[redacted] - Cranbury ~10/11/85

CA

Appendix in Support of motion for leave to take an interlocutory appeal for Δ-appellant, Twp of Cranbury

(double sided pgs)

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CA002260 B

Superior Court of New Jersey

CA002260B

Appellate Division

Docket No. AM

Nos.	**C 4122-73**	**L 055956-83 P.W.**
	L 079309-83 P.W.	**L 59643-83**
	L 054117-83	**L 058046-83 P.W.**
	L 070841-83 P.W.	**L 005652-84**

CONSOLIDATED

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, et al.,

Plaintiffs,

-vs-

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

Defendants,

and other Consolidated Cases.

CIVIL ACTION -- On Motion for Leave to take an Interlocutory Appeal from the Order entered October 11, 1985, in the Superior Court of New Jersey - Middlesex/Ocean County at No. C 4122-73. Honorable Eugene D. Serpentelli, A.J.S.C. presiding.

APPENDIX IN SUPPORT OF MOTION FOR LEAVE TO TAKE AN INTERLOCUTORY APPEAL FOR DEFENDANT-APPELLANT, TOWNSHIP OF CRANBURY

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Township of Cranbury

THE SUPERIOR APPELLATE PRINTING COMPANY

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Cranbury, N.J. 08512

Area Code 609
443-4202

Superior Court of New Jersey

Appellate Division

Docket No. AM

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CONSOLIDATED

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THE MAYOR AND COUNCIL OF THE
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LETTER OPINION DATED JULY 27, 1984

Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D SERPENTELLI

OCEAN COUNTY COURT HOUSE
C. N. 2191
TOMS RIVER, N. J. 08753

July 27, 1984

Bruce S. Gelber, Esq.
Eric Neisser, Esq.
William. Warren, Esq.
Carl Bisgaier, Esq.
Michael Herbert, Esq.

Guilet Hirsch, Esq.
Stewart Hutt, Esq.
Arnold Mytelka, Esq.
Thomas Farino, Esq.
William Moran, Esq.

LETTER OPINION

Re: Urban League v. Carteret
Docket No. C-4122-73

Gentlemen:

Before the receipt of this letter, you should have received a copy of the court's opinion in the AMG Realty Company et al v. Township of Warren. That opinion is dispositive of all of the legal issues relating to the establishment of a fair share methodology concerning the Townships of Monroe and Cranbury and is fully incorporated herein by this reference.

Based upon that opinion and the calculations contained in J-5 marked in evidence, the fair share of the Township of Monroe is established at 774 units, representing 201 indigenous and surplus present need units and 573 prospective need units for the decade of 1980 to 1990. As to Cranbury the fair share is established at 816 units representing 116 indigenous and surplus present need units and 700 prospective need units for the decade of 1980 to 1990. The reduction in the fair share numbers as shown on Tables

13A, 13B, 15A and 15B of J-5 represents a recalculation of the indigenous need based upon Carla Lerman's memorandum of May 24, 1984 and the use of J-20 in evidence. As to Monroe, the indigenous need is reduced from 196, as shown on Table 15A, to 133, as shown in J-20. As to Cranbury, the indigenous need is reduced from 29, as shown on Table 13A to 23, as shown in J-20.

In the case of Monroe the total fair share shall consist of 387 low cost and 387 moderate cost units. As to Cranbury, the total fair share shall consist of 408 units low cost and 408 moderate cost. The use of the terms "low and moderate" shall be generally in accordance with the guidelines provided by Mount Laurel II at p. 221 n 8. I find that the factual circumstances which warranted an equal division between low and moderate income housing in the AMG case exist with respect to Monroe and Cranbury. (AMG at 24) Similarly, the factual circumstances justifying phasing of the present need in the AMG case are sufficiently analogous here.(AMG at 24-25)

As should be evident from the fair share discussion above, I have rejected Cranbury's challenge to the State Development Guide Plan (hereinafter SDGP). Essentially, Cranbury argued that since the 1980 version of the SDGP, the Department of Community Affairs (hereinafter DCA) amended the concept maps, thereby characterizing less of the municipality as growth area. A reduction in growth area would lower Cranbury's obligation somewhat and might impact on the granting of a builder's remedy.

Cranbury's argument fails for two reasons. First, the testimony at trial did not demonstrate that the SDGP was ever formally amended. Apparently, the DCA considered many possible changes to the May, 1980 SDGP

and summarized their comments in a document dated January, 1981. (J-8 in evidence). However, the process never progressed beyond mere general discussion and, in fact, Mr. Ginman did not recall any specific discussion of a change affecting Cranbury with the Cabinet Committee. Second, and more importantly, our Supreme Court has adopted the May, 1980 SDGP - not the subsequent alleged amendments. Indeed, the Supreme Court went as far as giving the 1980 SDGP evidential value. (Mount Laurel II at 246-47) Any informality in adoption of the 1980 edition of the SDGP is overcome by the Supreme Court's endorsement of it as a means of insuring that lower income housing would be built where it should be built. (Mount Laurel II at 225)

With respect to the issue of compliance of the respective land use regulations of Monroe and Cranbury, counsel for both townships have stipulated that the ordinances do not provide a realistic opportunity for satisfation of the municipalities' fair share of lower income housing. Therefore, the land use regulations of both municipalities are invalid under Mount Laurel II guidelines.

Having identified the obligations of Cranbury and Monroe, and having found their land use regulations noncompliant, I hereby order these municipalities to revise their land use regulations within 90 days of the filing of this opinion to comply with Mount Laurel II. Both townships shall provide for adequate zoning to meet their fair share, eliminate from their ordinances all cost generating provisions which would stand in the way of the construction of lower income housing and, if necessary, incorporate in the revised ordinances all affirmative devices necessary to lead to the

construction of their fair share of lower income housing. (see generally Mount Laurel II at 258-278)

In connection with the ordinance revisions, I hereby appoint Carla L. Lerman, 413 Englewood Avenue, Teaneck, New Jersey, 07666 as the master to assist the Township of Monroe in the revision process and Philip B. Caton, 342 West State Street, Trenton, New Jersey, 08618, as the master to assist the Township of Cranbury in the revision process.

The right to a builder's remedy relating to both municipalities is reserved pending the revision process. To the the extent that any of the plaintiff builders are not voluntarily granted a builder's remedy in the revision process, each master is directed to report to the court concerning the suitability of that builder's site for Mount Laurel construction. As to the issue of priority of builder's remedies in Cranbury, Mr. Caton should also make recommendations, from a planning standpoint, as to the relative suitability of each site. After the 90 day revision period, all builder's remedy issues in both municipalities will be considered as part of the compliance hearing.

As the AMG opinion indicates, it is not the court's desire to revise the zoning ordinances of Monroe or Cranbury by its own fiat. Rather, the governing body, planning board, the master and all those interested in the process now have the opportunity to submit a compliant ordinance to the court. (AMG at 68) All those involved in the process must strive to devise solutions which will maximize the housing opportunity for lower income people and minimize the impact on the townships. (AMG at 80) Only if the townships

should fail to satisify their constitutional obligation must the court implement the remedies for noncompliance provided for by Mount Laurel II. (Mount Laurel II at 285 et seq)

Mr. Gelber shall submit a single order relating to both townships incorporating the provisions of this letter opinion pursuant to the five day rule.

Very truly yours,

Eugene D. Serpentelli, JSC

EDS:RDH
cc: Carla L. Lerman, P.P.
cc: Philip B. Caton, P.P.

NOTICE OF MOTION RETURNABLE SEPTEMBER 13, 1985 TO LIMIT BUILDER'S REMEDIES

HUFF, MORAN & BALINT
Cranbury - South River Road
Cranbury, N.J. 08512
(609) 655-3600
Attorneys for Defendant, Township
Committee of the Township of Cranbury

Plaintiff,

LAWRENCE ZIRINSKY,

v.

Defendants,

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation, and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

Docket No. L 079309-83 P.W.

Civil Action

Plaintiffs,

JOSEPH MORRIS and ROBERT MORRIS,

v.

Defendants,

TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, a municipal corporation of the State of New Jersey

Docket No. L 054117-83

NOTICE OF MOTION RETURNABLE SEPTEMBER 13, 1985 TO LIMIT BUILDER'S REMEDIES

Plaintiffs,

GARFIELD & COMPANY,

v.

Docket No. L 055956-83 P.W.

Defendants,

MAYOR AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, a municipal Corporation, and the members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof.

Plaintiffs,

CRANBURY DEVELOPMENT CORPORATION, a Corporation of the State of New Jersey,

Docket No. L 59643-83

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and theTOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

---

Plaintiffs,

BROWNING-FERRIS INDUSTRIES OF SOUTH JERSEY, INC., A corporation of the State of New Jersey, RICHCRETE CONCRETE COMPANY, a corporation of the State of New Jersey and MID-STATE FILIGREE SYSTEMS, INC., a Corporation of the State of New Jersey,

Docket No. L 058046-83 P.W.

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

---

Plaintiff,

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.

v.

Defendants,

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

CHANCERY DIVISION: MIDDLESEX COUNTY

Docket No. C 4122-73

Plaintiff,

CRANBURY LAND COMPANY, a New Jersey Limited Partnership,

v.

Defendants,

CRANBURY TOWNSHIP, a municipal corporation of the State of New Jersey located in Middlesex County, New Jersey

---

Docket No. L 070841-83 P.W.

Plaintiff,

TOLL BROTHERS, INC.

v.

Defendant,

TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY.

Docket No. L 005652-84

TO: MICHAEL J. HERBERT, ESQ.
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900 Route 9
Box 10
Woodbridge, NJ 07095

PLEASE TAKE NOTICE that on September 13, 1985 at 9:00 A.M. or as soon thereafter as counsel may be heard, the undersigned shall move before the Superior Court, Law Division, Ocean County, New Jersey for an Order granting:

1. To transfer the pending action to the Council on Affordable Housing, pursuant to Ch. 222, P.L. 1985.

2. Alternatively, to recalculate Cranbury's fair share number in accordance with the criteria set forth in Ch. 222, P.L.1985, and to establish a moratorium on builder's remedies in Cranbury Township.

3. To limit the number of builder's remedies in Cranbury Township to one.

Counsel will rely on the attached Affidavit and Briefs in support of the within motion.

HUFF, MORAN AND BALINT,
Attorneys for Township of Cranbury

BY: _____
WILLIAM C. MORAN

Dated: August 21st, 1985

AFFIDAVIT OF ALAN DANSER DATED AUGUST 19, 1985

HUFF, MORAN & BALINT
Cranbury - South River Road
Cranbury, N.J. 08512
(609) 655-3600
Attorneys for Defendant, Township
Committee of the Township of Cranbury

Plaintiff,

LAWRENCE ZIRINSKY,

v.

Defendants,

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation, and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

Docket No. L 079309-83 P.W.

Civil Action

Plaintiffs,

JOSEPH MORRIS and ROBERT MORRIS,

v.

Defendants,

TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, a municipal corporation of the State of New Jersey

---

Docket No. L 054117-83

Plaintiffs,

GARFIELD & COMPANY,

v.

Docket No. L 055956-83 P.W.

Defendants,

MAYOR AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, a municipal Corporation, and the members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof.

Plaintiffs,

CRANBURY DEVELOPMENT CORPORATION, a Corporation of the State of New Jersey,

Docket No. L 59643-83

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and theTOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

---

Plaintiffs,

BROWNING-FERRIS INDUSTRIES OF SOUTH JERSEY, INC., A corporation of the State of New Jersey, RICHCRETE CONCRETE COMPANY, a corporation of the State of New Jersey and MID-STATE FILIGREE SYSTEMS, INC., a Corporation of the State of New Jersey,

Docket No. L 058046-83 P.W.

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

---

Plaintiff,

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.

v.

Defendants,

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

CHANCERY DIVISION: MIDDLESEX COUNTY

Docket No. C 4122-73

Plaintiff,

CRANBURY LAND COMPANY, a New Jersey Limited Partnership,

v.

Defendants,

CRANBURY TOWNSHIP, a municipal corporation of the State of New Jersey located in Middlesex County, New Jersey

Docket No. L 070841-83 P.W.

Plaintiff,

TOLL BROTHERS, INC.

v.

Defendant,
TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY.

Docket No. L 005652-84

AFFIDAVIT OF ALAN DANSER

STATE OF NEW JERSEY)
COUNTY OF MIDDLESEX) ss:

ALAN DANSER, being duly sworn according to law, upon his oath deposes and says:

1. I am a member of the Township Committee of the Township of Cranbury, and the Mayor of the Township of Cranbury.

2. I have been on the Township Committee since January 1, 1980 and have lived in the Township of Cranbury all my life.

3. Since World War II, Cranbury's population has remained relatively stabile, remaining at or around the population of 2,000 people, through the 1980 census.

4. Cranbury Township never had a sewer system until 1978, when a Federal Grant Application, which had been filed in 1969 finally came to fruition and the sewer system was built to serve the village area of the Township, consisting of approximately 500 dwellings.

5. Since its inception, Cranbury Township has participated in the Housing and Community Development Revenue Sharing Program. Of all the group participants in this program for Middlesex County, Cranbury has used a higher percentage of its allotment for housing rehabilitation than any other municipality particpating in the program in the county. In terms of actual dollars, even though Cranbury Township is one of the smallest municipalities participating, it has spent more actual dollars on housing rehabilitation than any other municipality participating, with the exception of South River.

6. I make this affidavit in support of Cranbury Township's motion to transfer the above matter to the New Jersey Council on Affordable Housing.

ALAN DANSER

Sworn and subscribed to
before me this 19th day of
August, 1985.

DOREE A. KNUTSEN
A Notary Public of New Jersey
My Commission Expires March 17, 1987

PROOF OF MAILING

I hereby certify that on August 21, 1985 a copy of the within motion and supporting Affidavit and Briefs were mailed to the following attorneys:

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TERNS, HERBERT & WEINROTH, ESQS.
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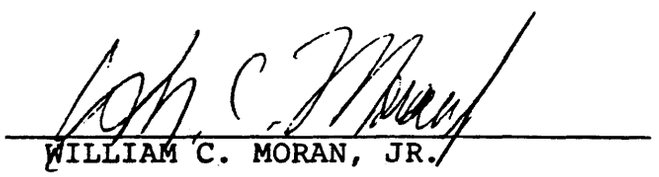
JOHN PAYNE, ESQ.
Constitutional Litigation Clinic
Room 338
Rutgers Law School
15 Washington Street
Newark, NJ 07102

Attorneys for Urban League

I further certify that the original of this motion was filed with the Clerk of the Superior Court, Trenton, New Jersey, and a copy of same has been filed with the Clerk of Ocean County Superior Court, Toms River, New Jersey and

with the Honorable Eugene D. Serpentelli, Ocean County Superior Court.



WILLIAM C. MORAN, JR.

Dated: August 21, 1985

BRIEF IN SUPPORT OF MOTION FOR TRANSFER TO AFFORDABLE HOUSING COUNCIL

HUFF, MORAN & BALINT
Cranbury - South River Road
Cranbury, N.J. 08512
(609) 655-3600
Attorneys for Defendant, Township
Committee of the Township of Cranbury

Plaintiff,

LAWRENCE ZIRINSKY,

v.

Defendants,

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation, and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

Docket No. L 079309-83 P.W.

Civil Action

Plaintiffs,

JOSEPH MORRIS and ROBERT MORRIS,

v.

Defendants,

TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, a municipal corporation of the State of New Jersey

Docket No. L 054117-83

BRIEF IN SUPPORT OF MOTION FOR TRANSFER TO AFFORDABLE HOUSING COUNCIL

Plaintiffs,

GARFIELD & COMPANY,

v.

Docket No. L 055956-83 P.W.

Defendants,

MAYOR AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, a municipal Corporation, and the members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof.

Plaintiffs,

CRANBURY DEVELOPMENT CORPORATION, a Corporation of the State of New Jersey,

Docket No. L 59643-83

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and theTOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

---

Plaintiffs,

BROWNING-FERRIS INDUSTRIES OF SOUTH JERSEY, INC., A corporation of the State of New Jersey, RICHCRETE CONCRETE COMPANY, a corporation of the State of New Jersey and MID-STATE FILIGREE SYSTEMS, INC., a Corporation of the State of New Jersey,

Docket No. L 058046-83 P.W.

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

---

Plaintiff,

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.

v.

Defendants,

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

CHANCERY DIVISION: MIDDLESEX COUNTY

Docket No. C 4122-73

Plaintiff,

CRANBURY LAND COMPANY, a New Jersey Limited Partnership,

v.

Defendants,

CRANBURY TOWNSHIP, a municipal corporation of the State of New Jersey located in Middlesex County, New Jersey

Docket No. L 070841-83 P.W.

Plaintiff,

TOLL BROTHERS, INC.

v.

Defendant,
TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY.

Docket No. L 005652-84

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POINT I

THIS COURT SHOULD ABIDE BY THE "CLEAR SIGNAL" OF THE SUPREME COURT AND DEFER TO THE LEGISLATIVE SCHEME TO SOLVE THE PROBLEM OF AFFORDABLE HOUSING.

At long last, the legislative and executive branches of the government have directly responded to the constitutional mandate to provide the opportunity for low and moderate income housing. On July 2, 1985, the Governor signed the "Fair Housing Act", Ch. 222, P.L. 1985. This act specifically states that it is a response to the invitation to legislative action contained in Southern Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158, 456 A 2d. 390 (N.J. 1983). Mt. Laurel II is replete with statements that this is properly a legislative function and that were the legislature to act, the courts should defer. "...[P]owerful reasons suggest, and we agree, that the matter is better left to the legislature." Legislation "might completely remove this court from those controversies". "...[W]e have always preferred legislative to judicial action in the field..." "Our deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions." 456 A 2d. at 417. "...[T]he complexity and political sensitivity of the issue now before us make it especially appropriate for legislative

resolution..." 456 A 2d. at 417 n. 7. "As we said at the outset, while we have always preferred legislative to judicial action in this field, we shall continue until the Legislature acts - to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine." 456 A 2d at 490.

The Legislature has acted. The Executive has acted. A comprehensive system now exists at an administrative level to approve municipal plans for low and moderate income housing. Cranbury Township has adopted the necessary resolution to notify the Affordable Housing Council of its intention to submit a fair share housing plan. Most of the work has already been done on that plan. §8, Ch.222, P.L. 1985. The compliance package submitted to this court in December 1984 can easily be modified to become a housing element described in §9 of the Fair Housing Act.

A presumption of validity automatically attaches to this long sought legislation. For a discussion of the reasons for this presumption, see Mt. Laurel II, 456 A 2d. at 466.

The act also provides for a transfer of existing legislation to the Affordable Housing Council on the motion of any party to that litigation. §16, Ch. 222, P.L. 1985. The only test for the transfer is whether or not it would

result in a "manifest injustice" to any party. Here, the plaintiff parties fall into two categories - the public interest group and the plaintiff builders. The plaintiff builders suits were filed between August 1983 and February 1984. They have been expeditiously handled. Defendant cannot be accused of any kind of unnecessary delay in its defense of the suits. When this court ordered the rezoning on July 27, 1984, Cranbury did request two extensions totaling forty-five (45) days, but is willing to compare its compliance timetable with any other municipality. Similarly, in meeting the timetable set down by this court for filing experts reports, Cranbury has outperformed the plaintiffs. There is no injustice to plaintiffs whose suits are relatively recent, where the defendant has not been dilatory and where there is now an opportunity for resolution of these issues in the manner preferred by the courts. [1]

With regard to the Civic League (formerly Urban League) other than the fact that they have been in this litigation for a long time, it is difficult to see how the transfer would work on injustice on it. As to the time argument all that Cranbury has done is avail itself

[1] With regard to the question of builder's remedy, see the discussion in Point II, infra.

of the judicial avenues properly open to it. That there was some merit to Cranbury's position is born out by the following facts:

1. The original fair share number which was appealed by the Township has been reduced by the court from 1351 units to 816 units, a 40% reduction. See Urban League of Greater New Brunswick, et al. v. Mayor and Council of the Borough of Carteret, et al., 142 N.J. Super 11, 359 A 2d. 526, 541 & 542. (Law Div. 1976).

2. Of the 92 months from the time of the original decision invalidating Cranbury's Ordinance until the decision in Mt. Laurel II, for 40 months the suit against Cranbury had been dismissed by the Appellate Division, Urban League of Greater New Brunswick et al. v. Mayor and Council of the Borough of Carteret, et al., 170 N.J. Super 461, 406 A 2d. 1322 (App. Div. 1979).

3. The new "Fair Housing Act" recognizes historic preservation and agricultural preservation as necessitating an adjustment of a municipality's fair share number §7(c)(2) c.222, P.L. 1985.

The question of injustice with regard to the Civic League would seem to revolve, then, around the question of additional delay. It should be noted that if this case proceeds there is a right of appeal both with regard to the fair share number and the remedy. That appeal could last at least as long as the proceedings before the Council on Affordable Housing. Any delay with regard to the Civic League will not delay the construction of affordable housing in Cranbury since the Civic League does not propose any housing.

Weighed against the possibility of prejudice to the Civic League is the prejudice to the town in saddling it with a fair share number based on slavish application of the formula developed in AMG Realty v. Warren, Sup. Ct., Law Div., decided July 16, 1984, when numerous municipalities have been allowed to settle for numbers less than that generated by the formula and even neighboring Monroe has been offered a reduction in its fair share number for a settlement. It is clear from the new legislation that any formula that the Council developed would be adjusted for historic preservation, agricultural preservation, established development patterns, and infrastructure costs. All of these are factors which should significantly diminish the fair share number assigned to Cranbury. If the motion is denied, Cranbury would remain one of the very few municpalities in the state whose fair share number would be based on the AMG formula.

For these reasons, this case should be transferred to the Council on Affordable Housing or alternatively the fair share number assigned to Cranbury should be adjusted after consideration of the factors set forth in section 7(c)(1) of the statute.

Cranbury has been much criticized for having done nothing for so long and doubtless will be again

in response to this motion. As indicated in the accompanying affidavit, Cranbury did nothing when it was impossible to do anything and did what it could when it could.

In 1974 when this litigation started, there was no sewer system in Cranbury, but Cranbury had been pursuing both EPA and Farmer's Home Administration grants for sewers since 1969. How can a town zone for high density housing without sewers? In 1978 and 1979, the sewer system was built. At that time the Township was waiting for guidance from the courts as to what it had to do. The direction from the courts was hardly illuminating. The court's decision in Mt. Laurel I, 67 N.J. 151, 319 A 2d. 713 (1975) carved out an exception for non-developing municipalities. Surely a town with zero population growth for thirty years, with 60% of its total land devoted to agriculture, with no sewer system, had some justification for considering itself as being in that category.

In 1979 Cranbury had a judgment of the Appellate Division which, in effect, said it was a winner. Cranbury was defending the appeal to the Supreme Court. After argument in the Supreme Court, it did not appear to make sense to revive the zoning ordinance until the Court issued its

decision. When it became apparent that this was not going to happen quickly, the Township began work in 1981 on a new Master Plan. It was adopted in October 1982, three months before Mt. Laurel II. In some ways it was prophetic. It provided for density bonuses for low and moderate income housing encouraged in Mt. Laurel II. It provided for agricultural preservation also emphasized in Mt. Laurel II. The Plan also reduced substantially the amount of land zoned for non-residential uses and provided for approximately 350 units of low and moderate income housing.

It must be remembered that up until this time there had been three fair share allocations for Cranbury. The first was done by Ernest Erber, a planner on the staff of the National Committee Against Discrimination in Housing, counsel for Urban League. His number of 531 units was rejected by the original trial judge. The second was the trial court's number of 1351 units which was rejected by the Supreme Court in Mt. Laurel II 456 A 2d at 489. The third was contained in Preliminary Draft of "A Statewide Housing Allocation Plan for New Jersey" prepared in November 1976 by the Division of State and Regional Planning". It projected a 1990 fair share for Cranbury of 561 units. That report was never finalized. During this time period Cranbury had spent a larger portion of its Housing and Community Development Revenue Sharing

than any other participant municipality in Middlesex County. It has committed to do so.

Any decision not to transfer this matter based on Cranbury's history would be to punish the town for acting no worse than an average New Jersey town and a lot better than many. The concept of justice referred to in the statute should not be based on punishment.

POINT II

A UNIFORM FAIR SHARE APPROACH FOR THE ENTIRE STATE IS DESIRABLE

This court in AMG Realty v. Warren, decided July 16, 1984 enumerated a fair share formula. In that opinion, this court invited its replacement with something better. "Indeed, the methodology represents the beginning of the refinement process. It is not written in stone and it should therefore provide the impetus for those in the legal and planning community, as well as others, to improve upon it or replace it with something better." Slip opinion at p. 78. As pointed out in this court's opinion in Allen Deane v. Bedminster, decided May 1, 1985, variations in the numbers produced by the AMG methodology have been permitted in numerous instances. Slip opinion at p. 4. Newspaper accounts of other cases indicate that variation in these numbers may be permitted even when this court has already fixed an AMG fair share number.

Now, the legislature has indicated that whatever fair share methodology is developed by the Council on Affordable Housing, it must permit modification based on several factors including historic preservation, agricultural preservation and established pattern of development. §7(c)(2) c. 222 P.L. 1985. None of these factors were taken into account in Cranbury's fair share.

Uniformity of approach is to be desired. This is the reason that only three judges hear Mt. Laurel cases. In light of the language of the Supreme Court cited in Point I, supra and this courts invitation to provide an alternative method, even if the matter is not transferred to the Council, the fair share number should still be adjusted to comply with the statute.

POINT III

ABSENT A SHOWING OF UNCONSTITUTIONALITY, THIS COURT MUST FOLLOW THE MANDATE OF THE "FAIR HOUSING ACT" AND DENY A BUILDER'S REMEDY TO THE PLAINTIFF.

> "No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a final judgment providing for a builder's remedy has already been rendered to that plaintiff." §28, Ch. 222, P.L. 1985.

The language of the statute could not be much clearer. There is a time limit set after which the provision expires but that limit will not be reached until five (5) months after the Affordable Housing Council adopts criteria and guidelines for determinations of fair share adjustments to fair share and phasing.

The statute is entitled to a presumption of validity. Mt. Laurel II 456 A 2d at 466. Anyone challenging the validity of the statute is required to give notice to the Attorney General. R. 4:28-4(a). "[T]he presumption goes deep, and indirectly includes the assumption of any conceivable state of facts, rationally conceivable on the record, that will support the validity of the action in question. Mt. Laurel II, 456 A2d 466.

It should be noted that a builder's remedy is not a constitutional right. Prior to Mt. Laurel II, they were granted only as extaordinary relief. See Oakwood at

Madison v. Tp. of Madison, 371 A. 2d 1192 n. 50. Their use was expanded in Mt. Laurel II, but only "where appropriate" and only on a "case by case" basis. 456 A 2d 420. It is clear that builder's remedies are only a device "to achieve compliance with Mt. Laurel", 456 A 2d at 452. Nowhere is there even a hint that a builder's remedy has risen to the level of a constitutional right.

It should also be noted that the moratorium on builder's remedies contained in the statute is absolute and not tied to a transfer to the "Affordable Housing Council. No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation filed after January 20, 1983..." (emphasis supplied.) There are no other modifiers. This court is required to assume the validity of that enactment and therefore to deny builder's remedies here.

Respectfully submitted,

WILLIAM C. MORAN, JR.

COMMUNITY NEWS

Whittingham project needs subsidized units

By MIKE FABEY
Staff Writer

MONROE — Union Valley Corp. will set aside set five percent of Whittingham, its new planned retirement community, for low-income housing..

Superior Court Judge Eugene Serpentelli recently told the township that at a later date five percent of the Whittingham units must be subsidized for low- and moderate-income residents.

The New Jersey Supreme Court's Mount Laurel II decision requires that municipalities provide their fair share of subsidized housing. The units in Whittingham will be deducted from the total number of units Monroe is obligated to provide.

In a recent telephone interview, Ross Wishnick, vice president of Union Valley, said, plans for Whittigham — to be built across from Concordia on Prospect Plains Road — are coming along just fine

The judge recently denied a request for a restrainting order sought by the Civic League of Greater New Brunswick, which wanted the project stopped because it wasn't to contain subsidized units.

Instead, the judge indicated that if necessary he would void the township's Mount Laurel II compliance package — Monroe's plan for complying with Mount Laurel II-required housing.

The judge also said that if needed he would appoint a planner to draft a new compliance package and impose his own ordinance on the township.

After the judge's decision was announced at a recent council meeting, William Tipper, president of the council responded, Like hell.

Councilman Michael Leibowitz said the judge told council he would "back out" of Mount Laurel II litigation if the state enacted legislation on the matter. The state recently created a housing council to help municipalities determine their fair share of subsidized housing.

After the meeting Councilman Albert Levinson said the township only agreed to set aside 5 percent of a future PRC for low-income housing. It did not specify Whittingham for the purpose.

"I don't know why the judge is doing this, now. I don't understand how the judge can void the whole package because of this."

Township Attorney Mario Apuzzo told council the judge asked if it would adopt an ordinance to accept a compliance package for 100 low-income units less than it was previously required to have, which would bring the number down to 664.

Council unanimously spurned that proposal because the judge asked it to waive its right to appeal the compliance package once the package was accepted.

Councilman David Rothman said the issue is moot because the judge never has acted on the compliance package council sent him several months ago.

URBAN LEAGUE PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO THE MOTIONS OF CRANBURY, MONROE AND
PISCATAWAY TO TRANSFER THIS CASE TO THE COUNCIL ON AFFORDABLE
HOUSING AND IN OPPOSITION TO CRANBURY'S MOTION TO IMPOSE
A MORATORIUM ON BULIDER'S REMEDIES

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Liberties Union 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.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX/OCEAN COUNTY NO. C-4122-73 (Cranbury) (Monroe) (Piscataway)

URBAN LEAGUE PLAINTIFFS' MEMORANDUM OF LAW

IN OPPOSITION TO THE MOTIONS OF

CRANBURY, MONROE AND PISCATAWAY

TO TRANSFER THIS CASE TO THE COUNCIL ON AFFORDABLE HOUSING

AND

IN OPPOSITION TO CRANBURY'S MOTION TO IMPOSE A MORATORIUM

ON BUILDER'S REMEDIES

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INTRODUCTION

This memorandum of law is submitted by the Urban League plaintiffs in opposition to the motions by the Townships of Cranbury, Monroe, and Piscataway to transfer this case to the Council on Affordable Housing, under Section 16(a)[1] of the Fair Housing Act, P.L. 1985, c.222.

At several points, the moving papers argue that transfer is necessary because there should be a uniform approach to fair share and other Mount Laurel issues, that the Supreme Court has frequently stated its preference for legislative and executive, rather than judicial, resolution of these difficult questions, and that the Legislature has now acted and directed the Council on Affordable Housing (hereafter the Council) to be the uniform decisionmaker. See, e.g., Cranbury brief, at 1-2, 5, 9-10; Monroe letter-brief, unnumbered Argument pages 4-5; Paley Certification, Para. 21.

In the abstract, these points are reasonable. The only problem is that they completely ignore the statute before this Court. The Legislature with crystal clarity has provided for two different kinds of decisionmakers -- administrative and judicial -- and established a complex set of rules, as set forth in detail below, to define how those two processes should interact. Some cases before the courts now will remain exclusively before the

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

courts. Some cases now before the courts or to be commenced hereafter will be transferred to the administrative body, with the possibility of return either in the form of appeal from a final agency determination or by reversion to the trial court if the agency or the affected municipality fails to take or complete specified steps on time. Other disputes may be resolved entirely within the agency through mediation.

The Legislature expressly gave this court considerable discretion to decide whether cases, such as this one, filed more than 60 days before the Act's effective date, should be completed by the court or transferred to the Council. For all of the reasons set forth below, it is manifest that this Court must deny the motions here. Indeed, we submit that if the Urban League case can be transferred under the Act, there is no pending case that would not be transferred.

FACTS

A. Common Facts

The pieces of litigation sought to be transferred by these motions are part of the oldest Mount Laurel action still pending before the courts of this state.[2] On July 23, 1974, more than 11 years and 2 months before the return date of these motions, the Urban League of Greater New Brunswick and seven individuals sued, on behalf of themselves and others similarly situated, 23 municipalities in Middlesex County, including Cranbury, Monroe and Piscataway, claiming that each municipality was violating the Constitution in that its zoning ordinance failed to provide a realistic opportunity for the development of low and moderate income housing. Judge Furman certified the class and, after an evidentiary hearing, denied defendants' motion for a severance. An extensive trial in Spring 1984 led to a lengthy opinion on May 4, 1976 and an implementing Judgment on July 9, 1976, over nine years ago.

In his opinion, Judge Furman ruled:

> Cranbury's zoning ordinance permits no new multi-family housing, except conversions to two family....The Township is overzoned for industry by over 2,000 acres and over 500% of projected demand....

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[2] The original Mount Laurel case was settled on July 29, 1985. Home News, July 30, 1985. This Court decided the Bedminster case on May 1, 1985. The appeal in the Mahwah case has been withdrawn. The Oakwood at Madison case itself is in limbo, with no formal action having been taken by the Court since 1977, although the builder-plaintiffs there have been joined as defendants in the Old Bridge portion of the Urban League case to insure compliance with their obligation.

