even if involving more than one builder, a form common to all post-Mount Laurel II litigation. Thus, the court should rule that transfer of a multi-municipality Mount Laurel action is not possible under 16(a).[24]

If it were considered possible, then the Court would have to consider, and allow the plaintiffs to address, the manifest injustice factors as to all eight remaining townships, including those that are not seeking or planning to seek transfer, some of whom might consider it a manifest injustice to themselves.[25] Alternatively, the Court would have to construe the statute to

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[24] It is possible that this case is the only remaining multi-defendant Mount Laurel action. We understand that only Denville is still an active defendant in the Public Advocate's Morris County suit which originally included some 27 municipalities.

[25] To date, only Cranbury and South Plainfield have sought transfer; some town councils have already affirmatively decided not to seek transfer.

allow transfer of the portion of a litigation relating to one of several municipalities if the Court considers severance appropriate at the time of the transfer motion. Judge Furman, after an evidentiary hearing, already denied defendants' motion for severance before the first trial in this case. This Court had given no consideration to severance, and no defendant had sought it, prior to this motion, presumably because of the accumulated familiarity and expertise that this Court has developed concerning this case and because of the potential interrelationship of compliance plans in neighboring towns.[26] In any case, we believe severance of South Plainfield is inappropriate for all the reasons set forth below, which establish that transferring the litigation as to South Plainfield would be a "manifest injustice."

Although there are, as noted before, many factors relevant to a determination of "manifest injustice", almost all of which are applicable in the South Plainfield context, because of their complexity and interrelationship, we will focus the discussion around four key points:

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[26] For example, neighboring towns may have concerns with the impact of high density developments along common roads or adjoining neighborhoods. If litigation concerning two such towns were severed through transference of one to the Council, either the other town would be prejudiced by judicial inability to consider such factors, or the transferred town would have to seek intervention in the litigation or the litigating party would have to seek intervention before the Council, thereby needlessly burdening the two decisionmaking forums and defeating the purpose of severance/transfer.

1. The case is 11 years old, extremely complex in substance and procedural history, and it is now virtually complete through the final remedial stage.
2. The terms of the Judgment were expressly bargained for and voluntarily accepted by South Plainfield more than a year ago.
3. The Borough has, for the past year, unconscionably delayed the process of remediation after its initial cooperation, and it now seeks to take advantage of its own improper conduct by transferring that could and should have been over before the end of 1984.
4. The fair share obligation imposed on South Plainfield is so modest, and so reasonable, that the Affordable Housing Council would be hard put to alter it, so that the only consequence of transfer is yet another delay, with severe impact on the likelihood of any low income construction in this fair share period.

These four aspects of manifest injustice are discussed in greater detail below. They must be considered, however, against the background of extensive delay that would face any case transferred now, for delay is an inherent part of the new system, as detailed above. Moreover, the Affordable Housing Council will likely be confronted with a large initial docket of cases, both transferred and new, which will create an instant backlog and make even further delays all but inevitable. It must be remembered that the Urban League has been in litigation for 11

years, not eight as in Kruvant, but against a municipality at least as intransigent as Cedar Grove. South Plainfield has ignored not one (as in Kruvant), but multiple deadlines set by the Court for final action which, if taken in a timely fashion, would have rendered transfer moot. The rezoning ordered in South Plainfield is every bit as appropriate as the variance granted in Kruvant, and it has the additional distinction of having been agreed to voluntarily by the Mayor and Council more than a year ago, when the stipulation was presented to the Court. As in Kruvant, this case has "been tried to the point of exhaustion." 414 A.2d at 3. No point would be served by transfer other than the illegitimate goal of pointless delay, an affront, as in Kruvant, both to the equities and to judicial integrity. Id. at at 14.

1. The Case Is So Complex, Has Taken So Long To Try And Is So Near Completion, That There Would Be Manifest Injustice In Transferring And Starting Over.

