

CA

General

~~18-Nov-1985~~
2 Oct 1985

Part 1: Transcript of Motions to
Transfer to Fair Housing Council
involving) AMG Realty v. Warren ^{tw} (p 4)

pgs. 169

- ~~1) Warren Twp (p 4)~~
- ~~2) Skytop v. Warren Twp~~
- ~~3) Timber Properties v. Warren Twp~~

and ^{oral argument} on Motion of Public Advocate
for Leave to Appear as Amicus Curiae
on short notice (p 76ff)

CA002537S

- Cranbury
- Monroe Twp
- Piscataway Twp
- South Plainfield
- Warren Twp.

(p105 is turned) (and 108)

RECEIVED

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. C-4122-73, et als

NOV 1985

JUDGE [Name]

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URBAN LEAGUE OF GREATER NEW BRUNSWICK,	:	TRANSCRIPT
	:	OF
Plaintiff,	:	MOTIONS
	:	TO
vs.	:	
	:	TRANSFER
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET,	:	
	:	
Defendant.	:	

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October 2, 1985
Toms River, New Jersey

B E F O R E :

HONORABLE EUGENE D. SERPENTELLI, J.S.C.

A P P E A R A N C E S :

ERIC NEISSER, ESQUIRE
and
J. M. PAYNE, ESQUIRE
For Urban League

ARNOLD K. MYTELKA, ESQUIRE
For Lori Associates and Habd Associates

JOSEPH MURRAY, ESQUIRE
For AMG Realty, Inc. and Skytop

GAYLE GARRABRANDT, C.S.R.
Official Court Reporter

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1 A P P E A R A N C E S (Cont.) :

2 WILLIAM WARREN, ESQUIRE
3 For Garfield & Co.

4 CARL BISGAIER, ESQUIRE
5 For Monroe Development Association and
6 Cranbury Land Co.

7 STEWART M. HUTT, ESQUIRE
8 For Zirinsky

9 STEPHEN EISDORFER, ESQUIRE
10 Assistant Deputy Public Advocate
11 Amicus Curiae

12 CARMEN CAMPANILE, ESQUIRE
13 For Peter Saker

14 J. ALBERT MASTRO, ESQUIRE
15 Warren Township Sewerage Authority

16 JOHN COLEY, ESQUIRE
17 For Warren Township

18 WILLIAM LANE, ESQUIRE
19 For South Plainfield Board of Adjustment

20 MARIO APUZZO, ESQUIRE
21 For Monroe Township

22 RAY TROMBADORE, ESQUIRE
23 For Timber Properties

24 PHILIP PALEY, ESQUIRE
25 For Piscataway Township

EUGENE JACOBS, ESQUIRE
For Warren Township Planning Board

FRANK SANTORO, ESQUIRE
For Borough of South Plainfield

WILLIAM C. MORAN, JR., ESQUIRE
For Township of Cranbury

1 THE COURT: What I would like to do, I think,
2 is hear the cases here involved today sequentially.
3 At the end of them, I expect to decide, and I think
4 perhaps the most efficient way would be to hear the
5 Warren case first, the argument in the Warren case,
6 and then we can proceed with the four matters in-
7 volved in the Urban League.

8 I don't know where you are. I haven't
9 identified you yet. But you can stay where you are.
10 And I would ask you, for the benefit of the reporter,
11 in each case, when you stand up, please repeat your
12 name before speaking.

13 Just for the record, these are five motions
14 which the Court has not consolidated, but brought
15 together for oral argument purposes. All of them
16 are applications for transfer, pursuant to the
17 recently-enacted legislation, to the Council on
18 Affordable Housing.

19 There are other aspects of the motions in
20 some cases, which will not be heard today. The
21 Court will only consider the applications for
22 transfer.

23 All right. Suppose we take AMG Realty vs.
24 Warren first. Where is Mr. Coley? Oh, there he
25 is.

1 MR. COLEY: John Coley, for Warren Township.

2 Your Honor, I was surprised. I thought you did
3 have control over things like storms. I was sur-
4 prised on Friday, when we didn't make it.

5 This is my motion to transfer the Warren
6 Township case into the Fair Housing Council.
7 Basically, my motion has been briefed with an
8 original brief and then a supplemental brief in
9 response to Mr. Murray's brief. And my motion
10 basically rests in the area of equal protection
11 arguments for Warren Township residents.

12 The residents of Warren Township have rights,
13 the same as the builders do, the same as the third-
14 party beneficiaries do. We have the right, Warren
15 Township, to have our fair share number determined
16 in accordance with the rules and regulations to be
17 established by the Fair Housing Council.

18 We have the right to transfer to cities
19 obligations out of our fair share housing allocation.
20 We have the right to be subject to the same rules
21 and regulations as will be promulgated by the Fair
22 Housing Council.

23 The Fair Housing Act itself, which was
24 passed by the Legislature over the summer, I feel
25 Section 3 is important to note. That refers to the

1 Act being passed in the public interest. And I
2 think that's what I am arguing, the public interest
3 in this Act, the public interest of Warren Township
4 to have the Act applied to them.

5 The Act is to be interpreted to give the
6 widest possible use of a municipality. The Act
7 grows out of the Supreme Court statement that Mount
8 Laurel cases are better left to the Legislature, and
9 that the Court prefers legislative action to judicial
10 action. And that's what the Court has gotten here.
11 They have gotten their legislative action, which
12 took a long time coming, but finally did come.

13 The Act offers a way to implement the com-
14 prehensive regional planning relative to the im-
15 plementation of Mount Laurel housing.

16 In Warren Township's case itself, relative
17 to regional housing, it is important to note that
18 Green Brook case which is a case before Your Honor,
19 which shows the impact one municipality has on
20 another municipality through Mount Laurel obliga-
21 tions in that municipality.

22 In Green Brook, the major plaintiff in that
23 case, Top of the World, is situated on the Warren
24 Township border. It uses Warren Township's sewers.
25 It uses Warren Township access to the tract. All

1 the burdens from that tract really go to Warren
2 Township, with none to Green Brook.

3 I am mentioning this, because this is the
4 important part of the Act that's been passed, the
5 Fair Housing Act. It gives the region -- it gives
6 the Council the right to consider the region.

7 The Courts, unfortunately, are stuck with
8 considering individual cases, and they can't go out
9 and look at the statewide planning aspects. They
10 can't go out and really -- and look at the regional
11 aspects.

12 THE COURT: I have heard that, I have seen
13 that argument, and I don't understand it. It seems
14 to me that the methodology that's been utilized in
15 one form or another by the Courts is a regional and
16 statewide methodology.

17 And I would question whether it's correct
18 to read this legislation as requiring the Housing
19 Council -- and I'm going to use that term, although
20 their title is otherwise -- to decide on an ad hoc
21 basis applications of municipalities for substantive
22 certification.

23 There is no express statement in the Act
24 that the Council must develop fair share numbers
25 for the entire state. Do you agree with that?

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MR. COLEY: There's no express language, and I don't think they will, Your Honor.

THE COURT: Okay. The Court has and, therefore, one-on-one -- and this doesn't go to any issue of constitutionality. I want to make that clear. But I am responding to the argument that it will more fairly evaluate because it will have a statewide perspective.

One-on-one, we have the methodology by which you could figure out the fair share number of every municipality in the State of New Jersey -- whether you think it's fair or not is not the question -- whereas it's not clear to me, under the legislation, while there is a requirement that they examine region and regional need, although the Act limits them in terms of a discretion as to region, it's not at all clear to me that they must have a fair share allocation for the state.

And therefore, the issue has to arise as to what happens when Warren Township goes to the Housing Council and says, we believe our fair share is one hundred, and nobody else has applied at this point. All right?

And the Housing Council looks at it and says, well, that looks fair, that looks like a fair

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1 thing for Warren Township to do. But in relation-
2 ship to what?

3 They really can't, there, really can't add
4 up the total fair share allocation of each muni-
5 cipality and, therefore, say Warren Township is
6 doing their fair share, can they?

7 MR. COLEY: They have to have a fair share
8 number set for the state.

9 THE COURT: Okay. So in the side drawer,
10 they've got to be able to pull it out and say, even
11 though legislation doesn't require this, we'd better
12 have an allocation for every municipality.

13 Now, assuming they do that, they're not
14 required to do that under the Act unless it's pointed
15 out to me -- I will retract that statement.

16 Assuming they do it anyhow, how different
17 is that from what the Court has done?

18 MR. COLEY: Judge, I will first argue that
19 in two points. The fair share allocation, I don't
20 think the Council can proceed, if we came in and
21 said we wanted a hundred -- I think Warren Township
22 would probably put ten instead of a hundred as our
23 fair share.

24 If we came in and said we wanted a hundred,
25 the Court or Council couldn't review that unless

1 they actually adopted the Warren formula, in
2 your case, or they came up with a new formula, they
3 had to have something to base it on, they would have
4 to then at least go into the region or probably go
5 into the state.

6 But the second, more important argument
7 that I was trying to point out, not fair share,
8 my argument that I am making now is, the regional
9 planning aspects, other than fair share number, I
10 view that as probably one of the most important
11 decisions they have to make, but they have to make
12 the regional planning decisions that can't be made
13 in the individual case before the Court.

14 The Court has an individual case to decide,
15 and they have to decide that case. They can't
16 say, okay, Warren Township, you're trying your case,
17 and now, considering Green Brook's case down the
18 road, which we are going to try in six months, we
19 see a regional problem here developing, and that
20 there has to be a dispersement of these units.

21 That's the area I am saying that the Court
22 can't consider like the administrative body can
23 consider. The fair share, I'll buy, the Court can
24 consider the same way. Whether the numbers are
25 the same, whatever --

1 THE COURT: Show me under the Act what it
2 is in terms of regional planning or statewide plan-
3 ning that the Council will do that the Court has
4 not or cannot do.

5 MR. COLEY: Well, Judge, there's no specific
6 statement of them to have to do anything. I mean,
7 like most legislation, the Court -- the Legislature
8 can't come up with every single aspect that has to
9 be considered. Throughout the Act, interspersed
10 all through the Act, there are statements of regional
11 planning, good planning decisions to be made and so
12 forth.

13 There's no specific case that says you have
14 to consider every fair share housing project in
15 the county or in the region in which a municipality
16 is located.

17 No, it doesn't say that. I couldn't find
18 it. But there's so many references to sound
19 planning and regional planning in the Act, that's
20 what I am basing my comments on.

21 THE COURT: Well, yeah, but that doesn't
22 answer the question, because, hopefully at least,
23 the Courts have not adopted fair share formulas,
24 or assigned fair share numbers, more importantly,
25

1 without considerations of regional and statewide
2 planning, so that I am yet to hear the distinction.

3 Now, I believe what they're obligated to do
4 in terms of planning is captured, at least most
5 explicitly, in Section C of -- subsection C of
6 Section 7, which, in essence, deals with the criteria
7 and guidelines.

8 And if you look through those, I am not
9 altogether clear that the Courts have not or cannot
10 consider those issues fairly. I don't think we
11 should get into the issue of relative degrees of
12 fairness, because that's a debate.

13 But can the Court, pursuant to criteria C-1,
14 establish present and prospective fair share of
15 housing need? Well, it's done it. How well it's
16 done it is open to debate, obviously.

17 Can the Court make an adjustment for present
18 and prospective fair share based upon available
19 vacant and developable land? It has done it. It's
20 cut Piscataway's fair share in half for that reason
21 already. It's cut Plainfield's fair share for that
22 reason, and it's likely to cut others before the
23 matter comes to conclusion, in case it should stay
24 there, and it may cut those further if those cases
25 would stay here.

1 Can the Court deal with preservation of
2 historically important or important historically --
3 that looks like a typographical error, that's what
4 it says -- historically or important architecture
5 and sites?

6 One of the principal issues in the Cranbury
7 case is just that. And one of the principal
8 reasons that the Court made a site inspection was
9 just that. And it's one of the principal areas
10 of the master's review, and I think one of the
11 principal reasons why he has recommended a dramatic
12 reduction in their obligation in terms of phasing.

13 And I don't want to go down the whole list.
14 There's too much to talk about. But what I am
15 suggesting is that I don't believe that there's
16 anything of a planning or -- planning nature that
17 the Court cannot fairly accomplish presently, if
18 that is given as the principal reason for transfer-
19 ring to the Council.

20 MR. COLEY: Your Honor, the items that you
21 mentioned, even though the Court, the Supreme Court,
22 when they decided Mount Laurel II, stated that these
23 were better left to the Legislature, but we will
24 do them anyhow, because the Legislature hasn't done
25

1 them, I have to go back to the fact that the
2 Court originally said, we can do this, but the
3 Legislature can do it better. That's where it should
4 be done.

5 THE COURT: No. They didn't say could do it
6 better. They said it belonged there. And that's --
7 and I have concurred with that. And I concur with
8 the fact that they might even be able to do it
9 better.

10 But remember, now, we are in the context of
11 the issue of manifest injustice. We are not in the
12 context of where Mount Laurel litigation belonged
13 in the first place. And the question is, may you
14 use as a reason for demonstrating the right to
15 transfer the fact that the Court cannot fairly
16 deal with the issue on a regional basis?

17 If you're right, then that creates injustice.
18 Whether it's enough injustice is to be met. But if
19 you're not right, then that's not even an issue.

20 Injustice, that's what I am going at, not
21 the question of who can do it better. Is there in-
22 justice in the present circumstances by the Court's
23 inability, as you indicated, to deal with this on a
24 regional basis? And what I am asking you to
25 demonstrate to me is just that fact.

1 Can the Court not do in these cases a fair
2 job in regional application?

3 MR. COLEY: In certain aspects they can,
4 Your Honor. I can see -- let's take an extreme
5 case. I have described, and you are aware of, the
6 Green Brook case, where there's just one municipality
7 impacting another. Take the junction of four
8 municipalities, where they all join in one area.
9 It happens that all the development is going to be,
10 from all four municipalities, at the very inter-
11 section of the four municipalities, an X. They're
12 all going to develop -- they're all square, and
13 they're all going to develop down in this area,
14 within a mile of the intersection of the four
15 municipalities.

16 How does the Court deal with the four
17 separate cases, unless they're consolidated? If
18 they have gone off and they're not consolidated,
19 how does the Court deal with that? How does the
20 Court say, okay, in this case I'm going to do this,
21 but then in six months I have to deal with Green
22 Brook or Bernards Township, and then we have to
23 deal with the same area?

24 To deal with that concept of development in
25 a quadrant such as that, you've got to deal with it

1 totally. You've got to deal with it as a region.
2 And the Court can't do that, because they're stuck
3 with handling individual cases.

4 THE COURT: How does the Council deal with
5 this?

6 MR. COLEY: The Council is dealing with
7 this on a regional basis, if it looks at it and
8 says there's too much development there, we're
9 not going to allow that development to take place.
10 It's ridiculous for infrastructure purposes, for
11 traffic. We are going to spread it out. They have
12 a fair share, but they're not all going to build
13 it where they want to build it, down in the corner.

14 THE COURT: But let's stay with the way the
15 Council works. Warren is in before the Council
16 saying, here's what we intend to do. Green Brook,
17 just assume Green Brook hasn't come, and the other
18 three towns haven't come, so they don't know what
19 they're going to do, any more than, presumably,
20 the Court would know.

21 Under your scenario, how the Court deals
22 with it practically is that Green Brook gets agitated
23 and they move to intervene in the Warren case or,
24 as we have in Hazlet and another municipality,
25 arguing over where the housing should go on their

1 borders.

2 Wouldn't it be the same thing there?
3 What difference, what knowledge would the Council
4 have that the Court doesn't have? And if you're
5 going to tell me that they have devised a regional
6 plan, I would indicate to you that that's not
7 provided for by the Act.

8 The best thing we have right now is SDGP,
9 which is or is not in existence, depending on one's
10 point of view. This Act doesn't create a regional
11 plan, does it?

12 MR. COLEY: Judge, it gives the Council the
13 ability to pass rules and regulations by January 1st,
14 '86. I don't know what they will be. And it's so
15 hard. I mean, so many of these administrative
16 bodies have an enabling ability given to them, and
17 they grow into such gigantic administrative affairs,
18 that you don't know what's going to happen.

19 I can foresee the Council taking that
20 position, and seeing the problems in municipalities
21 and saying we do have to have rules and regulations
22 to control just the fact situation that I just dis-
23 cussed.

24 THE COURT: As a matter of fact, wasn't
25 there some accompanying legislation that never made

1 it, which would, in effect, have created some
2 authority to develop another SDGP, put it in a
3 kind of understandable context, a truly statewide
4 analysis from a regional planning perspective?
5 That's not contained in this legislation, is it?

6 MR. COLEY: It's not in it, no, sir.

7 THE COURT: No. That, I think, we probably
8 all would agree that it would have been better if
9 it was, make the job a lot easier for all of us.

10 Okay. Well, I think we have covered that
11 part.

12 MR. COLEY: The third area under the Fair
13 Housing Act is the ability to redeem the cities;
14 by that I mean, stop the deterioration taking place
15 in the cities, the infusion of new monies into the
16 cities with this transfer of obligation rights.

17 That's set forth therein. That's not a
18 power that the Court has. It's a specific power
19 granted to this Housing Council, Fair Housing
20 Council.

21 THE COURT: All right. Let's take that one.
22 The Court has approved this principle, if the
23 township wishes to do so, that Freehold Township
24 satisfy a portion of Freehold Borough's need. That
25 has been discussed with the township, and they're

1 pursuing their desire to do so.

2 Why won't the Court have that authority?

3 MR. COLEY: The Court has the authority.

4 THE COURT: I thought you said we couldn't,
5 the Court couldn't do --

6 MR. COLEY: I'm saying that they can't do it
7 on a regional basis, is what I mean. They can't
8 have a rule and regulation saying here's what it's
9 going to be, everybody's going to be treated fairly
10 and equally on this.