> Cranbury's present zoning ordinance fall short of the Mt. Laurel standard and must be struck down in view of available suitable acreage adjoining the village on which low and moderate-income housing may be built without impairing the established residential character of the village or interfering with present farm uses.
> ...
> Monroe's zoning ordinance prohibits new multi-family housing except in planned retirement communities, requiring various amenities, on lots of 400 acres or more. The vacant acreage exceeding 20,000 acres is virtually preempted by industrial and rural residential zones....The township is overzoned for industry by over 5,000 acres and over 400%.
> The township's present zoning ordinance is palpably deficient under Mt.Laurel. Its own planning expert conceded a need for multi-family residential zoning with densities and other provisions compatible with low and moderate-income housing opportunities.
> ...
> Piscataway's zoning ordinance inhibits appreciable further low and moderate-income housing opportunites....80% of its vacant residentially zoned land is zoned for single-family housing...and only between 1 and 2% is zoned for multi-family housing....A zoning revision is under study to rezone 300 acres or more for Planned Residential Developments as an alternative to single-family housing, with mandatory minimums of low and moderate-income units.
> Prior to such a revision, along with elimination of bedroom and other restrictions on multi-family housing, Piscataway's zoning ordinance must be held unconstitutional under Mt. Laurel as not providing adequately for prospective regional housing needs.

Urban League of Greater New Brunswick et al., v. Mayor and Council of Carteret et al., 142 N.J. Super. 11, 28-29, 31, 32-33 (Ch. Div. 1976), aff'd, 92 N.J. 158, 456 A.2d 390 (1983). The opinion and ensuing Judgment required rezoning for 1,351 units for Cranbury, 1,356 for Monroe, and 1,333 for Piscataway. The Judgment was stayed pending appeal by seven towns, including these three.

In its opinion affirming, the Supreme Court 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." Southern Burlington Cty. NAACP v. Mount Laurel Twp., 92 N.J. 158, 350-51, 456 A.2d 390, 488-89 (1983) (Mount Laurel II).

After remand, there were extensive pretrial proceedings, in which all three townships participated, leading to a full 18-day trial in April-June 1984 on region, regional need, fair share allocation, and validity of revised ordinances. As to Cranbury and Monroe, this Court issued a letter-opinion dated July 27, 1984 and an implementing Judgment on August 13, 1984, which determined the fair share of Cranbury to be 816 and the fair share of Monroe to be 774. The Court held the zoning ordinance and land use regulations in each town unconstitutional, directed rezoning of each town within 90 days of the July 27 opinion, and appointed Masters to assist the towns in the revision process. As to Piscataway, the Court did not resolve the fair share issues although it had participated fully in the trial, but ordered further proceedings set forth below.

B. Compliance Facts as to Cranbury

After holding extensive meetings at which developers made presentations and the Township extensively discussed the issues and after obtaining some extensions of the Judgment's 90-day

deadline for ordinance revision, Cranbury submitted at the end of December 1984 a 135-page "Mount Laurel II Compliance Program for Cranbury Township, New Jersey." The Court directed the Master to report on the Compliance Program, which he did in April 1985. At a prehearing conference on May 3, 1985, the Court established a 60-day discovery period for exchange of expert reports on the compliance plan, which was subsequently extended to July 24, 1985. By that date all reports were filed and the plaintiffs requested that the Court set a firm date for the compliance hearing. No date has yet been set. On August 19, the instant motion was served.

C. Compliance Facts as to Monroe

Monroe took substantially longer to produce a compliance plan and then proceeded to undermine its own plan. On January 28, 1985, after four months of meetings with the Master, the Council, retained an experienced planning firm to further examine its alternatives. After further meetings, Monroe's "Mt. Laurel II Compliance Program" was submitted to the Court on March 29, 1985 by a Council vote of 3-2. The Mayor did not act on the resolution of submission, although he voiced his strong opposition. Under the Township's form of governance, at least four votes are required to overcome a mayoral veto. The Mayor also refused to authorize payment of the Master, the retained planning firm, or the Township's own attorney for their services in preparing the compliance plan. As a result, the Court ordered that should the

Township Administrator refuse to endorse such payment, the President of the Council was ordered to effect it. That Order of May 13, 1985 has not yet been complied with although no stay was obtained when a notice of appeal was served by the Township on July 26, 1985. App. Div. Docket No. A-5394-84T1.

The compliance plan proposed a variety of projects including a five percent set-aside on an extension of the existing Concordia Planned Retirement Community (PRC) to be known as Whittingham, which was to produce 100 lower income units, and 466 lower income units on a proposed new PRC known as Balantrae. Compliance Program at 25, 28, 33. The Court directed the Master to review and report on the Compliance Program.

While the matter was under consideration by the Master, the Monroe Planning Board and Township Council voted to approve the Whittingham project for 2,400 units, without any set-aside. The Township's attorney refused to provide plaintiffs with information about these public meetings for some three weeks, citing the need for the Mayor's approval. See Willams Affidavit of July 18, 1985, submitted with Notice of Motion for Temporary Restraints, Paras. 7-14. Ultimately, the Council President confirmed to the Master that the project submitted as part of the Compliance program had been approved without a set-aside.

On July 25, 1985, this Court provided the Township with two options to save its own compliance plan. First, the Court gave the Council another opportunity to vote on the Whittingham extension, explaining that if it re-affirmed the project without

any set-aside, the compliance plan would be void and the Master would be directed to come up with her own plan. Second, the Court stated that it would reduce the Township's total fair share by 100 units (presumably, the amount that would be lost by the Whittingham extension without a set-aside) if it would voluntarily comply and not appeal. These directives were embodied in a written order ultimately signed on August 30, 1985. On August 2, 1985, the Township Council informed the Court in writing that it had unanimously rejected both options. By the terms of its oral order on July 25, confirmed by a separate order also entered on August 30, the Court found the Township's compliance plan inadequate and void and directed the Master to provide a compliance plan by October 7, a mere 10 days after the transfer motion is to be heard.

Meanwhile, on August 5, 1985, the Township Council adopted a major revision to its zoning ordinance, permitting substantial residential construction without a set-aside or development fee as an option within the general commercial zone, in response to a request by the developer of the Forsgate project. Home News, August 6, 1985. On August 26, the developer of the proposed Balantrae project appeared before the Monroe Board of Adjustment seeking a variance to build a 2,510 unit planned retirement community on the site. Thomas Farino, the former Township Attorney and now attorney for Stratford at Monroe, Inc., the Balantrae developer, was quoted as saying that the project "may include a 10 percent set-aside, but he added that the number had

not been finalized." Home News, August 26, 1985.

D. Compliance Facts as to Piscataway

During the Spring 1984 fair share trial, all parties agreed that, because of approvals granted during the eight years since Judge Furman's Judgment, Piscataway no longer had sufficient vacant developable land to accommodate the fair share that would be allocated that Township under the formula used by the Court. The Court therefore directed the Court-appointed expert to prepare an inventory of the available land that was suitable for multi-family development. The expert's report was submitted on November 10, 1984 and the plaintiffs' expert endorsed it without exception. The Township, however, contested each and every site recommended by the Court's expert.

Meanwhile, as a result of repeated Township efforts to approve development inconsistent with the Mount Laurel obligation on the dwindling supply of vacant land, the plaintiffs were forced to bring a number of motions for temporary restraints, beginning in May 1984. These resulted in a series of individual orders, culminating in the Order of December 11, 1984, which restrained approvals on any of the sites found suitable by the Court-appointed expert in her November 10 report, pending a full hearing on the report.

After some discovery was had, and a supplemental Court-appointed expert report was submitted on Janaury 18, 1985, the Court held an extended evidentiary hearing in February 1985 on

the suitability of each contested site. On May 16, 1985, the Court held a personal site inspection. On July 23, 1985, a full year after issuing its opinion as to the fair share for Cranbury and Monroe, the Court issued a letter-opinion agreeing with virtually all of the Court-appointed expert's site suitability conclusions, setting Piscataway's fair share at 2215 units, denying requested credits against the fair share, declaring the existing ordinances invalid, and requiring the Township to rezone within 90 days.

On September 17, 1985, after careful review of the Township's extensive objections, dated August 14 and September 9, to the form of Judgment, which was first served by the plaintiffs on August 7, the Court entered Judgment establishing the fair share, denying credits, holding the ordinance unconstitutional, appointing a Master, and directing rezoning by October 23, 1985, a mere four weeks after the return date of the transfer motion. The Judgment also continues the December 11, 1984 restraints as to all sites found suitable by the Court, which restraints the Township, by its transfer motion, seeks to dissolve, notwithstanding the continuing validity of the Court's fair share and other constitutional rulings even if the case were to be transferred.

ARGUMENT

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 substantive issues, the relative degree of administrative and judicial expertise on the remaining issues, 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 that might occur in the absence of restraints on development of limited land resources, and, finally, the public interest in prompt resolution of litigation. Denial of these motions to transfer is not only consistent with the legislative intent, but necessary if it is to be given effect, for each of the relevant factors confirms that transfer here 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.

To assist the Court in the determination of these transfer motions, plaintiffs will initially outline how the statute intends the administrative process to work and to interact with

the litigation process. Then we will seek to explicate the consequences of a "transfer" under Section 16(a) and, as a result, the meaning of the "manifest injustice" standard. We will then argue why transfer of the litigation concerning Cranbury, Monroe, and Piscataway would be manifestly unjust. Finally, we will address the specific question of remedy as to Cranbury posed by the builder remedy moratorium in Section 28 of the Act.

I. THE STATUTORY SCHEME

A. 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, state and regional housing needs, and the adequacy of local authorities' fair share determinations and zoning policies to meet their constitutional obligation. Crucial to its interpretation is the clear legislative intendment that the Act be a "mechanism... which satisfies the constitutional obligation enunciated by the Supreme Court." Sec. 3. This statutory context is vital in light of some popular misreading of

the Act as "saving" municipalities from Mount Laurel II. If the Act truly did that, it would surely be unconstitutional.

To accomplish its stated 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 is to be held and the administrative law judge's initial decision is 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,[3] 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).

B. 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 a town goes through the entire process and receives substantive certification, then in any subsequent court

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[3] Under the Administrative Procedure Act (APA), such an appeal goes to "the head of the agency." N.J.S.A. 52:14B-10(c). It is unclear whether under the Fair Housing Act the "head of the agency" would be the Council itself or the Executive Director of the Council. The APA 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 proving by clear and convincing evidence that the local plan does not in fact provide the required realistic opportunity for the fair share. Moreover, in any such proceeding 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 certification process but has, before suit is 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", the proper avenue for judicial review of a final administrative determination ordinarily 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 fails to meet deadlines for initiation or 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.[4] In cases where review and

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[4] 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 3 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, although no time period is set for that review. 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.

This uncertainty arises because the version originally passed by the Legislature had defined a "review process" if mediation was not successful, but specified that the "review process" shall not be considered a contested case under the APA. The Governor, in his conditional veto, deleted that review process and explicitly added that if mediation fails the matter shall be referred to the Office of Administrative Law as a contested case. He did not, however, amend the wording of Section 19 which refers to the "review and mediation process." The task, then, is to give meaning to legislative intent in light of imprecise redrafting.

We believe that the second interpretation -- that "review and mediation process" encompasses the first three steps -- is the most plausible 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

mediation requests are filed within nine months after the Act takes effect, i.e. before April 2, 1986, the six-month completion period does not begin to run until that date. 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.[5]

Clearly these provisions are designed primarily as a threat, much like the current builder's suit under Mount Laurel II -- 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. For this reason, the legislation expresses a "preference," but not an absolute requirement, for resolution of both present and future disputes

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construed to provide an unworkable or meaningless time schedule.

[5] The normal method for judicial review of a final administrative decision is, as noted in text, by appeal to the Appellate Division and ordinarily 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 in which 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.

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 effective date of the Act. Quite simply, if the municipality adopts a resolution of participation within four months of the Act's effectiveness, the recent litigant must exhaust the review and mediation process. Sec. 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 Supreme Court's most recent discussion of the exceptions to the exhaustion requirement in Abbott v. Burke, 100 N.J. 269, 297-300 (1985). See also Brief on Behalf of Intervenor State of New Jersey, Morris Cty. Fair Housing Council, et al. v. Boonton Twp. et al., No. L-5001-78 P.W. (hereafter Brief on Behalf of Intervenor State of New Jersey), at 69.

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.[6]

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).[7]

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

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[6] There could, of course, be a case where the township's delay in responding to a plaintiff's good-faith pre-litigation submission had delayed the filing and service of the complaint until the period specified in Section 16(b). In such instances, arguably, the muncipality should not be allowed to benefit from the more absolute terms of Section 16(b), but rather should be forced to prove that there would be no manifest injustice under Section 16(a) in requiring exhaustion of the administrative process.

[7] See note 1 supra.

provisions that do exist only tend to cloud and confuse the question.

The Act does not require a municipality in a transferred case 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 promulgation 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 if the process is completed within six months of "receipt of a request of a party," is applicable. Thus as literally written, the statute only provides that by August 1, 1986,[8] more than 10 months after the return date of these motions, 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

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[8] 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, the Governor failed to meet the first deadline in the statute and did not nominate the members of the Council until August 29, 1985, and it is anticipated that the Legislature will be in session only briefly between now and the election in November. Thus, it is most unlikely that all members will be confirmed by the end of the calendar year. We, therefore, proceed on the assumption that the Council's obligation will date from January 1, 1986, the later of the two days provided in the statute.

in Section 10.[9]

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 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:

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[9] 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, issues discussed hereafter in text.

1) for the Court to construe a municipality's motion to transfer under Section 16(a) as rendering the timely filing of its housing element and fair share plan the equivalent of a petition for substantive certification of that element and plan;[10] 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, the second 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

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[10] In its brief in the consolidated Denville cases, received just before the filing of this brief, the Attorney General adopts this interpretation. Brief of Intervenor State of New Jersey, at 66.

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,[11] 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 force the Court to confront a further interpretation problem created by the inconsistent timetables established by Sections 16 and 19. 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 January 1, 1987 for town filing.[12] If a request for mediation and review could then be immediately filed,[13] the Council would have at least six months, or until

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[11] See note 1 supra.

[12] See note 8 supra.

[13] Ordinarily, 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 a formal petition is not required and the Council already has an objector in the form of the transferred litigant. Under the Attorney General's view, see note 10 supra, there would be a 45-day publication period after the filing of a housing element in a transferred

July 1, 1987, to complete that process. See note 4 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. But 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 specifies that the six-month period for relief from the exhaustion requirement begins to run nine months from enactment of the Act for cases in which the request is filed within that nine month period, should apply. If that were the case, a transferred plaintiff's motion for Section 19 relief from exhaustion could be filed by October 2, 1986, 15 months (nine months plus six months in the administrative process) from the Act's effective date, which would be almost a full three months before the town's housing element is even due to be filed under Section 16(a) and nine months before the Section 19 motion could even be brought under that approach.

Whatever the resolution of this quandary, one thing is quite clear -- the absolute minimum time that would be expended before any action is required before the Council for transferred cases is October 2, 1986, more than 1 year 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

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case. Brief of Intervenor State of New Jersey, at 66-67.

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, 21 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 in 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.[14]

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[14] In its brief in the consolidated Denville cases pending before Judge Skillman, the Attorney General urges the Court simply to ignore the second sentence of Section 19 and to apply the longer Section 16 timetable to transferred cases. Because the State considers the bringing of a motion for transfer as the equivalent of petitioning for certification when filing a housing element, see note 10 supra, it adds the 45-day publication period in Section 14 to the Section 16 timetable. See note 13 supra. Under the State's view, then a Section 19 request for relief from a delayed administrative process could not even be brought until August 15, 1987, nearly two years from now.

II. 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 have yet 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.[15]

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[15] We note that, in a technical sense, transfer is not literally possible at this time, because there is no Council, the Governor having only recently nominated and the Senate not yet 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 deferred setting a date for the compliance hearing in Cranbury and if restraints were not in effect as in Piscataway, we would have urged the Court to deny the motion as premature and continue with proceedings in court until a Council that could act upon a transferred case exists. Under the circumstances, we agree that prompt determination of these motions is crucial.

Should the Court be inclined to grant transfer, however, we would argue that transfer could not take effect and, thus, that the Court would have continuing jurisdiction and an obligation to move forward with the normal proceedings until, at a minimum, the Council's members are all confirmed, employees appointed and offices established, and, thus, a transfer to the Council is at least literally feasible. Under this view, the compliance hearing in Cranbury should in any case go forward, the Master's report in Monroe would still be due on October 7, and Piscataway's compliance plan would still be due on October 23, for it would be

A. The Consequences of Transfer

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 unadjudicated at the time of transfer and to resolve them in light of the existing record and prior rulings. Plaintiffs do not think it crucial for the Court to decide this important statutory construction issue in this case because, as argued below, it is clear that a transfer of any part of this litigation would, under either view of the subsequent proceeding, be manifestly unjust to the class of lower income households which is the affected "party" to this litigation. 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 could be transferred at all, the Council could determine only the issues remaining at the time of transfer.

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

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manifestly unjust to refer plaintiffs, especially ones on the verge of obtaining a final judgment after 11 years of litigation, to a nonexistent remedy.

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 adopts the latter view, then one must consider whether it would be manifestly unjust to transfer (with extended delays) such an extensively litigated case even though the new administrative agency would have very limited expertise and could address only unresolved disputes in light of the existing record and law of the case.

Resolution of these related issues depends primarily 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 the related law concerning primary jurisdiction.[16]

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[16] 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.

B. Caselaw Relevant to Manifest Injustice

1. 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 expressly stated an intent to apply it retroactively, or where it has done so implicitly because "retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation." Id. at 522. Likewise, retroactive effect is generally given to a statute 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 prejudice settled expectations reasonably relied upon, courts

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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).

2. 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. 269, 297 (1985). 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 297-98. 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 298.

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:[17]

> 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.

3. 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:

> 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

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[17] 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.

> 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).

Boss v. Rockland Elec. Co., 95 N.J. 33, 40 (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 that 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 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, to eliminate all references to "exhaustion" and the subsection now speaks only of "transfer".

C. <u>The Meaning of Manifest Injustice</u>

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."

1. Cases in which substantive determinations have already been made.

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.

This conclusion is bolstered by Rule 4:25-1(b), the rule concerning pretrial orders, which is one of the few other places in which the civil law in New Jersey relies on the "manifest injustice" standard.[18] The rule provides:

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

Clearly the purpose is to insure that no new claims or defenses are raised once the trial is underway. Rule 4:9-2 simply permits issued not raised by the pretrial order that "are tried by consent or without the objection of the parties" to be treated as if they were raised in the pretrial order. Thus, as in retroactivity and exhaustion law, the "manifest injustice" standard is meant to prevent forcing a party to relitigate or to

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

litigate additional issues once the case has been defined and adjudicated. Quite simply, transfer of cases already tried is fundamentally and manifestly unjust.

Indeed, this interpretation is directly consonant with the primary purpose of the Fair Housing Act -- to permit municipalities to comply voluntarily with their constitutional obligations, thereby maximizing respect for local home rule decisionmaking, with the threat of judicial intervention should they fail. Yet before cases, certainly those as complex as this one, are tried, there is always a substantial opportunity for negotiation, settlement and hence voluntary compliance on terms within the towns' control. This Court has already twice stated in print that it will be flexible in its fair share number and in phasing, and will temporarily stay builder remedy suits, if a township would voluntarily settle before or immediately after suit. J.W. Field Co., Inc., et al. v. Township of Franklin, et al., No. L-6583-84 PW (Jan. 3, 1985), slip op. at 8-12; The Allan Deane Corp. v. Township of Bedminster, No. L-36896-70 P.W. (May 1, 1985), slip op. at 4-5. Indeed, this Court has already demonstrated just such flexibility with regard to other towns in this litigation which were interested in settling. But, once a town has foregone the opportunity for voluntary settlement and proceeded to trial, there is no reason to transfer the case so that it can try voluntary compliance.

In the alternative, if the Court were to reject this view and find that 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.[19]

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 few remaining issues in old and mostly adjudicated cases.

The Gibbons standard of manifest injustice used by the Fair Housing Act explicitly contemplates that injustice and unfairness 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 some of the experiences in the Urban League litigation. In Kruvant, a variance had been sought for a multi-family development in a single family zone that the court found to be unsuitable for single family development. After

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[19] This interpretation coincides with the common sense meaning of transfer. When referring to transfer 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.")

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 the judicial hearing 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.

2. Cases in which development restraints will be needed pending final determination.

In addition to considering the problem of existing substantive adjudications and defendant conduct and delay, a court deciding whether transfer would be manifestly unjust in a particular case 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,[20] whether an overriding public interest calls for a prompt judicial decision, and whether irreparable harm would result.

Before seeking to apply these factors to Cranbury, Monroe, and Piscataway, 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

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[20] See pp. 34-39 supra for discussion of whether the Council has any jurisdiction over court cases in which substantive rulings have already been made.

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 and, 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 retains 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. Rule 4:52-6 and Mutual Home Dealers Corp. v. Comm'r of Banking and Ins., 104 N.J. Super. 25 (Ch. Div. 1968). The rules do not directly address, however, whether courts

may enjoin defendants to maintain the status quo pending completion of an administrative process.

Both logic and caselaw indicate that courts should have the power to do so. If a reviewing court can grant interim relief pending its review of a final or interlocutory administrative decision, to insure that its final decision will be effective and meaningful to the prevailing party, then it would appear logical that it should also have power to grant such relief pending completion of the administrative process. If the municipality does not file its housing element and fair share plan on time or the review and mediation process takes too long or if the Council denies or conditions certification, a transferred case will revert to the trial court.[21] 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 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

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[21] See discussion at pp. 16-18 supra.

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.[22] 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 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. Lomarch v. Township of Englewood 51 N.J. 108, 237 A.2d

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

881 (1968)(one year public reservation of sites within development amounts to a compensable taking of an option to build). 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.

III. IT WOULD BE MANIFESTLY UNJUST TO TRANSFER THE CRANBURY, MONROE OR PISCATAWAY PORTIONS OF THIS 11-YEAR OLD CASE, BECAUSE THE SUPREME COURT HAS ALREADY AFFIRMED THE RULING OF LIABILITY, THIS COURT HAS CONCLUDED ALL BUT THE FINAL STEPS IN DETERMINING THE PROPER FORM OF ZONING ORDINANCES NEEDED TO COMPLY, AND THE SUBSTANTIAL DELAY NECESSARY FOR ADMINISTRATIVE RESOLUTION OF THE REMAINING ISSUES WOULD SERIOUSLY JEOPARDIZE THE VESTED RIGHTS OF THE PLAINTIFFS AND NEEDLESSLY PROLONG BROAD-SCALE RESTRAINTS IN PISCATAWAY

A. Manifest Injustice Relevant to all Towns

Based upon the interpretation of the statute set forth above, the Court should deny the motions to transfer 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, the Court has already adjudicated plaintiffs' rights as to region, regional need, fair share, ordinance invalidity, and as to Piscataway, site suitability and appropriate densities for rezoning. Moreover, because of the limited vacant land remaining in light of Piscataway's actions since the July 1976 Judgment, the Court has already found it necessary to restrain development in Piscataway and 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 Cranbury, Monroe and Piscataway 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 Cranbury, Monroe and Piscataway, 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 consolidated actions brought by 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).[23]

If transfer of this case 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 which might well consider transfer a manifest injustice to themselves.[24] In addition, the Court would have to hear from and consider the impact upon the numerous other parties whose litigation has been consolidated with the Urban

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23 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.

24 To date, only Cranbury, Monroe, Piscataway, and South Plainfield have sought transfer; some town councils have already affirmatively decided not to seek transfer.

League case and thus would be transferred under the "fusion" doctrine of consolidation. PRESSLER, Current N.J. COURT RULES, Comment R. 4:38-1. Alternatively, the Court would have to construe the statute to allow transfer of portions of a litigation relating to several municipalities if the Court considers severance of all the other cases and of co-defendants to be appropriate at the time of the transfer motions. 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.[25] In any case, we believe severance of Cranbury, Monroe and Piscataway is inappropriate for all the reasons set forth below, which establish that transferring the litigation as to them would be a "manifest injustice."

There are, as noted, numerous factors relevant to a determination of "manifest injustice," almost all of which apply

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25 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.

to these three municipalities, as set forth individually below. But these individual discussions must be viewed in the context of two overriding common factors: the age, complexity and present stage of the litigation, and the delay necessarily attendant upon

In comparison to cases more recently filed, 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 the municipalities, particularly Piscataway, much greater opportunity to "win" by irretrievably altering its land use patterns to perpetuate exclusion. Moreover, as in Kruvant, this case has "been tried to the point of exhaustion." 414 A. 2d at 3. A fortiori, there would be manifest injustice in allowing the 11 years of Urban League litigation against these three towns, which can come to an end shortly, to stretch for years more in the Affordable Housing Council.

Any case transferred now would face substantial delay, for delay is not only an inherent part of any new system and but is mandated here by the statutory structure. In addition, 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. Whatever the equities in requiring substantial delays in other cases, it cannot be that the oldest, largest, most complex and most extensively litigated of the remaining cases should be subjected to yet another round of delay.

B. Manifest Injustice in Transferring Cranbury

Application of these standards requires denial of Cranbury's motion to transfer. The Cranbury "case" has been fully tried twice, once 9 years ago, leading first to a Judgment unanimously affirmed as to liability by the state Supreme Court nearly three years ago, and then to a second Judgment over a year ago confirming that the Township's post-affirmance revision of its zoning ordinance was unconstitutional and setting a 90 day deadline for compliance. The Township filed its compliance plan nine months ago, the Master reported five months ago and the expert reports were all filed and the entire matter was ready for the final hearing concerning the suitability of the sites of the two contested builder-remedy plaintiffs and the phasing of the fair share before the motion to transfer was even filed.

Transfer would needlessly delay and potentially undermine the various plaintiffs' vested legal rights. At the best the Council when constituted, staffed and housed, would get to consider this matter a year from now. More realistically, the

matter would stretch until at least August 1987. The Council has currently no expertise in site suitability and fair share phasing matters and is unlikely to accumulate much in the coming year, as it will first have to concentrate on issuing procedural rules and substantive criteria and guidelines and then will presumably be spending most of its initial efforts on evaluating fair share methodologies and allocations. Moreover, Cranbury presents some quite unique issues and, thus, whatever general expertise the Council might develop in the next 18 months is unlikely to provide special insight into the Cranbury situation. The Court and its Master, by contrast, have extensive familiarity not just with site suitability problems in general, but with the very sites at issue here, which have already been inspected in person four months ago. Whatever justification there might be to defer to fact-finding expertise and ability of an administrative agency in other contexts is wholly inapplicable here.

More importantly, delay will risk substantial deferral of the plaintiffs' established entitlement to construction now of lower income housing. There are three ready, willing and able developers who would be able to construct most of the required units in the coming years. As Mr. Mallach's Affidavit confirms, the last few years have been an extraordinarily favorable period for housing construction in New Jersey. This will almost certainly not last. Pushing back construction for two building seasons, the almost inevitable consequence of a transfer, may well mean that very few of the anticipated lower income units

will go up in the present fair share period. It is true that Mount Laurel promised only a "realistic opportunity", not a guarantee of construction. But, the Court must, under Section 16(a), consider the economic realities in deciding whether transfer of a particular case would at the time of the motion prejudice any party.[26]

C. Manifest Injustice in Transferring Monroe

All factors point towards denial of transfer here. In addition to the basic problems of delay and prejudice noted above, Monroe Township has acted in less than good faith towards the Court and its Master, not to mention the plaintiffs. After asking the Master to participate in numerous, extended meetings in order to prepare the Court-ordered compliance plan, the Township refused to pay her for her services, even after a formal Order was entered. Moreover, after proposing a compliance plan and while the Master, who helped the Township develop that plan,

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26 Quite amazingly, Cranbury's brief in support of its transfer motion states "Any delay with regard to the Civic League will not delay the construction of affordable housing in Cranbury since the Civic League does not propose any housing." P.4. In 1975 Judge Furman granted the then Urban League's motion for certification of a class of lower income households. That class is the "party" affected by transfer. In 1984 this Court granted that class a right to a realistic opportunity for construction of 816 lower income units. Delay in granting a final remedy will mean denial of that opportunity. Given the availability of a number of ready, willing and able developers, delay of the Civic League's final remedy will clearly mean delay in construction of housing for the class before this Court.

was reviewing it at the instruction of the Court, the Township expressly approved development of a major site without the set-aside requirement which the Township had proposed for that very site and developer in the plan. The Court gave the Township another chance, allowing it to reconsider its approval, but warning that reaffirmance of the initial approval would void the entire compliance plan. The Council unanimously voted to affirm and the Court has by oral order on July 25 confirmed by written Order dated August 30, 1985 voided the original compliance plan and ordered the Master to come up with her own recommended compliance plan. A town which has not only rejected all opportunities for voluntary compliance, both before and after trial, but has undermined its only submission to the Court for compliance should not now be given yet another chance to come up with a voluntary compliance plan.

Moreover, transfer would substantially and needlessly delay the final remedy. The Master is under Court order to submit her plan a mere 10 days after the transfer motion will be heard. At that point, the burden will be on the Township to show why the Master's proposal does not provide a realistic opportunity for development of the required fair share, a burden it will almost certainly be unable to meet, given the large available acreage and the large number of willing and able developers with suitable land. The Council will certainly not be ready to receive, not to say consider, any substantive matters for at least a year after the Master's plan is due. A town that has been found by the

Supreme Court to be in violation of the Constitution and has repeatedly flouted this Court's authority has no claim to renew its contemptuous stalling tactics before another body.

D. Manifest Injustice in Transferring Piscataway

Piscataway directly poses the question of whether transfer is possible, legally or practically, if restraints have been in place and will be necessary to ensure compliance with any plausible fair share. There is no question that restraints will be necessary. Even if Piscataway were to succeed in transferring its piece of this case and the statute were to allow the Council to ignore this Court's ruling and redetermine the fair share ab initio under the statute and its criteria, it is apparent that Piscataway would have a substantial fair share requiring preservation of most of the remaining vacant land.

The statute has two relevant provisions concerning determination of the municipal fair share of primary importance to Piscataway. In Section 7(c)(1), the statute authorizes a "credit" against the municipal fair share for "each current unit of low and moderate income housing of adequate standard." In Section 7(c)(2)(f), the statute authorizes "adjustment" of the fair share determined in 7(c)(1) whenever "[v]acant and developable land is not available in the municipality." As Mr. Mallach's Affidavit points out, a literal reading of the credit provision -- one credit for each existing housing unit meeting

building standards that is currently occupied by a low or moderate income housing -- would lead to the absurd result of more credits than the state-wide or regional need under any of the existing formulae. It is inconceivable that the Legislature intended this absurd result and thus the section must be read 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" is that it applies only to those units constructed or made affordable to the affected population during the current fair share. Thus, the provision credits not all such units currently in existence but only those that were currently developed. The Court's letter-opinion of July 23, 1985 with regard to Piscataway establishes that no such units exist. Thus, Piscataway would get no credits under the statute, even if the Council could redetermine fair share.

However, even if the absurd reading of the statute were employed, Piscataway would have a fair share comparable to its present 2215. The AMG methodology would have produced a fair share of 3744. Letter-opinion at 1. Even if could get the 1492 credits that would result from the literal, but inconceivable, application of the Section 7(c)(1) credit provision, it would end up with a fair share equal to about 2252. And, of course, a town cannot then seek further adjustment in light of limited available land if the land could accommodate the 7(c)(1) fair share. The "credits" must be against the actual need, and the result can be

modified downward only if the land is insufficient to meet that need. In Piscataway's case, the fair share resulting from either the limited land or the credit provision, literally applied, happens to work out to slightly above 2200 units.

Even a lower fair share would require restraints. It is clear that Piscataway will have to produce thousands of new units. It is clear that the Council process will take 1 1/2 to 2 years. Looking at any two years of the Piscataway's record prior to the 1984 restraints of this Court, one can readily determine that much of the remaining land will be committed to corporate parks and other projects by the time the Council finds Piscataway's housing element unsatisfactory (the more likely scenario given Piscataway's past and present positions on both fair share, credits, and compliance) and the case returns to this Court, or substantive certification is granted.

Fairness to landowners, not to mention constitutional taking doctrine, would require that the Court use the most, rather than the least, expeditious manner of resolving the litigation so that the restraints can be lifted. We doubt that Piscataway, so hesitant to comply with its constitutional obligation to date, would wish to aggravate its obligation by creating compensable takings. Yet by its motion to transfer, Piscataway is necessarily asking this Court to extend restraints, needlessly given the options, for an indefinite period, certain to be no less than 1 1/2 years. If it complied with the Court order, by rezoning the sites already found suitable at densities already found

appropriate, Piscataway could get the restraints lifted a matter of days after October 23, or less than a month from the hearing of this motion. Although the affected landowners are not "parties" to this action in the formal sense, the Court may certainly consider their interests, as well as the manifest injustice to the class of plaintiffs who have already waited 11 years for their remedy, in deciding to deny the requested transfer and the attendant continuing restraints. As the Court has already ruled in its letter-opinion of July 23, "it would be unfair and inappropriate" to grant extensions for compliance to Piscataway.