South Plainfield is part of the much larger Urban League case, which is now the longest-running piece of Mount Laurel litigation in New Jersey, having been filed on July 23, 1974.[27] South Plainfield was found to be in violation of the Constitution

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[27] The Mount Laurel case itself finally settled in July, 1985. It is worth noting that Mount Laurel Township, after years of bitter defense of its position, concluded that settlement was preferable to seeking transfer to the Affordable Housing Council.

by Judge Furman on May 4, 1976, and this ruling was vigorously affirmed by the Supreme Court as part of the Mount Laurel II decision in January, 1983.[28]

It should be noted that during the period between the first judgment against it in 1976 and the decision of the Supreme Court in 1983, South Plainfield assiduously pursued a development strategy that brought it ratables without poor people, and used up a substantial amount of vacant land that could have been devoted to housing. Indeed, in May 1976 Judge Furman found that the Borough had sufficient vacant land to accommodate a fair share of over 1700 units and that it was overzoned for industrial use by 400 acres but by 1984 all parties agreed there was insufficient land for anywhere near that number. Thus, by taking advantage of the unenforceability of Judge Furman's Order during the incredibly lengthy appellate proceedings, South Plainfield has already reaped the unconstitutional "benefit" of exclusionary zoning well beyond any rational entitlement to further delay.

Upon remand to this Court in 1983, for reconsideration of both compliance and remedy in light of the passage of time since the first trial, the parties engaged in a further year of extensive pre-trial discovery, and their planning experts participated in the unique "consensus" process that resulted in

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[28] The only time the Borough has won at all during eleven years of litigation was at the Appellate Division stage, 170 N.J. Super. 461 (1979), a decision eventually reversed in its entirety by the Supreme Court.

the fair share methodology formula now generally used in the Mount Laurel courts. See AMG Realty Co. v. Township of Warren, No. L-23277-80 P.W.(July 16, 1984).

In comparison to cases more recently filed, therefore, the Urban League litigation has been at the leading edge of every legal development in the field of exclusionary zoning, both before and after Mount Laurel II, and it has been concomitantly complex, time-consuming and expensive. In Kruvant, supra, the Supreme Court recognized that after eight years of intransigent resistance to implementation of an altogether reasonable trial judgment, further delay would in effect defeat plaintiff's meritorious claim. The Urban League litigation has involved much more difficult legal issues than Kruvant, and its extended history has allowed South Plainfield much greater opportunity to "win" by irretrievably altering its land use patterns to perpetuate exclusion. A fortiori, there would be manifest injustice in allowing the 11 years of Urban League litigation against South Plainfield, which can come to an end shortly, to stretch for years more in the Affordable Housing Council.

2. South Plainfield's Motion To Transfer Is Inconsistent With Its Voluntary Acceptance of The Mount Laurel Remedy More Than A Year Ago.

On the eve of trial, South Plainfield and the Urban League entered into a voluntary Stipulation of facts that amounted to a complete resolution of the issues between them. For its own

political reasons, South Plainfield chose to stipulate rather than execute a formal settlement, but it was understood that the Urban League would immediately move for summary judgment based on the Stipulation. Neisser Affidavit of June 21, 1985, Exhibit B, at 5. Accordingly, on May 22, 1984, the Court ruled that South Plainfield was in continuing violation of the Constitution, had a fair share number of 900 housing units (the derivation of this number is explained elsewhere), and could come into compliance by taking a number of legislative steps specified in the Stipulation, including adoption of an affordable housing ordinance, site specific rezoning, and assembly and donation of municipally owned land to help reduce the costs of specific development proposals. As of May 30, 1984, when the Court-appointed expert approved the Stipulation and Judgment, all that remained for South Plainfield to do was to enact formally the remedial steps that it had already agreed to. The Court allowed it 120 days for this essentially ministerial process.