11 And that's the basic thrust of my argument,
12 is the fair and equal treatment of municipalities
13 in the state. Municipalities are a subpart of the
14 state government. They have people that live in
15 them, and they've got to be treated fairly. They've
16 got to have the equal protection of the laws, Your
17 Honor.

18 Warren Township is a lot of times degraded,
19 and they say, why don't you just submit to the
20 Court? The Court has said this is what it is, you
21 should do it.

22 That's not right. Warren Township has a
23 right, and we have the right to press our rights
24 in court. We have the right under this Act, I feel,
25 to go in before this Act and be treated like every

1 other municipality in the whole state of New Jersey.

2 Now, the transfer of rights to cities
3 question, it will be set up, I would hope; but I
4 would imagine rules and regulations would say this
5 is how it's done, these are the formulas that will
6 be utilized. It won't be individual contractual-
7 type arrangements made in individual cases, with
8 everybody being treated differently.

9 That's not equal protection of the laws.
10 That's unequal protection of the laws.

11 THE COURT: So your argument is that the
12 Council has a better ability to deal on a uniform
13 basis in the distribution of these collective
14 agreements, so to speak.

15 MR. COLEY: Yeah. Maybe it all won't be
16 stuck in the Newark-Plainfield -- Freehold will
17 get their fair share, and Camden will get their
18 fair share. Maybe it will be able to go out of the
19 region and not just stay.

20 I don't know how they'll do it, but hopefully,
21 it will be something that will be done fairly and
22 uniformly.

23 THE COURT: Okay. I think that's a legitimate
24 argument.

25 MR. COLEY: Phew, got one.

1 THE COURT: I didn't say you didn't get the
2 other, too. I was just putting -- that's all.

3 MR. COLEY: The Section 3, which I continue
4 to find to be very important, I think shows the
5 legislative purpose and pretty much backs up what I
6 have been stating; and maybe, just so everybody can
7 know where I'm going from with it, I'd like to quote
8 a short paragraph.

9 The legislation declares that the state's
10 preference for the resolution of existing and future
11 disputes involving exclusionary zoning is the
12 mediation and review process set forth in this Act,
13 and not litigation, and that it's the intention of
14 this Act to provide a various -- provide various
15 alternatives to the use of the builder's remedy as
16 a method of achieving fair share housing.

17 This sets the whole tone of my application.
18 When I read that Section 3 in the Act as it was
19 finally passed, I said: I have to make this appli-
20 cation. And I feel that the Court will consider
21 the application and, hopefully, grant it, because
22 this really is an aspect, from going through the
23 Warren case for all the days that it was tried.

24 And I feel the Court did an excellent job
25 in hearing the case, and I'm not just saying that.

1 I am sure Your Honor realizes that. I think
2 everybody is friendly in the case. Nobody -- there
3 was no animosity in that case. And it developed
4 a fair share, the first one for the state. But I
5 don't feel that it had the way to do it.

6 The Legislature has stated that it's not the
7 way to do it. I think the Court said it's better
8 left to the Legislature. And then I think my motion
9 had to be made.

10 And I have discussed the regional and the
11 state planning opportunities that I feel are unable
12 to be explored and to be utilized, and I think the
13 welfare of the state as a whole must be viewed by the
14 Council. I think the Court maybe is better, if they
15 could do it. If the Court and the Judge could sit
16 as an administrative tribunal, maybe that would be
17 a better way. But fortunately, that's not the way
18 we have our judicial system established.

19 The Warren Township case requires a balancing
20 act. The developer's interest must be balanced.
21 There is a profit motive that won't be before the
22 Housing Council, that is before the Court, in every
23 one of these cases.

24 I mean, obviously, I don't think anybody in
25 the room can say these builders are doing this

1 because they want to help out the low and moderate
2 wage earner. They're doing it because they want to
3 make a profit, and I can't hold that against them.
4 That's the American way.

5 But that infuses into the hearing process
6 before the Court an aspect that shouldn't be there
7 for a good planning. This should be done without
8 any profit motives on anybody's side. Whether it's
9 the township's -- any adverse motives the township
10 may have, a profit motive of the contractor, there
11 shouldn't be any motive other than good planning
12 motives to be utilized, and I think that's where
13 the Court has a problem.

14 It has an advocate that's in there for per-
15 sonal gain. Before the Council, it won't have
16 that advocate, hopefully. And I feel that's im-
17 portant.

18 THE COURT: Well, the "hopefully" that you
19 just expressed in the transfer cases, assuming that
20 these tenacious, avaricious planners do not collapse
21 if these cases are transferred, I assume you will
22 be before an administrative law judge. Maybe that's
23 not a fair assumption, but I think it is.

24 And they will be continuing to pursue, in a
25 semi-litigation fashion, at least, all of their

1 rights, and be continuing to assert their right
2 to a builder's remedy until that issue is decided.

3 But at the very least, you are going to have
4 litigation in these cases in a pretty traditional
5 sense, aren't you, before the Administrative Law
6 Judge?

7 MR. COLEY: Well, depends if the builders
8 don't get what they feel would be a fair break be-
9 fore the Council in the mediation process. Are
10 you saying they would go directly in to a law judge?

11 THE COURT: No, no, I'm not.

12 MR. COLEY: You're saying ultimately, that's
13 probably where we will end up.

14 THE COURT: Yeah.

15 MR. COLEY: All depends. I mean, if the
16 builder is given something they feel is reasonable,
17 probably would end right in the Council. If it's
18 not, it may go to mediation, which may result in
19 something acceptable to the builder. Then if it
20 doesn't, then we will be before a law judge,
21 administrative law judge. It's hard to say exactly
22 how far it will go.

23 The second area of the balancing act ac-
24 knowledges the township's interest or rights. And
25 if it's not in the Council, as I stated, it would

1 be out of the planning process. The township may
2 be stuck with an excessive fair share based on the
3 rules and regulations promulgated by the Fair
4 Housing Council. Who knows what they will come up
5 with as fair shares?

6 Warren Township has 946 now. Maybe we're
7 worse off before the Council. Maybe we have thirteen
8 hundred. Maybe the Council comes up with six hundred.
9 I'm kind of shooting dice, saying -- taking it to
10 the Fair Housing Council.

11 THE COURT: That's going to be the ultimate
12 irony, wouldn't it? If we look back at the fair --
13 at the housing allocation report, I think that there
14 are very few communities who have been before the
15 Court who have gotten a fair share number higher
16 than the housing allocation report. Most of them,
17 the vast majority of them, are lower.

18 In other words, the last time the state
19 agency did it in 1978, when the need was presumably
20 less than it is today, the numbers were higher.
21 That would make me a little -- you know, what that
22 would do to me, that would make me wish I wasn't
23 a municipal attorney.

24 MR. COLEY: They may ask me what I was
25 doing down here today. Hopefully, it will be lower.

1 That's obviously one of the aspects of the -- of
2 this motion.

3 Also, Warren Township wouldn't be able to
4 take, actually take advantage of the transfer aspects
5 of the case, although Your Honor said we might have
6 an ability to work out something with the Court.
7 But I feel it would be much more fair to handle it
8 through the Council, and probably more regimented
9 and specific and more allowable, and probably a
10 better chance of succeeding.

11 And also, I think that we would be treated
12 as an island and considered in one individual case,
13 and really not be granted the due process which I
14 think we are entitled to, along with all the other
15 municipalities.

16 Then you have the third-party beneficiaries.
17 What are their rights that have to be balanced?
18 I think that they're entitled to planning at the
19 state level, which would take into consideration
20 transportation aspects of development, take into ac-
21 count all the things that aren't considered or just
22 can't be considered in a specific case in one
23 municipality.

24 I think that they also would be subject to
25 less delays in the Fair Housing Council. I feel

1 that once the Fair Housing Council gets rolling,
2 has their rules and regulations, and the towns
3 comply within the period set forth for their
4 housing element, I think you will find many less
5 towns appealing and feeling that they're being
6 treated unfairly, 'cause they're going to say: Here
7 we are in the -- we're in the Council. Everybody
8 in the state is going to be subject to the same
9 rules and regulations in this Council, and there's
10 no other way. We're stuck, and this is it, with no
11 sense of going on any further.

12 That's my own feeling. I think that's the
13 feeling that I get from discussing this with my
14 Township Committee, that if they knew they were
15 being treated the same as everybody in the whole
16 state, that they -- their feelings of pressing
17 appeals would be much less than they are at the
18 present time.

19 I think that the race to develop without
20 careful planning doesn't help the third-party
21 beneficiaries. It ultimately hurts them. So what
22 group wins the balancing act?

23 Well, the township and the third-party
24 beneficiaries should win it. I think it's a
25 flexible test. It has to be adjudged for the general

1 welfare of the whole state, and the -- really, the
2 welfare of the developers is minor compared to
3 residents of Warren and residents of the State of
4 New Jersey.

5 The question of manifest injustice I am
6 basically going to leave to Al Mastro, because he's
7 got it down pat, and there's no way of beating it.

8 THE COURT: He's been the expert on injustice
9 over the years. Anyone who's appeared before any
10 of his Boards or his Courts has always come away
11 with that attitude.

12 MR. COLEY: With manifest injustice.

13 THE COURT: I say that facetiously.

14 MR. COLEY: I don't think it's a burden of
15 proof. Joe argues in this case, Mr. Murray, that
16 it's a burden of proof. And it's not. I don't
17 think anybody has the burden to prove manifest in-
18 justice or not prove it in a case.

19 I think it's one item that the Court has to
20 consider, along with all the other aspects that I
21 have tried to point out in my briefs and my argument.
22 And I think that the manifest injustice, if any,
23 is on Warren Township by not being granted its motion
24 to go into the Fair Housing Council, because of a
25 denial of the equal protection arguments that I have

1 had.

2 And that's all I have on the transfer motion,
3 Judge. I basically rely on my brief, which goes
4 into detail on everything. Of course, Al is here
5 with me, representing the Sewer Authority, which
6 joined in with my motion to transfer.

7 THE COURT: Fine. I'd be happy to hear --
8 he's not wearing his gorilla suit today, though.

9 MR. MASTRO: Judge, I'm missing part of the
10 Court's thinking on the manifest injustice approach,
11 because the Court keeps asking questions, well, can't
12 the Court utilize as many, if not more, techniques
13 than the statute provides? And that may very well
14 be the case.

15 Certainly, we've explored a variety of
16 techniques over the past couple of years. But I
17 don't think that's the import of Section 16. It
18 indicates that the transfer should take place unless
19 there is a manifest injustice to any party.

20 So it seems to me the Court's position should
21 be reversed. Can the Council do about as well as
22 the Court can do? I think that's the inquiry that
23 should be made, and --

24 THE COURT: Let's just -- you're finished with
25 that point, or no?

1 MR. MASTRO: I want to say something else
2 about manifest injustice.

3 THE COURT: All right. If you're off that
4 point, let me just respond. Clearly, as it relates
5 to the validity of the legislation and all those
6 kinds of things, the Court should never get itself
7 into a question of the relative abilities of the
8 Court and the executive or legislative bodies to
9 deal with this issue.

10 That is not the test of constitutionality,
11 and I certainly wasn't talking about that.

12 What we were talking about is the argument
13 made by Warren, and I think by others, that it's
14 manifest injustice to the municipality because the
15 Court is not capable of dealing with those issues;
16 not that the Legislature or executive branch is
17 capable, but that the Court is not. And that's the
18 only reason I pursued the issue.

19 If it is conceded that the Court is, then
20 it's a non-issue, as far as I am concerned, because
21 then there's no injustice. That's what I am saying.

22 MR. MASTRO: I want to comment on that, Judge,
23 and I'll -- well, perhaps I'll do it now, Judge.
24 And I am trying to articulate this as delicately as
25 I can.

1 THE COURT: We are still friends, regardless
2 of what you say.

3 MR. MASTRO: One of the most frustrating
4 factors in this entire process has been the ad hoc
5 approach that the three Mount Laurel judges utilize.
6 I don't think it should be necessary for me to lean
7 over and ask Bill Moran whether Judge Skillman ruled
8 on any of these transfer motions yet. I don't think
9 we should have to communicate with other parties to
10 find out what another Mount Laurel judge is doing
11 or how he handles a particular case.

12 I think it lacks uniformity. It's been
13 very traumatic to the municipality's basic directions
14 there. Certainly, it was established in this very
15 case; but then again, I'm not sure that the other
16 two judges agreed with that approach, because some
17 of the statistical evidence that participated was
18 not digestible by everyone equally.

19 So there is that lack of uniform process,
20 lack of the municipality being able to say, well,
21 what are the guidelines? And I think, under the
22 statute, we will have them.

23 THE COURT: All right. Let me respond to
24 that. I would say that's one of the reasons why it
25 belongs with one body in one place, the entire

1 process. There's no question about that, and
2 that's what the Supreme Court was saying.

3 I might mention to you I don't believe that
4 there is a substantial divergence among the three
5 Mount Laurel judges. In fact, there's virtually
6 none, by virtue of the opinion that I will release
7 today or tomorrow on the present need issue, and so
8 that all three judges are using the same approach.

9 That still doesn't respond to your problem.
10 And you are absolutely correct in that area. And
11 that's what the Supreme Court was saying. Let's
12 have this treated in a uniform, singular fashion by
13 the body that should properly do it.

14 That does not go to the issue of manifest
15 injustice. That's -- see, that's where we are
16 drifting away from. Clearly, it goes to the fact
17 that any new case belongs there, if the statute's
18 constitutional.

19 MR. MASTRO: Yes. I tend to agree that, in
20 this context, we are drifting away from manifest
21 injustice. If I might comment on that -- and per-
22 haps these remarks would be more appropriate after
23 we heard from the other side, but I'll -- I assume
24 that they will raise the issue of manifest injustice.

25 If Your Honor recalls in Mount Laurel II,

1 when the Court was addressing the technique of
2 developing the municipalities in order to comply
3 with the constitutional mandate, they clarified
4 and were very clear that the developing municipalities
5 approach was just that, a technique. It was a
6 judicial remedy; and certainly, it was that com-
7 pliance with the Constitution was the objective, not
8 the means used, not the judicial remedy.

9 And after that, the developing municipalities
10 approach was discarded, the Mount Laurel II Court
11 used a different approach. And a technique this
12 time, the judicial remedy utilized, was the builder's
13 remedy approach. Bring a level of litigation to the
14 point where we can see some real results.

15 Now, Judge, the other parties to the litiga-
16 tion are the primary parties, indeed, are the lower-
17 income households. I don't think as a general rule
18 that manifest injustice would apply to a plaintiff
19 developer except under very exceptional circumstances,
20 because it's not the builder's remedy that must be
21 protected, it's the technique, it's something to
22 assure that the constitutional objective will be
23 achieved.

24 And indeed, that's what this legislation is
25 all about, to do just that. Now, if indeed it does --

1 and I think the Court, and all the cases indicate,
2 must attempt to implement it, presume it is con-
3 stitutional -- if that is the case, then the role
4 of the builder's remedy, I think, takes less of a
5 significant position, because the statute will
6 hopefully, if the legislators are correct, implement
7 the constitutional objective.

8 I know the question will arise, Judge, and
9 I might as well address it now, what is their in-
10 tention to insure that municipalities are going to
11 indeed present a plan, file their resolutions of
12 participation, present their housing elements, and
13 seek certification, substantive certification?

14 There are two, I think, two primary factors
15 that would motivate the municipalities, and I think
16 they're significant and they're very real.

17 Unless you do obtain a substantive certi-
18 fication, you would not obtain the presumption of
19 validity. There would not then be the obligation
20 on the other party to establish by clear and con-
21 vincing evidence that something went wrong.

22 You would have a council as a party litigant
23 in any case, and that's, to those of us who have
24 done municipal law, and I would include Your Honor
25 in that, that's a very, very significant factor.

1 The Mount Laurel II remedy was a tragedy
2 for municipalities where the presumption was indeed
3 reversed. That I consider a primary motivating
4 factor. I think it's realistic. I think it's going
5 to occur.

6 The second aspect is that without the sub-
7 stantive certification, the aid, which I think is
8 approaching something of 125,000,000, provided in
9 the Act would not be available to municipalities.

10 THE COURT: Can I interrupt you?

11 MR. MASTRO: Sure.

12 THE COURT: What is it that you say in the
13 Act requires the town to file a substantive certi-
14 fication? What would give it impetus to do so?

15 And secondly, what in the Act tells us how
16 soon the Council must act once an application for
17 substantive certification is made?

18 MR. MASTRO: The provision of the Act, Your
19 Honor, that indicates that any municipality that has
20 achieved substantive certification, then a presumption
21 of validity attaches.

22 THE COURT: Yeah. But suppose it hasn't.

23 MR. MASTRO: If it hasn't? It's exposed.

24 THE COURT: To what?

25 MR. MASTRO: Either to reversion to the Court,

1 under several sections --

2 THE COURT: A transfer case you're talking
3 about now.

4 MR. MASTRO: Yes.

5 THE COURT: Transfer case. Suppose it's
6 not a transfer case.

7 MR. MASTRO: Suppose it's a new case?

8 THE COURT: Yeah. I agree with you, I can
9 find in the Act a provision which would, in effect,
10 say that if these cases are transferred and there's
11 some kind of bogging around, they could come back
12 to the Court.

13 MR. MASTRO: Uh-hum.

14 THE COURT: I'll go out of order sufficiently
15 on this point to allow somebody, if they want, to
16 point out to me, is there any provision in the Act
17 which would, A, set the time limit upon which a
18 Council must act on an application for substantive
19 certification, even in a transfer case, or B, is
20 there anything in the Act which would, in effect,
21 punish the failure to make application for sub-
22 stantive certification in a non-transfer case?

23 MR. MASTRO: Well, the time limit, as the
24 Act indicates, the Council should act within six
25 months. And if --

1 THE COURT: No. Here. What are you looking
2 at?

3 MR. MASTRO: That's under -- it's either
4 six months or fifteen months. The second paragraph
5 of Section 19, I believe, Your Honor, second sentence
6 or last sentence in Section 19.