If "manifest injustice" means anything -- as it must -- then it must mean that there would be manifest injustice in transferring the Cranbury, Monroe and Piscataway portions of this case.

IV. THE COURT HAS THE AUTHORITY AND OBLIGATION, UNDER THE FAIR HOUSING ACT AND THE CONSTITUTION, TO PROCEED FORTHWITH TO DETERMINE THE SUITABILITY OF THE THREE BUILDER-PLAINTIFFS IN CRANBURY AND TO ENTER AN APPEALABLE COMPLIANCE JUDGMENT AS TO CRANBURY

Section 28 of the Fair Housing Act imposes a moratorium on the award of builder's remedies that will last, in applicable cases, until January 1, 1987, under the more plausible timetable for completion of the Council's criteria and guideline drafting.[27] The validity of this section is very questionable and it bears importantly on the transfer issues now before the Court.[28]

The issue arises as follows. One of the key bases for the Urban League's opposition to transfer of these cases is the argument that transfer will engender extended delay, depriving plaintiffs of the remedy to which they are constitutionally entitled, without any offsetting gain to the public good that can be achieved by such delay. The argument based on delay would become somewhat attenuated as to Cranbury, however, if the effect of a moratorium would be to delay for a roughly similar period the resolution of the cases even if they remain before this

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27 See note 8 supra.

28 The issue of the moratorium is also directly raised by Cranbury's Notice of Motion which seeks transfer, or alternatively, a moratorium on builder's remedy. Although the Court has informed the parties that it will not hear the alternative branches of the motion on the transfer motion's return date (September 27), we submit this argument now because, as explained in text, the question also bears upon the transfer issue.

Court. Thus it becomes important for the Court to determine now what effect the moratorium will have should the Cranbury portion of this case not be transferred.[29]

As a first step, the rights of the Urban League plaintiffs must be determined vis-a-vis Cranbury, which also faces builder-remedy claims by builder-plaintiffs. It is elementary that Mount Laurel rights can be vindicated by individuals and groups who are not builders, such as the Urban League plaintiffs. It is also elementary that in such suits, the non-builder plaintiffs can obtain site-specific rezoning of tracts that will result in a realistic opportunity for the satisfaction of the municipality's fair share, even though non-plaintiff builders and landowners also may be benefitted by such relief.[30] If a site is otherwise suitable for Mount Laurel purposes, the fact that a builder could have been awarded a builder's remedy is irrelevant, and it is

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29 In Piscataway, where there are no builder-plaintiffs seeking the builder's remedy, the Urban League plaintiffs have nevertheless identified numerous sites that the Court has now ruled are suitable for Mount Laurel housing. And in Monroe, where Monroe Development Associates seeks a builder's remedy, the Urban League plaintiffs will independently seek rezoning of the Monroe Development site even if the developer is held to be subject to the moratorium, because the site is a highly suitable one and is controlled by a developer likely to begin construction as soon as the litigation is ended. As to these two defendants, therefore, the moratorium is irrelevant to the interests of the Urban League plaintiffs, and largely irrelevant to the interests of the builder-plaintiff in Monroe (although we recognize its interest in being heard directly by the Court rather than indirectly through the advocacy of the Urban League plaintiffs).

30 Indeed, this is precisely the remedy that was allowed to the Urban League plaintiffs by the Supreme Court when this case was before it as part of Mount Laurel II, since there were at that time no builder-plaintiffs involved in the litigation.

equally irrelevant that under Section 28 of the Fair Housing Act a builder cannot seek relief directly.[31]

In Cranbury, three builder-plaintiffs (Garfield, Zirinsky and Cranbury Land Company) have viable builder-remedy claims, subject to the Court's ultimate ruling on suitability.[32] In addition, two non-plaintiff landowners (Applegate and Silbert) have been designated in the town's compliance proposal for Mount Laurel development.

The township has proposed that Garfield, Applegate and Silbert, all of which are on adjoining sites east of Route 130, be rezoned, and it opposes the award of builder's remedies to either Zirinsky or Cranbury Land, whose sites are, respectively, north and southwest of Cranbury village, on grounds that development of these sites would impact adversely on the town's historic and agricultural districts. The Master recommended

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31 As the Urban League plaintiffs have pointed out on previous occasions, there is an important distinction to be drawn between the builder's remedy on the one hand and a remedy which allows a builder to build on the other. The latter is an inevitable result of any successful Mount Laurel suit and does not require that the builder have participated in the litigation in any way. The former, by contrast, is a special remedy created by Mount Laurel II and available only to prevailing plaintiffs who meet the criteria established by Mount Laurel II. See 92 N.J. at 279-281. The importance of the builder's remedy, as opposed to the remedy that merely includes builders, is that the builder-remedy plaintiff acquires priority over other potential Mount Laurel builders and need satisfy a less stringent site suitability evaluation than the others. See generally J.W. Field Co., Inc., et al. v. Township of Franklin, et al., **********.

32 A fourth builder-plaintiff, Toll Brothers, is still technically before the Court as a builder's remedy claimant, but it has not opposed the Master's recommendation against its site and thus is effectively eliminated.

against the Cranbury Land site and in favor of a scaled down development on the Zirinsky site. The Urban League plaintiffs have urged that the Cranbury Land site also be included in the rezoning, if it is properly scaled down. The effect of either the Master's or the Urban League plaintiffs' recommendations would be to diminish or eliminate the use of the Applegate and Silbert sites.

There is general agreement that Garfield is entitled to a builder's remedy in any event, subject to continuing dispute over an appropriate density, because it was first to file and controls a suitable site. It is also generally agreed that the Applegate and Silbert sites are appropriate for development after all valid builder-remedy claims have been satisfied. Finally, there is general agreement that Cranbury's Mount Laurel development will have to be phased over a significant period of time (the exact period is in disagreement) because of Cranbury's small present population.

At the time of the filing of this transfer motion, the parties were ready for a hearing on the issues of site suitability and phasing, as a result of which the scope of the builder's remedies to be awarded would have been determined. As indicated above, the Urban League plaintiffs are not precluded from pursuing site specific relief in Cranbury, even if the builder-plaintiffs are prevented from doing so immediately by the Section 28 moratorium. However, the absence of builder-plaintiffs might materially affect the site-specific remedies that the Urban

League can request.

Under this Court's ruling in The Allan-Deane Corp. v. Township of Bedminster, Docket No. L-36896-70, decided May 1, 1985 (unreported), the municipality may come into compliance in the absence of a builder's remedy by rezoning any suitable sites which provide a realistic opportunity for meeting the fair share obligation, without regard to whether alternate sites might be regarded as superior or "more realistic" in some respect. Id. at 13.[33] Because there is general agreement that the Applegate and Silbert sites are suitable and realistic in the sense of the Bedminster holding, and because there is a sound planning rationale for concentrating all higher density development in Cranbury east of Route 130, the Urban League plaintiffs would be hard put to oppose the site selection portions of the township's compliance plan under the Bedminster ruling, if builder's remedy claims must be disregarded.[34]

These claims, however, may not be disregarded. Although the Fair Housing Act attempts to impose a time-limited moratorium on award of a builder's remedy, it does not attempt to prohibit use of the remedy for all times and all purposes. Builder's remedies

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33 Rezoning is not the only technique which a municipality may use to come into compliance with Mount Laurel II, but it is the technique which Cranbury has chosen to rely upon.

34 In light of the potential impact of the statutory moratorium if applied in this context, the plaintiffs might ask the Court to reconsider its Allan-Deane ruling on this point if it concludes that transfer should be denied but the moratorium applies to this case.

may still be awarded in actions filed prior to January 20, 1983 and they may be awarded in later-filed cases after the moratorium expires. Indeed, because the builder's remedy is an important aspect of the Supreme Court's constitutional requirement that effective mechanisms be created to enforce the right to housing opportunities in growth area municipalities, it is unlikely that the remedy could have been successfully abolished even if the Legislature had attempted to do so.

From this perspective, the Urban League plaintiffs submit that if the moratorium applies to the Cranbury litigation, which it quite apparently does not for two independent reasons discussed below, then it would be unconstitutional. Moreover, even if the moratorium applies and were constitutional as applied, procedures must be structured so that the opportunity of the builder-plaintiffs ultimately to claim their builder's remedy is not rendered moot.

A. The Moratorium on Builder Remedies in Section 28 of the Act Does Not Apply to A Consolidated Action in Which the First Complaint was Filed Prior to January 20, 1983

The Urban League is entitled to a remedy now. Section 28 does not affect the Urban League's entitlement to proceed to a judicial remedy for two distinct reasons. First, the section expressly defines the affected "builder's remedy" as a court imposed remedy "for a litigant who is an individual or a profit-making entity," and the Urban League is neither. Second, and more

importantly, the section only affects plaintiffs in exclusionary zoning litigation "filed on or after January 20, 1983." This provision was added by the Governor in his conditional veto to prevent "an unconstitutional intrusion into the Judiciary's powers." Conditional Veto Message, at 2. The Urban League case was filed 7 1/2 years before the cut-off date.

Moreover, this provision does not affect the ability of this Court to grant a builder's remedy to the three builder-plaintiffs still before the Court in Cranbury. The Garfield, Cranbury Land and Zirinsky complaints were consolidated by this Court with the Urban League case by Orders dated December 15 and 30, 1983, in response to the Township's motion for consolidation. The legislation expressly contemplates such consolidated multiple actions against a single town being treated as one for moratorium purposes. Section 28 defines "exclusionary zoning litigation" as "lawsuits filed in courts of competent jurisdiction in this State challenging a municipality's zoning and land use regulations ..." The separate use of "litigation" and "lawsuits" must have some meaning; the only practical meaning is that "litigation" encompasses consolidated actions against the same town, a situation certainly brought to the Legislature's attention during its consideration of this bill. The moratorium only purports to delay builder's remedies in "exclusionary zoning litigation ... filed after January 20, 1983." But this "litigation", that is this set of "lawsuits" challenging "a municipality's" zoning and land use regulation, was filed on July 23, 1974. Thus Section 28

does not prevent this Court from granting Garfield, Cranbury Land, or Zirinsky a builder's remedy now.

This conclusion is supported not only by the express language of this Section, which was carefully reworked by the Governor to avoid constitutional problems, but also by the existing Court rules and caselaw on the effect of consolidation. Rule 4:38-1(c), concerning further proceedings in consolidated cases, expressly provides:

> Unless otherwise ordered by the court, the action first instituted shall determine which party shall have the privilege to open and close and in other respects shall govern the conduct of subsequent proceedings. Upon a consolidation the court may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(Emphasis added).

Caselaw confirms that consolidation leads to a "fusion" of the previously independent actions and, therefore, bestows substantive rights that would not otherwise have been available. For example, in Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 477-79, 251 A.2d 278 (1963), the Supreme Court, after reaffirming the "fusion" doctrine, allowed one defendant to appeal a judgment NOV granted to the defendant in a second consolidated action, although the first defendant would clearly have had no such right had the two cases been tried separately. Likewise in R.L. Mulliken, Inc. v. City of Englewood, 59 N.J. 1 (1971), the Court permitted the plaintiff to amend a complaint originally brought in county district court to seek damages in excess of that court's jurisdiction after consolidation with a Superior Court

action, even though the statute of limitations had run on the claim filed in county court. See also Lawlor v. Cloverleaf Memorial Park, Inc., 56 N.J. 326, 266 A.2d 569 (1970). Thus, courts have regularly extended rights to litigants in consolidated litigation that would not have been available otherwise.[35] Presumably the Legislature and Governor wrote the carefully drafted Section 28 with the established law of consolidation in mind. Because this fused action was filed years before the cut-off date in that Section, the moratorium does not apply to the action.

B. The Section 28 Moratorium on Builder Remedies Does not Apply to Cases in which a Transfer Motion has been Denied and the Court will Adjudicate the Remainder of the Action

Even if the Court were to consider the moratorium applicable to those complaints filed after the deadline that had been consolidated with an older case, as here, the moratorium would be inapplicable even to those later filed complaints once the Court denies the transfer motion.

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35 The Rule says that the first case governs "Unless otherwise ordered by the Court." Although such an order might otherwise be permissible, it clearly cannot be where the Legislature has directly addressed the issue. Moreover, the subsequent sentence clarifies that such court orders are only designed to avoid unnecessary costs or delay. Here an order failing to let the first filed case govern the consolidated cases in this respect would only increase costs and delay, to the point of potentially undermining existing vested rights.

The language, history, and purpose of Section 28 confirm its inapplicability to cases where transfer has already been denied. As enacted, the moratorium does not have a definite duration but rather is tied to "expiration of the period set forth in subsection a. of section 9 of this act for the filing with the council of the municipality's housing element." Clearly that timeframe has no meaning for a municipality which will never be filing a housing element with the Council because it has been denied transfer and thus the Court will be determining its fair share and compliance plan. In contrast, when originally adopted by the Assembly in February 1985, Section 28 specifically said that a moratorium would be in effect "[f]or a period of 12 months following the effective date of this act." The Governor consciously reworked that language to avoid constitutional problems. Conditional Veto Message at 2.

Clearly the purpose of this section, as revised, is to permit an orderly development by the Council of its procedures, criteria, and guidelines and sufficient time for the affected municipalities to make a comprehensive and meaningful submission under a new and complex statute. In his veto message explaining his revision, the Governor stated:

> It is essential that the temporary moratorium on the builder's remedy be constitutionally sustainable in order to enable municipalities to take advantage of the procedures in this bill....A moratorium for the planning period in this bill is needed.

Id. at 2. Likewise in its defense of the constitutionality of this provision before Judge Skillman, the state, through the Attorney General explained:

> The "freeze" is clearly related to a rational legislative purpose: the orderly implementation of an administrative mechanism to enable municipalities to meet their constitutional obligation under the Mt. Laurel cases.... Similar to the moratorium imposed by the HMDC and upheld in Meadowlands Regional Development Agency, supra, the freeze at issue herein was provided by the Legislature to enable the administrative process to address a complicated issue in a comprehensive and orderly manner.
> ...
> By imposing a temporary moratorium on the award of a builder's remedy in Section 28, the Legislature attempted to provide time for the administrative system to work. As in those cases regarding the imposition of a moratorium on development generally, to allow for comprehensive planning, the Legislature here sought to afford municipalities an adequate opportunity to undertake such action as may be necessary to achieve voluntary compliance with their constitutional obligations under the Council's organizational period.

Brief on Behalf of Intervenor State of New Jersey in Morris Cty. Fair Housing Council v. Boonton Twp., et al., at 23, 27.

The moratorium in Section 28, then, is clearly designed to stay a court's hands in cases already filed, to permit the towns currently in litigation to make the transfer motion and, if the motion is granted, to give those towns and the Council the full time established in the statute to make and review the complex submissions without needless constraints and pressures. This Court has already afforded Cranbury time to make the transfer motion in a deliberate and comprehensive manner by not even scheduling the long-planned hearing on the builder-remedy issues until the transfer motion is decided. But there is no sense in, nor legislative intent for, a stay on court action once the court decides that a particular town will not be allowed to use the new administrative mechanism but will have its compliance obligations

determined by the court. There is no need for the town to develop a housing element and certainly no need to wait for the Council's criteria and guidelines if the Court is to resolve the matter anyway. Indeed, one of the major reasons for denying transfer is that the extended delay which the administrative process would impose is prejudicial and unjust to a party already long delayed in obtaining its remedy. It would not only be ironic, but would blatantly ignore the Legislature's decision to allow some cases to remain in court for resolution to rule that parties as to whom the administrative delay is manifestly unjust may be asked to wait the same period to await completion of the administrative process as to others. Indeed, as set forth below, such an interpretation would clearly render the provision unconstitutional.

C. If Section 28 were Construed to Apply to this Case after Transfer is Denied, the Provision would be Unconstitutional

A moratorium is not per se unconstitutional under New Jersey law, but the courts have been very sensitive to the requirement that any such suspension of property rights be carefully tailored to meet reasonable and achievable objectives. A moratorium which fails to do so risks violation of the takings clauses of the state and federal constitutions.

Thus, the courts have sustained moratoria where the purpose was to permit development of new permanent regulations, so long

as there was a showing of a need for the regulations, good faith progress towards developing them, their nearness to completion and the likelihood of their ultimate passage. In Toms River Affiliates v. Department of Environmental Protection, 140 N.J. Super. 135, 152, 355 A.2d 679, 689 (App.Div., 1976), for instance, it was said of a CAFRA "freeze" to permit development of regulations that:

> Such 'stop gap' legislation is a reasonable exercise of power to prevent changes in the character of the area or a community before officialdom has an opportunity to complete a proper study and final plan which will operate on a permanent basis.

See also Orleans Builders and Developers v. Byrne, 186 N.J. Super. 432, 448, 453 A.2d 200, 208-09 (App.Div. 1982); Cappture Realty Corporation v. Board of Adjustment of Elmwood Park, 133 N.J. Super. 216, 336 A.2d 30 (App.Div. 1975)(flood plain zoning); Meadowlands Regional Development Agency v. Hackensack Meadowlands Development Commission, 119 N.J. Super. 572, 293 A.2d 192 (App.Div.), certif. denied, 62 N.J. 72, 299 A.2d 69 (1972)(integrated regional development plan). See generally Payne, Survey of Eminent Domain Law, 30 Rutgers L.Rev., 1111, 1199-1202 (1977).

In keeping with this approach, where it appeared that good faith progress could not or would not take place towards solution of the problem which justified the moratorium in the first place, the Supreme Court has not hesitated to hold that the moratorium could be invalidated on takings grounds. See Deal Gardens,

Incorporated v. Board of Trustees of Loch Arbour, 48 N.J. 492, 500, 226 A.2d 607, 611-12 (1967); cf. Sciavone Construction Company v. Hackensack Meadowlands Development Commission, 98 N.J. 258, 486 A.2d 330 (1985)(possibility that 19-month moratorium could constitute a taking). And in Mount Laurel I, the Supreme Court recognized explicitly that a moratorium, even if otherwise permissible, should be evaluated with particular care in instances where it would operate to delay or deny construction of low and moderate income housing. 67 N.J. at 188n.20, 336 A.2d at 732n.20; but cf. Golden v. Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

Section 28 of the Fair Housing Act does not fit comfortably into this well-established doctrinal scheme. It is true that the moratorium will run, at most, until January 1, 1987, a total maximum period of eighteen months.[36] It is also true that the Council will have extensive amounts of planning and regulation-writing to do during that period. The crucial fact, however, is that none of this time-consuming preparation for the future administration of the Mount Laurel doctrine in New Jersey by the Council has anything to do whatsoever with the resolution of the Urban League case that is the subject of these transfer motions.

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36 The period is indeterminate at this point since the members of the Affordable Housing Council have not been confirmed. The moratorium expires twelve months after that event, or on January 1, 1987, whichever comes earlier. L.1985, ch.222, Secs. 28, 9(a) and 7(c), in that order, for computation of the moratorium period. The minimum period is thus approaching 15 months. As to moratoria of this length, see Sciavone Construction, supra.

Once this is understood, the essential rationale for allowing any moratorium disappears.

If, as the Urban League plaintiffs urge, the case is not transferred, the Affordable Housing Council obviously has no jurisdiction over Cranbury, and any "planning" that the Council may legitimately do with respect to other cases has no bearing on the outcome of the Urban League action. Even in the unlikely event that the case was otherwise suitable for transfer under the manifest injustice standard, the Urban League plaintiffs think it is clear that it must be transferred with the law of the case intact, requiring the Council to preserve the substantive determinations that have been made up to this point in the judicial proceedings. Because the Council will have no "instant expertise" with respect to these matters and because, as explained above, the Urban League plaintiffs are entitled to immediate relief in any event, with or without the builder-plaintiffs, there is little reason to transfer the case for the small amount of remedial work that remains, particularly since the Court is intimately familiar with these towns and has ample basis to rule without extensive additional preparation. In this instance, even a balancing process favors not transferring the cases, and again results in the moratorium serving no useful purposes vis-a-vis these proceedings.

The only situation in which the moratorium could possibly have a bearing on these cases would be if they were transferred to the Council, the Council concluded that it had statutory

authority to award the builder's remedy, and it required time to develop substantive rules to evaluate which builder's sites were suitable under the criteria of Mount Laurel II. The Section 28 moratorium might conceivably be sustained under this rationale, but only if the Court finds unequivocably that the legislation permits (indeed requires, in an appropriate setting) the award of a builder's remedy.

Even then, the moratorium provision would be dubious, because Mount Laurel II has already established the legal criteria, see 92 N.J. at 279-81, and the essence of "planning suitability" is a factual inquiry guided by individualized expert testimony, rather than detailed administrative rules. As noted by the Supreme Court in Mount Laurel I, supra, special care must be taken not to unnecessarily burden property-owner's rights to proceed with affordable housing.

In any event, the immediate purpose of analyzing the moratorium provision is to demonstrate its effect on cases that remain in this Court, not cases that are transferred. And as to the former, the unconstitutionality is plain.

D. If the Builder-Plaintiffs are Subject to the Moratorium After Transfer and the Moratorium is Constitutional as So Construed, the Immediate Remedy Allowed to the Urban League Plaintiffs Must Leave Room for the Builder's Claims to be Effectively Revived After the Moratorium Expires, By Including a Determination Now of the Suitability of the Affected Sites and Entering an Appealable Compliance Judgment.

As noted above, the Urban League plaintiffs are entitled to proceed immediately to a compliance remedy even if the builder-plaintiffs are temporarily barred by Section 28, and they are further entitled to seek rezoning of sites that could have been the subject of a builder's remedy claim. In doing so, however, the Urban League plaintiffs would be bound both by this Court's holding in Bedminster, supra, subject to its reconsideration, and by the obligation to sustain the constitutional importance of the builder's remedy procedure established by Mount Laurel II.

As a first step, if the Cranbury portion of the case is not transferred but the builder-plaintiffs are held to be temporarily barred, the Court should find immediately that the Garfield site is suitable for Mount Laurel compliance purposes and that, since it is preferred by the municipality, it meets the Bedminster test. See, in this regard, defendant's Brief in Support of the Motion to Limit Builder's Remedies, at 40, wherein Cranbury "requests" award of a builder's remedy to Garfield and Company. The Court should further determine an appropriate phasing schedule, and it should then authorize immediate phased development on the Garfield site and only the Garfield site during the period of the moratorium.

As to the rest of the fair share, the Court could proceed in one of two ways. The preferred way would be for it to conduct the compliance hearing as it planned prior to the Fair Housing Act, making findings on site suitability and consequent entitlement to the builder's remedies for all remaining builder-

plaintiffs. Builders found not entitled to the builder's remedy could then know where they stood and decide whether to withdraw. As to builders found entitled to the builder's remedy, the Court could establish phasing schedules that would allow building to begin after the expiration of the moratorium. The alternative to this immediate hearing and determination is to leave the substantive hearing on suitability of the other sites until the expiration of the moratorium, thereby leaving the builder-plaintiffs and the Township uncertain as to their ultimate status.

Under the first of these approaches, there would be a final, and therefore appealable, judgment, so that any issues the parties seek to appeal could be presented and hopefully resolved by the end of the moratorium period. The ability to use the moratorium period to resolve any such appeals is a major advantage of this first approach. If the second approach were chosen, however, the Urban League plaintiffs would urge the Court to direct final judgment as to the resolved claims, under Rule 4:42-2, or we would support an application for leave to file an interlocutory appeal. See Mount Laurel II, 92 N.J. at 290-91. The objective under either approach would be for Cranbury to be in a position to move promptly to compliance as soon as possible after the moratorium has expired.

This overall approach to the moratorium, if one is necessary, as plaintiffs have already contended it is not, would reconcile several potentially conflicting objectives. It would

honor the legislative moratorium, insofar as there is any dispute between the parties as to appropriate awards of the remedy, if the moratorium were applicable. It would honor Cranbury's oft-repeated concern that any remedy be phased so as not to be overwhelmed with development immediately. And, most importantly, it honors the still-valid, constitutionally important principle that the builder's remedy be available as a reward and a stimulus, both for litigation and for housing production.

Nevertheless, it is an imperfect, and needlessly imperfect remedy because, if the Court proceeds to plenary consideration of compliance with the builders before it now, we believe that the necessary phasing can be adjusted so that all three builders are allowed to proceed simultaneously, thus providing a more immediate economic return and surer protection against future turns of the housing economy. A phasing schedule that allows Garfield more up-front building while postponing Zirinsky and Cranbury Land until 1987 or later is surely an inferior remedy from the perspective of the public interest, but it is, in turn preferable to one that allows the fair share to be provided no earlier by non-plaintiff builders, such as Applegate and Silbert.[37]

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37 The rationale for allowing all builders to proceed simultaneously, if possible within the confines of the phasing schedule, applies principally to builder-remedy plaintiffs. Thus, if non-plaintiffs such as Applegate or Silbert were to be included in the compliance plan, the Urban League plaintiffs would argue that they should be phased in only after Garfield's project was accommodated to the maximum extent possible.

Long before the Fair Housing Act and its moratorium took form, the builder-plaintiffs in this case were actively involved in the complicated but vitally important process of giving meaning to Mount Laurel II's mandates. These plaintiffs and their planning experts played a significant role in the development of the AMG/Urban League fair share methodology, and in the general fashioning of post-Mount Laurel II doctrines. Whatever their private motivations, they have served the public good in the way that the Supreme Court envisioned in Mount Laurel II and, if they can otherwise satisfy Mount Laurel II's criteria, they are entitled to their remedy.

CONCLUSION

For all the reasons stated herein, the Urban League plaintiffs respectfully submit that the Court must deny the motions of Cranbury, Monroe and Piscataway to transfer this case to the Affordable Housing Council and the motion of Cranbury to apply a moratorium on builder's remedies.

DATED: September 18, 1985

Respectfully submitted,

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On Behalf of the ACLU of NJ

PLAINTIFF'S BRIEF AND APPENDIX IN OPPOSITION TO MOTION TO TRANSFER PER SEC. 16a OF THE FAIR HOUSING ACT OF 1985

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
Plaintiffs,	:	MIDDLESEX/OCEAN COUNTIES DOCKET NO. C-4122-73
vs.	:	Civil Action
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	:	(Mount Laurel)
Defendants.	:	

PLAINTIFF'S BRIEF AND APPENDIX IN OPPOSITION TO MOTION TO TRANSFER PER SEC. 16a OF THE FAIR HOUSING ACT OF 1985

JOSEPH MORRIS and ROBERT MORRIS,	:	
Plaintiffs,	:	
vs.	:	DOCKET NO. L-054117-83
THE TOWNSHIP OF CRANBURY, etc.,	:	
Defendant	:	

GARFIELD & COMPANY, :

Plaintiffs, :

vs. : DOCKET NO. L-055956-83 PW

MAYOR AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, etc. :

Defendants. :

BROWNING FERRIS INDUSTRIES OF SOUTH JERSEY, INC., a Corporation of the State of New Jersey, etc., et al., :

Plaintiffs, :

vs. : DOCKET NO. L-058046-83 PW

CRANBURY TOWNSHIP PLANNING BOARD AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, :

Defendants. :

CRANBURY DEVELOPMENT CORPORATION, a corporation of the State of New Jersey, :

Plaintiff, :

vs. : DOCKET NO. L-59643-83

CRANBURY TOWNSHIP PLANNING BOARD AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, :

Defendants. :

CRANBURY LAND COMPANY, a New Jersey Limited Partnership,	:	
Plaintiff,	:	
vs.	:	DOCKET NO. L-070841-83 PW
CRANBURY TOWNSHIP, etc.,	:	
Defendant.	:	

LAWRENCE ZIRINSKY,	:	
Plaintiff,	:	
vs.	:	DOCKET NO. L-079309-83 PW
THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, a municipal corporation and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY,	:	
Defendants.	:	

TOLL BROTHERS, INC., a Pennsylvania corporation,	:	
Plaintiff,	:	
vs.	:	DOCKET NO. L-005652-84
THE TOWNSHIP OF CRANBURY, etc., et al.,	:	
Defendants.	:	

On the Brief:

Carl S. Bisgaier, Esquire

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APPENDIX

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On July 22, 1984, this court ruled that the defendant had a fair share obligation under Southern Burlington Cty. NAACP v. Tp. of Mt. Laurel, 92 N.J. 158 (1983) ("Mt. Laurel II") of 816 units and ordered the defendant to rezone within ninety (90) days to satisfy that obligation. The defendant had previously acknowledged that its ordinances were non-compliant. The court appointed a master to monitor the rezoning and ordered consideration of site specific relief to the plaintiff and other consolidated plaintiffs.[1]

The defendant requested and received extensions to achieve its compliance package and one was not filed until late December 1984. The court then awaited the master's report which was not received until four (4) months later. Pre-trial preparation then ensued and was essentially completed with the filing of the defendant's expert report on July 23, 1985.

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[1] Reliance for this Statement of Fact and Procedural History is placed in the attached affidavits of Carl S. Bisgaier, Esquire dated September 17, 1985 (Exhibit A) and April 2, 1985 (Exhibit B) and the report of Abeles, Schwartz Associates (Exhibit C) and all documents previously filed, evidence of record and the orders, judgments and opinions of this court.

On July 2, 1985, the Affordable Housing Act of 1985 became law and, prior to the setting of a date for the hearing of this case, the defendant filed this motion to transfer per Sec. 16a of the Act. The defendant's compliance package is, for the most part, unchallenged by the plaintiffs. The only serious issues remaining are phasing and site specific relief to the developer-plaintiffs. The anticipated hearing should involve a relatively routine review of compliance and a full review of phasing and site specific issues.

Thus, we are as close to a final resolution of this matter as the court's schedule for the final hearing would permit. It is a relative certainty that had the defendant and master acted within the original timeframe suggested by the court, that hearing would be over and a final judgment resolving all issues entered. The Mt. Laurel II mandate would have already been fully vindicated.

The present motion is the last hurdle interposed by the defendant which stands in the way of a final resolution. The context of the motion requires an understanding of how we have gotten to this point.

The complaint in this matter was filed on November 10, 1983, and consolidated with the Urban League and other cases on November 18, 1983. While the Urban League case has been pending

since 1974, the plaintiff's efforts to provide lower income housing in Cranbury date to 1970. For fifteen years, the defendant has had a developer ready, willing and able to provide affordable housing. Numerous plans for development have been submitted and not considered for reasons such as the pendency of the Urban League case and a general moratorium placed on residential development by the defendant in the early 1970s.

While steadfastly avoiding any development for lower income housing, the defendant designated over 2000 acres for non-agricultural uses - primarily industrial and commercial. Its ordinance created a potential for between 3355 and 3890 units (an increase of between 2620 and 3155 over the 735 which existed as of the writing of the Master Plan). As a result of its 1983 zoning ordinance, the potential exists for between 3230 and 9170 new employees over and above the 2220 that were employed as of the writing of the Master Plan.

The Township, by admissions in its own Master Plan, stands at the crossroads of enormous development and development potential. Its access to the New Jersey Turnpike, Route 130 and Route 1, in Princeton regional area, make it one of the most attractive locations for employment and residence in the State.

As a direct result of the Township's adamant refusal to voluntarily provide lower-income housing opportunities, those needs generated between 1970 and 1980 have been left unsatisified. Despite the history of the Urban League case and the even earlier efforts by Cranbury Land Company, the issue of fair share is now directed at the 1980-1990 decade.

If this court acts now to finalize trial level proceedings, that fair share will be met. Further delay will, in all likelihood, move us into the 1990-2000 decade and the opportunity to satisfy the 1980-1990 need in Cranbury will be lost. Absorption rates for housing are finite. As each year passes, a year's worth of absorption is lost and the opportunity to provide housing for lower income persons is also lost. Meanwhile non-residential construction goes unabated and luxury housing on large lots eat up available land, water and sewer resources.

The defendant has avoided compliance for over a decade. Now, on the verge of a court-ordered compliance, it again seeks the delay which has served its exclusionary policies so well in the past. The defendant has now been found by two courts to have violated Mt. Laurel principles. It cannot be provided with another opportunity to avoid its constitutional obligation.

LEGAL ARGUMENT

INTRODUCTION

On January 20, 1983, the Supreme Court rendered its decision in Mt. Laurel II providing a judicial mechanism to assure vindication of a constitutional mandate first articulated eight years earlier in Mt. Laurel I. The creation of an effective judicial mechanism was deemed necessary, to some extent, because of a lack of a legislative mechanism to effect the same end. Mt. Laurel II, supra, 92 N.J. at 212.

On July 2, 1985, the Fair Housing Act became effective. L. 1985, c. 222 ("Act"). The Act was intended to create an administrative mechanism to address both Mt. Laurel I and Mt. Laurel II. Sec. 2 and Sec. 3.

In Mt. Laurel II, the Supreme Court had indicated its preference for legislative, as opposed to judicial, action but had asserted that:

> (W)e shall continue - until the Legislature acts - to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine. That is our duty.

Mt. Laurel II, supra, 92 N.J. at 352. The Legislature has now acted. The question presented then is the scope of this court's

"duty" in light of that action. In that regard, it is noteworthy that while the Court envisioned the possibility of "legislation that might completely remove this Court from those controversies" (Mt. Laurel II, supra, 92 N.J. at 212), it perceived that the judiciary would be more or less involved depending upon the actual scope of the legislation in light of the constitutional mandate.