It is important to note what South Plainfield did not have to do as a result of its voluntary decision to stipulate the basis for the summary judgment. It did not have to participate with the other Urban League defendants in the 18-day methodology trial in May, 1984. It did not have a fair share number calculated for it by the "consensus" formula, which would have resulted in a much higher fair share number (1725). It did not have to make all its appropriate vacant land available for Mount Laurel development (Neisser Affidavit of August 28, 1985, Para.

10. It did not have to surrender any of its autonomy to a master appointed by the Court to supervise a 90-day remedial process. (To date, no Master has ever been appointed for South Plainfield.) The Borough was treated, in other words, as if it had settled the matter amicably and in good faith, on the premise that what remained to be done could be done without controversy. Effectively South Plainfield was allowed to develop its own housing element anf fair share plan through discussion, control of discovery, and negotiation, just as it would through submission to the Council and mediation under the statute.

Unfortunately, the case soon became more controversial, rather than less, in the aftermath of the Judgment of May 22, 1984. At the time of its motion for transfer, 14 months later, South Plainfield had not adopted complying ordinances or received a judgment of repose from the Court. Instead, at the very time it moved for transfer, it was near the end of the third court-imposed deadline to adopt the ordinances, and the Borough Council, on advice of counsel, subsequently defied the Court's deadline by tabling the compliance ordinances on July 29. Only after a further hearing before the Court on August 2, 1985, did the Council remove the ordinances from the table and adopt them "under protest" on August 7, 1985.

There is practically nothing left to be done. The Court-appointed expert needs to review the ordinances to determine their adequacy for compliance, but given her familiarity with the Judgment from her prior review and the plaintiffs' acceptance of

the ordinances, except for a technical amendment to specify precisely the affected lands, this should take a short time and require little or no testimony. The only evidentiary matters that remain concern the impact of Borough land sales and development approvals inconsistent with the Judgment upon compliance with the Judgment. These should also be quite simple and the facts might even be agreed to by the parties. In any case, the need for this evidentiary development arises solely because of the defendant's misconduct. The defendant should not allowed to claim that transfer to an administrative body is necessary to hear evidence and find facts that would not have been necessary if it had not intentionally violated a series of direct court orders before the agency existed.

Moreover, there is currently no administrative expertise in these matters. The Council does not yet exist, the Governor having failed to meet the statute's first deadline. Even after the Council is formed and staff hired, it will be a considerable period of time before the Council gets down to the business of evaluating municipal compliance plans, as its first seven months of existence will be spent preparing general criteria and guidelines. Moreover, much of its initial work will relate to fair share determinations, not compliance plans. Thus, it will be a long time before one can honestly say that the Council has some special expertise in evaluating compliance plans under the statute that would warrant transfer under the requirements of the primary jurisdiction doctrine. Boss, supra.

It is true that South Plainfield has retained a technical right to appeal the summary judgment against it, and the case is therefore not final in this technical sense. It is difficult, however, to perceive any colorable issues that South Plainfield can hope to raise on appeal, because the Judgment simply repeats verbatim the comprehensive Stipulation as to facts and remedies that the Borough Council agreed to voluntarily, on advice of its counsel and after full debate. South Plainfield admitted that its ordinances were unconstitutional, it admitted the appropriateness of the compliance remedies, and it specified a fair share number that is not dependent in any way on the arguably appealable "consensus" formula set forth in AMG. Appeal, then, is nothing but another frustrating source of delay, which the Borough has no legal, let alone moral, basis to pursue. Although the Urban League plaintiffs cannot directly prevent South Plainfield from exercising its technical right of appeal,[29] the prospect of that appeal certainly does nothing to alter the fact that the South Plainfield litigation is over for all practical purposes.