7 THE COURT: That's the mediation request, I
8 believe. Mr. Neisser?

9 MR. NEISSER: Eric Neisser. I think Your
10 Honor asked two questions. I think the question as
11 to what sets a time limit for the Council is --
12 depends on Your Honor's and the other Courts' inter-
13 pretation of what is included in the mediation and
14 review process referred to in fifteen, because --
15 15A and B, so forth. That process assumes mediation
16 as some attempt to reconcile the parties, and if
17 that fails, a referral to the Office of Administrative
18 Law, which has a deadline.

19 And then the matter, under the administrative
20 procedure act, would go to the head of the agency,
21 which I presume to be the Council. And there's a
22 time limit, subject to extension, within that.

23 And then we fall back to, as I think
24 Mr. Mastro referred to, Section 19. If that process
25 is not completed within the six months, whatever that

1 process includes, then at least there's a possibility
2 of applying to a Court for reversion, although it's
3 not mandatory.

4 THE COURT: Okay. But if there's no ob-
5 jection filed, if there's no objection filed, and
6 it's a non-transfer case --

7 MR. NEISSER: There's no objection filed,
8 there's no time limit.

9 THE COURT: It's a non-transfer case. There's
10 no time limit on the Council. Sorry. There's no
11 time limit, or there's no requirement that an ap-
12 plication for certification be made. And there's no
13 time limit on the Council reviewing that application.

14 MR. NEISSER: That's correct.

15 THE COURT: Is that your position?

16 MR. NEISSER: Section 13 only says anytime
17 within six years after filing a housing element,
18 the township may petition for certification.

19 THE COURT: It's an unfortunate omission,
20 if it is an omission. I have not been able to
21 find it. But I would say in these cases I believe
22 the procedure would, in effect, be that if these
23 townships or towns did not file for certification,
24 then there would be, after a period of six months,
25 a right to seek remand to the Courts. And I gather

1 we are all in a line on that issue. Okay.

2 Well, you can't expect an Act to be perfect.
3 I just want that understood.

4 MR. MASTRO: Judge, it seems to me the
5 certification would apply to both new cases and
6 old cases, and that's the objective as far as the
7 municipality is concerned. Unless they can reach
8 that threshold, they've got a problem.

9 THE COURT: I don't see the problem they
10 have, Mr. Mastro. That's what I am getting at.

11 Now, again, I want to stress that we are
12 not dealing with the constitutional validity of
13 this. And it may be that the procedural guidelines
14 of the Council will cure this problem. I sure
15 hope it does.

16 But I don't see that a town that's not in
17 a transfer posture has any obligation to apply for
18 substantive certification and runs any risks if
19 it doesn't, at this posture.

20 What risk do they have? They can't be
21 subjected to a builder's remedy. If they get --
22 if a suit is started, they can then apply for
23 substantive certification. That's the only thing
24 that would make them apply, I believe. Then they
25 would have to.

1 Short of that, they don't have to apply.
2 And I think it's very clear under the Act that
3 there is no time limit on Council review in any of
4 the various instances in which they're reviewing,
5 except for the decision of the Administrative Law
6 Judge. That is controlled by the Administrative
7 Code.

8 MR. SANTORO: Your Honor --

9 THE COURT: Mr. Santoro.

10 MR. MASTRO: I don't think you are right
11 on that.

12 THE COURT: Okay. If I'm not correct --
13 Mr. Santoro?

14 MR. SANTORO: Frank A. Santoro, on behalf
15 of South Plainfield.

16 The point, Your Honor just raised about
17 there doesn't seem to be any motivation for a
18 municipality, that's not before you. That is one
19 which is not a transferred case. You are correct.
20 There's no time limitations.

21 But in the event of an exclusionary zoning
22 suit, the defense of administrative law, the
23 exhaustion of administrative remedies, is not
24 available to that municipality.

25 I think the legislation saw the -- that

1 aspect of it, that a municipality could simply
2 sit there and not have to worry about participating.
3 But the Act is clear that they cannot then say:
4 Well, now it's time to go to the Housing Council.

5 THE COURT: What section are you referring
6 to?

7 MR. SANTORO: You had to ask that.

8 THE COURT: I looked at that. I know it.
9 I know what you are talking about. And my con-
10 clusion was that it's not what it meant. Somebody
11 got a citation? This is academic, I concede.

12 MR. NEISSER: Sixteen B.

13 MR. MASTRO: Sixteen B we are looking at.

14 THE COURT: I say academic in these cases,
15 because these cases are dealt with by a different
16 provision.

17 MR. SANTORO: It says in the event -- the
18 last sentence of 16B -- in the event a municipality
19 adopts a resolution of participation within a period
20 established -- and, of course, the Act indicates
21 that a resolution of participation is the first step
22 toward ultimate application for substantive certi-
23 fication -- then the person shall exhaust the
24 review and mediation process of the Council before
25 being entitled to a trial on his complaint.

1 THE COURT: Yeah, but that relates to
2 cases instituted less than sixty days before the
3 effective date of this Act. It doesn't deal with
4 cases after the effective date of this Act. Maybe
5 it was intended to.

6 MR. SANTORO: Let me look it up. It's in
7 here somewhere.

8 THE COURT: Well, we have spent a lot of
9 time with it. If anybody comes up with it, tell
10 me after the hearing. I don't suppose it's going
11 to affect any of these cases, but it may affect
12 future arguments on other issues.

13 Okay, Mr. Mastro.

14 MR. MASTRO: Yeah, Judge. Can I reserve
15 some time after we have heard from the other side,
16 reserve some time on rebuttal?

17 THE COURT: Sure. Mr. Jacobs, are you too
18 satiated with the danish, or would you rest on the
19 arguments of Coley and Mastro?

20 MR. JACOBS: No. If you don't mind, Your
21 Honor, first of all, yes, thank you for the Melt-
22 away. May I just say that I'd like to reserve some
23 time a little later? I have taken some notes, and
24 I am anticipating some argument I'd like to respond
25 to, if I may.

1 THE COURT: All right, fine. We have
2 everyone on behalf of the defendants. All right.
3 Mr. Murray or Mr. Trombadore.

4 MR. MURRAY: Joseph Murray, representing
5 the plaintiffs in this Warren Township case, AMG
6 and Skytop.

7 As I perceive the Court's inquiry, I think
8 we can take the issue of manifest injustice on two
9 levels: One, the general level as applied to the
10 statute, as we see it, to everybody; and then a
11 specific level as to the particular plaintiffs in
12 this case.

13 At this point, I think we have been dis-
14 cussing the general level. And as I perceive
15 Warren Township's approach, their American way is
16 to: Let's keep this case dangling as long as we
17 can, in any posture, by any method that we can.
18 Warren Township takes a position that the developer's
19 dream of the American way is to make money.

20 We all know that we have primary motives
21 and secondary motives, and I'm not going to discuss
22 any motivation, other than the motivation of the
23 township to utilize the statute.

24 Now, as I perceive the statute, taking a
25 case that is in litigation more than sixty days

1 prior to its effective date, if the case is
2 transferred, Warren Township must within four
3 months file its resolution to apply or submit to
4 the Council process, because it knows if it doesn't,
5 it is compelled to come back here.

6 Warren Township, assuming it's filed that
7 resolution, then, by August of 1987, assuming the
8 guidelines are put into effect, has got to come up
9 with a housing element and proposed ordinances.
10 But after that point -- and the Court has raised
11 it quite clearly, and I have raised it, not in the
12 brief I filed here, but in the brief I filed in
13 Watchung, because the more I read this statute, the
14 more complex it appears and the more I see into it
15 that I didn't see before.

16 After it's filed its housing element, there's
17 nothing that compels Warren to apply for sub-
18 stantive certification. And the plaintiffs in this
19 case cannot even apply for mediation and review.

20 Mediation and review under the statute is
21 permissible in two instances: One, if the town has
22 applied for substantive certification, which it
23 doesn't have to do; or secondly, to cases that were
24 within the sixty-day time period prior to the ef-
25 fective date of the Act, those people can apply for

1 substantive -- for the mediation and review.

2 Plaintiffs in this case can't at that point.

3 Now, can we then petition the Court, as
4 the Court intimated possibly would be the case,
5 that we could come back to court and have the
6 matter resolved here?

7 It's likely that that would be the case.
8 But the purpose of the statute is ostensibly to
9 keep this fair housing concept in the legislative
10 process, which now it would not be. It would be
11 back here.

12 If the township goes through its substantive
13 certification process -- and believe me, there was
14 a comment that it might even have six years to do
15 so. That's not a six-year limit. That six years
16 means if you don't have a house -- if you have a
17 housing element that's six years old, you've got to
18 come in with a new housing element. It doesn't say
19 that you must petition for certification within that
20 six-year period at all.

21 They have no time limit for substantive
22 certification. And that applies to any type of
23 case, whether it's one that's been transferred or
24 one that's not been transferred. So on the --

25 THE COURT: Well now, wait a minute. I agree

1 with the first part of that, but let me follow
2 you on the second. What happens if they don't
3 apply? You have no remedy?

4 MR. MURRAY: I don't think we have any
5 remedy before the Housing Council if they do not
6 apply.

7 THE COURT: Can't you apply to the Court --

8 MR. MURRAY: Yes.

9 THE COURT: -- for a remand?

10 MR. MURRAY: Yes.

11 THE COURT: Okay. We are on board.

12 MR. MURRAY: Okay. And that's consistent
13 with what Mount Laurel II stated, if there's an
14 adequate legislative aid, adequate. This statute,
15 to that extent, is not adequate.

16 If we can be strung out for -- and we know
17 what happens when we make a motion to bring it back.
18 The town says: We're acting in good faith. Give
19 us another ninety days, extended to a hundred and
20 twenty, to six months, to six years.

21 THE COURT: Well, I'll tell you what I would
22 do, I think, absent some egregious situation. I
23 would probably say: Look, I saw fit to transfer
24 to the Housing Council, and the Housing Council
25 is acting on a statewide housing plan. Now go back

1 and get it done.

2 So I would rather tend to agree with you.
3 I would believe that in most instances, the Court
4 might very well be prone to re-remand to the
5 Housing Council, under some time constraints.

6 MR. MURRAY: If it re-remands, where does
7 that leave the developer litigant who has not yet
8 the opportunity or ability for a mediation and re-
9 view? You know, Mr. Coley briefed -- in his brief,
10 referred to a collaboration between the Council and
11 the municipality, give us the opportunity to col-
12 laborate. That's the wording of his brief.

13 We don't participate in such collaboration,
14 although we want to, and we claim we have the right
15 to; but under the statute, we aren't given the
16 right to. We are given that right only in a
17 mediation and review, and I challenge Mr. Coley to
18 tell me on a transfer when we can mediate.

19 We can't mediate until he seeks substantive
20 certification, after his claimed collaboration
21 has taken effect and been put to bed or whatever the
22 case may be, and here's where we get to the argument
23 of the shifting of the burden of proof and the
24 presumptions at that stage.

25 Right now, we've got the presumption that

1 they're illegal, that they're exclusionary, and
2 that we get the benefit of those presumptions.

3 We lose those. Even if we get to the
4 mediation process, we lose that by virtue of the
5 judgment that we got in May of 1982.

6 So on the general scope -- and that's getting
7 to the specific, but on the general scope of getting
8 back to his Council, I don't perceive it to be other
9 at this point than a built-in mechanism for stalling.
10 That's the way I see the mechanism, unless the Court
11 retains a strong hand to enforce an expedition of
12 that process.

13 And the Court cannot do that with respect
14 to the Governor's appointment to the Council,
15 cannot do that with respect to the adoption of
16 procedures, the adoption of guidelines. And there's
17 nothing the Court can tell that Council to do to
18 put those guidelines into effect by August of 1987
19 or September of '87 or September of '88.

20 You know, at that point the Court can make
21 the parties come back, but it can't tell the
22 Council at this point to do its job. I don't
23 perceive that to be within the legislative -- the
24 wording.

25 Notwithstanding that, I think the township

1 has expressed throughout this argument that Mount
2 Laurel is a -- what was the word they used --
3 tragedy for the municipality. Most municipalities,
4 I think, will either join in that concept of the
5 word, "tragedy." And I can't perceive a muni-
6 cipality, by virtue of this Act, saying the tragedy
7 has now been removed, we deem this to be a great
8 boon to the public, to the benefit to equal pro-
9 tection, whatever, and we are going to adhere to all
10 of the standards and guidelines and time limits as
11 quickly and fairly as possible.

12 That ain't the way the game's going to be
13 played.

14 Now, with respect to AMG and Skytop --

15 THE COURT: With all of that, though, do I
16 have a right to presume that?

17 MR. MURRAY: No, but I think the smell is
18 there in this case, and as it is in many others, by
19 inference. The township has taken the position,
20 in repeated affidavits and conduct -- and maybe I
21 shouldn't pursue it, because it would be -- let's
22 presume that they do intend to act fairly.

23 They are acting fairly if they stay within
24 the language of the statute, and the language of the
25 statute says we don't have to petition for certification

1 We are acting fairly, although we are now in Year
2 5.

3 THE COURT: Yeah. I said that only because
4 my background as a municipal attorney tells me one
5 thing, my constraints as a judge have to tell me
6 another. I was there between 1975 and becoming on
7 the bench, coming on the bench, when Mount Laurel I
8 was treated with disdain, to say the least.

9 But I don't think that I can presume that
10 under any set of circumstances. I must presume
11 the best case scenario before the Housing Council.

12 MR. MURRAY: I will grant that, but in my
13 heart I won't. Mr. Coley has indicated that if we
14 can get before the Council, we won't have an advocate.
15 He's right. There won't be an advocate against him
16 in the Council until we get to the mediation pro-
17 cess, which I say we will be deprived of.

18 Absent an advocate, Mr. Coley also said it
19 correctly, the hundred will become ten. Where are
20 these third-party beneficiaries ostensibly taken
21 care of with respect to that?

22 We are talking about those in need of the
23 low-income housing. We are talking about the basic
24 constitutional obligation which it has to perform.
25 Game-playing isn't part of fairness.

1 And I think utilizing the hundred to ten,
2 or taking the 946, if we are permitted the advocacy
3 position, you know, we can impede that. But how
4 much is to be put upon a developer who has been,
5 since 1980 or prior to that, in this case, to con-
6 tinue the role of an advocate throughout some dif-
7 ferent forum process?

8 That goes to the second level of manifest
9 injustice, not the general concept, but as it
10 applies here to our case. I don't know if they're --

11 THE COURT: There's nothing really un-
12 traditional about that process, is there? I mean,
13 executive bodies have for years worked things out
14 with those people whom they govern through their
15 regulatory process. And then they hold a public
16 hearing as to what they have worked out.

17 Now, I don't say that facetiously, either,
18 but that's true in many areas of governmental regula-
19 tion, so that that doesn't in any sense ring of an
20 injustice, does it?

21 MR. MURRAY: On the general first tier, no.
22 This second tier, with this plaintiff in this case,
23 absolutely yes. And the reason I'm saying this is
24 that by virtue of that judgment of May of 1982, by
25 virtue of that judgment of 1982, we won a ruling that

1 the township's ordinances are invalid.

2 THE COURT: Excuse me. Harold, tell them
3 court's in session. They're going to have to stop
4 for forty-five minutes. They're jackhammering
5 right below us.

6 MR. MURRAY: We won the judgment declaring
7 their ordinance unconstitutional and exclusionary.
8 We won in the last sentence of that order. The
9 application for builder's remedy was neither granted
10 nor denied. Order became jurisdiction.

11 No appeal was filed from that judgment,
12 although Mr. Coley's responding brief says, hey,
13 that wasn't a final judgment.

14 If it wasn't, I don't know what else is.
15 That '82 judgment was final. We have vested rights
16 accruing out of that judgment.

17 Once we got into the second case filed, again,
18 before January 20, 1983, which is this case that
19 we have here now, we won another judgment. Now, the
20 builder's remedy was specifically granted in that
21 judgment. This statute -- the moratorium doesn't
22 apply to our case. That's our position, that by
23 virtue of the timing of our case, the moratorium
24 is applicable, and you can grant a builder's remedy
25 in this case to these plaintiffs.

1 Once we get out of that and into the
2 Council, what you say is the routine method of
3 the executive branch, well, the "routinely" now
4 is broken, because we should have been part of that
5 intervening advocacy position. We are going to be
6 deprived of that.

7 That's the second level of the manifest in-
8 justice tier, the one specifically applicable to
9 our client.

10 I don't know, and Mr. Coley hasn't responded
11 to that, how he gets around the fact that we've
12 got this judgment, we've got the vested rights that
13 accrue from that judgment.

14 THE COURT: Are you saying that in the
15 transfer cases the procedure's unjust, but not in
16 the normal procedure? I mean, you may not like it,
17 but it's not unjust.

18 MR. MURRAY: In the transfer cases, we have
19 nothing in the statute that tells us what we are
20 to do with the twenty-one days of transcript and
21 exhibits and evidence and reports that have gone
22 into this case, what we are to do in the first
23 case with everything, do we start all over again,
24 or do we deny all that.

25 THE COURT: I'm glad you touched on that.

1 The briefs are interesting in that regard. You
2 find anything in the statute which would even
3 intimate that the Council would consider what we
4 did here or, B, be bound by any of my rulings?

5 MR. MURRAY: I find in the statute that the
6 Council would probably have authority to receive
7 experts' reports as direct public records, but not
8 be bound by anything that this Court did in the
9 AMG case, even its decision.

10 THE COURT: How about the transcript of the
11 twenty-one day hearing?

12 MR. MURRAY: I think that's evidential only
13 for cross examination, and nothing beyond that.

14 THE COURT: Couldn't just lay it on them.

15 MR. MURRAY: No. No. And if they -- you
16 know, if the town would say, look, this is a whole
17 new ball game here, let's -- we got different
18 standards, these experts testified as to standard
19 X, we have standard Y, no, I don't think it would
20 carry.