> The judicial role, however, which would decrease as a result of legislative and executive action, necessarily will expand to the extent that we remain virtually alone in the field.

Mt. Laurel II, supra, 92 N.J. at 213.

Thus, in determining the role of this court under the Act, it is necessary to consider the legislative intent in the context of the fundamental constitutional mandate which the Act purports to address. The court must be guided both by that legislative intent and by the underlying constitutional mandate, the implementation of which the courts are the ultimate guarantors.[1]

The defendant in this action seeks to trigger the provisions of Sec. 16(a)[2] of the Act. This section provides

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[1] As will be demonstrated below, this was the legislative intent and involves no conflict between the roles of the two constitutional bodies.

[2] The marked-up version of the Act available to plaintiff does not indicate a subsection "a"; although, it does indicate a subsection "b". Plaintiff assumes this is a misprint.

circumstances under which the court may exercise its discretion to "transfer" a case to the Council on Affordable Housing ("Council"). As will be discussed below, this request for a "transfer", and the supporting documentation offered by the defendant to the court, makes a mockery of the Act and the legislative intent and would, if granted, thwart the constitutional mandate. The integrity of the Act, the legislative intent and the constitutional mandate is severely implicated by this motion. In fact, it is seriously tarnished by the motion itself.

The Act stands today as the nation's foremost State legislative effort to respond to the housing needs of lower income persons. It is an extraordinary credit to the people of this State that the Act is law.[1] It is a greater credit to our judiciary that it filled the void which previously existed in the absence of the Act. It is absolutely essential, however, that while the judicial role may "decrease as a result of legislative ...action", it must decrease only to the extent intended by that legislation and only to the extent permitted by the Constitution. Anything further would create a void, something which the Court was dedicated not to do.

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[1]For the first time, as a result of the Act's amendment to the Municipal Land Use Law, every municipality, as a precondition of zoning, will have to adopt a housing plan element which "shall be designed to achieve the goal of access to affordable housing to meet present and prospective housing needs with particular attention to low and moderate income housing..." Secs. 10, 29b (3) and 30.

As will be demonstrated below, the Act contains numerous apparent flaws, internal inconsistencies and loopholes. To the extent possible, the court should interpret the Act in an effort to save it. There is substantial precedent for such action. Our Supreme Court has gone to great ends to fulfill the legislative intent by appropriately massaging statutes (to the point of the most delicate judicial surgery) in order to save them. See e.g., Jordan v. Horseman's Benevolent & Protection Ass'n., 90 N.J. 422 (1982).

Plaintiff believes that the Act should be saved and can be interpreted to be a constitutional and valid exercise of the police power. However, the transfer of this case to the Council would be contrary to the legislative intent and a manifest abuse of the constitutional mandate. As will be demonstrated below, the effect of a transfer would accomplish nothing more than delaying this court's review of site specific relief for two (2) or more years; a result which would unnecessarily test plaintiff's ability to maintain this action and the ultimate likelihood that any lower income housing would be produced.

POINT I

THE EFFECT OF A TRANSFER WOULD SIMPLY BE TO UNNECESSARILY DELAY IMPLEMENTATION OF THE CONSTITUTIONAL MANDATE AND RISK ITS ULTIMATE LACK OF IMPLEMENTATION

It would be unthinkable for this case to be "transferred" per Sec. 16a, let alone a "manifest injustice". A "transfer" would be contrary to the legislative intent and the constitutional mandate. However, the legal issues raised by the motion cannot be resolved without agreement as to the effect of a "transfer" generally and with specific regard to this matter.

Unfortunately, the Act presents a rather complicated scheme is so far as the interplay between the judicial and administrative process. Both are deemed essential to the overall satisfaction of the constitutional mandate; however, in many respects, the Act is silent or apparently inconsistent in its treatment of how the two (court and Council) should work together.

The presentation below represents plaintiff's effort to extract from the Act the legislative intent as to how it is to work mechanically. Plaintiff's legal arguments rest in large measure on this interpretation.

A. THE GENERAL EFFECT OF A "TRANSFER" PER SEC. 16a OF THE ACT

Before determining whether a "transfer" per Sec. 16a is appropriate, it is first necessary to evaluate the effect of a "transfer".[1] In this regard, the Act is seriously deficient; to such an extent that further legislation may be necessary before Sec. 16a is meaningful in certain respects.

Sec. 16a simply provides for a "transfer" (under certain circumstances) of "those exclusionary zoning cases instituted more than 60 days before the effective date of this Act". While the term "exclusionary zoning case" is not defined for general purposes under the Act[2], it is clear that by any reasonable definition the instant matter is such a case. Also, having been brought on November 10, 1983, it is covered by the provisions of Sec. 16a.

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[1] It has been argued that a "transfer" is impossible since the Council does not presently exist and will not exist until confirmation of the members nominated by the Governor. The Act contemplated consideration of these motions even in anticipation of that event, and this seems to be the best course. It would be better to resolve the issue now than await actual confirmation. Prematurity is really not the issue. Sec. 19 permits fifteen (15) months for review and mediation prior to judicial reconsideration of exhaustion. If the court is willing to accept that timeframe as reasonable, it hardly matters when actual confirmation occurs since it will be well within that timeframe. Further, if and when it appears that confirmation will not occur and further delay is unreasonable, an appropriate motion could be made to reinstitute the case.

[2] Sec. 28 of the Act, which deals with the moratorium on the builder's remedy, does contain a definition of the term "exclusionary zoning litigation", which, although limited to the purposes of that section and containing the word "litigation" instead of "case", does indicate the thrust of the legislative intent in this regard. See also Sec. 16b which refers to "litigation... challenging a municipality's zoning ordinance with respect to the opportunity to provide for low and moderate income housing".

Assuming this case is covered by Sec. 16a and further assuming that a "transfer" is otherwise appropriate, the question arises as to what would happen to the case if it were "transferred". Absent agreement on this point, it will be difficult, if not impossible, to determine whether a "transfer" is appropriate. Before addressing the implications of "transfer" in this case, plaintiff will first evaluate the general effect of a "transfer" per Sec. 16a.

Neither Sec. 16a, nor any other provision of the Act, directly defines the term "transfer". However, Sec. 16a, itself, and others address what happens once a case is transferred.

1. Loss of Superior Court jurisdiction: First and foremost, the decision to transfer appears to divest the court of jurisdiction. Sec. 16a explicitly provides that the failure of a municipality to file a housing element and fair share plan with the Council, in a timely manner, will result in a reversion of jurisdiction; a fortiori, jurisdiction must have been lost. Further, if a housing element and fair share plan are timely filed, then the court cannot again obtain jurisdiction over the controversy unless and until its jurisdiction is invoked per Sec. 18 if the Council denies substantive certification or its conditions for obtaining certification are not agreed to in a timely manner. Plaintiff also believes jurisdiction could be invoked if the defendant fails to act in good faith to pursue

substantive certification. As will be shown, plaintiff views a transfer as having the same effect as the filing for substantive certification per Sec. 13, which has been objected to per Sec. 14 and Sec. 15a(1) by a plaintiff.

This latter point is critical since the mere filing of a housing element and fair share plan is a relatively insignificant step under the Act and which appears to trigger no further responsibility on the part of the municipality whatsoever. Thus, pursuant to Sec. 13, ordinarily (in the absence of litigation) the municipal decision of whether to petition for "substantive certification" of the housing element is completely voluntary and, under that section, no Council review of the housing element and fair share plan will occur absent a petition being voluntarily filed by the municipality. Therefore, Sec. 16a must be interpreted as mandating substantive certification review per Sec. 14 and 15a(1) if transfer is granted; i.e., the granted motion would have similar status to a Sec. 13 petition which has been the subject of an objection.

This would be a fatal defect in the Act if it were not properly interpreted. If the result of transfer per Sec. 16a (or the exhaustion requirement per Sec. 16b were simply to require the filing of a fair share plan and housing element, any "transfer" would effect a manifest injustice and be unconstitutional (and the Sec. 16b exhaustion requirement would be unconstitutional).

This is because the result of a transfer would place compliance within the exclusive and voluntary control of the defendant.

In any event, plaintiff contends that the effect of a "transfer" is much different and compels not only mediation and review per Sec. 15 c but also the ability ultimately to achieve compliance in anticipation of appellate review either through a grant of substantive certification per Sec. 14 or the reversion of jurisdiction to this court per Sec. 18.

2. Ability to Force Mediation and Review: The question then is whether there is any way by which a "plaintiff" in a transferred case per Sec. 16a can force review of the housing element and obtain a determination by the Council of whether a substantive certification should be granted per Secs. 13, 14 and 15. The answer lies in Sec. 15 which covers those instances in which "(t)he Council shall engage in a mediation and review process..." (Emphasis added).

The ability to trigger "mediation and review" is significant. The Act does provide timeframes in which mediation review should be completed and provides for a hearing before the Office of Administrative Law (OAL) where mediation and review is unsuccessful. See Secs. 15 and 19. The significance of the OAL provision is that it brings into force existing statutory mechanisms to create a record, obtain a final administrative

decision and achieve access to appellate review (N.J.S.A. 52:14B-1, et seq.) or reversion to this court's jurisdiction per Sec. 18.

The problem lies in Secs. 15a and 16a. Pursuant to Sec. 15a, mediation and review is mandated in only two instances:

1. where a municipality has voluntarily petitioned for "substantive certification" pursuant to Sec. 13 and an objection is filed pursuant to Sec. 14 "within 45 days of the publication of the notice of the municipality's petition..." Sec. 15a(1); and

2. where "a request for mediation and review is made pursuant to Sec. 16 of this Act." See 15a(2).

Sec. 16, however, apparently limits the right to seek "review and mediation" to plaintiffs in Sec. 16b cases; that is, in those cases filed "less than 60 days before the effective date of this act or after the effective date...". In such cases, a plaintiff must "file a notice to request review and mediation with the Council pursuant to Sections 14 and 15 of this act". The administrative process then must be exhausted (subject to Sec. 19) if a timely resolution of participation is adopted per Sec. 9a.

Sec. 16a does not explicitly provide for the obligation or right of a plaintiff in a "transfer" case to request review and mediation. Therefore, given the limiting language of Sec. 15a(2), it might appear that a plaintiff in a 16a transfer case has two options:

1. await the possible voluntary action by the municipality to seek substantice certification per Sec. 13; or

2. file a new action and come under the provisions of Sec. 16b.

The alternative, of course, is for the Legislature to amend the Act to explicitly provide for the right of a Sec. 16a plaintiff to seek "mediation and review" or for the court to determine that the right is implicit in the concept of "transfer". The latter tack is appropriate since Sec. 16b can be read as mandating that a Sec. 16b plaintiff request "mediation and review"; whereas, Sec. 16a can be read as leaving the process up to the initial discretion of a party to seek it through a transfer motion and the ultimate discretion of the court as to whether to grant it. Further, it can be concluded that the effect of granting a 16a transfer motion is to put the matter, for procedural purposes, on the same track as a 16b case and that the request for a transfer is the legal equivalent to a petition for certification per Sec. 13. Support for this view can be found also in the language of Sec. 3 declaring "(t)he State's preference for the resolution of existing...disputes...is the mediation and review process". This suggests that all existing transferred cases were intended to be covered by Sec. 15c and not just 16b cases.

3. Timing of Completion of Trial Level Stage: Once this issue is clarified, another emerages: whether the timeframe set for completion of mediation and review is reasonable. This is an issue which will be discussed below in the context of

whether a transfer is appropriate. It is sufficient here to note that pursuant to Sec. 19 the process might be completed in this case within fifteen (15) months of the effective date of the Act, or October 2, 1986.[1] Even then, the process comparable to a trial level decision is not complete. Pursuant to Sec. 15c unsuccessful mediation efforts are transferred to the OAL and are heard as contested cases.

Sec. 15c provides for issuance of the "initial decision" of the Administrative Law Judge (ALJ) within ninety (90) days of transmittal. Presumably, that would require an initial decision on or before January 2, 1987. However, the Act is not clear that the date of transmittal must be on or before October 2, 1986. Thus, while the review and mediation process should (not "must") be "completed" within 15 months of the Act's effective date, there is no requirement that the Council transmit the case within that timeframe. As time goes by, plaintiffs in

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[1]Sec. 19 does not require completion of the mediation and review process within 15 months. No section establishes a time limit for that process. Sec. 19 merely provides some leverage for a litigant to push for finality since failure to complete the process within 15 months gives the litigant the right to file a motion to be relieved of the exhausion requirement. Presumably, if the motion is successful, jurisdiction would revert to the court. Sec. 19 does not provide for automatic termination of the duty and appears to leave it to the court's discretion. Further, since there is no incentive to complete the process before a motion is filed, it may not be completed until one is filed. This is true since even after a motion is filed, if the Council determines that mediation and review is complete, the court may still require a litigant to go to the OAL. Further, Sec. 19 does not specify what must be accomplished within the specified time period. Read with Sec. 15, it would appear to include all efforts to voluntarily settle disputes so as to trigger Sec. 15b. Thus, Sec. 19 appears to give the Council and parties a timeframe to settle prior to a transfer to the OAL per Sec. 15c.

transferred cases retain only their Sec. 19 option of petitioning the court for reinvocation of jurisdiction.

Further, Sec. 15c provides for an extension of the ninety (90) day OAL review period by the Director of Administrative Law "for good cause shown". No other standard is provided; nor is any substance given to that standard. It is possible, therefore, if not probable, that this period will be enlarged given the complexities attenuating exclusionary zoning litigation despite the "expediting" language in the Act. Again, further legislation or judicial surgery is needed to insure that plaintiff must consent to any enlargement of time and, in the absence of consent, enlargement will not be granted except in the most extraordinary of cases, such as the death or illness of the ALJ.

This loose end should be resolved now or certainly prior to the actual transfer of any case. This is necessary because it is clear that a party subject to further delay by a finding of "good cause" will have absolutely no recourse to challenge such a decision. An interlocutory appeal is unthinkable in that context and there will be obvious pressure on an adverse litigant in a contested matter to "play ball" with the ALJ and his or her desire for more time. It is relevant to note here that in Mt. Laurel II the Supreme Court chose to select three special judges to provide for the "expeditious" handling of

Mt. Laurel cases. This was in spite of the fact that our trial judges have had extensive experience handling traditional zoning cases (which ALJ's do not). Further, even with their expertise, the three judges have not been able to resolve contested remanded cases, let alone those newly instituted, within any time remotely like 90 days. This case was remanded on January 20, 1983, and still awaits a final trial level ruling two and one-half years later.

Thus, without some precision given to the term "good cause shown" in Sec. 15c it is likely that the OAL review will be for more than ninety (90) days. For that reason and the lack of specificity as to the transmittal date, even the January 2, 1987, date for the issuance of the ALJ's "initial decision" is extremely unlikely to be achieved. Regardless, even then the matter will not have reached a stage comparable to the finality of the initial trial level.

Pursuant to N.J.S.A. 52:14B-10, the "initial decision" or ALJ recommendation is transmitted to the Executive Director of the Council who has an additional forty-five (45) days to "adopt, reject or modify" the recommendation. This would bring us to approximately February 16, 1987, and still the law provides for extensions in the discretion of the agency head, again "for good cause shown". N.J.S.A. 52:14B-10(c). Again, judicial clarification of the basis for such an extension is necessary prior to a transfer since nothing will be able to be done at the time of an abuse of this provision.

Thus, even under the most hopeful timeframe, the Act does not provide for the conclusion of the comparable trial level stage until February 16, 1987, over a year and a half from the effective date. Further, it is clear that the timeframe will be much longer for reasons previously stated.

Importantly, the "final" Council decision may be that substantive certification should not be granted or should be granted only if certain conditions are met. Pursuant to Sec. 14, the municipality need not agree to the conditions and there is no provision in the Act to require it to do so. The Act provides only that, in such circumstance, jurisdiction will revert to the court. Sec. 18.

Regardless, even the minimum timeframe provided for conclusion of the Council's review will mean that over four years will have elapsed since January 20, 1983 (the date of Mt. Laurel II) and almost three and a half years since the filing of this action.[1] For now, it suffices to say that such a delay is obviously unconscionable given the plain language of our Supreme Court's opinion in Mt. Laurel II (particularly since it is merely a delay of this court's action). See Mt. Laurel II, supra, 92 N.J. at 199, 200, fn. 1, 200, 212, 286, 289, 290-91, 293 and 341. This will be discussed further below when plaintiff

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[1] It should be noted that this plaintiff has been attempting to provide lower income housing in Cranbury since 1969 and the Urban League since 1974.

addresses the question of whether "transfer" should be permitted in this case.

4. Scope of OAL and Council Review: Assuming mediation and review can be triggered and the timeframe for such review is reasonable, the next issue is whether the scope of such review is broad enough to effectuate Mt. Laurel II compliance. Before addressing that issue below, it is necessary first to determine the intended scope of review and mediation which can be undertaken by the Council and OAL. Any case which is transferred under Sec. 16 will contain the following issues which are potentially in dispute:

a. fair share (and all attendant issues such as indigenous need, SDGP impact, region, present and prospective regional need, fair share allocation methodology, credits, phasing);

b. ordinance compliance (and all attendant issues such as ordinance provisions, site availability, site suitability, legality of means chosen for compliance (e.g. condemnation, development fees, etc.), financing, state or federal funding availability, phasing); and

c. builder's remedy (and all attendant issues such as vindication of constitutional mandate, provision of sufficient lower income housing, good faith, site availability, site suitability).

It is relatively clear that most issues raised by "a" and "b" above (fair share and compliance) can be addressed by the Council under authority granted by the Act. The Council's Sec. 14 power to grant substantive certification and its statutory power to review an ALJ determination in a contested case

transmitted under Sec. 16 certainly contains within it the authority to address most of those issues. Problems may appear in other cases where a municipality chooses a "novel" manner of compliance such as through acquisition, condemnation and the imposition of fees. These mechanisms are of questionable legality and are being tested in cases pending before the three special Mt. Laurel judges. Whether they are of the sort of legal issues which can be resolved by the Council or by an ALJ is questionable. The problem is not ripe for resolution here since the defendant is not proposing to use any novel mechanism. Its compliance approach is the standard set-aside method and utilization of a private, non-profit entity.

Before addressing "c" above, the builder's remedy, two major questions remain:

1. are provisions of the Act which affect the scope and nature of review (both procedurally and substantively) unlawful or unconstitutional; and

2. what effect, if any, must be given by the Council and ALJ to the present record before this court and prior rulings of the court.

a. Provisions of the Act raising legal or constitutional problems:

Many aspects of the Act which address how the Council and the ALJ shall evaluate fair share and compliance are subject to serious legal and constitutional attack under Mt. Laurel II. Examples include:

(1) Sec. 4b, definition of "Housing Region". This section specifies that regions shall consist of "no less than two nor more than four contiguous, whole counties..." In this matter, the court has ruled that the appropriate region for Cranbury Township is one which consists of more than four counties. In other matters, another Mt. Laurel court has utilized a region of less than two counties and not "whole counties". See VanDalen v. Washington Tp., Docket No. L-045137-83PW (decided Dec. 7, 1984).[1]

(2) Secs. 4c and 4d, definitions of "low income housing" and "moderate income housing". Set at the 50% and 80% standard respectively, they do not provide for any "reach" into the various lower income categories. This "reach" has been mandated by the special Mt. Laurel judges in several cases.[2]

(3) Sec. 5a - appointment of Council members. This presents a minor inconsistency with Sec. 7a. The former states that Council members be "balanced to the greatest extent practicable among the various housing regions of the State". The latter calls for the Council to "(d)etermine the housing regions of the State". Presumably, the term "extent practicable" has given guidance to the Governor in nominating members and the section will be truly implemented as members are appointed to fill vacancies once the regions have been established.

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[1] One cannot state, however, that it would be impossible to develop a scheme of regions which is reasonable and constitutional for Cranbury Township and all municipalities and which consist of between two and four whole counties. Until the Council establishes its regions, it would be premature to rule on the validity of this provision.

[2] This problem could be rectified by Council regulations and, therefore, would not be ripe for review until after the resolution of the matter in a specific case. Judicial interpretation should occur, however, prior to any transfer.

(4) Sec. 7 and Sec. 8 - Limiting the Council's power to adopt criteria, guidelines and procedural rules to matters of procedure and fair share. The Council appears to have no power to issue criteria and guidelines for a compliant ordinance. Secs. 10 and 11 provide legislative standards for a housing element but no regulatory power. While Secs. 13, 14 and 15 provide for Council (and OAL) review of the housing element, no power is given to adopt rules, criteria or guidelines. This appears consistent with the legislative intent to give muncipalities maximum flexibility to devise their own compliance programs. On the other hand, it raises serious questions as to why so much time is necessary simply to promulgate fair share standards and whether transfer is appropriate in a case where fair share has been determined and the only issues to be resolved by regulation relate to fair share. See also Sec. 12 which provides for Council review and approval of "regional contribution agreements", but no power to regulate, by rule, criteria or guideline, the form of such agreement, other than as explicitly provided in Sec. 12(f) "the duration and amount of contribution" in such agreements.

This is significant in considering whether to grant a transfer motion. Most of the delay accorded the Council and municipalities is simply for the Council to adopt regulations

relevant to fair share. While consistency in fair share methodologies is relatively important, it is hardly the type of concern which outweighs the public interest in getting on with the construction of housing.

Further, the Legislature was not concerned that courts would continue to resolve fair share issues. The Act does not shy away from inconsistencies or the duplication of effort in the fair share context. First, as will be demonstrated below, the legislative scheme contemplates a substantial role for the courts independent of the administrative process. Second, the Council will not necessarily be imposing a single fair share methodology pursuant to Sec. 7. Review will be given to municipal fair share plans per Sec. 14 which require them only to be "consistent with the rules and criteria adopted by the Council...". Lastly, consistency in fair share was not seen as a constitutional prerequisite by the Supreme Court, nor has it been an experience at the trial level with the three special Mt. Laurel judges. Note the Court provided for presumptive validity only of region and regional need determinations and not of fair share methodologies. Mt. Laurel II, supra, 92 N.J. at 216.

The fair share issue has already caused an enormous delay in realizing satisfaction of the mandate, generally and in this case. It seems particularly inappropriate for it to continue to act as such a delaying factor.

(5) Sec. 7c(1) - permitting one-to-one crediting against the fair share for "each current unit of low and moderate income housing of adequate standard...". Secs. 4c and d would provide that such housing is affordable to lower income households and "occupied or reserved for occupancy" by such households. The disjunctive in the last phrase is troublesome. It should be read to mandate appropriate resale or rerental controls in light of Mt. Laurel II.

More problematic is the failure in Sec. 7c(1) to limit the credits to units constructed or made newly available within the fair share period, e.g., since 1980.[1] The special Mt. Laurel II judges have concluded in unpublished opinions that pre-1980 units generally cannot be credited and that a credit depends on the unit being: 1) newly available after 1980; 2) occupied by an eligible household; 3) affordable to such a household; and 4) subject to resale or rerental controls. The reason is obvious: the fair share is intended to address a need which exists and is

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[1]This problem could be rectified by Council regulations and, partially, by interpreting the last clause ("including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households") as delimiting the type of unit which could be credited.

being created within the fair share period. The existence of a pre-1980, standard unit is irrelevant to the satisfaction of that need; particularly since it represents a unit and a household not counted in the need figure. Even if that household were to move, the net effect would not be to increase the supply of housing since the household would occupy another unit. (An exception might be made for elderly housing on the assumption that a "move" means death, transfer to institutional quarters or relocation with a relative.) Given the silence of the Legislature as to the date of construction, the court should interpret this section to mandate crediting only of post-1980 units. The Act would then be read consistent with known precedent, the constitutional mandate and common sense.

(6) Sec. 7c(2) - mandating "adjustments" to the fair share. No specificity is given as to how such adjustments are to be made and some of the criteria are very troublesome; such as: Sec. 7c(2)(b) ("established pattern of development") and Sec. 7c(2)(g) (the prohibitive costs "to the public" of "(a)dequate public facilities and infrastructure").[1]

(7) Sec. 7e - providing for ceilings on the municipal fair share. This is one of the most troublesome

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[1] Regulations could easily resolve these problems. For example, Mt. Laurel II recognizes the potential need to phase based on deference to the existing development and suggests care be given to implementation of a fair share plan where existing development may be affected., Mt. Laurel II, supra, 92 N.J. at 240, fn. 5, 280 and 331-332.

sections of the Act. If applied literally, it would clearly "favor" municipalities which have had the most exclusionary history. The use of the term "and any other criteria" results in such a broad delegation of authority as to be of questionable legal validity. The provision, however, is so vague that it might be salvaged by regulations. This section and Sec. 7c(2) are very suspect in light of the lack of upward adjustment regionally to address the failure to satisfy the regional fair share if downward municipal adjustments are permitted. While regulations could address this problem, it is serious. On its face, it calls for a mandated regional fair share deficit; something clearly unconstitutional.

(8) Sec. 9a - establishing the voluntary nature of participation with the Council. First, whether to adopt a resolution of participation is voluntary and, second, the adoption of such a resolution only results in the required submission of a housing element. Sec. 13 provides that the municipality still retains the total discretion as to whether to seek substantive certification. The only "exposure" a muncipality has is that ultimately it will be subject to judicial review. This underscores the need for maintaining an effective judicial presence and a class of plaintiffs via the builder's remedy. Failure to adopt a timely resolution of participation permits a litigant not to exhaust administrative remedies. Sec. 9b.

Pursuant to Sec. 16a, failure to file a housing element and fair share plan, results in reversion of the jurisdiction of the court of a transferred case. Pursuant to Sec. 16b, failure to adopt a timely resolution of participation eliminates any exhaustion requirement (by inference). The Sec. 16b exhaustion requirement is also waived by Sec. 18 if a municipality fails timely to file its housing element or, if pursuant to Sec. 14, the municipality fails to achieve substantive certification in a timely manner.

Plaintiff has interpreted these sections in the context of a Sec. 16a transfer as mandating mediation/review and triggering a Council determination on whether or not to grant substantive certification. Lastly, Sec. 19 provides for possible reversion to the court if the review and mediation process is not completed in a timely manner. The issue which all of this triggers, of course, is the builder's remedy, since it stands as the only thing which will create any "exposure" for a recalcitrant municipality. This will be addressed further below.

(9) Sec. 9a presents another problem relative to timing. While the resolution of participation must be filed on or before November 2, 1985 (four months after the Act's effective date), the housing element may not be submitted until January 1, 1987, under a worse case scenario (i.e. under Sec. 7 the adoption by Council of criteria and guidelines seven months after January 1, 1986, or August 1, 1986 and filing of the housing element seven

months thereafter or January 1, 1987 pursuant to Sec. 9a). Consider this timeframe in light of the Sec. 19 pressure to complete review and mediation on or before October 2, 1986; almost three months before the outside date a housing element may have to be filed and only two months after the outside date when the Council's criteria and guidelines must be adopted per Sec. 7. Consider it further in light of the previously cited references in Mt. Laurel II for prompt satisfaction of the constitutional mandate. The problem appears to be sloppy draftsmanship. In any event, the specific should control over the general. The fifteen (15) month timeframe of Sec. 19 for transferred cases should be the delimiting provision regardless of Sec. 9a.

(10) Sec. 9b presents a problem for a potential litigant. Mt. Laurel II appears to require that a potential plaintiff first seek voluntary compliance before suing. Mt. LaurelII, supra, 92 N.J. at 218. If still required, it would be simple for a recalcitrant municipality not to adopt a resolution of participation until such a request is made and then immediately adopt one and submit a fair share plan and housing element before litigation is filed. This would totally take the sting out of the Sec. 9b "exposure" of waiver of the obligation to exhaust.[1]

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[1]This could be rectified by removing the "good faith" requirement as a pre-litigation obligation in light of the Act's admonition that failure timely to adopt the resolution creates the exposure of litigation. In such a case, attempting to achieve voluntary compliance before suing could be assumed to be a futile gesture where a municipality has failed to adopt a timely resolution or to file a timely housing element and fair share plan.

(11) Sec. 11a states that "(i)n adoptings its housing element...the municipality shall establish that its land use and other relevant ordinances have been revised to incorporate the provisions for low and moderate income housing". This appears to be somewhat inconsistent with Sec. 9a which calls for mandatory submission of the housing element and the apparent discretionary submission of "any fair share ordinance introduced and given first reading and second reading...which implements the housing element. It may further conflict with the MLUL process by which the element is adopted not by the Governing Body but by the Planning Board prior to the adoption of responsive zoning ordinance amendments. See Secs. 29 and 30; N.J.S.A. 40:55D-28 and 62.[1]

(12) Sec. 11a(3) - providing that resale and rerental controls last for not less than six years. See also Sec. 12f and Sec. 20e. A resale control of seven (7) years would appear to be acceptable. This may prove inconsistent with requirements imposed by the special Mt. Laurel judges that the controls last for as long as possible (25-30 years) and the

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[1]The most reasonable interpretation of these conflicts would interpret Sec. 9a as requiring submission of an adopted proposed compliance ordinance with the housing element and distinguish between municipal "adoption" of a housing element for Council submission purposes and planning board "adoption" for MLUL purposes. It also does not make sense to have substantive certification where the compliant ordinance has not been adopted since the Council does not possess power to order adoption.

admonition in Mt. Laurel II, supra, 92 N.J. at 269, favoring such controls.[1]

(13) Sec. 11b and 23 - providing for phasing of the fair share. In most cases (municipalities with fair shares of 500 units or greater) consideration is given to phasing periods of greater than six years (or the period of repose). These sections present some difficulties; particularly in light of the admonition in Mt. Laurel II that phasing should be sparingly used and that the housing is needed now. Mt. Laurel II, supra, 92 N.J. at 219, 280 and 331-332. Sec. 23 also presents potential due process and logistic problems. See Sec. 23b and c (re: phasing of particular developments) and Sec. 23d (e.g., "to prevent sites...from being used for other purposes..."). Also, deference is to be paid, per 23e(3) to historical growth patterns which may "reward" the more exclusionary municipalities.[2]

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[1]This most likely cannot be saved by regulation since it is an express statutory statement as to the municipal obligation. The power to regulate and adopt criteria and guidelines is limited to fair share issues and does not appear to allow for modification of this provision.

[2]On the other hand, whereas phasing appears to be mandated, the specific way in which it is implemented is not mandated by the Act which specifically refers to the timeframes as "guidelines". See Sec. 23e. Most of the suggested criteria are matters which the courts have been open to considering in any event. See Allan-Deane v. Tp. of Bedminster. Attacks on the facial validity of these sections would be inappropriate. Once a specific plan is approved, the courts will be able to evaluate it in the context of Mt. Laurel II.

(14) Sec. 11c and 12 - describing "regional contribution agreements" by which up to 50% of the municipal fair share may be satisfied by a "transfer (of units) to another municipality". See Sec. 12a. This poses very serious constitutional problems. Mt. Laurel clearly indicates that one of the negative constitutional effects of exclusionary zoning practices has been the polarization of our society - economically and geographically; the locking of the poor into urban ghettos. Mt. Laurel II, supra, 92 N.J. at 278. These sections would appear to reinforce that polarization. Further, Sec. 12b presents a problem of double counting fair share. It provides that the "sending municipality" receive a "credit against its fair share for housing provided". Presumably, the receiving municipality will also demand a "credit". Unless resolved, each transferred unit will be counted twice. Another question is how these sections will be related to Secs. 11b and 23 regarding phasing. It would seem clear that units "transferred" need not be phased since none of the phasing criteria are applicable to transfers. If anything, the provisions on phasing would mitigate against

phasing any "transferred" units.[1]

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[1]The transfer sections are clearly suspect. The purpose of the fair share methodology is to locate areas in which the development of lower-income housing is appropriate. While no methodology is perfect, the 50% transfer is so substantial as to make any methodology ineffective. On the otherhand, given various practical realities, most "sending" municipalities cannot be realistically expected to be able to generate their full fair share. Also, "receiving" municipalities will be, typically, just those which could not provide any conventional means of satisfying their indigenous need or fair share obligations, if any. "Transfer" would be plainly inappropriate for "sending" municipalities which cannot do that. Thus, the constitutional question may really turn on the specific facts of each municipality. These provisions would be clearly unconstitutional if invoked by certain municipalities (such as the defendant herein but would be a practically sound accomodation of the constitutional mandate if invoked by others; such as relatively built-up suburbs. A legal question may arise as to whether the failure to "propose the transfer" by such municipalities is unreasonable under Mt. Laurel II. Transfer may be a way to avoid problems with a lack of adequate vacant land and could mitigate against use of vacant land as a criterion for fair share adjustments (per Sec. 7c(2)(f) and phasing (see Sec. 23a[3]). The effect of the provision may be to open up many municipalities to a Mt. Laurel II attack; attacks which may be mounted by urban municipalities or citizen groups to prevent a municipality from phasing or reducing its fair share unless it is willing to pay for transfers. While Sec. 11d, discussed below, would not require municipalities to build housing, it would not stand in the way of conditioning phasing or mitigating fair share adjustments on the agreement by an affluent municipality to pay for transfers.