Manifest injustice has to be evaluated against this recent procedural history. The substantive work of the case was over more than a year ago, when the issues were voluntarily resolved by compromise between the parties. If "manifest" injustice means that the injustice is obvious, that it does not require elaborate parsing to understand, then the injustice is manifest in

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29 But see note 4 supra.

permitting South Plainfield to go back on its word by transferring a case that it had agreed to conclude. More than a year ago, South Plainfield freely struck a bargain that gave it the best deal obtainable, securing substantive concessions from the Urban League as well as relief from the expense of the May 1984 methodology trial. There is absolutely no equity in its present contention that it ought to be able to try for an even better deal, with years more of delay, while needed lower-income housing goes unbuilt in South Plainfield.

3. In addition to the manifest injustice in allowing further delay, there is manifest injustice in allowing South Plainfield to take advantage of its own prior unconscionable conduct, without which it would not be in a position to seek transfer.

Simply put, if South Plainfield had not stalled unconscionably beyond the generous 120-day period allowed it by the Court to implement its Stipulation, there would be no case to transfer. With Mount Laurel legislation under active consideration during much of this period, South Plainfield had every incentive to stall, and its tactics have had the effect, if not the provable design, of keeping the case "alive" until transfer could be sought. Its behavior has been so severe in recent months that the Urban League was moved to seek punitive sanctions, in an effort to get the agreed-to local ordinances adopted. It should not now be rewarded for its improper behavior, by receiving a transfer that will artificially prevent the case

from coming to a prompt and just conclusion.

South Plainfield's tactics have had two parts. First, it has moved with inordinate slowness to adopt compliant ordinances. The key zoning revisions were fully agreed to in the 1984 Stipulation, and the affordable housing ordinance, which did require further drafting, could easily be built on standardized models that have been acceptable to the Court and the parties in other towns. The 120-day period allowed by the Court to do this should have been more than ample (the Urban League, in fact, had asked the Court initially for a 90-day deadline). Indeed, Mr. Neisser first provided the Borough planning consultant with detailed comments on the first draft of the ordinances on July 26, and then gave detailed written comments on the next draft on September 5. Thus, defendant had complete drafts with plaintiffs' comments a month before the first deadline. After the plaintiffs' first restraint motion, brought in late October 1984, there was a direct meeting of the parties' experts to iron out remaining differences. By January, the Planning Board had recommended complete drafts for approval by the Council. Neisser Affidavit of August 28, 1985, Para. 12. Yet, the deliberate foot-dragging continued. When the Urban League on two occasions noted minor deviations in the texts of the ordinances proposed by South Plainfield from those agreed to at the November meeting, the Borough in each case sent the ordinance back to the Planning Board for reconsideration and recommendations although clearly the Council could have directly made the amendments before

adoption.

Compounding delays of this sort has been the Borough's spectacular bad faith in trying to subvert parts of the Stipulation and Judgment before the ordinances were adopted. In October 1984, the Urban League found it necessary to seek the aid of the Court to prevent the Borough from approving the Elderlodge development without a lower-income set-aside, in contravention of the voluntary Stipulation and Judgment. Again in June, 1985, it was necessary to obtain further restraints when the Urban League discovered that the Borough had, and was continuing, to sell off municipally owned land specifically committed in the Stipulation to Mount Laurel purposes. It was this action that led the Court to impose a strict timetable for South Plainfield to complete action on adoption of the ordinances.

For the last year and more, the Borough has acted virtually as if there were no judgment outstanding against it, let alone a judgment based on its own voluntary stipulation. Its bad faith is manifest. Its bad faith, moreover, explains why it has taken over a year to complete a straightforward drafting process. The Borough does not want to comply, and it has taken advantage of every opportunity it could find or manufacture to avoid complying. In retrospect, it is clear that it has also taken advantage of the Urban League, whose policy has been not to enforce deadlines too strictly, in the belief that Mount Laurel values are better served by encouraging defendant municipalities to come into compliance by autonomous choice, rather than through

judicial intervention and supervision. The Urban League's forbearance should not now be turned against it for inequitable purposes, as South Plainfield seeks to do. Indeed, as noted above, the fact that bad faith conduct should now have created some need for evidentiary determinations can hardly be turned into an argument for deferral to administrative fact-finding.