21 THE COURT: I'll give other counsel an
22 opportunity to comment on that. I know the Urban
23 League has argued that -- it's not quite clear to
24 me what they have argued, but it appears that they're
25 arguing that if the case is going to be transferred,

1 the Housing Council must take into account the
2 record and with the adjudication, so-called law of
3 the case.

4 I find nothing in the statute which -- ob-
5 viously, nothing express, which would justify that
6 conclusion. And I think the clear intent of the
7 statute and the municipality seem to support what
8 I am about to say, is that there should be a fresh
9 start, they shouldn't be bound with anything I did.

10 I'm not even sure that they would see the
11 expert reports.

12 MR. MURRAY: For cross examination, possibly,
13 if the same period of time were presented.

14 THE COURT: Oh, cross examination. You're
15 at the administrative law judge already. I'm
16 talking about their process of collaborating with
17 the municipality.

18 MR. MURRAY: I think on a collaboration
19 process, the municipality isn't going to bring in
20 the other clients', the developers' experts' reports.
21 They're going to utilize brand-new ones on their
22 own. We are left out again.

23 THE COURT: Okay, so maybe the first time
24 you'll get it at all, if you will get it, is in
25 mediation.

1 MR. MURRAY: Yes.

2 THE COURT: And I find it hard to believe
3 that a Council would want to burden itself with
4 twenty-one days of transcript and everything else
5 that's gone on in the Warren case and in the Urban
6 League case, or, in fact, that if they didn't mind
7 the burden, that they would accept it anyway, be-
8 cause their start is supposed to be a fresh one,
9 which may be very useful.

10 I'll hear counsel on that. It's an issue
11 that does bother me.

12 MR. MURRAY: We also say we wouldn't even
13 get mediation for this issue to arise if this case
14 were transferred. If somebody can help me on this,
15 how does a plaintiff developer at this stage of the
16 case, pre-sixty days, get mediation before the
17 Council?

18 Section 15A says we get mediation if an
19 objection to the municipality's petition for sub-
20 stantive certification is filed. That's one.
21 That's assuming they apply for substantive certi-
22 fication.

23 Two, if a request for mediation and review
24 is made pursuant to Section 16. Section 16 is
25 limited to the new cases, the sixty-day cases. Where

1 does --

2 THE COURT: But if you didn't get mediation,
3 you'd get a remand to the Court.

4 MR. MURRAY: Yes; therefore, the legislation
5 is not an effective alternative. Why do we have
6 to be strung out that far to merely come back here
7 to where we would be if the master got his report
8 in and we pursued the matter? Not back in 1985.
9 We are now in 1989, as a possibility. That's the
10 manifest injustice to us per se in this case.

11 I think the rest of what I would have to
12 say is already in the brief, but what I am arguing
13 on that substantive certification issue was not in
14 our brief, and we do urge in our brief our vested
15 right by virtue of that 1982 judgment.

16 THE COURT: Okay. Mr. Trombadore.

17 MR. TROMBADORE: Timber Properties sued
18 Warren Township in 1981, alleging that its zoning
19 ordinance was exclusionary, that it did not satisfy
20 the mandates of Mount Laurel I, that it did not
21 make adequate provision for least-cost or low-cost
22 housing.

23 That suit was not tried, because prior to
24 the trial date, the AMG suit was tried in the
25 Superior Court and, based on the evidence adduced

1 in the AMG suit, the Trial Court determined that
2 the zoning ordinance of Warren Township was indeed
3 unconstitutional.

4 The matter then came to this Court following
5 an attempt on the part of Warren to modify its
6 zoning regulations, on the further allegations that
7 the mandates of Mount Laurel II, which were sub-
8 sequently promulgated, were not met by the new
9 ordinances which had been drafted and enacted by
10 Warren Township; and that in 1984, this Court spent
11 some four weeks determining whether in fact Warren
12 Township's ordinances were constitutional.

13 In that process, the Court determined first
14 a method by which to fix regions for determining
15 fair share allocations; and secondly, the Court
16 then determined a method by which to formulate
17 the methodology for determining fair share alloca-
18 tions.

19 And on that basis, the Court entered a
20 judgment in favor of Timber, in favor of AMG, and
21 against Warren Township, first declaring it to be
22 part of a specific region, indeed two regions, one
23 for the present need and one for prospective need;
24 secondly, determining its fair share of housing for
25 lower and moderate income persons; and third,

1 awarding builders' remedies to both plaintiffs in
2 the case.

3 A master was appointed, and hearings were
4 conducted before the master. An ordinance was
5 drafted, a compliance package was submitted in
6 January of 1985, and we have been waiting for the
7 master to give us a report on that compliance
8 package for the last nine months.

9 It is the position of Timber Properties
10 that it has vested rights in what has transpired
11 to this point, and that it would be a manifest
12 injustice at this point to transfer this case to
13 the Housing Council.

14 The township argues that it's entitled to
15 equal protection of the law, and that if this case
16 is retained by the Court, it will be subject to
17 standards which may be different than those im-
18 posed upon other municipalities by the Housing
19 Council.

20 Their argument seems to be that if some
21 towns can take advantage of this new legislative
22 scheme and get what they might consider to be a
23 fairer shake, it would be very unfair for Warren
24 not to get the same thing; that, obviously, the
25 fair and equal thing would be for everybody to be

1 able to go to the Housing Council so that they'd
2 all be treated by that one agency.

3 There is even the suggestion that because
4 the Courts are not comprised of a single judge,
5 there's some inequality of that aspect of juris-
6 diction being retained here. The statute itself,
7 I think, reveals the error of that position, be-
8 cause the statute contemplates that there will be
9 cases which will not be transferred to the Housing
10 Council; otherwise, there would be no exception in
11 the statute.

12 So clearly, the Legislature itself, in pro-
13 viding that cases will be transferred except in
14 those situations where transfer would effect a mani-
15 fest injustice--and obviously, that contemplates
16 that there are such cases.

17 I would submit that if this is not one of
18 those cases, then clearly there can be no case
19 which should not be transferred. If you accept
20 the township's position that everyone is entitled
21 to treatment by the Council rather than by the
22 Court, then there'd be no basis on which the Court
23 could retain jurisdiction in any of the cases which
24 have come before it up to this point in time.

25 The reason that we feel this would be a

1 manifest injustice is because the investment of
2 time and money and effort over an extended period
3 by these plaintiffs would be washed away, would be
4 of absolutely no efficacy if the matter were trans-
5 ferred.

6 Section 4 of the Act defines terms and seeks
7 to define region. We spent the better part of a
8 week trying to define what region meant. We finally
9 decided region didn't mean region, it meant two
10 regions.

11 And now the Legislature, by definition, in-
12 dicates region shall mean, within broad parameters,
13 contiguous counties of not less than two nor more
14 than four and so forth; goes on in Section 7 to say
15 that one of the first tasks of the Council will
16 be to fix regions.

17 If indeed the Council is commissioned and
18 charged by the statute to determine regions based
19 on a fundamental definition of the Act, then I would
20 submit that the efforts of the Court and the decisions
21 of the Court in that regard are indeed history.
22 They are of no relevance to the work of the Council.

23 The legislation goes on to say that the
24 Council will promulgate regulations by which fair
25 share will be determined. Well, now, I don't have

1 to remind this Court that that was a process which
2 took a great deal of testimony and a great deal of
3 effort on the part of many people. The Court did,
4 in fact, formulate a plan based on information
5 presented in court, information tested by the ad-
6 versary system. The standards which again are de-
7 fined by the statute are clearly not consistent
8 with those standards that were applied by the Court.

9 If you take the credits which the Council
10 is called upon to consider in a given case, then
11 obviously you must come to the conclusion that the
12 fair share allocation which will result from the
13 processes before the Council will be quite different
14 than those which would result from a continuation
15 of a matter before this Court, because the credits
16 alone would vitiate the operation of the formulae
17 which were developed. The methodology would have
18 again no relevance.

19 THE COURT: You are about to wipe out three
20 years of my life here.

21 MR. TROMBADORE: Well, I mean, Your Honor,
22 I'm saying, in effect, that what this Court has
23 done may be some legacy to law students in a future
24 day, but no relevance, no relevance whatsoever to
25 what happens to land and housing development in this

1 state. And I don't think it's a matter of choice.

2 I think it's a matter which is mandated by
3 the language of this Act. The Council is told --

4 (Brief discussion off the record.)

5 MR. TROMBADORE: Your Honor, the argument
6 made in these cases on the part of Warren Township
7 would have exactly that effect. It would, in effect,
8 say to the Court, you don't have any choice, in
9 effect. You must transfer to the Council.

10 I don't think that's what the legislation
11 says. I think the reference to manifest injustice
12 is related to the concern of the Legislature which
13 was openly expressed even to the extent that some
14 who voted against it said: You know, this Act is
15 unconstitutional, because you are attempting to
16 divest judicial remedies which are already vested.

17 I don't want to argue the constitutionality.
18 I am arguing only the language of the statute itself,
19 which talks about manifest injustice as it relates
20 to vested rights; and I think that's what these
21 people were talking about. They were worried about
22 us, because they knew we existed. And they made
23 exceptions for us.

24 And I think they, in effect, were willing
25 to make the concession that in these cases, at

1 least the work we have done is not wasted, and
2 that you continue to do that work for us.

3 THE COURT: Am I incorrect in my recollection
4 that the minority position statement attached to
5 the bill called for transfer of all cases? I don't
6 have it before me, but my recollection is it did.

7 Is that right, Mr. Coley?

8 MR. COLEY: That's my recollection, Your
9 Honor. I don't have it with me today.

10 THE COURT: I don't know if that would be
11 any statement of legislative intent or not, that
12 that was amended to provide for some discretion in
13 the Court.

14 MR. COLEY: Judge, I only have a comment
15 on something that was brought up by Mr. Murray that
16 wasn't discussed in my first argument.

17 THE COURT: Yeah. I'm reading. I won't
18 read the name of the party. The blank also offered
19 an amendment that required the Court to transfer all
20 pending litigation to the Housing Council.

21 I think that's -- that was correct. All
22 right. Go ahead.

23 MR. COLEY: Two things. One that
24 Mr. Trombadore mentioned also is that the Court
25 would have done all this work for naught. That's

1 not true. The Court has exercised a very important
2 role in this whole process, and what the role was
3 was to make the Legislature act.

4 There was enough pressure brought to bear
5 after the Warren Township case and all the other
6 cases that the Legislature couldn't avoid the
7 Mount Laurel question any longer, and the Court
8 pushed them right into acting.

9 So it's not done for naught. I think it
10 was done for a purpose, for a very important pur-
11 pose, and also has resulted in an Act now before --
12 or a law in New Jersey that is a revolutionary law
13 in the whole country. I would venture to say it's
14 the first of its type.

15 THE COURT: I think you're right. I think
16 it's historic, and I think you're right. It took
17 a bit of a revolution to cause what occurred, if
18 you want to put it that way. That's what it takes
19 to get legislation.

20 And I would take it that it wasn't Mount
21 Laurel II, and I don't mean to demean it, that
22 caused the Legislature to act. It was the establish-
23 ment of fair share numbers, at which point the
24 Legislature said: Now, wait a minute. Mount Laurel
25 II apparently means a lot more than Mount Laurel I

1 did, and we now see what the Court was saying.
2 We should be in this meeting.

3 And on the other point, I want to assure
4 you it's been a wonderful experience, but I
5 don't covet its continuance.

6 MR. COLEY: Well, this is your opportunity,
7 Your Honor.

8 THE COURT: I understand.

9 MR. COLEY: Get rid of these and put them
10 where they should be.

11 The other thing brought up by Mr. Murray
12 was the Warren Township case, how he has vested
13 rights under Judge Meredith's May 27th, 1982
14 decision in the first part of their case. It was
15 tried under Mount Laurel I.

16 He does have a vested right there. He
17 declared our ordinance unconstitutional. No
18 question about it. He won, and he has that right
19 to say that he had our ordinance declared un-
20 constitutional.

21 But that case specifically said that
22 specific zoning relief as to the lands of the
23 respective plaintiffs, which were Skytop and AMG,
24 as described in the complaint filed in this matter,
25 is not granted nor denied at this time. He had no

1 builder's remedy from that case.

2 Mr. Murray has in this case a builder's
3 remedy that Your Honor gave him; but the wording
4 of your decision is: You've got it, but it's sub-
5 ject to Mr. Caton, who was appointed as a master,
6 determining if those properties are buildable or
7 not.

8 Mr. Caton is going to make that determina-
9 tion, give Your Honor his decision. If it's not
10 appealed or it's not objected to by either side,
11 it will be accepted. If it is objected to by either
12 side, there will be a compliance hearing.

13 Mr. Murray does not have a final builder's
14 remedy in this case. His vested rights are only
15 that he has vindicated the rights of society and
16 proven that Warren Township was unconstitutional,
17 probably as every other municipality's ordinance
18 was in this state. But that's his only right.
19 He does not have a vested right to a builder's
20 remedy at this point.

21 THE COURT: Anything further in the Warren
22 matter?

23 MR. MASTRO: Judge, we'd like to reserve
24 some time, to give some other people an opportunity,
25 to press the manifest injustice issue, perhaps comment

1 on it later.

2 THE COURT: Definitely not going to finish
3 all of this by lunch hour. How long have we been
4 going?

5 MR. PALEY: An hour-and-a-half, Judge.

6 THE COURT: All right. Let's just take a
7 short stretch, and then we'll go to twelve-thirty,
8 then continue thereafter.

9 (Whereupon a brief recess was taken.)

10 * * * *

11 THE COURT: We shouldn't take breaks. I
12 think of other questions. Who was going to be
13 heard? Mr. Mastro? Mr. Coley? We are done with
14 Warren? Let me just ask two questions, either
15 Mr. Coley or Mr. Mastro.

16 In terms of a comprehensive review of all
17 of the state, and handling these cases in a state-
18 wide or regional basis, what will the Housing
19 Council do with the fact that there are numerous
20 municipalities in Somerset County, for example,
21 and in adjacent counties, who have already resolved
22 the litigation, have not applied for transfer, and
23 some of whom already have housing under way?

24 And I don't want to mention those towns.
25 Maybe I'll goad them into getting here. I don't

1 need another batch of applications. But there are
2 a host of municipalities, or at least six during
3 the month of August, who voluntarily complied; and
4 in some cases, there's housing either in the
5 ground or in pipeline. How does the Council deal
6 comprehensively with them, or with you in relation-
7 ship to what they have?

8 I add to that the fact, inasmuch as I have
9 dealt with them, maybe I can see whether your
10 resolution is fair in relationship to them.

11 MR. MASTRO: We are talking about, Judge,
12 those municipalities who do have a final judgment?

13 THE COURT: Some of your neighbors,
14 Montgomery, Bridgewater --

15 MR. MASTRO: Bedminster.

16 THE COURT: Bedminster, yeah. I forgot
17 that. How could I forget Bedminster?

18 MR. MASTRO: Far Hills.

19 THE COURT: Far Hills.

20 MR. HUTT: Branchburg.

21 THE COURT: Branchbrook?

22 MR. HUTT: Branchburg.

23 THE COURT: Branchburg. Well, that's almost
24 there.

25 MR. MASTRO: I wish you to amplify that a

1 bit, Judge. What does the Council do with it?

2 THE COURT: Yeah. I mean, is the Council
3 going to consider what happened there? Are they
4 going to feel bound by the fact that this Court
5 imposed X fair share, in each case, with the con-
6 sent of the parties, and the Council said, yeah,
7 I think if we had handled it, we would have come
8 up with a totally different approach?

9 What does it do in terms of Warren? How
10 does it adjust, how does it deal with the fact that
11 the housing is in certain places already, in a
12 pipeline or zoned for or it may be under construction?

13 I was shocked to find out how much Mount
14 Laurel Housing is in fact in the pipeline. I
15 really hadn't realized it. But what does the
16 Housing Council do with that?

17 MR. MASTRO: I don't doubt that it would be
18 considered by the Housing Council on a number of
19 levels. Certainly, it will be considered when
20 evaluating a municipality's fair share. They come
21 in with their plan. The Council must certainly
22 determine what has happened, what is happening
23 in that particular municipality's region; to that
24 extent, will consider what has already taken place.

25 THE COURT: Will the Housing Council say:

1 Well, my goodness, if Town X's fair share, by
2 finding of the Court and by stipulation of the
3 town, is X, and Town Y's got twice the amount of
4 employment and twice the amount of vacant land and
5 twice the amount of everything that goes into pro-
6 viding housing, their number should be twice that?

7 MR. MASTRO: No, I don't think so. No. I
8 don't think that what has already taken place
9 should impact on the Council in attempting to
10 establish finality or exact disposition in that
11 region. Then there's no way you're going to get
12 anything approaching mathematical precision. I
13 don't think there's any need.

14 THE COURT: And so the fact -- I cannot agree
15 with you. And so the fact of the matter is that
16 at least in the example I have given in Somerset
17 County, there's really not an opportunity here for
18 uniformity, is there?

19 MR. MASTRO: For us to what?

20 THE COURT: For uniformity of treatment.
21 I mean, the barn door has been closed. The horse
22 is out in some cases.

23 MR. MASTRO: As to those already decided,
24 I suppose you are correct. But certainly, the tail
25 should not wag the dog.

1 THE COURT: No. I agree. But it does
2 relate to the ability of the Council to handle
3 everybody in the state on a uniform basis.

4 One other question. Inasmuch as you're
5 the expert on injustice, I ask you, do you read
6 Section 16 to make manifest injustice the only
7 criterion upon which the Court could deny a transfer?

8 MR. MASTRO: I do. Sounds like a wedding
9 ceremony, but I do.

10 THE COURT: In determining whether or not to
11 transfer, the Court shall consider whether or not
12 the transfer will result in manifest injustice to
13 any party to the litigation. I have considered
14 that, but I have considered something else as well.
15 And I think that something else, hypothetically,
16 should preclude transfer.