(15) Sec. 11d - providing that municipalities need not "raise or expend municipal revenues in order to provide low and moderate income housing". If read literally, this would defeat the Mt. Laurel II doctrine since needed infrastructure, public services and tax abatements would not be forthcoming.[1]

(16) Sec. 13 - providing for the voluntary request for substantive certification. As previously discussed, absent the threat of litigation and the builder's remedy, there is no incentive to seek certification. This would be a greater problem if the Act were read to preclude a litigant in a "transfer" case from triggering mediation and review and forcing an ultimate Council ruling on substantive certification. Further, in light of Secs. 14 and 15, a question arises as to whether the petition for substantive certification can be voluntarily withdrawn if an objector appears. Clearly, under Sec. 14, a municipality need not accept Council conditions for obtaining certification; that is, it need not "refile its petition with changes satisfactory to the Council".[2] The Act is best read to permit a municipality to withdraw if an objector appears but to permit a litigant to force review either by the court or Council through

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[1]This is rectified by a strict reading, consistent with Mt. Laurel II, that the municipality need not directly finance the actual construction of the units. In support, see Sec. 11a(4), (5), (6) (7) and (8).

[2]This underscores the need for potential litigants and, in turn, an effective builder's remedy.

the filing of a complaint. The objector could become a litigant if the municipality withdrew; the withdrawal resulting in no exhaustion requirement. See 9b and 16b. The major apparent flaw in the Act is the lack of remedial power delegated to the Council to obtain compliance by a "recalcitrant municipality": one which does not adopt a resolution of participation, file its housing element and fair share plan, petition for substantive certification, agree to conditions for substantive certification or adopt implementing ordinances. The solution to this "flaw" is found in the builder's remedy and the continued availability of judicial relief. This will be discussed further below.

(17) Sec. 15c - providing for transfer to the OAL of any case were mediation is unsuccessful. No time limit for mediation is imposed except in litigated cases and then only to the extent to which Sec. 19 acts as a time limit.[1]

(18) Sec. 22 - providing for a 6-year repose for municipalities which have settled exclusionary zoning litigation "prior to the effective date of this act". Cherry Hill in Camden County is now attempting to use this section to get repose even

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[1]This obviously must be corrected by procedural rules. The Council should not be permitted to allow fruitless mediation to go on. This would clearly be contrary to the constitutional mandate that satisfaction of the fair share be accomplished expeditiously.

though the relevant "settlement" provided for no lower income housing either on the developer's tract or anywhere else; nor did it receive judicial approval or a judgment of repose.[1]

(19) Sec. 25 - providing powers to municipalities to actively engage in housing production. Its elimination of "condemn or otherwise acquire" from previous drafts suggests that such action is illegal. This issue is presented by several municipal compliance programs which contemplate condemnation as one mechanism to effectuate compliance and will have to be resolved judicially. No case raising such an issue should be transferred since this is a matter peculiarly judicial in nature, as opposed to administrative.

(20) Sec. 28 - providing for a moratorium on granting the builder's remedy in Mt. Laurel II litigation until as late as January 1, 1987. See Secs. 7 and 9. The period could be shortned if the Council adopts its criteria and guidelines earlier than the latest possible date (August 1, 1986). While this does not directly address fair share and compliance, it and the builder's remedy generally are crucial to the overall constitutionality of the Act and will be separately addressed below.

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[1]The problem could be easily rectified by an interpretation of the word "settlement" to include the criterion of a judgment of repose as part of the "settlement".

b) Utilization of the Present Record:

As previously indicated, a "transfer" per Sec. 16a would trigger the mediation and review process.[1] If that process is unsuccessful, Sec. 15c would trigger an OAL hearing. The question is: what use, if any, must be given to the present record in this case; that is, what will be mediated and reviewed and the subject of the "contested case"?

The present record includes a determination of the implications of the SDGP, fair share, non-compliance, and resolution of numerous issues affecting the builder's remedy. The defendant has prepared a new ordinance which, as to its land use controls, is relatively unflawed. Perhaps the only remaining contested mattersbetween the parties is the issue of site suitability for the award of the builder's remedy and phasing. The initial two prongs of the remedy have been satisfied: vindication of the constitutional mandate and commitment to provide a substantial percentage of lower-income housing. Thus, of the multiplicity of factual and legal issues presented by a Mt. Laurel II case, all have essentially been resolved.[2]

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[1] Again, Sec. 16a does not explicitly indicate that mediation and review would follow a transfer. This must be judicially read into the Act.

[2] It is true that the court has yet to rule on the compliance of the defendant's new ordinance. However, the master has indicated his support for the ordinance and, in the absence of major concerns by plaintiffs (given the severe adversity with which this case has been litigated), one can assume a finding of compliance even subject to possible modifications.

Thus, having fully litigated a Mt. Laurel II claim, plaintiff now raises the question of the significance of the extensive record created. The defendant clearly anticipates completely relitigating all issues. This is consistent with the actions of a defendant in another transfer case which explicitly seeks "an Order rescinding all previous Orders of the Court inconsistent with the transfer of this matter..." The Order desired states, in relevant part:

> ORDERED, 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 Order.

The defendant there is not specific as to which previous orders or judgments are being referenced or how and to what extent they would be inconsistent.

The Act, itself, is silent. No substance is given to the term "transfer". However, given the sixty (60) day line drawn between a 16a and 16b case, the use of a term like "transfer", and the divestiture of jurisdiction during transfer, it appears that the Legislature intended the Council to review and mediate what is left of this case. Since numerous issues in this case are no longer left for mediation and review, but are resolved by orders and judgments, those matters are no longer

reasonably subject to mediation and review.[1]

On the other hand, parties are always capable of further settlement discussions which, if successful, may, with court approval, modify prior rulings or orders. This has been the experience in Mt. Laurel II litigation. However, if settlement efforts, subsequent to the entry of a judgment or order, fail, then the judgment or order stand.

The legislation, then, is most reasonably read to permit mediation on all issues. However, the OAL "contested case" requires adjustication only of those issues not previously resolved by the court by judgment or order. In the context of this case, that would essentially mean that as a result of transfer:

1. possibly 15 months or more would be spent attempting to mediate site specific relief and phasing;

2. upon the lack of success of mediation efforts, those issues alone would go to the OAL for a determination; that is, whether the grant of substantive certification should be conditioned on site specific relief and phasing of the fair share permitted.

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[1] See Sec. 3. The purpose of "transfer" is not to relitigate but to use the Council to resolve disputed issues. Where issues are no longer disputed; that is, they have been settled or judicially resolved, the Council has no function.

The effect of transfer, therefore, would be to present the site specific relief issue and phasing to the ALJ and Council prior to its probable ultimate consideration by this court and to delay those determinations for almost two (2) years. As has been indicated above, failing successful mediation, the most plaintiff can hope for is that the Council will condition an award of substantive certification on municipal provision of site specific relief. If the municipality then refuses, the matter returns to this court per Sec. 18 for ultimate review. If the Council refuses to so condition an award of substantive certification, presumably plaintiff could seek appellate review and prevail on such an appeal.

This, of course, presumes that the Council and OAL have jurisdiction to review site suitability disputes in the context of the builder's remedy. If they do not, "transfer" is clearly ridiculous and, more importantly, the Act itself may fail. The only other avenue is for the court to condition transfer on an award of the builder's remedy.[1]

Before addressing the builder's remedy issue, it should be noted that legally the "transfer" need be viewed an nothing

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[1]This would require a site suitability hearing prior to a decision to grant a transfer motion.

more than a change of venue from the Superior Court, Law Division, to the Council and OAL. Viewed as such, it may be given the simplest and most realistic interpretation, one which must have been intended by the Legislature in the absence of explicit language to the contrary (of which there is none).

The Rules of Court provide some guidance. Thus, R.1:13-4 addresses the transfer of actions to administrative agencies which were improperly filed in court; that is, where the court has no subject matter jurisdiction. In such cases, the court is without power to rule on any issue other than lack of jurisdiction and the transfer is a means to put the matter in its proper forum.

The court here, however, had essentially exclusive jurisdiction prior to the Act and its orders and decisions were well within its subject matter jurisdiction. The Act did not retroactively divest the court of that jurisdiction. It only provided a new mechanism, prospectively, to resolve disputes; that is, matters unsettled or not subject to court orders or decisions.

The use of the Council as an alternative mechanism to resolve matters still in dispute is up to the court's discretion. The effect of a "transfer" in that context is more akin to an R.2:5-5 decision to refer those disputed aspects of a matter back

to an administrative agency for a complete record or R.4:3, et seq. relating to transfer of actions among the various trial divisions of the Superior Court. In all such cases, prior orders and decisions stand and the new forum is used only to resolve issues still in dispute.

This interpreation is consistent with the Transfer Act, N.J.S.A. 52:14D-1, et seq. Pursuant to N.J.S.A. 52:14D-7, an inter-agency transfer does not affect on-going actions or proceedings..."nor shall the transfer affect any order or recommendation made by, or other matters or proceedings before the agency."

The Legislative scheme, in this light, becomes relatively clear. Further, it is most consistent with the plain language of the Act. As will be discussed further below, the Legislature clearly did not envision a major departure from the on-going process to satisfy the constitutional mandate. The Act was intended to supplement, not emasculate, existing compliance mechanisms; to further, not retard movement toward satisfaction of the constitutional mandate.

5. The Builder's Remedy Under the Act: Perhaps the Act's most serious potential defect - both legally and constitutionally - is its treatment of the builder's remedy. The issue here is greater than simply the constitutionality of Sec. 28, the "moratorium" provision. The question presented is

whether the builder's remedy is at all viable; that is, whether the Council or the OAL have the legal authority first to consider and, second, to award that relief to a litigant.

The reason why the issue is so fundamental is because of the voluntary nature of participation under the Act (see Secs. 9a and 13). No municipality is required to participate before the Council and no municipality is required to seek a substantive certification. The latter is true even if the municipality has adopted a resolution of participation and filed its fair share plan, housing element and proposed compliant ordinance. In fact, it appears that a municipality could withdraw its petition for substantive certification if an objector appears and, in any event, it need never agree to refile its petition to accord with conditions imposed by the Council. See Secs. 14 and 15.

The Act is strictly voluntary. It is, on the other hand, as the Legislature has explicitly stated, both a comprehensive "scheme...which satisfies the constitutional obligation" and an alternative "to the use of the builder's remedy as a method of achieving fair share housing". Sec. 3. However, it is only those things if a municipality voluntarily undertakes to utilize the scheme.

The Supreme Court has already spoken on this issue and, after the most careful and extensive deliberation, held that the

satisfaction of this constitutional mandate cannot rest upon voluntary compliance. It reached this conclusion reflecting on the history of voluntary action subsequent to Mt. Laurel I. It should be remembered that the first trial level decision in this area was rendered in 1971[1]; twelve (12) years prior to Mt. Laurel II. Mt. Laurel I, itself, was rendered in 1975; eight (8) years prior to Mt. Laurel II.

The Supreme Court, therefore, had ample opportunity to evaluate whether and, if so, to what extent, "voluntary" compliance was a reasonable likelihood. In fact, compliance was not purely "voluntary" prior to Mt. Laurel II. The threat of litigation was prevalent. Many muncipalities had been sued by both public interest and private (for-profit) plaintiffs.

The six consolidated cases which resulted in the Mt. Laurel II decision involved approximately twelve (12) municipal defendants, two municipalities participating as amici curiae (which were separately involved in their own Mt. Laurel II action) and fifteen (15) Middlesex County and three (3) Bergen County municipalities which were not the subject of the appeals; in all, approximately 31 municipalities. Other municipalities were also under litigation; including, but not limited to,

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[1] Oakwood-at-Madison, Inc. v. Madison Tp., 117 N.J. Super. 11 (Law Div. 1971). The trial decision which was the basis of the Court's ruling in Mt. Laurel I was rendered in 1972. Southern Burlington Co. NAACP v. Tp. of Mt. Laurel, 119 N.J. Super. 164 (Law Div. 1972).

twenty-seven (27) in Morris County (one of which, Chester, was also separately before the Court in Mt. Laurel II). Most of these municipalities - all but three (Franklin, Clinton and Chester - which had also been sued by the Public Advocate) had been sued by public interest groups. Thus, prior to Mt. Laurel II, at least as many as sixty (60) municipalities (and clearly many, many more) had been sued, mostly by public interest groups.

Despite this history of litigation with public interest plaintiffs, the Court acknowledged that more was needed. The Court was aware of the reasonable likelihood that public interest sponsorship for Mt. Laurel II litigation was waning. Representation by counsel at oral argument and subsequent history have confirmed that fact. The Public Advocate has not filed any Mt. Laurel II actions since 1978 (other than amicus presentations in other matters) and, in fact, dropped its Morris County litigation against fifteen of the original 27 municipalities sued partially on the basis of inadequate resources. Morris Co. Fair Housing Council v. Boonton, 197 N.J. Super. 359, 363 (Law Div. 1984). The National Committee Against Discrimination in Housing ("NCDH"), the original funding source for this and the Middlesex County cases, is nearly out of business and is no longer participating in this case. The matter is being pursued by the Constitutional Law Clinic at Rutgers. The resources limitation

on that group is obvious. The Suburban (now Metropolitan) Action Institute, which funds the Mahwah case, has barely been able to pursue that action, let alone the three others initially sued. In fact, it has been the presence of builder litigants, heavily relied upon by the public-interest plaintiff since Mt. Laurel II that has made the Mahwah case financially manageable. Legal Services programs undertook only one Mt. Laurel case other than Mt. Laurel itself (East Windsor). That case was settled without trial and the Mt. Laurel case was picked up by the Public Advocate in 1975.

As the trial court noted in J.W. Field Co., Inc. v. Tp. of Franklin, Docket No. L-6583-84 PW (Law Div. 1985) every suit since Mt. Laurel II has been brought by a builder. (Slip Op., pg. 4). This is largely confirmed by plaintiff's knowledge that the only non-builder Mt. Laurel II suit brought since 1983 is one against Cherry Hill Township and that only because of an alleged misuse of the builder's remedy by a builder plaintiff in a prior action.

Thus, at the oral argument of the Mt. Laurel II consolidated cases, the Court addressed its concern that there was no plaintiff class to continue the vindication of the Mt. Laurel mandate. Colloquy ensued as to the use of attorney's fees and/or the builder's remedy (eschewed as a routine remedy in 1977 in Madison). The decision in Mt. Laurel II represents the Court's resolution of this problem.

Again, it should be noted, that the Court felt it had a problem in the first place because of the lack of voluntary compliance with the constitutional mandate. Over and over again, the Court reiterated its frustration and impatience. See Mt. Laurel II, supra, 92 N.J. at 199, 200, 200 fn. 1, 212, 286, 289 290-91, 293 and 341.

Its primary goal in the opinion was to encourage voluntary compliance. Mt. Laurel II, supra, 92 N.J. at 214. Its second was to simplify litigation and third was "to increase substantially the effectiveness of the judicial remedy". Id. Thus, to get compliance, the Court knew it needed a clearly defined obligation and "exposure" to those who did not voluntarily comply. "Exposure" would be effected by encouraging litigation. This encouragement would be effected by clarity to the mandate, expeditious resolution of disputes and the creation of a plaintiff class willing to bring lawsuits. Thus, the Court turned to the builder's remedy.

The Court had already held that:

> Here we have plaintiffs who assert interest in one of the basic necessities of life and seek protection that, if denied, would similarly affect many, many poor people.

Mt. Laurel II, supra, 92 N.J. at 307. In that context, it was clear to the Court that the judicial attitude toward municipalities

could not be "that the Mount Laurel obligation is a matter between them (the municipalities) and their conscience", Mt. Laurel II, supra, 92 N.J. at 341.

Thus, the Supreme Court held that the builder's remedy and the threat of builder litigation is essential to the satisfaction of the constitutional mandate. It is completely irrelevant whether the remedy, itself, is viewed as being of constitutional magnitude or rather in aid of the vindication of a constitutional wrong. The point is that, as to the vindication of this constitutional mandate, the issue has been resolved.

Given this background, one can consider how the Legislature viewed the builder's remedy and the threat of builder litigation in the context of the Act. Plaintiff's position is as follows:

1. if the builder's remedy cannot be awarded in a case transferred per Sec. 16a or when exhaustion is required per Sec. 16b, then those provisions of the Act are unconstitutional;

2. the builder's remedy can be awarded in a case transferred per Sec. 16a or when exhaustion is required per Sec. 16b and, therefore, those provisions are not unconstitutional.

The first point above follows from the rulings of the Supreme Court in Mt. Laurel II for several reasons:

a. First, Secs. 16a and b cover all possible cases brought to vindicate the constitutional mandate. If Mt. Laurel II litigation will rarely result in a builder's remedy, then no builder is likely to sue to vindicate the constitutional

mandate.[1] See discussion of Madison in Mt. Laurel II, supra, 92 N.J. at 279.

b. Second, no other plaintiff class is adequate to bring such actions. Mt. Laurel II is witness to the Court's opinion as to the ability of the public interest bar to carry this responsibility and there is no incentive in the Act or cases which would attract any other class of plaintiffs; e.g. a modification of the rules governing the award of counsel fees or direction and funding to the Public Advocate. The counsel fee remedy would be inadequate, in and of itself, given the tremendous front-end and carry costs inherent in Mt. Laurel II litigation.

c. Third, no other incentive exists for voluntary compliance. If no builder's remedy can be achieved, plaintiffs in transferred cases will drop out and no incentive will exist for the municipality to pursue certification.

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[1] It may be that a rare builder or landowner will do this but very, very unlikely. Attaching a Mt. Laurel II count to an arbitrary and capricious challenge would jeopardize an early resolution of the non-Mt. Laurel II claim. The only hope for site specific relief would come from whatever leverage Sec. 15c gives by preventing substantive certification in a contested matter prior to an OAL hearing and the requirement in Sec. 10f that the housing element include a "consideration of lands of developers who have expressed a commitment to provide low and moderate income housing". Neither is likely to give any encouragement to a potential litigant. Further, if no builder's remedy would be required by the Council or OAL as a condition of receipt of substantive certification, no municipality would be foolish enough to permit reversion to the jurisdiction of the court per Secs. 9a, 18 and 19.

This last point should be obvious. The Act, itself, creates no incentive whatsoever to voluntary compliance outside of the scope of litigation. In fact, it is for this reason that it is fairly clear that the Legislature fully intended that the builder's remedy remain as the major, if not only, incentive to achieve voluntary compliance. In this regard, the Legislature did not depart one iota from the Court's findings and the lessons of history.

Thus, it is apparent that the Legislature did not intend to emasculate the builder's remedy at all. In fact, the Legislature intended to use it in exactly the same manner as the Supreme Court. This is witnessed by the fact that, in numerous sections of the Act, it is the threat of litigation alone which is used by the Legislature to encourage voluntary compliance.

First, one may look to the findings and declarations in the Act. Sec. 2, which contains the findings clauses, makes no reference to the builder's remedy at all. The Legislature is simply articulating the need for "a comprehensive planning and implementation response to the constitutional obligation..." and reiterating the Court's own statement that to the extent such a response is legislatively provided, its role "could decrease". See Secs. 2b and c.

In Sec. 2d, the Legislature finds that "state review of the local fair share study and housing element" is "an essential

ingredient to a comprehensive planning and implementation response". In fact, such review is an "essential ingredient" to the scheme created by the Legislature for a non-judicial mechanism which would provide "a comprehensive planning and implementation response to (the) constitutional obligation". Sec. 2c. The threat of litigation, however, is the only leverage used by the Legislature to assure itself that:

1. either municipalities voluntarily choose to utilize the scheme in the Act; or

2. the courts would remain available as a guarantor of compliance or, at least, as an alternative vehicle available to achieve compliance.

The legislative purpose, then, was not to supplant judicial enforcement but to supplement it. This is explicitly stated in Sec. 3:

> (I)t is the intention of this Act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

Immediately precedent to that statement is the Legislature's declaration for its preference for the mediation review process over litigation as a means of dispute settlement. Again, there is no declaration or intent to supplant litigation or the builder's remedy; merely to supplement that method and mechanism with another, "preferred" means.

Legislative reliance on the potential for litigation as leverage for voluntary compliance can be found in the following sections:

a. Sec. 9b provides for a loss of the exhaustion requirement in Sec. 16b cases for any municipality which does not adopt a resolution of participation on or before November 2, 1985, and which is sued prior to the filing of its fair share plan and housing element;

b. Sec. 12b provides for use of regional contribution agreements "in an exclusionary zoning suit". See also Sec. 17b;

c. Sec. 16a provides for only discretionary, not mandatory, transfer of existing Mt. Laurel II cases;

d. Sec. 16a provides that where a case is "transferred" to the Council from the Superior Court, "jurisdiction shall revert to the Court" if the defendant fails timely to file its housing element and fair share plan per Sec. 9a;

e. Sec. 16b provides that exhaustion is required only if a defendant timely adopts a resolution of participation per Sec. 9a;

f. Sec. 17 grants only a rebuttable presumption of validity, in subsequent litigation, to housing elements and implementing ordinances which have been granted substantive certification. The courts, both appellate and trial level, therefore, act as reviewers of Council approvals. See also Sec. 17c;

g. Sec. 18 provides for elimination of the exhaustion requirement in Sec. 16b exclusionary zoning litigation where a municipality fails timely to submit its housing element. It also "expires" upon Council's rejection of substantive certification or municipal failure timely to adopt changes required by the Council. The time period cannot be extended without agreement "by the Council and all litigants";

h. Sec. 19 provides that the exhaustion duty may be lifted where mediation and review are not completed within a specified timeframe;

i. Sec. 23 provides for judicial imposition of phasing; and

j. Sec. 28, attempting to affect a "moratorium" on the award of a builder's remedy, does not preclude the remedy from ultimately being granted and does not preclude pursuit of exclusionary zoning litigation by non-profit or public plaintiffs or even by a for-profit developer. This is consistent with the Court's treatment of builders who have been denied the remedy but also still deemed to have standing to pursue vindication of the mandate. See Mt. Laurel II, supra, 92 N.J. at 316 and 321.

From this perspective, the overall intent of the Act is clear. The Legislature sought to provide a means by which voluntary compliance with the constitutional mandate could be achieved - just as did the Supreme Court in Mt. Laurel I. Where the Court provided a judicial mechanism, the Legislature provided one which is administrative. However, both rely on the remedies utilized in Mt. Laurel II as the leverage to assure that either voluntary or involuntary compliance would occur. The Legislature did not reject the Court's findings that it was not the mandate which had failed but its administration. Just as the Court deemed the threat of litigation as essential to that administration, so did the Legislature.

The question then is how the Legislature intended a transferred matter to be handled with regard to the builder's remedy. The following depicts various scenarios and how they would be handled under this Act:

1. neither party in a 16a case moves for "transfer": the litigation proceeds to a judicial resolution per Mt. Laurel II;

2. a party in a 16a case moves for "transfer", and the motion is denied: the litigation proceeds to a judicial resolution per Mt. Laurel II;

3. a party in a 16a case moves for a "transfer", and the motion is granted: the litigation is "transferred" to the Council and the case is essentially treated as if 16b "exhaustion" was mandated and Secs. 14 and 15a(1) and b "objector" status occurs. The entire case and controversy (including whether to condition certification on granting site specific relief) moves to the Council for "mediation and review" per Sec. 15a(2); that is, the motion to transfer is deemed the functional equivalent of timely adoption of a resolution of participation per Secs. 9a and 16b and request for certification per Sec. 13.

4. if the "transferred" municipality fails timely to file its housing element and fair share plan per Sec. 16a: jurisdiction reverts to the court which proceeds to a judicial resolution per Mt. Laurel II;

5. if the Council fails timely to complete its mediation and review: jurisdiction may revert to the court per Sec. 19. If jurisdiction does not revert, more time will be available to complete the process. If jurisdiction does revert, the court will proceed to a judicial resolution per Mt. Laurel II;

6. if the mediation and review process is successful per Sec. 15b: the Council may grant substantive certification per Sec. 14. Presumably, the success of the process will mean a non-builder's remedy site specific settlement has occurred which is satisfactory to the builder. If approved by the Council (assuming the municipality makes such approval a condition of the "settlement"), that would resolve the matter;

7. if the mediation and review process is unsuccessful per Sec. 15c: whatever is left of the case and controversy (even if only the issue of site specific relief) is transmitted to the OAL and handled as a "contested matter". The OAL will then render an intial decision which may include recommendations that substantive certification should be granted or denied or denied subject to conditions and site specific relief should be granted or denied or granted subject to conditions.

The Executive Director of the Council then reviews the decision and renders an opinion:

a. if substantive certification is granted and site specific relief is not required as a condition of certification: the developer could appeal to the Appellate Division both the grant of substantive certification and denial of site specific relief as a condition of certification. If he prevails on either, the matter would be remanded to the Council. If he prevails only on reversing substantive certification, presumably he would drop out of the case; although he could legally continue as an objector. If he prevails on site specific relief then the matter would be remanded and such relief would be a condition of obtaining certification. If the municipality refuses to refile per Sec. 14b in compliance with the condition, the matter reverts to the courts per Sec. 18. In light of the Appellate Division ruling and the law of the case doctrine, the trial court would essentially be engaged in an R.1:10-5 proceeding.

b. if substantive certification is granted subject to provision for site specific relief: the municipality would not have the right of appeal. Per Sec. 14, it must decide whether to accept the condition. If it does not, Sec. 18 provides for reversion of jurisdiction to the court.

c. if substantive certification is denied: jurisdiction in Secs. 16a and b cases would revert to the court per Sec. 18 for resolution per Mt. Laurel II. The municipality would appear to have no right of direct appeal to the Appellate Division as jurisdiction vests at the trial level; a procedure consistent with the widsom of Mt. Laurel II that only fully adjudicated, compliant (albeit "under protest") ordinances be appealable. Mt. Laurel II, supra, 92 N.J. at 214, 285-290.[1]

The above presents an internally consistent framework for the resolution of Sec. 16a cases whether or not transferred. It is consistent with the Act and Mt. Laurel II and can readily be presumed to be representative of the legislative intent.

The only remaining issue is the effect of the Sec. 28 moratorium on the court's ability to grant a builder's remedy. While resolution of this issue is not essential before ruling on a motion to transfer, certain issues arise which should be considered.

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[1] It appears that in non-Sec. 16 cases, a Council determination not to grant substantive certification would be directly appealable by the municipality. This also is consistent with Mt. Laurel II since it was only the context of litigative adversity which triggered the Court's concerns for the single appeal mode. A non-Sec. 16 "objector" (see Secs. 14 and 15a[1]) would also be entitled to directly appeal the grant of certification. The effect of court approval would only be to grant a rebuttable presumption against future litigation and not repose per Mt. Laurel II.

It should be noted that the moratorium appears to have no obvious or obscure purpose with regard to other provisions of the Act. There are only two possible cases in which the remedy would be granted: 1) a case which is not transferred per Sec. 16a or where exhaustion is not required per Sec. 16b; or 2) a case which is transferred but where the remedy is granted as a condition of transfer.

In the first type of case, there is literally nothing to be gained by the moratorium since the case will proceed in the judicial forum and will be largely unrelated to anything occurring before the Council. There is no reason to await any action by the Council prior to granting the remedy and no harm would occur to the administrative process by granting the remedy.

While the issue of the constitutionality of the moratorium may not be ripe for review, it appears that Sec. 28 is on the most tenuous of constitutional grounds. It is a clear attempt by one constitutional entity to circumscribe another constitutional entity's powers which are derived directly from the Constitution itself. Further, the attempt is being made in a context that serves no apparent purpose.

While the legality of Sec. 28 may be able to await a ripe circumstance for review in the first type of case, it may be ripe now in the second type. In cases where a transfer is being

requested per Sec. 16a, it may be appropriate to approve a transfer only on the condition that the remedy be granted. This is necessary if the Court finds that the Council is not empowered to condition a grant of substantive certification on an award of site specific relief (using the same standards for such an award as is contained in Mt. Laurel II).

Clearly, no transfer would be constitutional if the builder could not obtain a builder's remedy. The vindication of the constitutional mandate is based on builder litigation or the threat of such litigation - both in Mt. Laurel II and the Act. Without the remedy, no threat of litigation exists. Therefore, a "transfer" must include either the award of the remedy by the court or the potential for its being required by the Council as a precondition of substantive certification.

If the Council is found not to have that power, then either a transfer cannot be granted or it can only be granted after the court awards the builder's remedy (or site specific relief is settled). If the court determines to grant a transfer, in that context, it must then address the legality of Sec. 28. Plaintiff is not briefing that issue now since its analysis of the Act does not lead to a confrontation with Sec. 28; however, plaintiff reserves the right to address this if the court deems it appropriate and relevant.

7. Conclusion: We come, then, to the so-called "bottom line" on the general effect of a transfer per Sec. 16a:

a. the entire case and controversy (including the request for site specific relief) goes to the Council for mediation and review and the matter essentially is a Sec. 16b action;

b. mediation and review will take place only as to those issues not yet resolved by settlement, Order or Judgment of the Superior Court; and

c. jurisdiction in the Council will remain unless divestiture is mandated by various sections of the Act as a result of the defendant's failure to satisfy certain deadlines for doing certain things and in the court's discretion if mediation and review is not timely completed.

B. THE SPECIFIC EFFECT OF A TRANSFER PER SEC. 16a OF THE ACT ON THIS CASE

If the court grants the defendant's motion for a transfer per Sec. 16a, it will have divested itself of jurisdiction over this matter and jurisdiction will lie in the Council. The case will be treated similarly to a 16b case in which exhaustion is mandated and the municipal master plan, proposed zoning ordinance amendments and the Court's adjudication of fair share and compliance would be submitted as the housing element and fair share plan.

Mediation and review would ensue, as a practical matter, on the issues of site specific relief and phasing and would be unsuccessful. The defendant has been resolute in refusing to seriously consider negotiations as to a settlement throughout this matter. The court's master failed to obtain even an offer for plaintiff to consider (let alone reject or accept).

The remaining issues on which mediation and review would be unsuccessful (phasing and site specific relief as a condition of substantive certification) would be transmitted to the OAL for a hearing as a contested case. The ALJ would recommend granting or denying site specific relief. The initial decision would go to the Council which would render a decision.

The ultimate decision would either be a grant of substanti e certification denying site specific relief or a grant of substantive certification on condition that site specific relief would be agreed to by the defendant.

In the former case, plaintiff would appeal the denial of site specific relief. In the latter case, the defendant, per Sec. 14, would within sixty (60) days, either make the "changes satisfactory to the council" or refuse to act. If it refused to act, jurisdiction would revert to the court per Sec. 18.

Disregarding the unlikely possibility of a settlement, the process lasts between a year and a half to several years and,

in the end, we would be at the same point where we now find ourselves - awaiting this court's determination on site specific relief. The question as to whether a "transfer" should be granted in light of the above becomes almost rhetorical. We are now one step away from a final trial court ruling on this case which was remanded to this court on January 20, 1983. Over two and one-half years have elapsed since that remand. Virtually every issue has been resolved. The only remaining issues - site specific relief and phasing - are ready for trial. The defendant now seeks a stay of a year and a half to several years of this trial level determination. No substantial reasons are given in favor of transfer. The motion should be denied.

POINT II

THE TRANSFER OF THIS ACTION PER SEC. 16a OF THE ACT WOULD BE CONTRARY TO LAW AND A VIOLATION OF THE CONSTITUTIONAL MANDATE OF MT. LAUREL II.

This case, as all Mt. Laurel II cases, is an action in lieu of prerogative writs per R.4:69-1, et seq. As such, it is subject to R.4:69-5 which states that:

> 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.

In light of the specific language in the rules requiring exhaustion except in cases of a manifest injustice, it is somewhat questionable as to why the Legislature felt the need to explicitly provide for discretionary transfer in Sec. 16a cases and mandatory exhaustion in Sec. 16b cases. One would have thought that simply having provided a mechanism for administrative relief and having indicated its "preference" that the administrative mechanism should be utilized to resolve existing disputes (Sec. 3), the provisions of R.4:69-5 would control. Even without Sec. 16,

the courts would have had to evaluate whether a transfer or exhaustion would be appropriate.[1]

Absent Sec. 16, it would seem that exhaustion would be mandatory in all matters, subject only to the "manifest injustice" provision in the Rule and the "interest of justice" exception in the case law.[2] Sec. 3 would have been sufficient to express the "retroactive" legislative intent and preference that the mechanism in the Act be used to resolve what is left to be resolved in existing disputed cases.

Sec. 16, however, must be viewed as supplemental to the Rule and existing case law. The Legislature was obviously concerned to be more specific as to how the courts should treat different matters. Both Secs. 16a and b, along with other provisions of the Act, provide instances in which the court's

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[1]This is true despite the language in Mt. Laurel II that exhaustion is not required in those cases. Mt. Laurel II, supra, 92 N.J. at 342, fn. 73. The Court was then referring only to local administrative bodies which clearly were not available mechanisms to resolve constitutional disputes and were never intended as such under their enabling legislation.