It should not be forgotten that the Affordable Housing Council is a mechanism to effectuate the constitutional purposes of Mount Laurel I and Mount Laurel II, not to frustrate them. Moreover, the essence of the statutory procedure is the submission of a voluntary plan of compliance, which is to be approved by the Council if it meets the general guidelines that have been promulgated for such plans. It seems self-evident that there would be manifest injustice in tranferring to a voluntary compliance process a case in which the municipality has already had that opportunity but then pulled away from its own plan and unmistakably signalled its lack of interest in voluntary compliance.

It would grossly weaken the legitimacy and the authority of the Affordable Housing Council for it to become a repository for intransigent cases such as South Plainfield's that are completed in all meaningful respects, and whose transfer to the Council can only be for the purpose of frustrating Mount Laurel compliance through delay, as happened in the years between Mount Laurel I and Mount Laurel II. This case has been delayed for 11 years; it can be fully resolved in the trial court within weeks and in the

the appellate courts within months. Transfer will delay matters for at least 18 months to two years, and to utterly no useful purpose. Transfer would be manifestly unjust.

4. South Plainfield can gain nothing from transfer except the illegitimate value of delay, which would seriously jeopardize the likelihood of lower income housing construction given the cyclical nature of the construction industry and the costs of delay.

That transfer will serve no useful purpose is clear, because it is virtually impossible that the substantive outcome of South Plainfield's Mount Laurel obligation could be altered by the Affordable Housing Council in a manner that would satisfy both South Plainfield and the Constitution.

First, it is absolutely impossible to know what outcome will prevail in the Council. The Legislation itself contains few substantive rules. It merely states guidelines, many of a common sense variety already incorporated into the Urban League proceedings[30] and leaves the more detailed rule-making to the Council. In this, the Act parallels the decision of the Supreme Court in Mount Laurel II to give wide latitude to the three Mount Laurel judges.

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[30] For example, the statute mandates consideration of historic preservation, limited vacant developable land, and phasing of large fair shares, Secs. 7(c)(2), 23, all of which have already been considered by this Court in the Cranbury, Piscataway, South Plainfield, and Old Bridge litigation.

Even speculative gain is unlikely, however, if the Council could, contrary to the interpretation presented earlier, redetermine a previously adjudicated or stipulated fair share . Using the AMG methodology, South Plainfield's fair share would have been 1725 units of low and moderate income housing. Judgment, Para. 2. The voluntary Stipulation provides a fair share of only 900 units, which the Mayor has stated is well below the Borough's actual capacity, Transcript of July 29, 1985 Council Meeting, at 57, and, as explained in Eric Neisser's affidavit, the remedial portions of the Stipulation and Judgment contemplate that no more than 603 lower income units will actually be built. Neisser Affidavit of August 28, 1985, Para. 5 and Exhibit B. Thus, the parties have already, through negotiation, adapted the formulaic fair share process to the reality of South Plainfield's specific situation, just as the Affordable Housing Council would be required to do under the statute.

Given that there is some need for affordable housing in South Plainfield that is not presently being met (a point conceded by the Borough through the Stipulation), it is extremely difficult to see how the Borough's ultimate fair share obligation could be reduced below the terms of the Stipulation negotiated last year. Mr. Mallach's affidavit indicates that even a literal application of the credit provision in Section 7(c)(1), which would wipe out almost all fair share obligations throughout the state, would reduce the South Plainfield obligation by 749 units.