17 MR. MASTRO: The only test is manifest in-
18 justice to any of the parties, period.

19 THE COURT: All right. If there's somebody
20 who disagrees as we go along in this process, I'd
21 be happy to hear them.

22 MR. COLEY: Judge, I disagree, and I hate
23 to disagree with my learned co-counsel, but I dis-
24 agreed when I put my argument before you before. I
25 think that's not a burden that anybody has to carry,

1 but one item that the Court has to consider along
2 with all the other aspects of the transfer cases.

3 THE COURT: So you would suggest that I
4 could permit or deny a transfer in your town, even
5 if there was or was not manifest injustice, I could
6 ignore that, or not ignore it, but I could consider
7 it and not treat it as controllable.

8 MR. COLEY: No. I think that if Your Honor
9 found that there was manifest injustice -- okay.
10 I recognize your argument now. If there is manifest
11 injustice that's to a degree that the Court feels
12 the -- manifest injustice is, conveys a nebulous
13 term. What is it? You've got to determine what it
14 is.

15 I think to determine what manifest injustice
16 is, you've got all the aspects of the case to look
17 at, not any single aspect or whatever. You've got
18 the whole thing. So ultimately, you have to make
19 a judgment call on what manifest injustice is.

20 And if you decide there is manifest injustice
21 in the case, then I think you have to rule as you
22 decide that way, you know, which you have to rule in
23 favor of the person that is going to suffer the
24 manifest injustice. You have to.

25 But if you find there isn't any manifest

1 injustice to either party, you can still transfer.

2 THE COURT: Okay. But if there is manifest
3 injustice, could I still not transfer? Or, rather,
4 could I still transfer?

5 MR. COLEY: If there is manifest injustice,
6 could you still transfer?

7 THE COURT: Yeah.

8 MR. COLEY: I don't believe -- no, I think --
9 it's hard to say. It's hard to say, Your Honor.
10 I think that it's the degree of manifest injustice
11 that's there.

12 THE COURT: Suppose there is demonstrated
13 manifest injustice to the plaintiffs and the lower-
14 income people?

15 MR. COLEY: Well, how do you demonstrate
16 manifest injustice?

17 THE COURT: The Court so finds. I find.

18 MR. COLEY: Okay. Well, then you've made a
19 determination based on all the factors in the case.

20 THE COURT: Right. On whatever factors are
21 used, and then I say: However, even with manifest
22 injustice, I am going to transfer. Do you think
23 the statute permits that?

24 MR. COLEY: What if you find it on both
25 parties? Maybe you find we have manifest injustice

1 and the plaintiff has manifest injustice.

2 THE COURT: It's a balancing thing, but
3 let's suppose I find it. I mean, don't change
4 my -- I'll be happy to answer yours.

5 MR. COLEY: No, I understand.

6 THE COURT: But that may be, that the
7 injustices are in equipoise, so to speak, and that
8 maybe is not enough injustice to find manifest.

9 But what happens if I say, yeah, there's
10 manifest injustice to the plaintiffs and the lower-
11 income people, but there are other factors here
12 which I believe should lay this before the Housing
13 Council?

14 MR. COLEY: Judge, you could, I think, based
15 on the wording of, "The Court shall consider whether
16 or not the transfer would result in manifest in-
17 justice to other -- to any party to the litigation."

18 It doesn't say that's the only thing that
19 you can consider, so I would say that possibly you
20 could, based on that wording.

21 THE COURT: Okay. So the converse is, I
22 could deny a transfer even if there isn't manifest
23 injustice?

24 MR. PALEY: Yes.

25 MR. COLEY: I would think so.

1 THE COURT: Okay.

2 MR. COLEY: It's not the most artistically-
3 drawn paragraph in the world.

4 THE COURT: You see, if you get the converse,
5 it makes -- I mean if you get that concession, it
6 makes the whole thing easier. I can say: Well,
7 there may be manifest injustice, but I'm not going
8 to deny -- I'm not going to transfer, or I'm going
9 to transfer for other reasons.

10 The statute leaves that interpretation,
11 although I wonder whether that was the legislative
12 intent. Okay. Anything further? Anything
13 further on the Warren matter?

14 All right. We have five minutes. I think
15 maybe, rather than start an argument, it might be
16 best if we can agree on how we are going to do the
17 argument after lunch. I can take each individual
18 municipality and hear counsel involved in each of
19 those, if counsel could agree to.

20 I understand that each of them are going
21 to have to argue their own specific facts if they
22 wish, but if counsel could agree to handle specific
23 areas, it might be useful.

24 Any thoughts or any preference on whatever?
25 I'll take them alphabetically and -- all right. I

1 didn't know whether any of you had conferred.

2 All right. Why don't we then recess for
3 lunch. I'll come back, and we'll take whosoever --
4 who's first, Cranbury? Cranbury's first, I guess.
5 All right. Right after lunch, one-thirty.

6 MR. MORAN: Your Honor, are you going to rule
7 on the request of the Public Advocate for leave to
8 appear amicus curiae on short notice?

9 THE COURT: You know, we could do that,
10 couldn't we, right now, get counsel, if he wishes,
11 on his way.

12 MR. TROMBADORE: Does that mean you're
13 going to deny it?

14 THE COURT: That was very considerate, unless
15 he wants to stay. I didn't read his papers, because
16 they arrived here this morning. Well, I should
17 probably say they arrived here late last night.

18 Is the application to be heard with respect
19 to these transfer motions?

20 MR. EISDORFER: Yes, Your Honor.

21 THE COURT: And reading the -- I did catch
22 a heading that dealt with constitutionality. I
23 understand we are not involved in that today.

24 MR. EISDORFER: Your Honor, we are not ad-
25 dressing the issue of constitutionality. We are

1 merely suggesting that the proper interpretation of
2 the phrase, "manifest injustice," needs to be inter-
3 preted in the light of the constitutional context.

4 THE COURT: Can we get counsel's appearance?

5 MR. EISDORFER: Stephen Eisdorfer, on behalf
6 of the Public Advocate of New Jersey.

7 THE COURT: All right. Are there objections?

8 MR. PALEY: Yes.

9 MR. SANTORO: Yes.

10 THE COURT: Briefly, Mr. Paley.

11 MR. PALEY: Philip --

12 MR. HUTT: Why don't we take a vote? All
13 in favor?

14 MR. TROMBADORE: I think we'd lose.

15 THE COURT: Have you looked behind the rail?
16 I think you have. It's close.

17 MR. PALEY: Philip Paley, Piscataway.
18 Piscataway objects. I have not had an opportunity
19 to review the brief, which I understand was delivered
20 to my office sometime yesterday.

21 I think that the interests of plaintiffs in
22 this, in the Urban League case, are adequately
23 represented by the Urban League, which has submitted
24 a timely brief. I see no basis for the even limited
25 intervention of another party at this point.

1 THE COURT: Mr. Santoro?

2 MR. SANTORO: I also object to the appearance
3 being allowed today. Our motion's been pending since
4 July 23rd, Your Honor.

5 Again, the Urban League has very adequately
6 briefed just about every issue conceivable, and I
7 only had the opportunity to cursorily look through
8 the brief that I received from the Public Advocate,
9 so I request that the Court hold off allowing that
10 today, and give us all the opportunity to reply to the
11 issues raised in that brief.

12 THE COURT: Mr. Moran?

13 MR. MORAN: Your Honor, I'd only point out
14 that but for the intervention of a lady named
15 Gloria last Friday, this motion would have been
16 after the fact. And it would seem to me that I had
17 received over 260 pages of briefs and documents,
18 which I can't possibly see what the Public Advocate
19 can add to that hasn't already been said.

20 THE COURT: You'd be surprised.

21 MR. NEISSER: I just want to say, compliments
22 will get him nowhere.

23 THE COURT: As I indicated, I hoped to dis-
24 pose of these motions after oral argument. Maybe I
25 won't. But that's my intention at this point. When

1 I'm finished hearing all of this, maybe I'll change
2 my mind.

3 And there is inherent prejudice, counsel,
4 to those people who have not read the brief. I don't
5 know where it comes down. But I am assuming, from
6 the reaction I got, that it is supported by the
7 plaintiffs here. I think it is fundamentally unfair
8 to expect them to respond. I don't know that you are
9 covering any new ground. Are you?

10 MR. EISDORFER: Your Honor, I think we take
11 a somewhat different posture from some of the other
12 plaintiffs.

13 THE COURT: All right. Well, I think that
14 the matter does come terribly late. I received it
15 yesterday. Was it filed earlier than that?

16 MR. EISDORFER: Your Honor, it was sent by
17 Express Mail Monday.

18 THE COURT: Okay. Well, I think it's stamped
19 yesterday here, so that's when we got it. And I
20 don't know when the rest of the counsel got it, but
21 that, to me, is really inadequate notice.

22 And this matter's just been carried too far.
23 It would be inappropriate to carry it any further.
24 And there are other motions pending. And the Court
25 would not be averse to modifying its approach to this

1 issue if, in fact, the case is decided today.

2 Now, if the case isn't decided today, I
3 might give opportunity for comment on the reply briefs
4 on the brief which you filed, and intervening for
5 that purpose. But I am going to deny the application
6 to be heard on this particular hearing day.

7 All right. See you at one-thirty.

8 MR. PALEY: Thank you.

9 (Whereupon the luncheon recess was taken.)

10 * * * *

11

12 A F T E R N O O N S E S S I O N

13

14 THE COURT: All right. I think in the
15 absence of an objection, perhaps the easiest way
16 to handle this would be to have all the municipalities
17 be heard with respect to their application, and then
18 to hear the individual plaintiffs and the Urban
19 League in response. We can make it the Urban League
20 and the individual plaintiffs, depending on what
21 plaintiffs have agreed upon. And I think I said I'd
22 go alphabetically. Mr. Moran.

23 MR. MORAN: Your Honor, obviously, the issues
24 in this case or this motion have been briefed at
25 quite some length, and I don't see the necessity for

1 being very lengthy. I just had a few points that I
2 wanted to highlight.

3 The Supreme Court in its Mount Laurel II
4 opinion, towards the end of the opinion, attempts
5 to reassure municipalities that are afraid that some-
6 how or another they're going to get it in the neck,
7 so to speak, and that everybody else around them is
8 going to go scot-free, and point out to the Court
9 that all municipalities throughout the state are
10 going to be treated similarly under this, and that
11 in any event, any municipality will not be any worse
12 off than any of its neighboring municipalities.

13 We have already seen in the Warren/AMG
14 formula that this Court has developed, and which has
15 been followed through the state, that there is some
16 difficulty in the practical application of that,
17 particularly in light of the fact that the strict
18 application of that formula on a twenty percent
19 set-aside would result in the construction of market-
20 rate units at approximately twice the amount which
21 the market could absorb.

22 That would mean, in the long run, that those
23 municipalities to get sued first may indeed be
24 treated worse than those municipalities that didn't
25 have to do anything right away. That's not really

1 the point that I am trying to make here, however.

2 The point I am trying to make here is that
3 for the first time now, the Legislature has come up
4 with a system for treating the low and moderate income
5 housing problem in the State of New Jersey. And we
6 are now in the transitional phase, because it is
7 obvious that no matter what approach this Court takes
8 on this motion, that the number of Mount Laurel suits
9 will be diminishing in the future rather than in-
10 creasing, I am sure much to the Court's delight, and
11 I can assure you, I think, much to the delight of a
12 lot of people in this room.

13 The question really then becomes as to what
14 extent will municipalities that have already found
15 themselves thrust into litigation not be permitted
16 to avail themselves of the techniques that will be
17 developed over time by the Council on Affordable
18 Housing, but to go along with those techniques
19 which have been developed by this Court and by other
20 Courts in the state.

21 In effect, the question becomes one for the
22 citizens of towns such as Cranbury. The Supreme
23 Court told me that I wasn't going to be treated
24 differently than any other town, and now I see that
25 most of the towns in this state who want to take --

1 want to solve their Mount Laurel problem are going
2 to be treated by the Council on Affordable Housing.

3 And with specific reference to Cranbury,
4 the Council on Affordable Housing has been directed
5 to take into account in determining a fair share
6 number questions such as farm land preservation and
7 questions such as historic preservation.

8 I realize the Court, in its comments this
9 morning, indicated there was nothing to stop the
10 Court from dealing with that. But in reference to
11 Cranbury, the Court specifically said not that they
12 were going to adjust Cranbury's fair share number,
13 which is the language used in the statute, but they
14 were going to deal with the problem perhaps through
15 the phasing device which has been recommended by the
16 master. There is a big difference.

17 THE COURT: There may be a big difference;
18 there may not be.

19 MR. MORAN: Well --

20 THE COURT: If the Court finds that because
21 of historical preservation or whatever, Cranbury
22 can't absorb more than 200 units a decade for the
23 next three decades, then your fair share's 200 units
24 a year -- per decade. Doesn't make any difference
25 what your true fair share is.

1 MR. MORAN: Well, that may very well be,
2 Your Honor, depending on how things come out at this
3 point. I don't think Cranbury's in a position to
4 know how they will come out. At the moment, the
5 only number they see is 816.

6 THE COURT: Well, they see a number by
7 Mr. Caton that says -- I don't have his report in
8 front of me, but my recollection, two hundred and
9 some, for up to nineteen ninety-four. Isn't that
10 about the number?

11 MR. MORAN: Just under three hundred, I
12 believe.

13 THE COURT: Yeah, two eighty-seven, I think.
14 And so that's -- hmm? That's a fair share obliga-
15 tion for fourteen years of 287 units.

16 MR. MORAN: That's by tracing it back to --

17 THE COURT: Where it's all calculated from
18 1980 to 1984.

19 MR. MORAN: The point that I am trying to
20 make, though, is that at this point, it's still
21 problematic whether or not that will or will not be
22 the result in this case, whereas on a transfer
23 motion, at least the township has the assurance that
24 the Council on Affordable Housing will be required
25 to make an adjustment if it's -- if it determines that

1 the fair share that it finally comes up with would
2 be likely to impair historic preservation or impair
3 the municipality's ability to preserve adequate
4 amounts of farm land preservation.

5 THE COURT: Aren't I obligated to do that
6 under Mount Laurel II?

7 MR. MORAN: Historic preservation isn't
8 mentioned at all in Mount Laurel II.

9 THE COURT: Well, I would think environmental
10 considerations and planning includes historic preser-
11 vation. I would so find, if you would like me to do
12 that. I have always perceived it to be my obliga-
13 tion under Mount Laurel II to take that into account.

14 MR. MORAN: Taking it into account is dif-
15 ferent than making an adjustment in the number. I
16 realize that you think that phasing has the same
17 result, but I'm not satisfied yet that it does.

18 I'd like also to move on to the question of
19 manifest injustice, because I think that's key to the
20 case, because it's the only criterion that's mentioned
21 in the statute for the Court to take into considera-
22 tion.

23 THE COURT: Before you move on to that, let
24 me just ask you, you make a comment that everybody's
25 going to be treated alike, and that's the way the

1 Supreme Court wanted it.

2 I don't think the Supreme Court said that,
3 and I would appreciate if you would cite me to that.
4 In fact, I think the Supreme Court said just the
5 opposite, that no municipality should be a mirror
6 image of another municipality, and that's a direct
7 quote.

8 MR. MORAN: The language -- and I don't have
9 it right in front of me, Your Honor, but if at the
10 end of my argument you give me a couple of minutes,
11 I can find it for you.

12 THE COURT: Sure. Fine.

13 MR. MORAN: All of the papers that I have
14 seen filed by any of the plaintiffs in the case
15 sooner or later get down to the point that the mani-
16 fest injustice that would be worked upon them if
17 this transfer motion were granted would mean ad-
18 ditional delay. And they point to the fact that at
19 least eighteen months additional delay is called
20 for by the time period set forth in the statute both
21 for the filing of documents and also for the Council
22 to come up with its own rules and regulations.

23 I would point out to the Court, however, that
24 that delay is built into the statute and cannot
25 constitute the kind of manifest injustice that the

1 Legislature had in mind when it was talking about
2 manifest injustice being a criterion taken into
3 account in determining whether or not to transfer.

4 If that delay is inherent in the statute,
5 that would mean -- and it was also to constitute
6 an element of manifest injustice, that would mean
7 that there's no case under which a transfer motion
8 could be granted.

9 Similarly, because of the fact that the
10 Legislature has specifically said that these -- that
11 the mediation process set forth in the statute is
12 the preferable avenue for the treating of these
13 problems rather than the Courts, it would seem to me
14 that the presumption should be in favor of the
15 transfer rather than against it, and only in those
16 cases where manifest injustice can be demonstrated
17 should there be a denial of that request.

18 If we look at it from the perspective, then,
19 of the delay that's involved here, it would only
20 seem to me that on very unusual cases, where some
21 particular prejudice would result to a plaintiff,
22 not as a result of the delay process that's involved,
23 but for some other reason, should the motion be denied.

24 Finally, I would like to call the Court's
25 attention to some features which I believe are unique

1 to Cranbury and would militate in favor of a treat-
2 ment of Cranbury's situation by the administrative
3 body that has been set up for the particular purpose
4 of reviewing these plans and dealing with these
5 problems rather than the Court.

6 And with all due respect, Your Honor, I think
7 you can admit that the Court lacks the inherent
8 expertise that the administrative body might have
9 after it's had a chance to establish itself for a-
10 while, with all due respect to the expertise that
11 you have developed over the last couple of years,
12 as I dare say that nobody is more familiar with the
13 problems at this point in the state than you are,
14 and that is that Cranbury Township -- the point I
15 want to make is that Cranbury Township is the most
16 impacted town by Mount Laurel II of any town that I
17 know of that is in litigation in the State of New
18 Jersey.

19 By that I mean --

20 THE COURT: Mr. Coley doesn't agree,
21 Mr. Paley doesn't agree, Mr. Santoro doesn't agree.

22 MR. MORAN: Mr. Coley and I have debated
23 this issue before, and I remember one evening where
24 he actually bowed to me and said that in terms of the
25 numbers, I was correct.