[2]See Roadway Express, Inc. v. Kingley, 37 N.J. 136, 141 (1962); Patrolmen's Benevolent Ass'n. v. Montclair, 128 N.J.Super. 59, 63 (Ch. Div. 1974), aff'd. 131 N.J. Super. 505 (App. Div. 1974); Brunetti v. Boro of New Milford, 68 N.J. 576, 588-589 (1975); N.J. Civil Service Ass'n. v. State, 88 N.J. 605, 613 (1982); State Dept. of Environmental Protection v. Ventron Corp., 92 N.J. 473, 498-499 (1983).

jurisdiction, once having been relinguished by transfer or exhaustion, would be re-invoked. However, read together, they also distinguish between two different types of cases as to how the Legislature believed that the court should evaluate the traditional exhaustion requirement.

Sec. 16b provides for mandatory exhaustion of all cases filed subsequent to the Act and those existing cases filed within sixty (60) days of the Act. As such, and to that extent, the section is total surplussage since Sec. 3 was sufficient to trigger mandatory exhaustion (subject to the manifest injustice standard) for all existing and future cases. Sec. 16b makes sense only in contradistinction to Sec. 16a, circumstances in which the courts are being told that exhaustion is not mandatory (as traditionally imposed) and that the court shall use broader discretion in determining whether to transfer. It represents the sense of the Legislature that dispite its "preference" that all existing disputes exhaust, a less rigorous standard of whether to exhaust should be applied in matters that predate the Act by greater than sixty (60) days. The sixty (60) day distinction, essentially, is one between matters which have just been filed and, at most, issue joined by way of Answer, and those which have proceeded beyond the pleadings stage.

Thus, although the manifest injustice standard is used in Sec. 16a, it is clear that the Legislature believed that such an injustice was more likely to exist in 16a cases than in 16b cases. Further, while the Legislature was not willing to say that exhaustion would not attach to any 16a case, nor was it willing to say that it should attach to all 16a cases.

In fact, the transfer of all cases had been considered[1] and rejected both by the Legislature and the Governor. The minority statement to the bill which came out of the Assembly Municipal Government Committee indicated that the Committee had rejected their amendment which would have required the courts to transfer all pending litigation to the Council. The effect of the amendment would have been to eliminate the sixty (60) day distinction between 16a and b cases and to put all cases into the Sec. 16b mode.

The Governor, who delivered a detailed conditional veto of the bill, did not agree to include the mandatory language. The Assembly Committee's language, which stated a "preference" per Sec. 3, was accepted and Sec. 16a was modified to provide for transfer in the court's discretion utilizing the "manifest injustice" standard.

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[1]The following analysis of legislative history is largely adapted from work produced by Kenneth E. Meiser, Esquire, of Frizell and Pozycki, attorneys at law.

The use of this standard was considered superior to specific standards which had been in preceding versions.[1] This essentially represents the wisdom of the case law which has found numerous instances where exhaustion should be waived and a preference not to impose rigid standards or criteria.

The point is, though, that whatever the standard or criteria, it was clearly the legislative intent that the court should approach a 16a motion more reluctantly and differently than a 16b motion. The standards are not identical even though similar language is used. The legislative intent is that despite the general preference for exhaustion, the requirement of exhaustion for 16b cases was far more rigid than in 16a cases. Therefore, in considering what is a "manifest injustice" under 16a, clearly the legislative intent is for the court to look to how it is different from a 16b case - what has happened in the case which makes it different from one in which issues have just been joined only by way of pleading.

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[1] Initially, Sen. 2046 contained five factors for the court's guidance in considering a transfer: 1) the age of the case; 2) the extent of discovery and other pre-trial procedures; 3) trial date; 4) likely date by which mediation and review would be completed; and 5) whether transfer would facilitate and expedite the provision of a realistic opportunity for lower income housing. The Senate version was changed to preclude exhaustion unless a transfer was "likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing". See N.J. Civil Services Ass'n., supra, 88 N.J. at 615 regarding use of legislative committee statements for construing legislation.

A. The Manifest Injustice Standard

The concept of "manifest injustice" appears in the law in many different contexts. Three are relevant here: first, as to the retroactive application of a statute; second, as to the requirement of exhaustion per R.4:69-5; and third, as to a transfer per 16a.

Generally, it can be said that the term derives its meaning from the context in which it is used and/or applied. In order to evaluate how it is used or how it should be applied, one must consider the nature of the action which has triggered its use and which will be affected by its application. To the extent possible, standards should be set to provide some degree of consistency in the application of the phrase.[1]

In the context of Mt. Laurel II, the "manifest injustice" must be viewed generally as it may relate to the types of injustices which the court attempted to vindicate; that is, primarily, the failure of local government to provide realistic housing opportunities for lower income citizens. Secondardily, "manifest injustice" must be construed in the context of the developer-plaintiff, that party which was invited into the judicial arena by the court to assure that the rights of lower income citizens would be vindicated.

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[1] Reliance is placed on the legal analysis presented by the Public Advocate in its brief in opposition to a transfer motion in another case. The relevant portion of that brief is attached hereto as Exhibit D.

In the context of the poor, several concerns raised by the Court must be addressed. Most generally, the Court was concerned about the vindication of their rights. Thus, the fundamental question to be addressed is how a decision on a transfer motion will affect those rights - in the specific municipality and throughout the State.

Mt. Laurel II represents the end of a search by the judiciary to find a means to assure vindication of the constitutional mandate. It is working in many municipalities. As hoped by the Court, developers have sued and, as a result of the litigation and the threat of litigation, municipalities are moving to comply - some even without suit.

This has been accomplished because of the efforts by the court to deal with numerous obstacles to the prompt judicial resolution of Mt. Laurel II issues. As articulated by the Public Advocate, these include:

> "1. Significant delay in the vindication of the rights of lower income persons.
>
> 2. Increased complexity of litigation which significantly impedes vindication of the rights of lower income persons.
>
> 3. Diminished availability of effective mandatory remedies which significantly impedes the vindication of the rights of lower income persons.
>
> 4. Exclusive reliance for some additional period upon voluntary compliance by the defendant muncipality.

5. In cases where builders' remedies are sought, a diminished likelihood that there will be parties with the means and incentive to assert the rights of lower income persons."

The last point is extremely significant. The court has already ruled that voluntary compliance in the absence of the threat of litigation is meaningless. The Legislature has essentially so found; as previously detailed, the Act relies exclusively on the threat of litigation to induce voluntary participation before the Council.

The developer-plaintiffs stand not only as representatives of the poor but as examples to future litigants. Extraordinary reliance has been placed on them by the Court. How they fare in this process will be the test of whether future litigants appear to vindicate this constitutional mandate.

Developers who sued did so in reliance on the Court's expression of commitment that if they brought suit, subject to conditions set in the opinion, they would achieve a certain result - site specific relief in a timely fasion. The timeliness of that relief is already in question given the extraordinary length of the trial stage to date. The death knell to future litigation would be judicial unfairness to those developers who have sued and who are bearing the economic and political risks of suit.

A delicate balance has been struck in the private residential development business in favor of undertaking this type of litigation. If that balance is tipped in the other direction, any hope for the vindication of this mandate will be dashed. If this plaintiff class suffers any injustice at the hands of the judiciary, it will never appear again, regardless of the call. The mandate would then be completely unfulfilled - there is simply no other plaintiff class.

1. Retroactivity and "Manifest Injustice":

The Act is clearly intended to apply retroactively in several aspects (see e.g. Sec. 12b and Sec. 23, and Sec. 28). It explicitly is intended to apply to the resolution of existing disputes.[1] Sec. 3 and Sec. 16. However, even where retroactivity is clearly intended, it may not be applied in specific cases if it would result in a "manifest injustice" to an adversely affected party. Gibbons v. Gibbons, 86 N.J. 515, 523 (1981). The standard applied by the Court has been articulated as follows:

> 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.

Gibbons, supra, 86 N.J. at 523-524. See also Ventron, supra, 90 N.J. at 498. The standard then is one of unfairness which,

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[1]Note, it is not intended to apply to the relitigation of issues already resolved by settlement, Order or Judgment. See above.

in turn, is a function of "deleterious and irrevocable" consequences arising from reliance on prior law.

In this matter then, one issue which must be resolved is whether the retroactive application of the exhaustion requirement would be unfair either to plaintiffs or the class they represent. The question is whether any deleterious and irrevocable consequences would result by retroactive application given their reliance on Mt. Laurel II as providing a mechanism to satisfy the constitutional mandate.

2. R.4:69-5 Exhaustion and "Manifest Injustice":

As previously stated, the Rules of Court would have required consideration of exhaustion even in the absence of an explicit requirement in Sec. 16. This is due to the legislative preference for utilization of the Act over litigation even as to on-going matters. Sec. 3.[1] R.4:69-5 which embodies the traditional concept of exhaustion, would require it "except when manifest that the interests of justice require otherwise..." That concept of "manifest injustice" has been analyzed by the courts.

While exhaustion is not deemed to be jurisdictional or absolute, the Supreme Court has acknowledged "a strong presumption favoring the requirement of exhaustion of remedies". (Brunetti, supra, 68 N.J. at 588)and has characterized the "course of bypassing the administrative remedies made available by the Legislature" as "extraordinary", Kingsley, supra, 37 N.J. at 141.

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[1] Again, the statutory reference is to exisiting "disputes"; not matters already resolved.

The judicial precedent gives some substance to the Act's distinction between 16a and 16b cases. It appears that the Legislature intended application of this standard to Sec. 16 cases in which exhaustion is "mandated". It further appears, as argued above and further supported here, that the Legislature intended the courts to apply a less demanding standard in 16a cases. While stating its "preference" for exhaustion in all cases, it provided for a different standard for a 16a transfer. The "strong presumption" and "extraordinary course" language of Brunetti and Kingsley would not apply in a 16a case. There, the legislative "preference" would not be honored if a "manifest injustice" (in the 16a context) would occur.

However, before addressing the 16a context, it is necessary to flush out the 16b standard since, if a transfer (16a) would violate that more rigorous test, a fortiori, it would not be granted. Traditional exhaustion may not be required by the court for several reasons; all of which must be applied on a case by case basis. Exhaustion, generally, is not required if the interests of justice so require. Brunetti, supra, 68 N.J. at 589. The "interests of justice" have been found not to require exhaustion:

a. when exhaustion would be futile. Brunetti, id. Futility arises unless the remedy is "certainly available, clearly effective and completely adequate to right the wrong complained

of". Patrolmen's Benev. Ass'n., supra, 128 N.J. Super. at 63 (cited with approval in Brunetti, id.);

b. when a need exists for "a prompt decision in the public interest". Brunetti, id.;

c. when "the issues do not involve administrative expertise or discretion and only a question of law is involved". Brunetti, id.;

d. where "irreparable harm will otherwise result from denial of immediate judicial relief". Brunetti, id.;

e. when not warranted in light of "underlying considerations such as the relative delay and expense, the necessity for taking evidence and making factual determinations thereon". Kingsley, 37 N.J. at 141. See also N.J. Civil Service Ass'n., supra, 88 N.J. at 613.

3. Sec. 16a Transfer and Manifest Injustice:

While the traditional exhaustion standards apply to the Sec. 16b case, something less rigorous was intended for Sec. 16a cases. The Legislature clearly intended a distinction between 16a and 16b cases and that distinction must be realized by way of a difference in how the term "manifest injustice" is used in the two contexts. The distinction and standard may be understood by a reconsideration of the fundamental policy behind the exhaustion doctrine.

The Supreme Court has ruled that exhaustion of administrative remedies is:

> ...a rule of practice designed to allow administrative bodies to perform their statutory function in an ordinary manner without preliminary interference from the courts.

Brunetti, supra, 68 N.J. at 588. (emphasis supplied). The underscored language is crucial to an understanding of the distinction between Sec. 16a and 16b cases and the standards to be applied.

Where there has already been "preliminary interference from the courts", the policy behind the rule of practice supporting exhaustion diminishes in importance. The Legislature assumed that in Sec. 16b cases there would be little or no such preliminary interference. For those matters, exhaustion would be mandated and required by the courts except, as previously indicated where exhaustion would not be in the interests of justice, as traditionally understood.

On the other hand, the Legislature assumed that in Sec. 16a cases there might be substantial preliminary interference as a result of the judicial process. It was keenly aware of the potential impact of retroactive application of the Act to such cases. It called upon the courts to act in their discretion to

determine whether, over and above the traditional reasons used to waive exhaustion, there were other reasons and to apply a less rigorous standard; that is, to permit waiver in Sec. 16a cases for reasons which, in the context of a 16b case, waiver normally would not be permitted.

Substantial "preliminary interference" would occur, for example:

a. where some or all issues had been litigated and resolved;

b. where some or all issues had been litigated and a decision was imminent;

c. where some or all issues had been fully prepared for a hearing and the hearing imminent;

d. where substantial discovery had occurred and was essentially concluded;

e. where settlement had been reached on some or all issues; and

f. where substantial time and expense had occurred or risk taken which would mitigate against transfer.

Further, it is clear that the Legislature intended that the traditional criteria for waiver (applicable in Sec. 16b cases) be less rigorously applied in Sec. 16a cases. Thus, the use of the term "preference" in Sec. 3 and acceptance of the court's

exercise of discretion in Sec. 16a yields to a less rigorous application of the judicial criteria than application in the Sec. 16b context where exhaustion is mandated and the court's "discretion" is that derived only from fundamental equitable principles.

B. A Transfer Per Sec. 16a Would Result in a Manifest Injustice

For purposes of this case, the factors mitigating against transfer are so numerous and overwhelming that transfer is out of the question. One might moreeasily address the question as to why the defendant brought the motion at all. Presumably, the Legislature anticipated that there were some cases which should not be transferred. If Sec. 16a is intended to draw any line, this case clearly falls on the side of non-transferability.

This case is, for the most part, over at the trial level. Plaintiff has incurred enormous expenses and spent an enormous amount of time seeking to vindicate the constitutional mandate. Its efforts pre-dated even Mt. Laurel I by several years. For over fifteen years, it has publicly committed its development to provision of lower-income housing. It attempted to seek voluntary rezoning and sued to effectuate compliance prior to Mt. Laurel I. This lawsuit, brought after Mt. Laurel II, was filed and has been diligently pursued for over two (2) years. Every relevant Mt. Laurel II issue has been extensively litigated. We are now on the eve of complete vindication of the constitutional mandate. The only issues in serious contention are site specific

relief and phasing, and these issues are ready for immediate hearing. They would have already been heard and resolved had this court not been required to address certain factual and legal issues for the first time in this case and permitted, at defendant's request, numerous extensions of its 90-day compliance order and awaited the master's report for four (4) months.

There may be Mt. Laurel II cases which have been litigated longer, but not many. The Supreme Court articulated its standards in Mt. Laurel I and II. This plaintiff had been proposing a development with lower income housing since 1970. As soon as it became apparent that the defendant would again flaunt the constitutional mandate after Mt. Laurel II, plaintiff commenced plans to litigate and filed its complaint in November of 1983.

When this case began, the defendant had a patently exclusionary ordinance which it had readopted in the face of Mt. Laurel II and which the proofs indicate was done with knowledge that it did not satisfy the mandate. The defendant has attempted to thwart this mandate by use of delaying tactics on numerous occasions - seeking recusal, striking of testimony, Supreme Court stay, delays in satisfying the court's compliance order and now this attempt at transfer.

The major concern is that of the represented class: lower income households which comprise the indigenous and regional needs. This case is, of course, a representative action in which plaintiff is suing, in part, as representative of the interests of the poor. Boonton, supra, 197 N.J. Super. at 365-366. Those households would never have attained the articulation and vindication of their rights in Cranbury Township had it not been for the actions of this plaintiff and others in the consolidated case. Those rights have been litigated by one party or another against this defendant since at least 1974 and have yet to be completely vindicated. The consolidated plaintiffs have brought them to the eve of complete vindication. Any further delay is unthinkable.

1. Defendant presents no basis for transfer: Given the history of this case and its present status, one would think that the defendant, in seeking a transfer, would present the court with a reason for transfer. The only reason given is that a transfer is necessary so that the defendant will have the benefit of the Council's guidelines on fair share. The defendant appears to assume that a transfer will mean a complete relitigation of all issues previously resolved and, even if it does, that the Legislature envisioned Sec. 7 a reasonable basis for transfer. As previously indicated, "transfer" does not entail relitigation of any issue already resolved. The fact is

that the timeframe for mediation and review in Sec. 19 is totally independent of the issuance of fair share criteria and guidelines in Sec. 7. Further, the Act is not retroactive as to covering matters already determined by court order or judgment such as fair share and compliance; whereas, it intends to be as to transfer per Sec. 16a and exhaustion per Sec. 16b and the moratorium on the builder's remedy per Sec. 28. The absence of an express intent to make a statute retroactive is essentially dispositive that it was intended for prospective application only. Ventrol, supra, 92 N.J. at 498.

Further, there is no direction in the Act that courts utilize the Council's guidelines under Sec. 7; whereas, Sec. 23 specifically directs courts to follow statutory guidelines for phasing. This is not to say that consistency is inappropriate; just that it was deemed unnecessary by the Legislature. In fact, the Act itself explicitly tolerates and anticipates two mechanisms - administrative and judicial - for the resolution of identical issues without the admonition that they be resolved pursuant to the same criteria or guidelines. Even under the administrative mechanism, the Act appears to tolerate substantial flexibility in fair share approaches. See Sec. 10, 11 and 14a. Further, the Supreme Court never mandated absolute consistency in fair share approaches, giving presumptive validity only to determinations of region and regional need.

While fair share has been deemed to be one of the most difficult and time-consuming issues to resolve (See Boonton, supra, 197 N.J. Super. at 371), its resolution with precision is not considered essential to fulfillment of the constitutional mandate. Boonton, supra, 197 N.J. Super. at 367-371. The fact is that fair share determinations have been made and approved in many cases with substantial flexibility being demonstrated by the courts. The Council's fair share criteria and guidelines are hardly a necessary prerequisite to compliance.

Furthermore, if the defendant is correct, then all cases should be transferred per Sec. 16a. The Legislature clearly knew of this issue and determined not to mandate transfer of all cases. Also, if transfer entails the relitigation of all issues, that in and of itself would be a manifest injustice in this case for reasons already stated.

2. the "manifest injustice" and retroactivity: a decision to transfer per Sec. 16a is one to apply the compliance mechanism in the Act retroactively to a specific case brought in reliance upon a judicial determination in the judicial context. Since Mt. Laurel I, the poor have relied on the judicial mechanism. Since Mt. Laurel II, plaintiffs and their representative class have relied on the judicial mechanism to satisfy those rights in Cranbury Township.

Previously quoted passages in Mt. Laurel II indicated the court's desire for legislation and an administrative mechanism for it to decrease its involvement if not totally withdraw. However, there was absolutely nothing in Mt. Laurel II to suggest

that a litigant in bringing a Mt. Laurel II action risked the termination of that action as a result of subsequent legislative efforts. This is extremely significant with regard to the developer-plaintiff class. Both the administrative mechanism devised in the Act and the judicial mechanism utilized in Mt. Laurel II rely exclusively on the threat of litigation by the developer-plaintiff class as leverage to attain either voluntary compliance or mandated compliance.

This class was invited to litigate and did so in substantial reliance on the integrity of the courts to carry out the commitment expressed in Mt. Laurel II with regard to the builder's remedy and expeditious resolution of the case. If the expectations of this class are dashed, its members will never undertake such an effort again. The result will be no threat of litigation and a return to the pre-Mt. Laurel II days of non-compliance. This would undermine both Mt. Laurel II and the Act.

The poor, of course, have suffered, are suffering and continue to suffer in anticipation of satisfaction of their most fundamental needs. One suffers more when hope is created and then dashed; expedition promised and then delayed. Plaintiff has undertaken a major financial effort and risk. Its ability and resolve to pursue this case is finite.

The consequences of reliance are deleterious and irrevocable. An enormous commitment has been made in the face of the Supreme Court's promise that these matters would be administered expeditiously. Over two years have now elapsed. Transfer would mean another year and a half or more before this matter would return to this court in the same posture as it stands today - if plaintiff is capable of continued financing and maintains its resolve. If it does not, the reliance placed on this process by it and the poor will have been completely misplaced.

While retroactivity as to transfer and exhaustion in some 16a cases and in all 16b cases probably is appropriate, it is clearly not so here. In any event, this issue need not be addressed since plaintiff does not believe the Legislature intended to cover this type of case by its retroactive application of Sec. 16a.

3. "Manifest Injustice" and R.4:69-5:

As previously indicated, even under standard principles of exhaustion per R.4:69-5, it should be waived in this case. If so, we need not even address the lesser standard imposed in Sec. 16a. The resolution of the issue mandates waiver since for numerous reasons the imposition of the exhaustion requirement would seriously damage the public interest.

a. exhaustion here would be an act of futility. Plaintiff interprets the Act to provide for mediation and review of phasing and of site specific relief and the Council's ability to condition substantive certification on an agreement, by the municipality, of site specific relief. Presumably, the Council will use the same standards as the court in deciding whether a compliance program must include site specific relief to be acceptable.

Certainly, if all issues in a "transferred" case could not be reviewed and mediated by the Council, exhaustion would be totally futile since the Legislature would not have provided for adequate jurisdiction in the agency to handle a transferred case. The use of the term "transfer" in Sec. 16a and exhaustion in Sec. 16 generally must indicate the legislative intent that the whole controversy could be heard by the agency.

Further, this lends support for plaintiff's argument that a party in a transfer case per Sec. 16a can force mediation and review, transmittal for an OAL hearing and an ultimate decision by the Council per Sec. 14 as to whether substantive certification should be granted, granted with conditions, or denied. If this ability were not present, then transfer would be patently damaging to the parties (the developer and the poor) affected.

Also, if a municipality in a transferred case fails to act in good faith or reasonably participate in mediation and review and the OAL hearing, the case would be appropriately returned to the court. The municipal movant for transfer is making the functional legal equivalent act as one seeking substantive certification in a different form. If that turns out not to be done, the court's jurisdiction may again be invoked.

It is true that the Council has no enforcement powers. However, plaintiff's interpretation of the Act is consistent with ultimate enforcement resting with the courts directly or indirectly. The leverage gained by the threat of ultimate judicial enforcement is essential to the viability of the Act. If plaintiff is wrong as to this interpretation, exhaustion would be truly futile and transfer unconstitutional.

We come then to the question of futility in the context of this case. Mediation and review on phasing and the site specific issue is totally useless. Plaintiff has been seeking to negotiate to no avail for over two years. Even the threat of this court's rulings on fair share and compliance did not trigger settlement. Even after the court's decision and the elimination of virtually all other issues, no settlement discussions occurred.

Plaintiff is then faced with the prospect of meaningless mediation and review. It can only hope for a Council award of substantive certification conditioned on site specific relief. The defendant would surely fail to refile with that condition accepted per Sec. 14. Why should it? What does it have to lose? The only thing that will happen is a transfer back to this court per Sec. 18; a year and a half or more later.

Time is on the defendant's side, delay is its only remaining weapon. It has worked for the defendant in the past. This motion is simply an attempt to use it again.

b. a prompt decision is in the public interest: The Supreme Court in Mt. Laurel II spoke often and at length of the need for a prompt adjudication to resolve such a fundamental injustice. As has been demonstrated, a transfer would mean a year and a half or more delay in the resolution of the issue of phasing and site specific relief. In a case which has lasted for over two (2) years, where so much money has been spent and time consumed, where the issues are so ripe for final adjudication, a prompt decision is mandated by the Constitution. If Sec. 16a can be read to require a transfer in this situation, it is unconstitutional. It might be different if this case had barely begun or the issue not ripe for adjudication. Had not the plaintiffs endured over two years of litigation, the timeframe in the Act might not be totally unreasonable. However, this is not such a case. The Constitution demands a prompt resolution of this matter.

c. lack of administrative expertise: the site specific issue has to be the least subject to administrative or ALJ expertise. While it is referenced in the Act (Sec. 10f), it is hardly one which a Council mediator, ALJ or Council Executive Director will have more expertise than this court. Nor does the legislation intend for particular expertise to be developed on this issue. The court, in any event, has that expertise now.

d. irreparable harm: assuming plaintiff's interpretation of the Act is correct, the major harm which would result from a "denial of immediately judicial relief" would be substantial additional expenditures and delay. These expenditures and delay could be the last straw as to plaintiff's resolve. Having accepted the court's invitation to undertake this effort, plaintiff would be devastated by being forced to engage in a charade before the Council at great expense and for an enormous period of time. Plaintiff is not threatening to drop its effort; however, the court must consider the realities of the situation. In the course of this litigation, the court has witnessed the withdrawal of NCDH. It must be as clear to the court as it has been to the defendant that delay maximizes the possibility that a Mt. Laurel II plaintiff will be exhausted long before the administrative and judicial process has been exhausted. Whatever the Supreme Court intended to be the measure of a litigant's

resolve, it never intended this. The defendant has been found twice, on two separate ordinances, by separate courts, to have violated the fundamental rights of the poor. Those rights are irreparably harmed each day they must await vindication. Now that they are on the verge of vindication, they cannot be denied immediate judicial relief.

One must also consider the real possibility of a change in the housing market which could force further delays. Also, during any delay of this case, other development is moving forward, water and sewer capacity is being absorbed. Further, due to its previous delay, the defendant "lost" its obligation to satisfy housing needs generated in the 1970s. Now we are dealing with a need for housing which began in 1980. We will be almost through that fair share period by the time this case is over if it is transferred.[1]

e. underlying considerations: relative delay and expense: little more need be said. Any attempt to balance the equities between plaintiff (and its representative class) and the defendant tips and topples in favor of plaintiff.

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[1]Note that the initial Cranbury case was brought in 1974. As a result of delay, the entire 1970-1980 fair share period was lost. Cranbury now is attempting to avoid a fair share based on 1980-1990 needs. Meanwhile, thousands of conventional units have been built in the region and Cranbury has experienced enormous increases in jobs and ratables and a lesser, although significant, increase in luxury housing.

4. Manifest Injustice and Sec. 16a Transfer: The preliminary interference by the judicial process in this case has been so extensive that a 16a transfer is clearly unwarranted. Virtually every issue has been resolved. We are in the remedial phase of this case. If the Act mandated that such a case be transferred it would be unconstitutional - a direct undermining of the entire thrust of Mt. Laurel II that the non-compliant municipalities be brought to justice expeditiously and that the court exercise a strong hand in assuring ultimate compliance. Further, all of the arguments given above as to R.4:69-5 are more weighty in the context of a Sec. 16a transfer since, as previously indicated, the "discretion" granted the court by Sec. 16a, as opposed to the standard in Sec. 16b, is clearly more broad.

The 16a/16b distinction is critical here. The Legislature was aware of the Court's commitment to the developer-plaintiff class as well as its resolve that Mt. Laurel II cases be handled expeditiously. It chose not to treat all cases in the same way. Sec. 16b cases represent those in which little reliance has been placed in Mt. Laurel II, minor efforts have been made and in which, for the most part, a transfer would be relatively harmless. The timeframe for Council adjudication would be more or less similar to that experienced at the trial level in the courts and, perhaps, even less.

The Legislature knew that Sec. 16a cases, however, may entail substantial reliance on the commitment in Mt. Laurel II to both the poor and the developer-plaintiff class. That reliance may have led to substantial expenditures of time and money, great political risk and enormous involvement by the courts. Much may have occurred - issues resolved, orders entered.

The Legislature acknowledged this distinction and explicitly deferred to the court's discretion (over and above the standard exhaustion theory applicable to 16b cases) to keep control over cases in which such an effort had occurred. Not to do so would be to fundamentally undermine the mandate, just as Madison had done. Further, inexplicable delay would occur for the poor, and the developer-plaintiff class, once burned, would not risk being twice foolish. The only leverage available in the Act and in the courts would be lost. Sec. 16a represents a clear determination by the Legislature not to take that risk and an admonition to the courts to be extremely cautious in the Sec. 16a context.

C. Transfer and the Unconstitutionality of the Act.

Obviously, if the Act is unconstitutional in substantial and relevant respects, a transfer of this matter to the Council would be totally inappropriate. The Act, as demonstrated above, is extremely complicated and cumbersome and serious questions are raised as to the reasonableness and constitutionality of many of its provisions. However, the Supreme Court has ruled that:

> (A) legislative enactment will not be declared void unless its repugnance to the Constitution is so manifest as to leave no room for reasonable doubt.

Brunetti, supra, 68 N.J. at 599.

In light of that strong admonition and the public interest to be served by saving the Act, plaintiff has undertaken this brief with the goal of interpreting the Act so that it is constitutional. Many assumptions have had to be made in advance of a judicial interpretation. Plaintiff has indicated numerous sections which would fall if interpreted differently and will support a finding of unconstitutionality if those sections are so interpreted.

Plaintiff has purposely not briefed the constitutionality of Sec. 28, the builder's remedy moratorium, since it does not appear to be directly implicated by this motion. That provision raises profound questions of unconstitutionality and plaintiff reserves the right to brief and argue that point if it is deemed relevant to this motion.

CONCLUSION

For the aforementioned reasons, defendant's motion for a transfer per Sec. 16a should be denied.

Respectfully submitted,

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Dated: September 18, 1985

EFFECT OF TRANSFERRING CRANBURY TOWNSHIP'S TO AFFORDABLE HOUSING COUNCIL ON CRANBURY LAND COMPANY

Prepared for

Cranbury Land Company

by

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I. INTRODUCTION

In So. Burlington Cty. NAACP v. Mount Laurel Twp., 67 N.J. 151 (1975) [hereinafter Mt. Laurel I], the New Jersey Supreme Court determined that municipalities have a constitutional obligation to afford a realistic opportunity through their land use regulations for the construction of low and moderate income housing. Although this decision provided a basis for challenging exclusionary land use practices, most municipalities were still able to prevent the construction of lower income housing within their borders. After another eight years of litigation with few concrete results, the court responded in So. Burlington Cty. NAACP v. Mount Laurel Twp., 92 N.J. 158 (1983) [hereinafter Mt. Laurel II] by creating procedural and substantive mechanisms to actually promote the construction of lower income housing.

The foremost of these mechanisms has been the builder's remedy, which offers developers bringing successful suits the incentive of a rezoning, often with a density bonus and streamlined approvals, in exchange for setting aside 20% of their project for lower income housing. This remedy has encouraged over 100 suits by developers since 1983.

The court in Mt. Laurel II recognized that builder's remedies are "(i) essential to maintain a significant level of Mt. Laurel litigation, and the only effective method to date of enforcing compliance; (ii) required by principles of fairness to compensate developers who have invested substantial time and resources in pursuing such litigation; and (iii) the most likely means of ensuring that lower income housing is actually built".* In doing so, the court held that "instead of being ordinarily rare, a builder's remedy will be ordinarily granted in Mount Laurel litigation, provided that the project includes an appropriate portion of low and moderate income housing, has no substantial adverse environmental

* 92 N.J. 158 at 128.

impact, and is located and designed in accordance with sound zoning and planning concepts".* The court, in effect, relied upon and encouraged developers to seek builder's remedies so that the housing needs of lower income households would not only be articulated but actually met.

The Cranbury Land Company (CLC) joined suit against Cranbury Township in Middlesex County over two year ago and asked for a builder's remedy. The case has proceeded to the point at which the court-appointed master, Philip Caton, has submitted recommendations for the rezoning of various parcels in Cranbury for lower income housing and the plaintiffs in the suit, including CLC, have filed responses. The next step would be for the court to decide whether the proposed ordinance conforms to the Mt. Laurel II doctrine.

Cranbury, however, has petitioned the court under the recently enacted "Fair Housing Act"** to be transferred from the court system to the "Council on Affordable Housing" (The Council). As the case was filed more than 2 months before the effective date of the Act any party to the case can file a motion to transfer the case. The Act directs that the court's decision to transfer a case take into consideration whether any party to the litigation will suffer a "manifest injustice".

Regardless of the ultimate outcome of proceedings before the Council rather than the courts, a transfer to the Council would result in significant delays. Under the Act, the council members potentially will not be appointed until January 1, 1986. The Council then has seven months to develop criteria and guidelines. Municipalities then have five months after the guidelines are set to file their housing elements and ordinances with the Council. As a result, the Council may not hear cases until January 1, 1987. A transfer to the Council therefore could result in a minimum delay

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* 92 N.J. at 128.

** P.L. 1985 Chapter 22 (hereinafter cited as Fair Housing Act), Section 16.

of one-and-a-half years, plus the additional time for the Council's administrative procedures and subsequent appeals.

This report evaluates the effects of these delays on the plaintiff, CLC, as well as on the ultimate beneficiaries of the suit - low and moderate income households. The following planning and economic concepts illustrate the extent to which the delay in transferring the case to the Council will affect the parties to this case:

1. During the delay, municipal resources and land will be depleted by other types of development. This may affect the feasibility of Mt. Laurel development on the plaintiff's site.

2. Housing production typically is prone to building cycles. A delay will place plaintiffs in an unfavorable position within the building cycle.

3. Increases in the cost of capital will force housing prices up during the delay, making the development of Mt. Laurel housing less feasible.

4. The effect of further delay in implementing the Mount Laurel II decision is particularly adverse in Cranbury's case because of the municipality's consistent refusal to provide for badly needed low and moderate income housing in the past. Unlike many other New Jersey municipalities, Cranbury, for the most part, did not take advantage of the federal and state housing subsidy programs available during the 1960s and 1970s. In addition, other municipalities have reached tentative or final settlements which will produce Mount Laurel development, making further delay by Cranbury objectionable from the standpoints of consistency and fairness.