Thus, even if the Council were to start with a number lower even than the 1523 units that Mr. Mallach had projected for South Plainfield last year, Judgment, Para. 2, even one as low as 1350, for example, and applied the credit provision in the quite absurd manner suggested by its literal language, the resulting fair share would be in the neighborhood of the 600 units anticipated from the Judgment.[31] If, on the other hand, the Council were to limit the credit provision to a more rational meaning,[32] the statutory provision for downward adjustment of the fair share in light of limited vacant, developable land, Sec. 7 (c)(2)(f), could not possibly reduce the number below 900, for the Mayor has already publicly stated that capacity for that level still exists. As for Mr. Santoro's suggestion that the Borough might wish to seek a regional contribution agreement under the statute,

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[31] Obviously if the credits under Section 7(c)(1) reduce the fair share to a number that is attainable given available land, the Borough could not also seek an adjustment under Section 7(c)(2)(f) for lack of vacant developable land.

[32] It is inconceivable that the Legislature intended the absurd result of eliminating fair shares throughout the state because of the current existence of adequate lower income housing for some portion of the population. The provision must, therefore, be interpreted in a manner consistent with both its language and the constitutional obligation to satisfy unmet housing needs. We believe that the proper interpretation of the credit for "each current unit of low and moderate income housing" is that it applies only to those units constructed or made affordable to the designated population during the current fair share period. Thus, it credits not all such units currently in existence but only those that were currently developed. As the Stipulation makes clear, there are practically no such units in South Plainfield, as only 33 units were rehabilitated for lower income households in the eight years between the first Judgment by Judge Furman in July 1976 and the Stipulation in May 1984.

plaintiffs note that there is ample room for that between the 603 units to be build on the eight sites and the 900 unit Borough obligation.

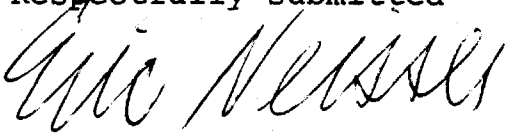
The only "benefit" South Plainfield can realistically hope to gain from transfer, then, is further delay, of which it has already had more than enough. Delay would, however, have a devastating effect on the plaintiffs' rights. Delay always imposes significant carrying costs in the construction industry. But there is much more at stake here. The affidavit of Alan Mallach confirms that we are currently in one of the most favorable times for housing construction in New Jersey. It is unlikely that these exceptional market conditions will continue indefinitely -- indeed in all likelihood the market two or three years from now will change for the worse. Mallach Affidavit, Paras. 15-16. The Affidavit of Lawrence Massaro brings the point home vividly with regard to South Plainfield. He has just delivered $1 1/4 million to the Borough to purchase 24 acres in the Pomponio Avenue site, which has been rezoned for 15 units per acre, and has a contract to sell the land, once conveyed and approvals received, to a major, experienced developer of low income housing. He states that even the minimum 13 month delay that would be caused by transfer, under the tightest interpretation of the Act: "would expose the development to substantial risks due to possible changes in the economic climate, employment situation and demographics and that adverse changes could jeopardize the fiscal viability of the project thus

completely defeating the objective of actually having lower income homes built in South Plainfield." Massaro Certification of August 27, 1985, Para. 17. Thus, delay occasioned by transfer might well undermine the very relief that the Court has awarded plaintiffs, whether or not temporary restraints were imposed on development during transfer.

By pressing ahead with the transfer motion in the face of these realities, South Plainfield suggests (as its actions over the last year have also suggested) that it prefers no-share to fair-share, and that the Stipulation voluntarily signed in May 1984 was signed with the proverbial crossed fingers behind the municipal back. To transfer this matter now to the Affordable Housing Council, as if South Plainfield had never voluntarily stipulated to a compliance plan, as if it had not tried to subvert that plan for more than a year now, and as if the existing Judgment were oppressively unrealistic, would be to make a travesty of the constitutional obligation that the Fair Housing Act of 1985 seeks to implement. If "manifest injustice" means anything -- as it must -- then it must mean that there would be manifest injustice in transferring the South Plainfield portion of this case.

DATED: August 28, 1985

Respectfully submitted



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