1 MR. COLEY: That was after a couple of
2 drinks, Your Honor.

3 MR. MORAN: Specifically in terms of -- in
4 terms of a fair share allocation, which has already
5 been fixed for Cranbury, and relative to existing
6 population, Cranbury Township, I believe, has the
7 highest relative fair share number. Cranbury Township
8 is the only municipality in the state, to my know-
9 ledge, that is in litigation at the present time,
10 that presents both substantial questions of farm land
11 preservation and historic preservation.

12 In addition to that, Cranbury has the
13 problems which are endemic throughout this litigation
14 in terms of existing infrastructure, water, sewer,
15 roads and all of the other problems that exist.

16 But it seems to me that this combination
17 of problems, A, the tremendous impact that's going
18 to have on the town, B, the question of historic
19 preservation, which I think, from any fair reading
20 of the evidence that is already before this Court,
21 is not something that is thrown into this as a make-
22 weight -- it has some legitimate substance to it --
23 and the question of historic preservation, would
24 indicate that these problems should be treated by
25 some administrative body that has all of the

1 professional help at their beck and call that will
2 be available to the Council on Affordable Housing,
3 and not be treated as the result of an adversarial
4 process by a question of who has the better experts
5 that they can put on the witness stand.

6 That's the reason, I think, that in this
7 particular case the motion should be granted.

8 THE COURT: Well, when you go before the
9 Housing Council on this issue of historic preserva-
10 tion and farm land preservation, what are you going
11 to tell them that you are not going to tell me?

12 MR. MORAN: I am going to be telling them
13 exactly the same things, Judge. I might be able to
14 tell them in a little bit more informal fashion,
15 outside the regular rules of evidence which control
16 in a courtroom situation such as this, 'cause those
17 rules of evidence can be bent in an administrative
18 setting.

19 THE COURT: They're pretty well bent in
20 Mount Laurel cases, too, unfortunately.

21 MR. MORAN: But I am assuming, and I think
22 it's a valid assumption, that the several individuals
23 who comprise this Council will bring their own
24 independent expertise to it.

25 I am also assuming that they will have at

1 their beck and call a staff of people who bring
2 their own professional expertise to it, and that
3 that expertise will give them some assistance in
4 differentiating between the conflicting sides of a
5 story told in an adversarial situation and the type
6 of situation that is properly treated here where they
7 get that help.

8 If you look at any kind of history of ad-
9 ministrative law, you will find Courts throughout
10 are always paying due respect to the administrative
11 expertise of the agency involved. And I think that
12 that's exactly the kind of expertise that Cranbury
13 Township wants to avail itself of in determining a
14 course that is going to affect the entire future of
15 the township.

16 THE COURT: Don't we have amici curiae in
17 your case who are representing the historical
18 preservation interests?

19 MR. MORAN: Pardon, Your Honor?

20 THE COURT: Don't we have amici curiae in
21 your case representing the historic preservation?

22 MR. MORAN: Yes, Your Honor, we do. The
23 extent to which they're going to be -- continue to
24 be able to do so, I'm not sure, because I understand
25 there are funding problems there.

1 THE COURT: The Court could appoint experts
2 on that issue.

3 MR. MORAN: Your Honor, the Court --

4 THE COURT: I assume.

5 MR. MORAN: The Court can do all of these
6 things, obviously. But the point that I am trying
7 to make is that that's outside the normal routine
8 of things that are done in the court procedure, where-
9 as it will be part of the normal routine that's going
10 to be handled by the Affordable Housing Council.

11 We have to rely on the Court to use extra-
12 ordinary, heroic steps, so to speak, in order -- as
13 you did in developing the consensus methodology.
14 But it's not an automatic for the Court. It should
15 be an automatic for the Council on Affordable Housing.

16 THE COURT: Thank you. A, B, C, D, E, F --
17 Monroe.

18 MR. APUZZO: May it please the Court, Your
19 Honor, Mario Apuzzo, on behalf of Monroe Township.
20 Our position in the case is that if Your Honor were
21 to grant the motion to transfer, that there would be
22 no manifest injustice to the plaintiffs in our case.

23 The contrary is that if Your Honor were not
24 to grant the motion to transfer, we maintain that a
25 manifest injustice would be done upon the

1 municipality and those people in need of affordable
2 housing. But the first item I address on the issue
3 of manifest injustice is the expense and delay, ex-
4 pense and delay arguments which have been put forth
5 in the Plaintiffs' briefs and documents.

6 The argument is that large sums of money
7 have been already spent, and that all this money
8 which has been spent will be wasted if the motion to
9 transfer is granted.

10 We maintain that more money will have to be
11 spent if these cases are not transferred, much more
12 than if the cases were to be transferred.

13 It's highly likely that appeals will follow
14 in the case if the matter continues in the courts.
15 There's no secret that these cases have been very
16 controversial, and the political environment has been
17 highly heated in the township of Monroe. The elected
18 officials have taken a strong stand on this issue.
19 The word has been that appeals would follow.

20 So we are maintaining that to hold the case
21 in the court would just increase the amount of re-
22 sources that have to be expended in order to come to
23 a conclusion in this matter.

24 THE COURT: How would I assume that appeals
25 will not follow the Housing Council procedure? I

1 mean, there's a right of appeal from the decision
2 of an administrative law judge; and, as a matter of
3 fact, there are a host of questions under the Act
4 as to direct actions in the Superior Court while
5 the matter's before the Housing Council.

6 And I don't want to go into those, because
7 I think they're not germane either to what we are
8 doing today or constitutional issues. But what makes
9 you think that there won't be litigation out of the
10 Housing Council? I don't assume that those people
11 who filed affidavits that they put \$250,000 into this
12 thing at this point are going to lay back simply and
13 let the Housing Council do what they want.

14 Now, maybe they will be satisfied with the
15 process. That you could argue. Maybe they won't.
16 But why is there any greater prospect of appeal here
17 than there?

18 How do I know, as a matter of fact, the
19 municipalities are going to appeal? How do I know
20 they're not here because political pressures mandate
21 they be here, and that when the judge says no, they
22 can blame the judge and go on and comply?

23 How do I know all those speculative things?
24 In one case, I don't believe it is speculative. I'm
25 not talking about in the municipalities before this

1 Court today, necessarily.

2 MR. APUZZO: Your Honor, you are correct.
3 You don't know. However, we do have to make
4 judgment decisions in this matter, and we maintain
5 that given the background and history of this whole
6 situation regarding the Mount Laurel issue, that
7 if the case were transferred to the Housing Council,
8 that the township would less likely appeal any
9 decision rendered by the Housing Council.

10 THE COURT: That's a fair bet. I think
11 that's a fair bet. It's more likely; however, one
12 might assume that the plaintiffs will appeal. It's
13 a swap-off, isn't it, in terms of manifest injustice?

14 MR. APUZZO: Well, the township cannot control
15 what the plaintiffs will do in terms of appeals. But --

16 THE COURT: No. But in terms of criteria to
17 determine manifest injustice, we are going to talk
18 about delay. There's going to be delay whether the
19 plaintiff appeals or the defendant appeals. And if
20 the likelihood of appeal is relatively the same,
21 and that is terribly speculative, then I really can't
22 do much to factor that in.

23 What I can factor is the best case scenario
24 before the Council. That I certainly can factor in,
25 and I think that should be factored in. Okay?

1 MR. APUZZO: May I move on to the next
2 point, Your Honor?

3 THE COURT: Please.

4 MR. APUZZO: Thank you. Also, we foresee
5 paper battles in these continuing court proceedings,
6 blizzard of papers, a monumental waste of judicial
7 time and resources. Well, maybe I shouldn't use the
8 word, "waste," but tremendous amount of judicial
9 time and resources will be needed in order to bring
10 these cases to a conclusion, given the background
11 that has existed.

12 And when we factor this into the resources
13 which will be expended, the delays and so forth, we
14 maintain that that's something the Court should
15 consider in terms of manifest injustice to the people
16 in need of the affordable housing.

17 THE COURT: I agree with that. And assuming
18 there is a transfer, will all of the what you
19 characterize as blizzard of paper work, will that be
20 transferred to the Council?

21 MR. APUZZO: Well, that, Your Honor, I'm
22 glad you bring that point up, because I wanted to
23 address that later on. That goes back to the point
24 which was raised about whether everything that has
25 been done by the Court will be a waste.

1 I maintain no, because if you read the
2 statute, it says that the -- I think it's Section 14 --
3 an objector can come forward and say, I object to the
4 petition for certification. And I can't imagine the
5 Housing Council not considering information, facts,
6 evidence which have been established in a court, as --
7 not considering as viable information. That's beyond
8 conception.

9 THE COURT: How about the transcript, the
10 eighteen-day trial?

11 MR. APUZZO: The eighteen-day trial?

12 THE COURT: Yeah. I guess it was eighteen
13 days, however long it took.

14 MR. APUZZO: Whatever information which has
15 been established which will go to the issue of the
16 type of housing that should be built, how much
17 housing, when it should be built, I can't imagine the
18 Council not considering viable information in making
19 its decision.

20 THE COURT: So they're going to be hit with
21 that blizzard, plus the additional blizzard of
22 litigation before the administrative law judge. And
23 I would assume if the Council's got to consider it,
24 the administrative law judge has got to consider it.

25 MR. APUZZO: Well, when I say blizzard of

1 papers, I mean new papers, not old ones.

2 THE COURT: Yeah. Well, they're going to
3 get both, aren't they? They're going to get all the
4 old ones. And I'll tell you, if you want to look in
5 there, there are five file drawers of pleadings, five
6 full file drawers of pleadings, consuming over thirty
7 files, plus experts' reports and masters' reports,
8 and I'd be happy to send this to the Council, by the
9 way. The floor is buckling. And it may make sense
10 for them to consider that.

11 I'm not at all sure, I repeat again, I don't
12 believe the legislation evidences any intent that
13 they must or should. But let's assume, by procedural
14 guidelines they establish, that they should or must.

15 So they've got to go through all of that, and
16 then go through the presentation that the objecting
17 party wants to make to the revisions to the housing
18 plan that have been made by the municipality. It may
19 be another eighteen days. I have to tell you what a
20 burden that is.

21 It took me one full month to go through one
22 case in getting prepared to understand what it was,
23 specifically the Bedminster case. Took me a full
24 month of five days a week reading nothing but
25 pleadings, briefs, exhibits, prior transcripts and so

1 forth, to get ready for Bedminster.

2 So you're talking, taking about a tremendous
3 burden on the Housing Council.

4 MR. APUZZO: I can understand what you are
5 saying, Your Honor; however, one thing comes to mind,
6 that the Court operates in a legal setting, which could
7 cause a -- more generation of papers, more cumbersome
8 procedure, where, in an administrative body, you might
9 have more flexibility which allows you to get to
10 items in a quicker manner.

11 I'm not exactly sure how it's going to work,
12 but I think it's possible to think of the idea of
13 the Council being able to have greater flexibility
14 and, well, with the individuals that have been ap-
15 pointed to the Council --

16 THE COURT: I would hope that the Council
17 could move on cases administratively and in a less
18 complex manner than we do. When it gets before an
19 administrative law judge, my experience has been that
20 those proceedings are really not essentially different
21 than the court proceeding, or when they're hotly
22 contested.

23 I would hope that they're not, in this case,
24 that complex, but I can't imagine they wouldn't be.
25 Why would it change? You've got a judge with all

1 the essential powers and obligations of a Superior
2 Court judge, who's going to have to make findings
3 of fact and conclusions of law, presumably, in some
4 cases, and create a record of exhibits.

5 How is that proceeding any different?

6 MR. APUZZO: Well, the way it differs is in
7 this fashion, Your Honor. We have to consider again,
8 like I said before, the background, the environment
9 out of which we come in these cases.

10 We are now in an adversarial situation. We
11 are in court. If the cases were transferred, it is
12 my contention that the mayor and council of Monroe
13 Township would not be so resistant to the whole
14 process and, being less resistant, you have a loosening
15 of whatever reins or whatever motivations are
16 there now.

17 There has been this argument about the role
18 of the Court in the housing issue.

19 THE COURT: I would buy that, up to the point
20 of administrative law judge involvement. I have no
21 difficulty with that, because at that point it's a
22 unilateral or one-party proceedings. When you get
23 to the administrative law judge, I'd be awfully
24 frightened as a lawyer to just assume that because
25 my municipality did well before the Council, that I

1 was going to do well before an administrative law
2 judge or, for that matter, the Appellate Division,
3 because you know that's the next step.

4 So you are going to have to create a full
5 record, just as adequately as you would have to
6 create here; otherwise, you are just laying yourself
7 open to the Courts again, not to speak of the ad-
8 ministrative law judge.

9 There's a, hopefully, less complexity through
10 the Housing Council. Certainly, there's a hope that
11 we won't even have litigation before the Housing
12 Council. That would be the best of all worlds.

13 But it's difficult to perceive that, in these
14 cases at least, in transfer cases that are hotly
15 contested.

16 MR. APUZZO: Again, I think it's important
17 to keep in mind the mind set of the municipality at
18 present. If that mind set can be changed in a
19 certain way and get the cooperation of the elected
20 officials, I think that would have a tremendous
21 impact in getting this housing issue eventually re-
22 solved in the quickest manner, in the best possible
23 manner.

24 Another reason why I think it would be a
25 less complex matter if the situation did end up in

1 the Housing Council's jurisdiction, as I stated,
2 the mayor and council are willing to work with the
3 new Housing Council. They have waited for the
4 creation of such a body. And I can't really imagine,
5 or I should say I really don't know what the mayor
6 and the council will do if the case is not trans-
7 ferred.

8 I take it, based upon the history of the
9 whole thing, that it's going to be a very contro-
10 versial matter there, and the township -- there's
11 going to be resistance, and we might just be pro-
12 longing this whole situation instead of doing some-
13 thing which will get the cooperation and get the
14 thing finished as quickly as possible.

15 Finally --

16 THE COURT: The import of that is, you
17 recognize it's going to take longer before the
18 Council than before the Court, if I understood what
19 you just said.

20 MR. APUZZO: When I said Council, I meant
21 governing body of the Township, the mayor and the
22 governing body of the township.

23 THE COURT: I thought I heard you say it's
24 going to be a contested thing, and we may as -- it's
25 a question of whether we are prolonging it or whether

1 we should just get it over with now. I thought
2 I heard you say that.

3 MR. APUZZO: No. There's an assumption
4 in what Your Honor just said, "get it over with now."
5 I don't know whether that's really going to be some-
6 thing which can happen so quickly. I am putting
7 forward the idea that maybe we can't get it over that
8 quickly if it stays in the court.

9 THE COURT: Let's see where you stand. You
10 have adopted an ordinance, a compliance ordinance;
11 and but for a problem with one of the parcels that
12 you have allowed to be built for non-Mount Laurel
13 purposes, you are satisfied, you were satisfied with
14 the ordinance at that stage. You adopt it under
15 protest, I understand.

16 So what's left is a compliance hearing, a
17 determination by the Court that it does not comply.
18 And if the Court finds it does, it's all over, unless
19 we have some offended plaintiffs. And you can appeal,
20 or they can appeal.

21 And if the Court finds it's not compliant,
22 then the master's going to draw an ordinance for you.
23 As a matter of fact, in this case, I'm sorry --
24 correct myself -- the master's already been directed
25 to draw an ordinance for you, because you zoned

1 yourself into noncompliance by allowing a parcel to
2 go.

3 And that master's report -- I was confusing
4 you with another town. That master's report is due
5 on October 7th, as I recall. So by October 7th,
6 theoretically, we will have the report from the
7 master. And if the master's worth their salt, the
8 Court is going to have a compliant ordinance,
9 theoretically.

10 Of course, we will have to hold a hearing,
11 and that will be the end of it, won't it? There will
12 be an appeal. How long do you think that's going to
13 take?

14 MR. APUZZO: I don't even want to venture
15 the guess on how many things can be done to stall
16 something in the political process.

17 THE COURT: Stall? I'm not going to stall.
18 Who else is going to stall? The plaintiffs won't.
19 The master's not going to. Who's left?

20 I guarantee you, nobody's going to stall that
21 one. I mean, what's the point of stalling it? That
22 case is ready to be heard. Appeal is another story.
23 Okay. Anything else?

24 MR. APUZZO: Yes. The second item regards
25 the democratic process. I know it sounds a little

1 out of tune, but basically what I want to address
2 is the plaintiffs' response to the motion. And the
3 plaintiffs have mocked -- have made a mockery of the
4 democratic process in Monroe Township. They have
5 simply ridiculed our motion, coming forth with this
6 hee-haw test, which to this day I don't know what it
7 means, and notions of --

8 THE COURT: Mr. Mytelka will explain to us
9 what it means, subsequently. Okay.

10 MR. APUZZO: I am very curious to know. I
11 mean, it's fascinating.

12 THE COURT: I think we're making it the last
13 speech. There's something worth staying for.

14 MR. APUZZO: Anyway, about children murdering
15 their parents and crying that they're orphans, and
16 the whole thing has just taken a ridiculous stance
17 on our position.

18 They argued that the township has acted in
19 bad faith. What we contend is that the Cou-
20 not hear taxpayers' complaints. It's
21 officials of the township.

22 THE COURT: You

23 MR. APUZZO: Indira
24 Court --

25 THE COURT: I have heard

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1 and I have heard them directly and indirectly
2 through counsel. But I agree that it's -- certainly,
3 the political problems with Mount Laurel rest primarily
4 on the Council and the governing body.

5 MR. APUZZO: That's what I meant to say.
6 You know, the elected officials are accountable to the
7 people who have elected them, and they must make
8 the right decisions in order to stay in office, to
9 be considered good leaders.

10 What we contend happened in Monroe Township
11 is, yes, the Council and the mayor did not act as
12 quickly as the Court would like them to act; however,
13 what they were doing was serving the interests of
14 the people who elected them, and totally within their
15 rights.