5. The delay will particularly affect Cranbury's indigenous need and present need households. These households will be denied

due process because they must wait at least two additional years for affordable housing.

These considerations demonstrate that the delays associated with transferring the case to the council will place the successful development of CLC's Cranbury site in jeopardy. This represents a "manifest injustice" to CLC, which has brought this suit in good faith. In addition, it is a manifest injustice to the lower income households, represented by CLC, whose housing needs will again be deferred, if not denied.

II. PLANNING AND ECONOMIC IMPACTS OF TRANSFER TO COUNCIL

A. DEPLETION OF MUNICIPAL RESOURCES AND LAND BY OTHER DEVELOPMENTS DURING THE DELAY MAY AFFECT FEASIBILITY OF SITE FOR MT. LAUREL DEVELOPMENT

The Cranbury Land Company joined in the Mt. Laurel suit against Cranbury Township in November 1983 under the guidelines of the Mt. Laurel II decision. The CLC site consists of two tracts of cultivated farmland totalling 137 acres. It is located adjacent to the Millstone River, near the Cranbury-East Windsor border and is almost equidistant from downtown Cranbury (1-1/2 miles to the north) and downtown Hightstown (2 miles to the southeast). While the area immediately north of the site is dominated by agricultural activity, the area south of the site has recently experienced rapid urbanization in the form of office and residential development.

On the basis of environmental considerations and sound planning principles, the proposed CLC site is well-suited to the type and density of residential development that has been proposed for it. The site has accessibility to all necessary municipal resources, including public sewer services, roadways and other public resources, and its proposed development is not expected to have a significant impact on them.*

Cranbury's location along the Route 1 corridor, however, places it within an area of tremendous growth, and, as such, the CLC project must compete with proposed projects in Cranbury, as well as in surrounding municipalities. As pointed out in CLC's

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* There is currently insufficient capacity in the municipal water supply system to serve the CLC development. According to Peter E. Meyer, P.E., of Professional Planning and Engineering Corp., Morristown, NJ, however, proposed new well holding tank with a capacity of up to 250,000 gallons can provide adequate water supplies to the CLC development. See Suitability Analysis for a Proposed Mt. Laurel II Development on the Cranbury Land Company Site in Cranbury Township, prepared by Abeles Schwartz Associates, for more detailed analysis.

Response to Cranbury Township's Compliance Program, over 22.5 million square feet of major industrial and commercial activity is under construction or planned along the Route 1 corridor in West Windsor, Plainsboro, East Windsor and South Brunswick alone. This development will create a large number of new jobs, and in turn, generate a large demand for new housing. Although Cranbury may continue to limit development within its borders, development in Cranbury as well as adjacent towns will affect the feasibility of the proposed CLC Mt. Laurel II project.

While the case is pending in the Council, these other projects will reduce the quantity of municipal resources available to the proposed Mt. Laurel project.

This depletion of municipal resources will affect the feasibility of the Mt. Laurel project in several ways. First, from a marketing point of view, the other residential projects may saturate the market, affecting the ability of the market to absorb the project's market rate units. They also may have an advantage over the Affordable Living Corporation's market rate units because (1) they potentially would come onto the market first, and (2) they could be sold at lower prices.* Secondly, the depletion of municipal resources may increase the cost of obtaining municipal resources, and, at the same time, also decrease its ability to obtain adequate municipal resources. As the capacity of municipal resources, particularly roads, schools and sewer is reduced, CLC's project will be perceived to have a greater relative impact on these resources.

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* There are a number of reasons why the similar units in competing developments could be sold at lower prices. These include (1) that they have lower carrying costs because they experience fewer delays, (2) they have the marketing advantage of not being associated with Mt. Laurel housing; and (3) they do not have to subsidize lower income units.

In addition, the depletion of resources will affect its position to receive a builder's remedy. This is because the Fair Housing Act allows for adjustment of a municipality's fair share for such factors as lack of vacant and developable land and infrastructure capacity as well as for historic preservation, architectural preservation, environmental preservation, open space preservation, and agricultural preservation.

During the past fifteen years, over 703,000 square feet of office, commercial and industrial development has been approved directly north of Cranbury in the area along Route 130 and the New Jersey Turnpike (Table 1). The development pattern in this area and continuing demand for such uses in the area indicate that this development will extend south into Cranbury. This, as can be seen in site plan approval in Cranbury, has already begun (see Table 2). It is, moreover, being encouraged by Cranbury's land use regulations: the Township has zoned approximately 2,316 acres for office, industrial and commercial uses. Based on industrial, commercial and office development that has occurred in the South Brunswick area during the past 5 years, development in Cranbury in its non-residential zones will be intense during the next 5 to 10 years. One of the effects of the development will be increased traffic within Cranbury.

In addition, this development will create a large number of new jobs, and in turn generate a large demand for new housing in Cranbury and its surrounding area. Increased residential development is already underway in Cranbury, evidenced by an additional 100 units under construction as part of the Shadow Oaks development, and 25 to 30 units under construction on Country Crossing near Station Road.

This new development will increase traffic throughout Cranbury, including on Main Street, which can be expected to impact the historic district. Moreover, residential development not only

TABLE 1

Site Plan Approvals in South Brunswick
(Area Directly North of Cranbury Only)
1980 - 1984
(in square feet)

	Commercial	Industrial	Office	Total
1984	1,454	115,730	88,670	250,854
1983	5,716	35,445	-	41,162
1982	220,300	2,280	-	222,580
1981	8,155	-	-	8,155
1980	5,880	220,000	-	225,880
Total 1980 - 1984	241,505	373,455	88,670	703,631

Source: Middlesex County Planning Board

TABLE 2

Site Plan Approvals, Cranbury
1980 - 1984

	Commercial	Industrial	Total
1984	43,725	24,400	68,125
1983	4,250	-	4,250
1982	3,295	-	3,295
1981	-	-	-
1980	-	-	-

Source: Middlesex County Planning Board

in Cranbury but in the surrounding towns will affect sewer availability which is currently provided from the Middlesex County sewer system in Sayreville. This system has a finite capacity and the feasibility of the CLC site is affected by depletion of its available capacity by other projects.

In addition, Cranbury, like many other nearly fully developed municipalities, has contended that a Mt. Laurel development will drain its municipal resources, particularly sewer, water and roadways. Currently, there is sufficient capacity for CLC's proposed project. This situation could change if the case is delayed to go before the Council, and Cranbury meanwhile approves a significant amount of new development. In this event, the delay may put the CLC site at a disadvantage in securing adequate municipal resources and would prevent the development of Mt. Laurel housing on the site.

B. SIGNIFICANCE OF THE "BUILDING CYCLE" ON THE PRODUCTION OF MOUNT LAUREL HOUSING

The residential construction industry historically and consistently has been subject to building cycles. These cycles exhibit periodic extremes of high and low activity. While the causes and effects of building cycles are complex, it is clear that the extreme cyclical instability of the construction industry influences the cost of such factors as land, labor, building materials, financing and profit.* The conditions existing during building peaks results in a much larger amount of lower and middle income housing than is produced during low production periods.

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* For a more complete discussion of the cyclical instability of residential construction, see Arthur P. Solomon, "The Cost of Housing: An Analysis of Trends, Incidence and Causes", Journal of Housing, April 1981, pp. 194-202.

In addition to the amount of housing constructed, the building cycle also effects the type of housing produced during certain periods. This is particularly relevant to the production of Mt. Laurel housing. From both a marketing and an economic perspective, middle income housing is generally considered to be the most appropriate type of housing to cross-subsidize Mt. Laurel housing units in developments with "set-asides". In contrast, developers often consider upper income and luxury housing less marketable as a component of a Mt. Laurel project. Although the industry continues to produce upper-income and luxury housing during all periods of the building cycle, the proportion of middle income housing produced tends to decrease slightly during low production periods, which further reduces the total produced.

These characteristics of building cycle periods are illustrated in the following tables. Table 3 shows the annual housing costs deemed affordable for each income group in the U.S. between 1974 and 1983.* Table 4 shows the distribution of sales prices for new homes during each year. These tables rely on the national median household incomes (in current dollars) and the annual average mortgage rates. As Table 5 shows, the proportion of new housing units affordable to middle income households generally reflects the position in the building cycle. During the ten year period from 1974 to 1983, the proportion of housing units affordable to middle income households in peak building years included 17.2% in 1977, 20.0% in 1978, 22.4% in 1979 and 24.2% in 1983. In contrast, the proportions in low production years are slightly lower. These included 15.6% in 1974, 17.3% in 1975, 16.4% in 1976, and 22.4% in 1980. Even more revealing and much more significant to the production of

* The affordability levels reported in this table assume that 25% of income is spent on the amortization of the mortgage and interest. This means that these households were paying approximately between 28% and 35% of their incomes on shelter when taxes, insurance and maintenance were added.

TABLE 3

AFFORDABILITY RANGE FOR HOUSING UNITS, BY INCOME GROUP
1974 - 1983

	1983	1982	1981	1980	1979	1978	1977	1976	1975	1974
Median Income (Current Dollars)	$20,885	$20,171	$19,074	$17,710	$16,461	$15,064	$13,572	$12,686	$11,800	$11,197
Low & Moderate Income HH's*	≤$16,708	≤$16,137	≤$15,259	≤$14,166	≤$13,169	≤$12,051	≤$10,858	≤$10,149	≤$ 9,440	≤$ 8,958
"Least Cost" HH's*	$16,706- $25,062	$16,137- $24,205	$15,259- $22,889	$14,166- $21,252	$13,169- $19,753	$12,051- $18,077	$10,858- $16,286	$10,149- $15,223	$ 9,440- $14,160	$ 8,958- $13,436
Middle Income HH's*	$25,062- $31,328	$24,205- $30,257	$22,889- $28,611	$21,252- $26,565	$19,753- $24,692	$18,077- $22,596	$16,286- $20,358	$15,223- $19,029	$14,160 $17,700	$13,436- $16,795
Upper Income HH's*	>$31,328	>$30,257	>$28,611	>$26,565	>$24,692	>$22,596	>$20,358	>$19,029	>$17,700	>$16,795
Mortgage Rate	13.43%	15.79%	16.29%	13.44%	10.87%	9.70%	8.68%	8.82%	9.19%	9.55%
Capitalization Rate	.01145	.01325	.01365	.01145	.00933	.00859	.00787	.00787	.00823	.00841
Loan to Sales Price Ratio	77.3	76.6	74.8	73.2	73.8	75.2	N.A.	N.A.	76.2	N.A.
Affordability Range**										
Lower Income Units	<$39,328	<$33,124	>$31,135	<$35,216	<$39,845	<$38,866	<$38,324	<$35,822	<$31,360	<$29,588
Least Cost Units	$39,326- $58,992	$33,124- $49,684	$31,135- $46,704	$35,216- $52,825	$39,845- $59,766	$38,866- $58,301	$38,324- $57,483	$35,822- $53,731	$31,360- $47,040	$29,588 $44,379
Middle Income Units	$58,992- $73,530	$49,684- $62,108	$46,704- $58,379	$52,825- $66,031	$59,766- $74,708	$58,301- $72,876	$57,483- $71,854	$53,731- $67,164	$47,040- $58,800	$44,379 $55,474
Upper Income Units	>$73,530	>$62,108	>$58,379	>$66,031	>$74,708	>$72,876	>$71,854	>$67,164	>$58,800	>$55,474

* Low and moderate income households are those earning below 80% of median household income; "least cost" households are those earning between 80% and 120% of median household income; middle income households are those earning between 120% and 150% of median household income; and upper income households are those earning over 150% of median household income.

** Affordability range is based on a 30% conventional mortgage.

SOURCE: U.S. Department of Commerce, Bureau of Census, Statistical Abstract of the United States, 1985, Tables 734; calculations by Abeles Schwartz Associates.

TABLE 4

SALES PRICE DISTRIBUTION OF NEW SINGLE FAMILY HOMES, 1974-1984 (in Thousands)

	1984	1983	1982	1981	1980	1979	1978	1977	1976	1975	1974
Under $30,000								57	80	112	149
$30,000 to $39,999	47	65	67	88	137	184	316	175	170	176	183
$40,000 to $49,999								200	168	127	98
$50,000 to $59,999	75	84	68	70	97	135	156	149	100	65	48
$60,000 to $69,999	101	109	77	69	87	118	116	93	60	35	22
$70,000 to $79,999	98	95	53	51	63	80	77	57	69	34	20
$80,000 to $99,999	126	113	61	63	68	92	82	52	N.A.	N.A.	N.A.
$100,000 to $119,999	57	49	26	31	31	38	31	18	N.A.	N.A.	N.A.
$120,000 and over	136	108	60	65	63	61	38	19	N.A.	N.A.	N.A.
Total	639	623	412	436	545	709	817	819	646	549	519
Average	$97,600	$89,800	$83,900	$83,000	$76,400	$71,800	$62,500	$54,200	$48,000	$42,600	$38,900
Median	$79,900	$75,300	$69,300	$68,900	$64,640	$62,900	$55,700	$48,800	$44,200	$39,300	$35,900

SOURCE: U.S. Bureau of the Census and U.S. Dept. of Housing and Urban Development, Construction Reports, series C25, Characteristics of New Housing, annual, and New One-Family Houses Sold and For Sale, monthly, as reported by U.S. Dept. of Commerce, Bureau the Census, Statistical Abstract of the United States, 1985.

TABLE 5

HOUSES SOLD WITHIN MIDDLE INCOME HOUSING RANGE UNITED STATES, BY YEAR

Year	Total New Housing Units Sold (in 000's)	Number Within Middle Income Housing Range (in 000's)	% of Total Sold Within Middle Income Range
1974	519	81	15.6%
1975	549	95	17.3%
1976	646	106	16.4%
1977	819	141	17.2%
1978	817	163	20.0%
1979	709	159	22.4%
1980	545	122	22.4%
1981	436	N.A.*	N.A.*
1982	412	N.A.*	N.A.*
1983	623	151	24.2%

* For years 1978-84, the U.S. Bureau of the Census grouped sales prices of all new single family homes under $50,000 in one category (see Table 6). Because uniform distribution in this category could not be assumed, accurate figures for the number sold within the middle income range couldnot be determined for 1981 and 1982, years in which this range starts below $50,000.

SOURCE: Abeles Schwartz Associates, Inc. calculations, based on Tables 3 and 4.

Mt. Laurel housing, however, is the quantity of middle income housing produced. During low production periods, for instance, such as 1974 and 1975, only about 60% as many new homes in the middle income range were sold than in peak years such as 1978 and 1979. Although the increase of peak years over low years varies among individual building cycles, it is generally a significant difference.

New Jersey building trends during the past twenty-five years illustrate the cyclical nature of the industry. Table 6 reports the number of building permits approved per year in New Jersey. These totals, shown graphically in Table 7, reveal that the state experienced three major building cycles form the late 1950's to 1981, and is currently in the midst of a fourth cycle that began roughly in 1981. These cycles span approximately six to seven years and peak periods occur every six to eight years, or approximately three to four years into the construction cycle.

New Jersey entered its current cycle in 1981. After a slight percentage increase of .5% from 1981 to 1982, the number of building permits in New Jersey increased by nearly 72% from 1982 to 1983 and by 20.7% from 1983 to 1984. Although building permit data is incomplete for 1985, preliminary data indicate that 1985 represents an exceptionally strong year for the construction industry. During January, for instance, statewide construction activity reached its highest total since 1973 and increased 84% over the 1984 total.

Based on past cyclical behavior of the construction industry in New Jersey, it is likely that the building cycle is now or will soon reach its peak. The last peak year was seven years ago in 1978, and the current building cycle is now in its fourth year. This reflects the typical time frame for a peak year and, as such, this is a particularly advantageous period during which

TABLE 6

BUILDING PERMITS APPROVED, NEW JERSEY

1970 - 1985

Year	Building Permits Approved	Percent Change	Year in Cycles
1964	68,078	+24.9%	*
1965	64,933	- 4.6%	
1966	50,163	-22.7%	
1967	46,958	- 6.4%	
1968	43,661	- 7.0%	
1969	21,030	-51.8%	
1970	40,143	+90.9%	1
1971	58,360	+45.4%	2
1972	64,979	+11.3%	3*
1973	52,743	-18.8%	4
1974	26,171	-50.4%	5
1975	23,313	-10.9%	6
1976	31,355	+34.4%	1
1977	34,920	+11.4%	2
1978	38,756	+10.9%	3*
1979	34,868	-10.0%	4
1980	22,257	-53.8%	5
1981	21,293	- 4.3%	6
1982	21,404	+ 0.5%	1
1983	36,404	+71.9%	2
1984	43,925	+20.7%	3
1985 (est.)	60,679	+38.1%	4*

1 Projection based on the first 5 months of 1985 as compared with same period in 1984.

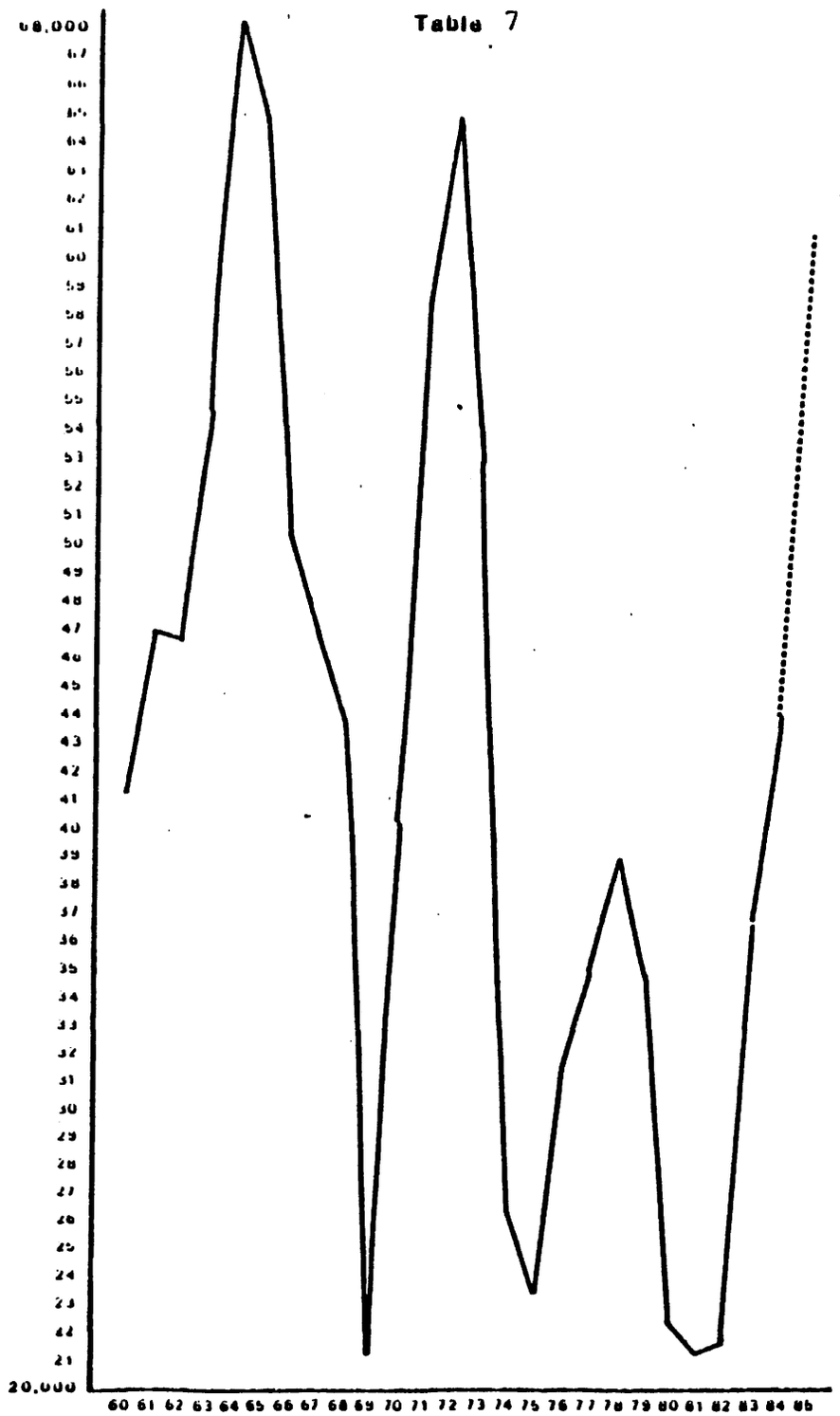
* Peak year.

SOURCE: New Jersey Department of Labor, Residential Building Permits, Annual Reports, 1960-1984; Monthly Reports, January to May 1985.

NEW JERSEY BUILDING PERMITS APPROVED

1960 - 1984 (and projection of 1985 based on first 5 months of year)

Table 7



SOURCE: New Jersey Department of Labor, Division of Planning and Research, Office of Demographic and Economic Analysis.

to build. These favorable conditions should continue through 1986, however the cycle will probably begin its downswing sometime during that year. As a result, the construction industry can be expected to experience a low production period from around 1987 to 1989. This is the time when the Affordable Housing Council would most likely complete its review of Cranbury's housing element.

Thus, while the building climate is currently conducive to building in general, and specifically for Mt. Laurel development, this situation will dissipate within the next few years, and will not reach another peak period until around 1990. For CLC, time is therefore particularly critical. If its case proceeds in the courts and it receives approvals to begin construction before the end of 1985, CLC will be in an excellent position to carry through a Mt. Laurel project. On the other hand, if the case is transferred to CLC, a delay of one-and-a-half years or more would place the project in a low production period. This could ultimately delay the project until 1990, when building conditions are again projected to improve.

In summary, the building cycle makes the timing of Mt. Laurel projects particularly important. A delay in approvals of one year may cause the construction of the project to be delayed three or four years because of the building cycle.

D. EFFECT OF DELAY ON THE COST OF CAPITAL AND THE CONSEQUENTIAL IMPACT ON THE AFFORDABILITY OF HOUSING

As shown in the previous section, the construction of housing is subject to the instability of cyclical building cycles. This section discusses in detail one of the main components of building cycles, which strongly affects both the quantity and the cost of housing - namely, the availability and cost of capital. Although the variability and complexities of this component make its precise impact on housing costs difficult to project, the likely magnitude of these impacts are outlined below.

The price of money constitutes the greatest single housing cost element. In order for housing to become available to lower income households, there must be an adequate money supply and low interest rates.*

Government regulations and policies and those of commercial lenders periodically adjust the mortgage supply.** While their decisions are complex and beyond the scope of this report, it is clear that their policies have a large impact on the housing

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* For a more detailed description of these concepts, see e.g. Roger Starr, Housing and the Money Market, Basic Books, 1975; Kent W. Colton, "Housing Finance in the 1980's: economic factors indicate future directions", Journal of Housing, January 1981, pp. 15-20; and Arthur P. Solomon, "The Cost of Housing: An Analysis of Trends, Incidence and Causes", in The Cost of Housing, proceedings of 3rd Annual Conference, Federal Home Loan Bank of San Francisco (1978), pp. 7-41.

** The determination of what is an adequate money supply involves a delicate balance. When the money supply is too large people tend to spend more and save less, because of the perception that the dollar is losing value too fast. When the money supply is too small, however, housing builders and suppliers have difficulty borrowing money with which to expand production, and people are more prone to accumulate savings rather than to spend. See Starr, Housing and the Money Market, Ch. 5, pp. 58-81.

industry. Specifically, if the money supply is small, builders, suppliers and home buyers have difficulty securing financing. This is especially a problem for lower income households, who are considered high credit risks and have difficulty generally in securing financing.

Table 8 illustrates the extent to which both the increase in the total mortgage debt varies from year to year. Currently, developers consider the money supply to be adequate for the construction and marketing of Mt. Laurel projects. It is, however, difficult to project whether the money supply will remain large enough during the time it takes to transfer the case to the Affordable Housing Council. The unpredictability of the money supply places the project at considerable risk if it is transferred to the Council.

Closely tied to the availability of money, mortgage lending rates are a major factor in the affordability of housing. Mortgage rates depend on a large number of factors, including the money supply, inflation rates, the amount of risk involved, and general business cycles. They are, as such, subject to periodic rate changes. Table 9 shows the mortgage rates for FHA insured secondary market mortgages, conventional new home mortgages and conventional existing home mortgages. Mortgage rates have typically increased or fallen by between .5 to 2.5 points per year and have ranged from a low of 5.83% in 1965 to a high of 16.52% in 1981 for conventional loans on new homes.

The impact of these rate changes on the affordability of housing is substantial. Table 10 illustrates the impact on a household earning $20,000 per year. Assuming that 25% of household income is devoted to the amortization of the loan and interest, the household could have afforded to purchase a home for over $85,000 in 1965 when interest rates were at 5.83%; however, this same household would have only been able to

TABLE 8

TOTAL MORTGAGE DEBT

Year	Mortgage Debt	Absolute Increase	Percent Increase
1975	806	-	-
1976	893	87	10.8%
1977	1,023	130	14.5%
1978	1,174	151	14.8%
1979	1,338	164	14.0%
1980	1,472	134	10.0%
1981	1,583	111	7.5%
1982	1,655	72	4.5%
1983	1,826	171	10.3%

SOURCE: Board of Governors of the Federal Reserve Bulletin, monthly, as reported in the U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1985, Table 839.

TABLE 9

AVERAGE ANNUAL MORTGAGE RATES
UNITED STATES, 1960-1983

Year	FHA Secondary Market	Conventional New Home	Conventional Existing Home
1960	6.16	N.A.	N.A.
1965	5.47	5.83	5.89
1970	9.03	8.52	8.56
1973	8.19	8.30	8.33
1974	9.55	9.22	9.23
1975	9.19	9.10	9.14
1976	8.82	8.99	9.04
1977	8.68	8.95	9.00
1978	9.70	9.68	9.70
1979	10.87	11.15	11.16
1980	13.44	13.95	13.95
1981	16.16	16.52	16.55
1982	15.31	15.79	15.82
1983	13.11	13.43	13.45

SOURCE: Board of Governors of the Federal Reserve System, Federal Reserve Bulletin, monthly, average based on quotations for one day each month as compiled by FHA; as reported in U.S. Department of Commerce, Bureau of the Census, Statistical Abstract or the United States, 1985.

TABLE 10

EFFECT OF CHANGING INTEREST RATES ON THE AMOUNT THAT A HOUSEHOLD EARNING $20,000 COULD SPEND ON THE PURCHASE OF A HOUSE

Mortgage Rate	Affordable Sale Price	Mortgage Rate	Affordable Sale Price
7.0%	$85,534	12.00%	$53,984
7.25%	$81,452	12.25%	$53,006
7.50%	$79,471	12.50%	$52,062
7.75%	$77,584	12.75%	$51,104
8.00%	$75,681	13.00%	$50,226
8.25%	$73,968	13.25%	$49,334
8.50%	$72,237	13.50%	$48,515
8.75%	$70,584	13.75%	$47,682
9.00%	$69,006	14.00%	$46,878
9.25%	$67,497	14.25%	$46,100
9.50%	$66,052	14.50%	$45,347
9.75%	$64,668	14.75%	$44,654
10.00%	$63,269	15.00%	$43,948
10.25%	$61,998	15.25%	$43,263
10.50%	$60,710	15.50%	$42,567
10.75%	$59.539	15.75%	$41,925
11.00%	$58,351	16.00%	$41,301
11.25%	$57,209	16.25%	$40,696
11.50%	$56,111	16.50%	$40,108
11.75%	$55,055		

* Assuming 25% of income spent on amortization of mortgage and interest, 25% downpayment and 30-year fixed rate conventional mortgages.

SOURCE: Abeles Schwartz Associates, Inc. calculations.

purchase a house for $40,000 in 1981 when interest rates rose to over 16.5%. While not as dramatic as this, the fluctuations of interest can be felt on a year to year basis. The typical increases of .5 to 2.5 points means the amount that this household can afford to spend on a new home will increase or decrease from 7.0% to 14.0%.

The New York Times reports that interest rates for August, 1985 in New Jersey are at 11.85% for conventional mortgages.* This is 2-3/4 points below the 14.64% prevailing interest rates at this time last year. Thus, a household with an annual income of $20,000 could purchase a $54,000 house now, whereas only a year ago the household could only have afforded a $45,000 house, assuming they spent 25% of their income for debt service.

Current low interest rates are a major reason that the development of Mt. Laurel housing is economically feasible. The situation, however, is likely to change if the project is delayed one-and-a-half to two years. Although it is not possible to accurately predict interest rates into the future, many economists forecast that mortgage rates will soon "bottom-out" and will again increase. If this prevailing analysis is correct, Mt. Laurel projects may become economically infeasible.

E. THE DELAY CAUSED BY TRANSFER OF THIS CASE TO THE COUNCIL WOULD WRONGLY EXTEND A SERIES OF MISSED OPPORTUNITIES FOR PRODUCTION OF LOWER INCOME HOUSING IN CRANBURY

Cranbury has a long history of ignoring the housing needs of low and moderate income households, which makes it even more crucial that no further delay in provision of Mt. Laurel housing be created by transferring the subject case to the Affordable Housing Council.

* New York Times, Aug. 4, 1985, Section 8, p. 6, based on previous weeks; Source: HSH Associates.

During the 1960s and 1970s, when a variety of federal and state housing programs helped generate tens of thousands of low and moderate income dwelling units throughout the state, not one subsidized project was constructed in Cranbury. The mid-1960s and early 1970s were also historic peaks in the production of non-subsidized housing in New Jersey, when building cycles crested at unusually high levels. While Cranbury limited residential construction activity in general during this time, its exclusionary zoning regulations ensured that virtually none of the housing constructed was affordable to lower income households.

During the 2-1/2 years since the Mt. Laurel II decision litigation and negotiated settlements have resulted in significantly increased opportunities for development of lower income housing throughout the state. Because of the necessary reliance on decennial Census data to quantify lower income housing needs, the remaining five years to 1990 are crucial ones in which a whole-hearted effort should be mounted to meet the needs identified from 1980 Census data. The delay that would be caused by transfer of this case to the Council, when combined with the normal time needed for development of sizeable residential projects, would virtually preclude this goal from being met with regard to Cranbury's fair share of the need. This would represent another missed opportunity on Cranbury's part. In addition, it would be inconsistent and inequitable in light of the fact that other municipalities will be addressing their and the region's Mt. Laurel housing needs during the next five years, while Cranbury in all likelihood would not begin to meet its fair share of the need until the 1990s.

F. THE EFFECT ON LOWER-INCOME HOUSEHOLDS

It must be borne in mind that the parties who will suffer perhaps the greatest "manifest injustice", should this case be transferred to the Affordable Housing Council, are the low and moderate income households in Cranbury and Cranbury's present need region, who would be denied the timely access to habitable, affordable housing which the Mt. Laurel II decision sought to provide.

Dilapidated and overcrowded housing conditions impose daily hardships on roughly 29 lower income households in Cranbury and 100,000 such households in Cranbury's present need housing region according to the calculations of the court-appointed Master. The sheer magnitude of these numbers argues most strongly against any action which would result in further delay in the provision of this desperately needed housing.

In this regard, CLC, which is prepared and committed to constructing 136 dwelling units of Mt. Laurel housing as part of its proposed development, represents the interests of the lower income households in need. There is a very real danger that these housing units cannot and will not be constructed should this litigation be transferred to the Affordable Housing Council, with the inevitable delay and uncertainties which this entails. In the end, the parties that will suffer most are the lower-income families and individuals who would have occupied these dwellings, and for whom the decision regarding the future administration of this case is not just a legal or technical issue, but a matter of whether they will continue to endure substandard and often wretched housing conditions.

III. CONCLUSION

Currently, CLC is in a highly favorable position to develop its proposed Mt. Laurel II project. The site has access to municipal resources and will not have any significant impacts on them. General building conditions as well as mortgage rates are particularly favorable and conducive to this type of development. In addition, the master's report providing a compliance program for Cranbury has been completed, and plaintiffs have already filed replies.

The transfer of the case to the Affordable Housing Council will delay the case at least 1-1/2 years. This delay will have several adverse impacts on the development of the site. It will force the plaintiffs, CLC, to incur additional expenses because of the delay and duplication of effort involved in presenting the case to the Council. The development of other competing projects in Cranbury will also affect the project during the delay. These projects will deplete municipal resources, potentially increasing costs to the Affordable Living Corporation's project, as well as increasing its perceived impact on these resources. In addition, the favorable building conditions and mortgage rates currently prevailing are expected to change during the next 1-1/2 to 2 years, thereby making the project less feasible.

As a result, from a planning and economic perspective, the delays involved in transferring the case to the Affordable Housing Council will have significant impacts on its proposed Mt. Laurel II project, and may, in fact, make the project infeasible. This situation represents a "manifest injustice" to the Affordable Living Corporation, as well as to low and moderate income households.