16 They are looking out for the best interests
17 of the township, and that is why we have this en-
18 vironment that we do have. It's not a matter of
19 acting in bad faith. It's just a matter of trying
20 to do what you think is correct.

21 THE COURT: Well, Mr. Apuzzo, you're hitting
22 a nerve. I'm going to tell you in advance that the
23 conduct of the municipality with respect to what has
24 occurred prior to this date is not a factor in my
25 mind in judging manifest injustice. But if you

1 attempt to stand before me and tell me about a
2 municipality that purposely defied this Court's
3 order, and tell me that that's part of the democratic
4 process, if you're telling me about governing of-
5 ficials who have violated their oath of office, and
6 telling me that they're acting in good faith, we
7 are really wasting time.

8 MR. APUZZO: I'll continue on to the next
9 item, Your Honor. Lastly, I want to address the
10 idea of a drain on resources and increased services
11 which will be required due to the influx of new
12 housing.

13 It's no secret that with housing, you have
14 people coming in and population increases, you have
15 a tremendous increase on need for water, sewer
16 facilities, police protection, mass transportation,
17 shopping centers, fire protection, police protection,
18 first aid, health care, recreation, schools, roads
19 and highways, garbage disposal, and utilities.

20 I am sure there are others, but that's just
21 one list. These items are the essence of local
22 government. And it's a formidable task to administer
23 and provide for these items.

24 The local officials are more in tune and
25 better qualified to deal with these situations. We

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contend that if the motion is transferred to the Housing Council, that the local officials will be able to contribute to this process and thereby remove any kind of a manifest injustice which could befall upon the township if they were locked into a situation where these items that I have delineated were not properly considered.

The Housing Council will be an administrative body. They will have experts who will be looking at these types of concerns. Not that the Court hasn't done that, but I think, as was stated already by Mr. Moran, that the Council will be focusing in on these items. That's what their job will be, to deal with the housing issue.

The Court is not the same type of body. A Court has different cases coming to it. One day you're dealing with one case, the next day you have a different case. And you just can't focus your attention on one specific concern that is before society.

That's why we have delegates within our own Legislature. dealing with all kinds of things existing, so he will delegate that administrative agencies or

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1 They're more in tune with the problem and,
2 hopefully, better qualified, and will do a better job
3 in the end.

4 We feel that this is part of the township's
5 right to self-determination, to be able to have a
6 body which will address its concerns on a level that,
7 hopefully, will exist with the Housing Council.

8 Finally, the idea of taxation with representa-
9 tion I think also comes into this. To have a Court
10 impose housing upon the township, the citizens, the
11 taxpayers who are paying the bills for all these
12 items that I have enunciated, they will not have any
13 control over what the Court is doing. They will be
14 putting out the tax dollars, and all these different
15 things will be happening, generating more tax dollars.

16 If the Court is doing that, the people --
17 they can't get to the Court. They can't say: Well,
18 I'm not going to vote for you, or you should do this
19 or you should do that. There's no Council meeting.
20 There's no poll or anything like that.

21 But if the local representatives were dealing
22 with this problem, then that situation would change
23 and would be more in tune with the democratic process.

24 Finally, I want to go to the idea of sound
25 land use planning. What we are proposing here, that

1 is, what the plaintiffs are proposing, would
2 definitely have a tremendous impact on the present
3 generation and future generations, will require
4 sound land use planning. Even the Mount Laurel
5 decision tells us that the builder remedy should
6 not be granted if to do so would be clearly contrary
7 to sound land use planning. We have to consider that.

8 We maintain that, with all due respect to the
9 Court, that the Housing Council will be better
10 equipped to deal with the land use planning items.
11 For that reason, again, we are tying that into the
12 manifest injustice that would be done to the town-
13 ship, the taxpayers, if the housing issue were to be
14 resolved by the Court as opposed to the Housing
15 Council. Thank you, Your Honor.

16 THE COURT: You are welcome. Just let me
17 ask you one question. Do you agree with the
18 proposition that the way I should decide these cases
19 is to determine what would be the quickest and most
20 efficient way of providing construction of lower-
21 income housing?

22 MR. APUZZO: Yes, Your Honor.

23 THE COURT: Okay. Mr. Paley.

24 MR. PALEY: First, Your Honor, I disagree
25 with Mr. Moran.

1 THE COURT: On everything?

2 MR. PALEY: Virtually. I'm pleased to hear,
3 from a combination of the comments you made about
4 my number having been cut down, cut in half, this
5 morning, and Mr. Moran's comments this afternoon,
6 I have apparently done very well in this litigation
7 so far, and I may want to reconsider my position.

8 THE COURT: I think you've done greatly.
9 You have had a forty-eight percent reduction in your
10 fair share number so far. And you may go further.

11 MR. PALEY: Well, you know, it's like Pete
12 Rose. He also made the greatest number of outs of
13 any baseball player. I say that because our original
14 number was 4192, easy to remember.

15 I'd like to address two points from this
16 morning, Your Honor, and I am going to try not to be
17 repetitive. Your Honor asked about the regional
18 aspects of the potential transfer. And I recall in
19 Piscataway's case we had testimony about a street
20 called New Brunswick Avenue, that Your Honor has seen,
21 the Harris Steel Tract. And it's really tracts,
22 because half of them are on the Piscataway side, and
23 half of them are on the South Plainfield side; and
24 the tracts that are on the South Plainfield side are
25 included in the judgment that was entered for low and

1 moderate.

2 THE COURT: I remember that site speci-
3 fically. That was very near the site where the
4 Doberman pinscher acknowledged my presence.

5 MR. PALEY: That is correct.

6 At the wheel of a rusted truck,
7 if I recall.

8 THE COURT: Yes, exactly.

9 MR. PALEY: In any event, the point was that
10 Piscataway tried to indicate to the Court that even
11 within the confines of a consolidated case, where
12 South Plainfield and Piscataway are both parties to
13 the same case, there ought to be some consideration
14 of and recognition for the fact that on this one
15 road, there was going to be two large, relatively
16 large high-density developments.

17 And that view that we tried to espouse was
18 certainly not reflected in Your Honor's opinion, and
19 since it clearly was not reflected in the judgment
20 for South Plainfield, that suggests that less at-
21 tention was given to the regional, if you want to
22 call it that, aspects of this by this Court than the
23 Court thought that it might have this morning.

24 THE COURT: I knew where South Plainfield
25 was going to put its housing. They had a stipulation

1 where they said they wanted to put it. And I knew
2 where the Harris Steel site in Piscataway was in
3 relationship to that. It didn't affect -- as a
4 matter of fact, I thought it was more appropriate
5 in light of where South Plainfield was going. I
6 considered that.

7 MR. PALEY: You also asked this morning
8 whether the municipality might have concern that
9 their number might be higher. I'm not sure how I
10 could expect reasonably that my number would be
11 higher, unless Your Honor were to order us to annex
12 South Plainfield as a separate borough to Piscataway,
13 and take over their vacant land, which is a remedy
14 that I am not suggesting, but it's given the fact
15 that what has virtually happened in Piscataway's
16 case has been that the vacant acreage that is suitable
17 has been determined at an average density -- and I am
18 summarizing substantially -- of ten to the acre; and
19 you multiply by two Mount Laurel units for each
20 acre, you come up with the 2215 number.

21 That's not the way that the Court did it,
22 but the effect is virtually the same. So I am not
23 too concerned about the fact that we might get hit
24 harder by Affordable -- by the Housing Council.

25 THE COURT: Are you still investigating the

1 possibility that you can come back and now show me
2 that even the 2400 number, whatever it is, can't be
3 satisfied?

4 MR. PALEY: We, Your Honor, having received
5 your judgment dated September 17th --

6 THE COURT: Made a motion for transfer.

7 MR. PALEY: Motion for transfer was prior
8 to the judgment.

9 THE COURT: I'm only kidding.

10 MR. PALEY: Okay.

11 THE COURT: I understand. But I --

12 MR. PALEY: That may be a possibility. It's
13 clear to me, from reading Your Honor's opinion of
14 July 23rd, that Your Honor left open a fair amount
15 of discretion on the part of the town to endeavor to
16 show you that the 2215 was not achievable in one way
17 or another.

18 THE COURT: Fine.

19 MR. PALEY: Now first, Your Honor, addressing
20 the question of manifest injustice -- and again, I
21 am trying not to be repetitive -- it is clear to me
22 that the words, "any party to the litigation," con-
23 tained in Section 16, include municipalities.

24 I mean, it's like sometimes in the past, I've
25 kind of gotten the impression that the concept of

1 fair share meant fairness to plaintiffs, but not
2 necessarily fairness to defendants. I know that
3 that's not the way that Your Honor views it, but I
4 think if anyone has suffered manifest injustice or
5 will continue to suffer manifest injustice from the
6 failure of the Court to transfer, it's Piscataway.

7 Sure, it's taken a long time to conclude
8 Piscataway's litigation, because we said from the
9 outset when you are dealing with a town that is sub-
10 stantially developed and has limited vacant land, it
11 doesn't make sense to apply a methodology that's not
12 designed to meet that situation.

13 And when Your Honor rendered his opinion on
14 July 23rd, Your Honor rendered the opinion without
15 determining a fair share number by virtue or by use
16 of the methodology, but merely by analyzing what
17 Your Honor perceived as being vacant developable
18 land.

19 THE COURT: I think that's an inaccurate
20 statement. What I did was, to calculate your fair
21 share, determine that the vacant developable land
22 defense provided for in the methodology was appropriate
23 and, therefore, determined what vacant developable
24 land was suitable, and then determined the fair share.

25 So I did use the methodology. It was the

1 first signal to me that you couldn't meet the number.

2 MR. PALEY: Well, okay. I'm not sure that
3 our difference is any more than semantic. The point
4 is that the ultimate parameter of Piscataway's obli-
5 gation was vacant developable land. And my point is
6 that the time that was expended in developing the
7 fair share methodology, which Piscataway participated
8 in, and perhaps even a substantial portion of the
9 time expended during the February hearing, which was
10 more addressed to the suitability, could have been
11 avoided had the Court looked at Piscataway and said:
12 We simply are not going to apply the formula here.

13 Indeed, I recall the certification from the
14 Urban League that was submitted in support of their
15 application for a restraint against Mr. Bernstein's
16 client, the Sutler Corporation, Cite 30, in which
17 they said: Based upon our analysis -- and this was
18 back on June 1st, 1984 -- Piscataway's number cannot
19 exceed twenty-five hundred.

20 That was what they said, so that despite
21 Mr. Neisser's comment in his brief that Piscataway
22 has delayed and delayed and delayed and obfuscated
23 and obfuscated, I don't think that that's true.

24 We said: Use a different analysis for
25 Piscataway, because we are differently situated than

1 the other municipalities here, and other municipalities
2 in Mount Laurel litigation. We are more densely
3 developed. We are different. And ultimately, I think
4 that that's what the Court did.

5 Mr. Trombadore talked before about the, what
6 he views as the prejudice, if you will, to plaintiff
7 developers who have participated in litigation and
8 who have expended fair amounts of money to file these
9 motions for transfer now pending before Your Honor.

10 I agree with that analysis, but I think it's
11 applied to the wrong parties. All of the muni-
12 cipalities have acted for years based upon what zoning
13 laws were in effect. We knew what Mount Laurel I said.
14 We didn't know what Mount Laurel II said until in 1983,
15 when it came out.

16 In Piscataway's case, for example, Piscataway
17 had to deal with the impact of Route 287, which
18 bisects the township. And had we zoned all of the
19 land along Route 287 for residential purposes, there's
20 no question in my mind but that many developers would
21 have come into Court and would have said: We can
22 put up an office building, we can put up a commercial
23 development and industrial development there. It's
24 right adjacent to a highway. There are four exits
25 in Piscataway. And they probably would have been able

1 to overturn the zoning as being unreasonable.

2 So our industrial zoning principally parallels
3 Route 287, and that's where the development comes.

4 Now, I have always found it unusual, and I've
5 indicated this before to the Court, that now, in
6 1985 and '84 and in '83, Piscataway is expected to
7 remedy those, quote, mistakes, end quote, which it
8 made by adhering to valid, legal zoning at all times
9 in the past.

10 Nobody ever accused, at least until I got
11 Mr. Neisser's brief on this motion, nobody ever sug-
12 gested that Piscataway had overzoned or that Piscataway
13 was keeping out residential development.

14 And I've communicated my analysis of the
15 relevant statistics to this Court before: The fact
16 that our median income is 102% and not 135% or 150%
17 of the region, which suggests a very large proportion
18 of lower-income people who are already there; the
19 fact that one-third of our private housing is high
20 density apartments; the fact that of those 3400 apart-
21 ments, approximately 2500, if I remember correctly,
22 are affordable at least to moderate-income people,
23 based on the testimony that was presented here, some
24 large proportion of that.

25 And I say, Your Honor, that we are -- I have

1 no problem with the concept that Your Honor employed
2 implicitly in your opinion by saying that because of
3 the extensive development that has taken place in
4 Piscataway, there ought to be some modification of
5 the standard analysis and the derivation of our
6 number.

7 But what I am saying is, to in effect now
8 deprive us of the legislative thinking process em-
9 bodied in the Fair Housing Act, which says, at this
10 point, that those lawsuits that are now filed go
11 before the Council, and they are permitted to con-
12 sider the impact of development on existent patterns
13 of development, that strikes home to a town which is
14 substantially already existingly developed and has
15 been developed.

16 That may not be true of a number of the other
17 municipalities here and elsewhere in Mount Laurel
18 litigation that have substantial amounts of vacant
19 land, but we don't.

20 THE COURT: Don't you think the July opinion,
21 letter opinion tells you that the Court is going to
22 consider the existing land patterns as part of what-
23 ever you wish to present to the Court in that regard?

24 MR. PALEY: Yes, it does, Your Honor. But
25 what that does is, in effect, send us back yet for a

1 third round of hearings, and it compels us to try
2 and persuade a Court that has said our fair share
3 number's 2215, that it should only be 2115, or 215,
4 using the same standards that Your Honor has already
5 employed.

6 THE COURT: I think that's incorrect, you
7 misunderstand the opinion. The opinion says that
8 you've got land out there that could accommodate
9 2215 units. It says, however, you may be able to
10 show me, for whatever reasons -- and I don't specify
11 them, I will concede -- that that would be inappropriate.

12 Land use patterns would certainly be an
13 appropriate basis. Given congestion in a specific
14 area might be appropriate to eliminate a lot.

15 The approach at the time of the initial
16 hearing was just far too broad to make me reach a
17 specific conclusion as to any specific lot. I couldn't
18 do that. I think you would understand that.

19 But at this point, I think you can come in
20 and say: Judge, you said Lot 25 is okay, but here's
21 the problems there, and give me the specific nature
22 of those problems.

23 To say, well, there's some drainage problems,
24 or there are some road problems, that's not enough,
25 because roads can be widened and sewers can be

1 installed, and those kinds of things.

2 So I think land use patterns have and will be
3 considered. In one case before this Court, the
4 Court reduced the fair share number by thirty-five
5 percent based upon land use patterns, Freehold
6 Township.

7 MR. PALEY: Well, I think, to conclude that
8 area, let me say that I echo the sentiments that
9 have already been presented before this Court that,
10 in effect, no matter what Your Honor calls it, and
11 certainly without demeaning Your Honor or the process
12 that we have all been through, the effect -- the
13 view of the public towards this process has been
14 that what's happened here is legislation. And I
15 think to a large extent, everyone will agree that
16 what's happened here is legislation. And I don't
17 believe that a Court is the proper place for legis-
18 lation to emanate; and on that basis, I support the
19 transfer.

20 The last point that I want to make is this.
21 With respect to Piscataway, our opinion was rendered
22 on July the 23rd. Your Honor signed the judgment
23 September 17th. The judgment appoints a master and
24 directs that the master coordinates with the town,
25 and that the town have zoning in place by

1 October 23rd, if that's ninety days. It might be
2 October 22nd.

3 The point is that nothing has happened
4 formally before this Court. There have been no
5 hearings on compliance. There have been no hearings
6 subsequent to Your Honor's determination of the
7 fair share number for us to try to reduce the number,
8 or for us to try to effect compliance, so that we are
9 in a stage where, from our perspective, all that's
10 happened is, Your Honor has determined a number.

11 And if ultimately this matter and other
12 matters are going to be transferred to the Affordable
13 Housing Council, I would suggest that now is the
14 most appropriate time for Piscataway's transfer to
15 take effect.

16 THE COURT: You are suggesting that's where
17 you would start with the Council?

18 MR. PALEY: No, I am not suggesting that.
19 But I am saying that if we are here for another
20 month, we then have to start a whole other process
21 and a whole new round of hearings. I'm saying this
22 is a proper time and appropriate time, given the
23 fact that Your Honor's opinion was only rendered
24 in July, for transfer.

25 THE COURT: Okay.

1 MR. PALEY: Thank you very much.

2 THE COURT: Thank you.

3 MR. SANTORO: The story from the Bible
4 indicates -- I forget, may have been The Wedding
5 Feast -- the first shall be last, and the last first.

6 South Plainfield was first to file its
7 motion, as far as the people here today.

8 THE COURT: There's also another biblical
9 story which says: What are you complaining about
10 as long as you've got your fair share?

11 I said that facetiously, too, however,
12 reviewing with the county employees -- we want to
13 give certain ones bigger raises. The other ones
14 say: You've got to give it to us. And I cited
15 the Bible.

16 MR. SANTORO: The Court had asked some
17 questions before. I just happened to take some of
18 the opportunity to listen with one ear and read with
19 the eyes. The question was whether or not the tran-
20 scripts of trial proceedings of various municipalities
21 could be utilized by the Council on Affordable
22 Housing.

23 If you look at the Section 7E, it does not
24 preclude that, among other studies and what have
25 you, the Council could look at decisions of other

1 branches of the Government. I would suggest that
2 that certainly would not preclude any case law
3 developed in the Mount Laurel cases to date, Your
4 Honor.