DEFENDANT GARFIELD & COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR TRANSFER TO THE AFFORDABLE HOUSING COUNCIL AND A MORATORIUM ON BUILDER'S REMEDIES

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION : MIDDLESEX COUNTY

DOCKET NO. C-4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.	:	
Plaintiffs,	:	
vs.	:	CIVIL ACTION
THE MAYOR and COUNCIL OF THE BOROUGH OF CARTERET, et al.,	:	
Defendants.	:	

DEFENDANT GARFIELD & COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR TRANSFER TO THE AFFORDABLE HOUSING COUNCIL AND A MORATORIUM ON BUILDER'S REMEDIES

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Defendants.	:	

PROCEDURAL STATEMENT

More than eleven years ago the Urban League of Greater New Brunswick challenged the exclusionary zoning practices of the Township of Cranbury. There followed two years of discovery and pre-trial proceedings and then a lengthy trial before Judge Furman. That trial took place more than nine years ago and resulted in a finding that Cranbury had prohibited construction of any new multi-family housing within its borders and had created industrial zones which could accommodate more than 500% of projected industrial demand while at the same time generally insisting upon one acre residential lots. Urban League of Greater New Brunswick v. Carteret, 142 N.J. Super 11, 28 (Ch. Div. 1976). Declaring that Cranbury's long time practice of zoning to exclude members of the low and moderate income community of this State violated the constitutional mandate issued by the Supreme Court in South Burlington N.A.A.C.P. v. Mt. Laurel Township, 67 N.J. 515, cert. denied. 423 U.S. 808 (1975), Judge Furman required Cranbury to rezone its net vacant acreage suitable for housing to permit construction of 1,351 units of low and moderate income housing. 142 N.J. Super. 11.

In November of 1976 Cranbury secured from the Appellate Division a stay of Judge Furman's order pending its appeal. That appeal was not argued until almost three years after Judge Furman issued his decision. On November 11, 1979, more than six years ago and more than five years after the case was filed, the Appellate Division reversed the judgment below. The case was then appealed to the Supreme Court. On January 20, 1983 the Supreme Court reversed the Appellate Division and remanded the case to this Court 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 N.A.A.C.P. v. Mt. Laurel Township, 92 N.J. 158, 350-51 (1983). The Court concluded that the unconstitutionality of Cranbury's long standing land use policy "has already been amply demonstrated". Id.

On July 25, 1983, the Township of Cranbury adopted a new land development ordinance which is the subject of this litigation. This ordinance was adopted notwithstanding a presentation made to the Township Committee by Garfield & Company pointing out that Garfield & Company was willing to construct low and moderate income housing on its tract of land in Cranbury but that the constraints found in the ordinance would preclude it from doing so. On September 7, 1984, less than two months after adoption of the ordinance, Garfield & Company commenced a litigation challenging the ordinance. Subsequently, other parties with interests in land located in Cranbury also commenced actions challenging the ordinance. Cranbury then moved this Court for an order consolidating these actions with the eleven year old Urban League case. On December 15, 1984 this Court granted Cranbury's consolidation motion.

Subsequent to entry of the order of consolidation extensive discovery took place in this case. More than one hundred pages of interrogatories were

propounded and answered and half a dozen depositions were taken. In addition, experts for each of the parties to this consolidated action met on three different occasions in an ultimately successful attempt to devise a consensus fair share formula. A trial was then scheduled, which precipitated a recusal motion by Cranbury. After being fully briefed and argued, this motion was denied. There followed a three week trial on the issues of fair share, whether Cranbury's new zoning ordinance met its fair share obligation and whether plaintiffs Zirinsky, Cranbury Land Company and Toll Brothers should be denied a builder's remedy on the ground that they did not proceed in good faith. Cranbury specifically did not challenge Garfield & Company's right to a builder's remedy on this ground. During the trial Cranbury's expert expressed his general acceptance of most of the reasoning and conclusions set out in the Consensus Report. He concluded, however, that both the growth area and wealth factors should be eliminated from the fair share formula. He testified that Cranbury's fair share of low and moderate income housing should be 599 units, 329 more units than could be built under Cranbury's present ordinance with all of its cost generating features. Cranbury stipulated that its ordinance violated the Mt. Laurel constitutional mandate.

Before this Court could even render its decision, Cranbury moved for a new trial. The motion was fully briefed, argued and denied. This Court ordered Cranbury to revise its zoning ordinance within 90 days to permit the construction of 816 low and moderate income units, only 217 more units than Cranbury's own expert concluded were needed and 535 units less than Judge Furman had concluded nine years before were needed.

Cranbury's time to submit a compliance program was extended on two different occasions. Soon after its submission, Cranbury filed a petition with the Supreme Court seeking a stay of all further proceedings in this case. This

application was denied. Subsequently, all parties to this case exchanged expert reports in preparation for the hearing on Cranbury's proposed compliance package. All parties, presumably, are presently prepared to proceed with that hearing.

STATEMENT OF FACTS

In the more than eleven years since its zoning ordinance was first challenged as so racially and economically restrictive as to violate constitutional obligations, little, if anything, has been done to promote the development of low and moderate income housing in Cranbury. Rather, the municipality has authorized vast sums of money to delay or deny the development of such housing.

Almost six months after this Court's Mount Laurel II decision, Cranbury adopted the zoning ordinance presently at issue. That ordinance designated Garfield & Company's land as a preferred location for low and moderate income housing. This property was zoned at a density of up to five units per acre. However, to construct housing at this density, Garfield & Company had to purchase something which the new zoning ordinance denominated as Transfer Development Credits. It took the purchase of 3.5 Transfer Development Credits and an agreement to construct 3/4 of a unit of low or moderate income housing per acre to reach the five unit per acre maximum density permitted. It was estimated that each of the Transfer Development Credits would cost between $8,000.00 and $10,000.00.

On July 25, 1983, the Cranbury Township Committee held a hearing on this proposed zoning ordinance. At that hearing a representative of Garfield & Company made a presentation. He informed the Township Committee that Garfield & Company was willing and able to develop its property in Cranbury for Mount Laurel housing. However, he explained that such development would be impossible, inter alia, in light of the density provisions and the Transfer Development Credit purchase requirement contained in the proposed ordinance. Notwithstanding this presention, the Cranbury Township Committee adopted the proposed zoning ordinance without modifying the density provisions, Transfer

Development Credit purchase requirements or any of the other cost generating provisions. Garfield & Company then commenced suit within forty-five days as required by Rule 4:69-6.

Subsequently, plaintiffs Zirinsky, Cranbury Land Company and Toll Brothers also challenged the zoning ordinance on the ground, inter alia, that it did not provide a reasonable opportunity for the construction in Cranbury of that municipality's fair share of the region's low and moderate income housing. During the course of pre-trial discovery, the plaintiffs learned from Cranbury's own planners that although the zoning ordinance mathematically provided for the construction of up to 375 low and moderate income units in Cranbury, there did not exist enough Transfer Development Credits to permit the construction of this number of low and moderate income units. Rather, there would be a shortfall of 700 market rate and subsidized units. Because the zoning ordinance contemplated that 15% of these units would be for low and moderate income families, only 270 low and moderate income units could be built under Cranbury's zoning ordinance; even assuming that the Transfer Development Credit scheme and other cost generating features were lawful.

The ultimate conclusion of Cranbury's own planner was that Cranbury's ordinance was not in conformance with the principles set out in Mount Laurel II. Rather, he submitted a report dated March 19, 1984 in which he expressed his general acceptance of most of the reasoning and conclusions set out in the report submitted to Judge Serpentelli by the Court appointed master, Carla L. Lerman. Mr. Raymond, Cranbury's expert, recalculated Cranbury's fair share based upon his modification of the formula found in Ms. Lerman's report. He eliminated both the growth area and wealth factors from the fair share formula. However, Mr. Raymond still concluded that Cranbury's fair share was 599 units, 329 more units than could be built under Cranbury's zoning ordinance with all of

its cost generating features. During pre-trial discovery Mr. Raymond, his associate Mr. March as well as Mayor Danser and Planning Board Chairman Don Swanagan all testified that Garfield & Company's land was an appropriate and desirable location for the construction of low and moderate income housing.

Prior to the trial of this action, Cranbury moved for the recusal of Judge Serpentelli. This motion was fully briefed and argued. It was denied. After a full trial, Judge Serpentelli found that Cranbury had a fair share of 816 low and moderate income units. He appointed a master and gave Cranbury 90 days to develop a proposed compliance program. After a series of meetings of the Planning Board and Township Committee, the municipality's planners came up with a draft compliance program which urged a staging over a period of years of Cranbury's fair share and designated the property owned by Garfield & Company as the preferred location for the first phase of low and moderate income residential construction in Cranbury. However, the municipality secured an extension of time from Judge Serpentelli to submit its compliance program and revised its planner's recommendation. Cranbury's ultimate submission proposed that there be no Mount Laurel development of Garfield & Company's property until 1996, and that development take place over a period of twelve years. Yet, it recommended immediate development of two parcels of land continguous to the Garfield tract owned by persons who were not plaintiffs in the litigation and had not been involved in any way in challenging Cranbury's zoning ordinance. Thus, Cranbury's submission to Judge Serpentelli placed Garfield & Company, the first developer plaintiff to commence suit and the only developer plaintiff seeking to construct housing in an area which Cranbury had zoned for high density residential development, in a worse position than it would have been in had it never challenged Cranbury's zoning ordinance.

ARGUMENT

In the fourteen months since this Court declared Cranbury's zoning ordinance unconstitutional, not a single new unit of low or moderate income housing has been built in Cranbury. In the thirty-two months since our Supreme Court declared Cranbury's former zoning ordinance unconstitutional, not a single new unit of low or moderate income housing has been built in Cranbury. In the nine years since Judge Furman declared Cranbury's former zoning ordinance unconstitutional, not a single new unit of low or moderate income housing has been built in Cranbury. In the more than eleven years since Cranbury's zoning ordinance was first challenged as so racially and economically restrictive as to violate constitutional obligations, not a single new unit of low or moderate income housing has been built in Cranbury.

Cranbury, of course, has an answer to this continuing gross denial of constitutional rights to this State's low and moderate income families. Judge Furman's fair share calculation was wrong. Judge Furman had been reversed by the Appellate Division. The Supreme Court broke new ground. The consensus formula was unanticipated. Yet, one fact overwhelms each and every excuse presented by Cranbury. For more than a decade it has taken no action which would open its doors to low and moderate income citizens. Rather, it has spent tens of thousands of dollars in a highly successful effort to avoid the necessity of making a place for low and moderate income residents within its borders.

Cranbury's true intentions can readily be understood by reviewing the situation of Garfield & Company. Cranbury's present zoning ordinance designates the Garfield tract as an appropriate location for low and moderate income housing. Its draft compliance package proposed immediate development of the Garfield tract for low and moderate income housing. Its compliance package proposed the Garfield tract as one of the four tracts to be developed for low

and moderate income housing. Its experts all concede that the Garfield tract is the appropriate location for low and moderate income housing. Indeed, its experts concede that development of the Garfield tract at the density proposed by Garfield & Company would not be contrary to sound planning principles. Add to this the fact that development of the Garfield tract, even at the density proposed by Garfield & Company, would only generate two-thirds of the low and moderate income units which Cranbury's own expert testified it was obligated to provide for. Yet, Cranbury demands that Garfield & Company be denied a builder's remedy and consigned to the Affordable Housing Council to begin its case all over again. Nothing could make Cranbury's intention clearer. It seeks just what it has sought for more than a decade - DELAY. Its watchword is the same today as it has been through two full trials and three appeals - Tens of Thousands of Dollars for Delay But Not One Penny For Compliance.

POINT I

IT WOULD BE MANIFESTLY UNJUST TO TRANSFER THIS CASE TO THE AFFORDABLE HOUSING COUNCIL

This consolidated action may not be transferred to the Affordable Housing Council if the transfer "would result in manifest injustice." Fair Housing Act, §16.a. Cranbury has moved for such a transfer notwithstanding the fact that the manifest injustice of any such transfer is apparent. Such a transfer would delay for at least twenty-two months* a decision which would otherwise be had within three months and would require needless relitigation of issues which have already been litigated on two different occasions. The delay will increase the costs to the developers of the low and moderate income housing which they must subsidize. It will also increase their holding costs and, of course, will bar hundreds of low and moderate income families from adequate housing for at least another two years. In the case of Garfield & Company, it may also increase the cost of sewer service by between one and five million dollars. Finally, as Cranbury is well aware, the greater the delay the greater the likelihood that a project will never be built.

Beginning this litigation all over again also places a substantial burden on the plaintiffs. The Urban League, of course, has obvious funding problems. The developers may not be in such a dire financial circumstances, but they will most certainly be financially injured if this litigation must be commenced again, ab initio. The less money spent in court, the stronger the development which can be constructed. Absolutely no reason exists for starting all over

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* That transfer to the Affordable Housing Council will delay this case by at least twenty-two months was demonstrated by the Urban League in a memorandum recently submitted to this Court which analyzed the Fair Housing Act. Urban League's Memorandum of Law in Opposition to South Plainfield's Motion to Transfer to the Council on Affordable Housing at p. 18-31 (C-4122-73).

again just as this case has almost been concluded. Cranbury has already had two bites of the apple. It is not entitled to a third.

POINT II

THERE SHOULD BE NO MORATORIUM ON BUILDER'S REMEDIES

Section 28 of the Fair Housing Act invokes a moratorium on the issuance of a builder's remedy in connection with exclusionary zoning litigation filed on or after January 20, 1983. The Urban League commenced its action long before this date. That action is, therefore, not subject to the moratorium. By order dated December 15, 1985, issued pursuant to a motion filed by Cranbury, the cases of all other plaintiffs were consolidated with the Urban League case. Therefore, by Cranbury's own request, all actions brought subsequent to January 20, 1983 have been fused with the Urban League case into a single litigation.

> "In legal contemplation, consolidation fuses the component cases into a single action." [2 Schnitzer & Wildstein, New Jersey Rules Service at p. 1506.].

The fusion effect of a consolidation order was recognized by the Appellate Division in Florio v. Galandkis, 107 N.J. Super. 1 (App. Div. 1969).

> "Although the three actions were originally instituted as separate actions their consolidation by the court fused them into a single action." [107 N.J. Super. at 5].

Presumably it was also recognized by this Court when it issued its July 27, 1984 letter opinion in this case under the caption, Urban League v. Carteret, Docket No. C-4122-73.

Garfield & Company, Cranbury Land Company, Toll Brothers and Lawrence Zirinsky were consolidated into the 1974 Urban League case at the instance of Cranbury. No basis therefore exists for refusing a builder's remedy pursuant to a statute which would be effective only if these plaintiffs had not been fused into the Urban League case.

POINT III

THE FAIR HOUSING ACT'S MORATORIUM ON THE AWARD OF BUILDER'S REMEDIES IS UNCONSTITUTIONAL

The Fair Housing Act moratorium on the award of builder's remedies violates the constitutional mandate found in Mount Laurel II. The builder's remedy was authorized to secure compliance with the Supreme Court's constitutional mandate.

> "In Madison, this court, while granting a builder's remedy to the plaintiff appeared to discourage such remedies in the future by stating that 'such relief will ordinarily be rare.' 72 N.J. at 551-52 n. 50. Experience since Madison, however, has demonstrated to us that builder's remedies must be made more readily available to achieve compliance with Mount Laurel. We hold that where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." [92 N.J. at 279-80].

As the builder's remedy is necessary for enforcement of the constitutional right and is an essential part of the right, the legislature may not interfere with it. Morin v. Becker, 6 N.J. 457, 471 (1951).

It is also true that the moratorium violates the separation of powers clause of the New Jersey Constitution. It is a blatant attempt to override the Supreme Court's constitutional power to make rules governing the administration, practice and procedure in all courts. New Jersey Constitution, Art. 3, par. 1, and Art, 6, §2, par 3; Sears, Roebuck & Co. v. Katzmann, 137 N.J. Super. 106 (App. Div. 1975). When a statutory provision and a court rule are in conflict, the rule must prevail. Borough of New Shrewsbury v. Block 115, Lot 4, 74 N.J. Super. 1 (App. Div. 1962); State v. U.S. Steel Corp., 19 N.J. Super. 274 aff'd, 12 N.J. 38 (1953).

Another deficiency of the builder's remedy moratorium is that it does not meet the due process mandate of the New Jersey Constitution, Article 1, Paragraph 1. Due process requires that the legislative purpose bear a rational relationship to a constitutionally permissible objective, Ferguson v. Skrupa, 372 U.S. 726, (1963); U.S.A. Chamber of Commerce v. State, 89 N.J. 131, 155 (1982). Although a court should not review the wisdom of legislative action, it must determine whether such action falls within constitutional limitations. N.J. Sports Exposition Authority v. McCrane, 61 N.J. 1, 8 (1972). No public purpose can be envisioned for a twelve to fifteen month builder's remedy moratorium. In the event that this case is not transferred to the Council on Affordable Housing, no public purpose is served by preventing this Court from awarding an appropriate remedy authorized in Mount Laurel II. Any further delay is, in fact, clearly contrary to the public interest. 92 N.J. 199-200, 289-90, 291, 293, 341.

POINT IV

IF THIS COURT ADOPTS A COMPLIANCE PROGRAM WHICH INCLUDES ANY OF THE ORIGINAL PLAINTIFF DEVELOPERS' SITES, THE MORATORIUM WILL BE MOOT AS TO THAT PLAINTIFF DEVELOPER

By its terms the moratorium on builder's remedies excludes from its scope the Urban League. The Urban League is not a profit making entity. Moreover, it filed its action prior to January 20, 1983. Therefore, the Urban League may press forward with its lawsuit, which demands a general revision of the Cranbury zoning ordinance to bring the municipality into compliance with the Mount Laurel constitutional mandate. To the extent that this Court mandates a revision including land owned by any of the plaintiff developers, it will be immaterial that a builder's remedy moratorium exists.

For example, Cranbury has already designated the Garfield site as suitable for low and moderate income housing. Should the Court agree with the designation, Garfield & Company might well not require a builder's remedy to construct low and moderate income housing in Cranbury.

POINT V

THE FAIR HOUSING ACT TAKEN AS A WHOLE IS UNCONSTITUTIONAL

Various provisions of the Fair Housing Act directly violate Mount Laurel II. For example, the Act limits housing regions to between two and four counties having significant social, economic and income similarities. Section 4(b). These arbitrary restrictions seriously interfere with the Supreme Court's objective the "the gross regional goal share by constituent municipalities be large enough fairly to reflect the full needs of the housing market area of which the municipality forms a part." Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 536 (1977). It will also tend to preclude the pairing of urban and neighboring suburban counties. The poor will be forced to remain exactly where they are, in the most urban and racially segregated areas.

The standards set out in the Act for adjustment of fair share also violate the Mount Laurel constitutional mandate. Section 7(c)(2)(g) requires the Affordable Housing Council to take into account the unavailability of public facilities. Moreover, §7(e) authorizes the Council to enforce an arbitrary limitation based upon a percentage of the existing housing stock in a municipality, no matter how much higher the municipality's fair share would otherwise be.

Finally, the absence of any authority in the Act permitting the Affordable Housing Council to issue builder's remedies also violates the Mount Laurel constitutional mandate. As previously pointed out, the builder's remedy was an integral part of the Mount Laurel constitutional mandate. The Fair Housing Act, however, unilaterally eliminates this remedy.

CONCLUSION

For all the reasons set out in this memorandum, Cranbury's motions to transfer this case to the Affordable Housing Council and to keep plaintiffs from receiving a builder's remedy should be denied.

Respectfully submitted,
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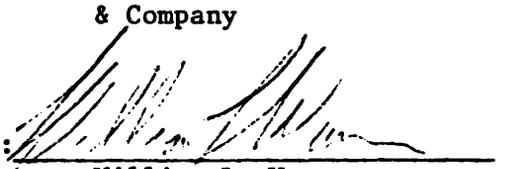
By: 
William L. Warren

Dated: September 20, 1985
Princeton, New Jersey

AFFIDAVIT OF DONALD E. FETZER

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ATTORNEYS FOR GARFIELD & COMPANY

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

DOCKET NO.: C-4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.

Plaintiffs,

vs.

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

Defendants.

CIVIL ACTION

AFFIDAVIT OF DONALD E. FETZER

DONALD E. FETZER being duly sworn deposes and says:

1. I am a professional engineer employed by Van Note-Harvey Associates, a firm of consulting engineers, planners and land surveyors.

2. My firm has been retained to conduct a feasibility study for water and sewer availability on the land owned by Garfield & Company in the Township of Cranbury.

3. The Garfield tract is situated in the eastern most portion of Cranbury just on the border with Monroe Township. As part of my investigation I therefore contacted the executive director of the Monroe Township Municipal

Utilities Authority. This agency supplies both water and sewer service throughout Monroe.

4. The executive director of the Monroe Utilities Authority, Mr. Michael Rogers, expressed an willingness to consider providing utilities to the Garfield & Company site.

5. The most economical method of sewering the Garfield site would involve pumping waste water through a twelve inch force main to a Forsgate Treatment Plant located in Monroe. At the moment the 1.5 million gallon per day Forsgate Plant is operating at capacity and cannot accept any additional flow. However, on June 20, 1985 a public hearing was held and on July 3, 1985 the Middlesex County Board of Chosen Freeholders adopted an amendment to the Lower Raritan/Middlesex County Water Quality Management Plan which includes conversion of the Forsgate Plant to a 5.5 to 6.0 million gallon per day pumping facility.

6. After conversion, sewage will be pumped from the Forsgate site to the Middlesex County Utilities Authority Treatment Plant in Sayreville via the Outcalt Pump Station.

7. This conversion is being undertaken by a group of eleven developers in cooperation with Monroe Township Municipal Utilities Authority. Inclusion of the Garfield tract flows would necessitate increasing the pump station and force main design by .5 million gallons per day.

8. As the Forsgate Treatment Plant conversion project is now being formulated, it is vital that the Garfield & Company tract be included in this planning process. If the plan is made final and the conversion take place without inclusion of the Garfield tract, the cost of sewering the Garfield tract will almost certainly increase by more than a million dollars and perhaps by as much as five million dollars.

9. The executive director of the Monroe Township Municipal Utilities Authority has emphasized the necessity that all developers interested in participating in the conversion project sign up immediately. Otherwise, there will be no capacity allowed to them. Any delay in joining with these other developers could significantly increase the cost of developing the Garfield tract for residential housing.

DONALD E. FETZER

Sworn and subscribed to before me
this 19th day of September, 1985.

Notary Public

LETTER FROM STERNS, HERBERT & WEINROTH, ESQS. TO HONORABLE EUGENE D. SERPENTELLI, J.S.C. DATED SEPTEMBER 23, 1985

SEP 24 1985

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OF COUNSEL
RICHARD J. HUGHES

September 23, 1985

Honorable Eugene D. Serpentelli, J.S.C.
Court House
Ocean County
CN-2191
Toms River, New Jersey 08754

Re: Lawrence Zirinsky, et al. v. Cranbury Township, Motion to Transfer

Dear Judge Serpentelli:

Please accept this letter brief in lieu of a more formal response to the motion by Cranbury Township to have the exclusionary zoning litigation against it transferred to the new Council on Affordable Housing established by the Fair Housing Act.

This Court has already received closely reasoned submissions from a number of the other parties involved in this case. These papers amply demonstrate that transfer of this case is totally inappropriate under the statute. In addition, such transfer runs completely counter to our State Constitution as interpreted in Mount Laurel II to require speedy disposition of exclusionary zoning litigation. These arguments need not be repeated. It suffices to say that plaintiff Zirinsky finds Cranbury's transfer motion to be an astonishing attempt to avoid a final decision in an eleven year old case.

Worse still, this motion seeks, in effect, to thwart judicial action in the enormous number of pending Mount Laurel II cases, many of which were filed in good faith years ago pursuant either to Mount Laurel I or Mount Laurel II. This baleful effect will occur because if a transfer can be granted in this eleven year old case then it can in any case presently

pending before the Courts, and filed in reliance on the Supreme Court's specific encouragement to builders lawsuits.

Such a ceding of judicial control over Mount Laurel II litigation would destroy the primary goal of the unanimous decision. That goal is the establishment of clear law and clear penalties for violating that law inorder to induce voluntary compliance by municipalities. See 92 N.J. at 214. Notwithstanding this primary goal, there will be no voluntary compliance if Cranbury's motion is granted. A spill-over effect or other cases will be immediate and disasterous. Why should any set of municipal officials take on the politically difficult task of compliance if, by filing a motion, even in the oldest of cases, they can postpone the day of reckoning for two years or more. Why settle or comply, if it is obvious as a result of grant of transfer here, that the Courts are willing to cede their control of Mount Laurel II litigation to an as yet non-functioning administrative agency.

This spill-over will probably cause existing settlement discussions to break down. It will intensify the political pressures against low income housing and in favor of delay on even municipal officials and attorneys who are presently inclined to seek an accommodation with the Courts and with the plaintiffs and to get on with the business of implementing the goals of Mount Laurel II. Such willingness to accommodate will disappear if Cranbury's delay effort is approved by this Court.

In sum, a decision by this Court granting transfer has a clear potential for devastating voluntary compliance and stiffening resistence to Mount Laurel II by signalling all communities, no matter what the status of their present litigation, that a two or more year delay is available to them merely for the asking. Such a result is not only contrary to the purposes of the legislation, which explicitly assert, in sections two and three, the State's desire to implement Mount Laurel II. It is also totally contrary to the Constitution of our State which was found by the Mount Laurel II Court to mandate prompt action to achieve the elimination of exclusionary zoning in accordance with the decade old

STERNS, HERBERT & WEINROTH

pronunciation by Justice Hall in the Mount Laurel I decision. Since, therefore, Cranbury's motion would imperil adherence to Mount Laurel II statewide, it should be denied.

Very truly yours,

Michael J. Herbert

MJH/car
cc: All Counsel of Record in the Cranbury, Monroe and Piscataway Cases

LETTER FROM HUFF, MORAN & BALINT, ESQS. TO HORORABLE EUGENE D. SERPENTELLLI, J.S.C. DATED SEPTEMBER 24, 1985

HUFF, MORAN & BALINT
COUNSELLORS AT LAW
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CRANBURY, NEW JERSEY 08512

J. SCHUYLER HUFF
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September 24, 1985

Honorable Eugene D. Serpentelli, J.S.C.
Court House
Ocean County
CN-2191
Toms River, New Jersey 08754

Re: Urban League of Greater New Brunswick, et al. v. The Mayor and Council of the Borough of Carteret, et al. - Docket No. C-4122-73

Dear Judge Serpentelli:

I am writing this short letter memorandum as a reply to the volumes of material with which I have been served in opposition to Cranbury Township's Motion to transfer and accompanying alternate Motions. Yesterday, September 23, 1985, I was served with Briefs totalling 195 pages, together with an additional 38 pages of supporting Affidavits and 28 pages of professional reports, for a total of 261 pages of documentation. Obviously, it will be impossible to respond to all of the material contained therein, or to even review it in complete detail prior to the hearing scheduled on these Motions for September 27, 1985. However, there are certain points in passing which I feel deserve some comment.

The vast majority of the arguments on the part of the various plaintiffs against this transfer Motion are directed at the Statute ("The Fair Housing Act", Chapter 222 P.L. 1985). The arguments made are that a minimum of 18 months additional delay will be necessary before anything can happen under that Statute. If that delay in and of itself, will constitute a "Manifest Injustice" that would mean that no transfer Motion would be granted despite the fact that the Legislature has specifically authorized such transfer Motions. The fact that the judicial system may think that there is a better way to handle the problem than that which the Legislature has devised, should not permit the Judiciary to substitute its judgment for that of the Legislature, unless the objections rise to the level of constitutionality. While the various briefs submitted

appear to question the moratorium on builder's remedy on constitutional grounds, I do not see any strong arguments against the transfer motion, itself, or the entire procedures of "The Fair Housing Act" being raised on constitutional grounds. The fact that the Legislature has built this initial delay into the system, and simultaneously authorized the transfer motion, clearly means that they did not intend that this internal delay would be considered a Manifest Injustice which would result in a denial of the Motion. Similarly, as pointed out in numerous occasions in Mt. Laurel II, the Judiciary has in the past indicated its strong intent to defer to the Legislature the question o f dealing with the problem of low and moderate income housing. For a discussion of these citations, see Township of Cranbury's initial brief, pages 1 & 2.

It should be further noted that the delay which would occur as the result of the granting of this transfer motion is certainly no greater and probably substantially less than the delay that would occur, if the Township were to appeal whatever ultimate decision may result from this Court. It should be noted in this regard, that the period of time from the original Decision in Mt. Laurel II, was six and one-half years. The vast majority of this time was taken with waiting for the scheduling of oral arguments and waiting for court opinions. In the meantime, the Township of Cranbury is committed to going forward with its support of the Cranbury Housing Associates Project which in its first stage will construct 40 low and moderate income housing units. Despite Mr. Warren's protestations to the contrary, since the initiation of this suit, the Township of Cranbury has continued to support low and moderate income housing in the Township through use of community development revenue sharing funds, and through support of Cranbury Housing Associates Project, such as the Pin Oaks Development which is geared solely towards low income individuals. Granted, these projects are small, but in relative terms the construction of 40 low and moderate income housing units in Cranbury, is the equivalent of the construction of 800 such units in East Brunswick.

Another point that should be addressed is the Urban League argument that the transfer motion should not be granted when it would have the effect of disrupting vested rights. This argument has the effect of saying that somehow the Civic League and the plaintiff builders have a vested right in the fair share number that has been awarded to Cranbury Township. It would almost seem to indicate that they view this action as one for damages with the measure of damages being the fair share number allocated, and once that number has been arrived at, it becomes a property right of theirs which cannot be taken away. When looked at in those terms, the preposterousnesss of that argument is self evident.

Finally, it should be noted that plaintiff's references to the case of Kruvant v. Cedar Grove, 82 N.J. 435, 1980 are inapposite. Kruvant involved a situation where municipality continually rezoned the plaintiff's property after being reversed on its denial of a zoning variance for a multi-family development. The case was replete with efforts by the municipality to evade directors of the Court without resort to the judicial process. Cranbury Township has done nothing in this case which would in any way evade any Order of a Court which was directed to it, other than to take a judicial appeal of that Order. If it is to be criticized for exercising the rights that are available to it under the law, then again, transfer motions could not legitimately be granted in any case.

Obviously, there are numerous other points raised in the various briefs which need to be addressed. In the limited time available, however, I wish to highlight these most important points. Additional comments will be made at the time of oral argument.

Respectfully submitted,

WILLIAM C. MORAN, JR.

WCM:gs
cc: Michael J. Herbert, Esq.
Carl S. Bisgaier, Esq.
Guilet D. Hirsch, Esq.
Richard Schatzman, Esq.
Joseph J. Stonaker, Esq.
Jonn Payne, Esq.
William Warren, Esq.
Thomas R. Farino, Esq.
Philip Caton
Harry Pozycki, Esq.
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OCT 21 1985

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On Behalf of the ACLU of NJ

SUPERIOR COURT OF NEW JERSEY
MIDDLESEX/OCEAN COUNTY
NO. C 4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

vs.

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

Defendants.

(Cranbury)

ORDER

Cranbury Township having moved to transfer this case to the Council on Affordable Housing pursuant to Section 16 of the Fair Housing Act, Laws of 1985, c.222, and having filed in support thereof an Affidavit of Alan Danser and a Brief in Support, and Urban League plaintiffs having filed in response an Affidavit of Alan Mallach and a Memorandum of Law in Opposition, Cranbury Land Company having filed a Brief and Appendix in Opposition, and Garfield and Company having filed an Affidavit of Donald E. Fetzer and a Memorandum in Opposition, and Lawrence Zirinsky having filed a letter-brief, and Cranbury Township having filed a reply letter-memorandum, and the Court having heard oral argument in open court on October 2, 1985 from William Moran, Esq. for Cranbury Township, Eric Neisser, Esq. for the Urban League

plaintiffs, Carl Bisgaier, Esq. for Cranbury Land Company, and William Warren, Esq. for Garfield and Company, and the Court having rendered an oral decision on October 2, 1985, with findings of fact and conclusions of law,

IT IS HEREBY ORDERED THIS 11 DAY OF OCTOBER 1985:

1. Cranbury Township's motion to transfer is denied.

2. Stay of this Order pending any possible appeal is denied.

Eugene D. Serpentelli

EUGENE D. SERPENTELLI, A.J.S.C.

270a

FROM HUFF, MORAN & BALINT, ESQS. TO MS. GAIL GARRABRANDT
DATED OCTOBER 8, 1985

HUFF, MORAN & BALINT
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October 8, 1985

Ms. Gail Garrabrandt
Room 133
Ocean County Court House
Toms River, New Jersey 08753

Re: Urban League of Greater New Brunswick vs.
Township of Cranbury, et als.
Docket No. C-4122-73

Dear Ms. Garrabrandt:

This will confirm my conversation with you after the hearing on the Motion to Transfer which was argued before Judge Serpentelli on Wednesday, October 2, 1985. Would you please provide the undersigned with a copy of the transcript of the entire proceedings, including oral argument and the Court's oral opinion.

I am enclosing herewith a voucher for the Township of Cranbury that you can use in connection with this matter. If you have any questions, please give me a call.

Very truly yours,

WILLIAM C. MORAN, JR.

WCM:gs
Enclosure

Called + left message on 10/9/85 for Gayle Garrabrandt to disregard our request because another attorney had requested transcript which we will share the expense.