5 Doesn't say they have to consider it, but
6 it doesn't preclude the use of anything that's come
7 before this Court in terms of the Housing Council's
8 handling of perhaps either the mediation and review
9 process, or even the objections that might be heard
10 by the Office of Administrative Law.

11 The other question that was raised is how
12 quickly or whether or not delay would result from
13 an objection being filed to the either substantive
14 certification or the mediation-review process by
15 either plaintiff or defendant municipality, and there
16 was an inquiry as to how much longer would this
17 take.

18 There is a directive in the Fair Housing
19 Act that says that the Office of Administrative Law
20 shall issue its initial decision within ninety days
21 after the transmittal of the matter as a contested
22 case.

23 THE COURT: Oh, yes. I wasn't addressing
24 myself to that. How long will the mediation take?

25 MR. SANTORO: If the -- as I recall, if the

1 Council does not complete its mediation and review
2 within a specified period set forth in the statute,
3 that a plaintiff can petition --

4 THE COURT: I mean on transfer cases.

5 MR. SANTORO: On transfer cases, yes.

6 THE COURT: I was saying generally there's
7 no time limit on mediation.

8 MR. SANTORO: Generally, no. But on transfer
9 cases, there are. With those two issues out of the
10 way, South Plainfield --

11 THE COURT: There's also no time limit on
12 Council review under either set of facts.

13 MR. SANTORO: Yeah. That's how I see it as
14 well. The South Plainfield case never really did
15 develop twenty-one days of testimony, Your Honor.
16 South Plainfield never did have its case tried.

17 South Plainfield, in May of 1984, entered
18 into a stipulation of facts. The stipulation of
19 facts then resulted almost literally in Your Honor's
20 summary judgment brought after the application of the
21 plaintiff Urban League.

22 THE COURT: Well, you know, I have seen it
23 in the papers, and I think that the record should be
24 entirely cleared. You weren't counsel.

25 MR. SANTORO: No, I wasn't.

1 THE COURT: Counsel started off the case,
2 to the best of my recollection, the trial of the case.
3 At some point along the line, a settlement -- and I
4 emphasize the word, "settlement" -- was reached of
5 all issues, but the issue of settlement was decided
6 to be handled by way of a Court order.

7 And it gave the Court an unavoidable stipula-
8 tion. I say unavoidable in the sense that the Court
9 could only reach one conclusion, and that was to enter
10 a judgment. Both counsel were fully aware that that's
11 what the Court would do. The record should be clear.

12 MR. SANTORO: Yes. I'm not Monday morning
13 quarterbacking my predecessor.

14 THE COURT: Well, I'm not either, but I don't
15 want to sound like this was some order of the Court
16 that called for some Court discretion. It doesn't
17 call for any discretion at all.

18 MR. SANTORO: No. As a matter of fact, the
19 plaintiff's brief on this indicates that that is
20 exactly the procedure that was to be followed. But
21 what I question is whether or not the settlement
22 should now deter South Plainfield's right to have
23 questions that were not addressed, that will be ad-
24 dressed by the Housing Council in view of a further
25 reduction.

1 And I recognize, and certainly the Court
2 and the plaintiff recognize, that South Plainfield's
3 fair share numbers have gone down from 1778 to what
4 now appears to be 900, although Mr. Neisser indicates
5 900 is a generous number and takes into consideration
6 in the event there are some buildings damaged by
7 fire, et cetera, and includes some additional land;
8 otherwise, six hundred is more likely the number.

9 Nonetheless, the negotiations which led up
10 to what I want to put on the record is an unauthorized
11 stipulation, never treated the two facts, as far as I
12 can see from the record, never treated and considered
13 that the established pattern of development in the
14 community would be drastically altered.

15 THE COURT: Did you say an unauthorized
16 stipulation?

17 MR. SANTORO: That's correct, Your Honor.

18 THE COURT: Oh, okay.

19 MR. SANTORO: And let me follow through on
20 that, why I say that is such.

21 THE COURT: Well, I don't -- unless you feel
22 it's germane, I don't really want --

23 MR. SANTORO: I want to get it on the record
24 for purposes later on.

25 THE COURT: Well, it'd better not be later on.

1 You better move very quickly, because I have dealt
2 with that in Manalapan, about another attorney was
3 unauthorized to settle that case.

4 MR. SANTORO: The stipulation requires in
5 one instance that the borough expend funds in the
6 way of seed money for the possible development of
7 the Morris Avenue site. Such a stipulation would
8 require a formal resolution of the governing body,
9 passed at a public hearing called for that purpose.

10 This stipulation did not result from any
11 resolution adopted by the governing body at a public
12 meeting called for that purpose. It would have to
13 be at a public hearing. Since it requires the
14 expenditure of money, no caucus or executive session,
15 notwithstanding litigation pending, would make this
16 stipulation, without the benefit of a resolution,
17 legal.

18 THE COURT: I suggest you read 405 Monroe
19 Park, I think, 405 Monroe something, versus Asbury
20 Park. It's a decision by Justice Weintraub in about
21 1962, and I'll give you the cite after we are
22 finished, clearly directly on point.

23 MR. SANTORO: Okay.

24 THE COURT: Says you're estopped, period.

25 MR. SANTORO: The Council on Affordable

1 Housing, in adopting criteria to review the housing
2 element of the municipality who will participate
3 in the mediation and review process will make adjust-
4 ments to the fair share number, which will include
5 whether or not adequate public facilities and infra-
6 structure capacity are available, or whether the
7 cost would be so prohibitive -- that is South Plain-
8 field's situation.

9 Additionally, the established pattern of
10 development in South Plainfield is one of single
11 family residential. That would be drastically
12 altered.

13 Hence, those two criteria at the very least
14 would allow the Council on Affordable Housing to
15 consider a further reduction in the fair share
16 number. I am certainly not suggesting that South
17 Plainfield's transfer to the Council on Affordable
18 Housing would remove completely any obligation
19 whatsoever.

20 I am simply suggesting that South Plainfield
21 be treated like every other municipality, as a
22 case in pending litigation, where final judgment
23 has not been entered, and that the Court today, in
24 denying such an application on behalf of South
25 Plainfield, would in essence create manifest injustice

1 to the residents of South Plainfield. Thank you,
2 Your Honor.

3 THE COURT: I read with some interest
4 the 83-page transcript of the August 28th, 1985
5 meeting of the mayor and council of South Plainfield.
6 And having represented thirteen municipal bodies when
7 I came on the bench, I wasn't surprised by much of
8 what went on there.

9 And I think the context is rather evident.
10 There's a division in the governing body here as to
11 compliance. There's some people who think I'm an
12 ogre, and other people who think I'm reasonable.
13 And I don't have any problem with that at all. I
14 think my wife has alternate opinions of the same
15 thing.

16 At a point in time, Plainfield was willing
17 to go along with this in 1984, I gather. And the
18 political composition changed. That's what I get
19 from this transcript, unless I misread it.

20 The only thing that I find troublesome in
21 the transcript is a statement to the effect that
22 eventually -- and "eventually" means to me in accord-
23 ance with the -- if the Urban League continues to
24 get what they want -- the oral argument will be heard
25 on the first Friday of September, and shortly after

1 August 30th.

2 It gives the impression that the Urban
3 League has the judge on a string. I don't really
4 enjoy that kind of comment at all.

5 All right. Let's proceed.

6 MR. MORAN: Your Honor, I don't know whether
7 you still want that citation that you were asking
8 me for before.

9 THE COURT: Oh, your citation, yes.

10 MR. MORAN: I am referring to language that
11 was at the bottom of page 219 of the opinion, if I
12 can read it to the Court quickly.

13 THE COURT: Two nineteen, did you say?

14 MR. MORAN: Yes. It's part of the opinion
15 that a member of the Planning Board in Cranbury
16 referred to as the "Don't worry about it" part of the
17 opinion. It says: As for those municipalities that
18 may have to make adjustments in their lifestyles to
19 provide for their fair share of low and moderate
20 income housing, they should remember that they are
21 not being required to provide more than their fair
22 share. No one community need be concerned that it
23 will be radically transformed by a deluge of low and
24 moderate income development, nor should any com-
25 munity conclude that its residents will move to other

1 suburbs as a result of this decision, for those
2 other suburbs may very well be required to do their
3 part to provide the same housing.

4 That was the part that I had in mind before,
5 'cause I think it's clear that "their part" would
6 mean their fair share, and the difficulty that I
7 was pointing out was that fair shares are now going
8 to be calculated by different bodies.

9 THE COURT: Yeah. Of course, I read that
10 section to deal with the issue of radical transforma-
11 tion, but there's also another portion of the opinion,
12 which I will give to you right after the break, which
13 says that a municipality will not be heard to com-
14 plain that it has to do its fair share merely because
15 another has not. That's cited in the AMG case. It's
16 in -- that's almost verbatim from the opinion.

17 Let's take a short break, and let me ask the
18 plaintiffs to try to confer with themselves, see if
19 we can limit the argument; otherwise, we are going to
20 be quite late.

21 (Whereupon a brief recess was taken.)

22 * * * *

23 THE COURT: From AMG versus Warren, blank
24 New Jersey Super blank, now, I quote from page 80 of
25 the original decision. I don't know what it is in the

1 slip decision.

2 "The issue is one of equity : The, quote,
3 'fair,' unquote, in fair share. Warren's complaints
4 are understandable. Naturally, it cherishes its
5 character, and it has a right to expect others to
6 equally bear the burden of housing the poor.

7 "Warren's equity argument is twofold. It is
8 unfair to require Warren to satisfy its fair share
9 before other municipalities do their part. Secondly,
10 it is unfair to bring such change to Warren.

11 "As to the equities amongst municipalities,
12 complete equity is not reachable, as the Supreme Court
13 clearly stated, quote: 'There may be inequities
14 between and among these municipalities located within
15 growthareas, as there undoubtedly are between all
16 of them and municipalities outside of growth areas,
17 for the tax and other burdens caused by the location
18 of lower income housing will not be fairly spread.'"

19 That's at page 239 of the opinion, and you
20 can also compare page 304 of the opinion. There is
21 no question there will not be total equity in the
22 process.

23 MR. MORAN: Your Honor, I just would like to
24 state that the point that I was trying to make is
25 not that there was going to be total equity, was that

1 two municipalities similarly situated, both of whom
2 are having their fair share calculated, now stand
3 the possibility of having them calculated in a dif-
4 ferent formula.

5 THE COURT: That's clearly true, but that
6 doesn't deny that there can be inequities both in
7 the court, if they both stayed in court, or if they
8 both were in the Housing Council. And, by the way,
9 there's some real question under the Act as to how
10 much latitude the administrative law judge might
11 have to change what the Housing Council has done,
12 too.

13 So that's a further question of just what
14 kind of certainty you have before the Act. But you
15 can get two inequitable decisions before either
16 body, or one before each. It's a Chinese menu.

17 Okay. Have you fellows agreed on --

18 MR. NEISSER: I believe I was to attempt
19 first.

20 THE COURT: All right. And we will do our
21 best not to repeat the same arguments that were
22 made, okay?

23 MR. NEISSER: I will --

24 THE COURT: Mr. Neisser.

25 MR. NEISSER: -- not take, I will not take as

1 long as the cumulated total of the four opponents
2 that I -- whose arguments I will address, but on
3 behalf of the class of thousands of persons who we
4 are honored to represent, I think I have the obliga-
5 tion to hit a few key points.

6 It is truly a sad day today, in my view,
7 because after much labor and thought, the Legislature
8 has come up with a substantial piece of legislation,
9 whatever's one's particular view of any particular
10 section or mechanism, and it's designed as the
11 Legislature said, to satisfy the constitutional obli-
12 gation; and yet the very first matters we have before
13 Your Honor are what I would consider abuses of the
14 process, because if the Urban League case, or should
15 I correctly say four portions of the single case,
16 can be transferred to the Affordable Housing Council,
17 I simply do not know of a case that cannot be trans-
18 ferred or should not be transferred.

19 It's quite clear from the legislative intent,
20 first to address Mr. Moran's and others' argument
21 that uniformity of decision maker was not the sole
22 or even the primary goal of the Legislature.

23 There are innumerable sections which I will
24 not burden the Court with now, which make it clear
25 that there were to be two tracks. Some cases would

1 remain in court, some cases would be before the
2 Council. Some cases, as you know, might bounce back
3 to the Court if the Council or the Township does not
4 proceed through the administrative process as de-
5 signed.

6 When the Legislature wanted uniformity as
7 to decision making, a matter that we kept hearing
8 about earlier this afternoon, it said so, Sections 20
9 and 21, dealing with the use of monies that are made
10 available through appropriations.

11 There's an express provision in 21B and 20C
12 which say that in the first twelve months after the
13 Act, such monies shall be available to towns that
14 don't have substantive certifications, which include
15 those in litigation.

16 With regard to phasing, in 23, there's a
17 specific provision for Court judgments to take into
18 account phasing in cases still pending. And in 12B,
19 dealing with regional contribution agreements, again
20 specific reference to what the Council can do and what
21 the Court can do.

22 So the Legislature's totally capable of, and
23 has shown in its specific provisions, of identifying
24 when the matters should be treated the same, what
25 elements should be treated the same, and made it

1 perfectly clear that there will be two sets of
2 decision makers.

3 I think one thing that has been entirely
4 ignored in this argument is what cases the Legis-
5 lature meant to transfer, since they clearly meant
6 some to be transferred. Two obvious examples, I
7 think.

8 One is a case that is more than sixty days
9 old, maybe six months, eight months, ten months;
10 perhaps substantial discovery has ensued, but no
11 trial's occurred. The matter has not been resolved,
12 we haven't had eighteen days of trial and so forth.

13 Clearly, that was the kind of case, although
14 some costs had gone into the matter, that's the kind
15 of case the Legislature had in mind.

16 I can conceive of a case that's an older
17 case, that might have been decided by a Council or,
18 I should say, Board of Adjustment or Planning
19 Board, pre-Mount Laurel, and was challenged on, let's
20 say, an arbitrary and capricious basis, but a Mount
21 Laurel claim was thrown in; comes to this Court some-
22 time in '83, after Mount Laurel II, remands to the
23 Board of Adjustment to reconsider the matter in light
24 of Mount Laurel II.

25 Such a case may be two or three years old,

1 yet no substantial court proceedings may yet have
2 occurred, no determinations may yet have occurred.
3 That's the kind of case the Legislature clearly had
4 in mind.

5 The Court asked earlier, I think, in regard
6 to a few of the counsel, what is there in the statute
7 that indicates what would happen, what would be
8 transferred, all the paper we talked about, the
9 trial, would there be law of the case binding?

10 I suggest there are a few provisions that
11 address it. For example, in Section 3, it reflected,
12 as was argued by one of counsel earlier, that there
13 is a preference on the part of the State for resolution
14 of existing and future disputes, not matters that
15 have already been resolved through adjudication, but
16 existing and unresolved matters, and our case, cer-
17 tainly, aspects of compliance.

18 But let's look at it from the whole picture.
19 There aren't any specific provisions, as Your Honor
20 asked, telling the Court what to do or what to
21 transfer, if a transfer is the case. And I suggest
22 there's a good reason. They didn't intend this kind
23 of case to be transferred.

24 They didn't intend a case fully tried on
25 issues of fair share and ordinance invalidity, and

1 substantially completed as to ordinance compliance
2 or revision of ordinance for compliance, to be
3 transferred.

4 THE COURT: They intended something to be
5 transferred.

6 MR. NEISSER: And I tried to indicate a
7 number of cases, cases that have not been tried on
8 any of the substantive issues, are the logical cases
9 to go. And there are a large number of them. I
10 believe at last count, there were over 150 pending
11 Mount Laurel actions.

12 We are talking here about the oldest remain-
13 ing Mount Laurel action, which has been adjudicated
14 fully twice with regard to Piscataway, which had a
15 third hearing already, and a large number of sub-
16 stantive determinations.

17 Your Honor indicated this morning that your
18 initial view is that if the matters were transferred,
19 the intents of the Legislature were that the Council
20 should start over again and redo everything. If
21 that's the case, I think the manifest injustice is
22 clear; and I think at this point that needs address-
23 ing on the part of the defendant -- defendants' argu-
24 ments.

25 They keep referring to the delay, and I

1 completely agree with Mr. Moran, I find myself
2 shocked to say, that the amount of time that the
3 process will take before the Council cannot by
4 definition be manifest injustice, because any trans-
5 ferred case will have to go through that process.

6 Whether that process turns out to be twenty-
7 two months, as the Attorney General has indicated
8 before Judge Skillman, or slightly shorter or slightly
9 longer, we are talking about some defined period of
10 time that must pass before any town will get a final
11 determination out of the administrative law judge and
12 the Council.

13 What the Court, I believe, has to analyze in
14 manifest injustice is the relative delay, what has
15 already transpired in this case, and what would
16 transpire in this case if the matter were not trans-
17 ferred and the Court completed it.

18 And with regard to that, we clearly have
19 all the equities, it seems to me, on the side of the
20 plaintiffs. A, obviously, the case is over eleven
21 years old and has been through a substantial series
22 of delays, some of them merely, as the defendants
23 argue, through the normal legal process, some of
24 them due to what I would submit has been bad-faith
25 delay on the part of some of the defendants.

1 What is the status now? With regard to
2 Monroe, we are due to have a master's report
3 October 7th -- it's five days from now -- if this
4 matter stays here, and then a compliance hearing.

5 We are due to have, October 23rd, less than
6 three weeks from now, a compliance plan from
7 Piscataway; or, according to the Court order, the
8 process would be, it seems to me, for the master to
9 present her compliance plan.

10 With Cranbury, we have been waiting, and we
11 are ready for a hearing on compliance. The only
12 issues are, really, the suitability of two sites,
13 and the phasing problem. That has been ready, from
14 the point of view of experts' reports and everything,
15 since July 24th.

16 THE COURT: The only thing that's held that
17 up is the Court. That's no -- I mean, the record
18 should be clear that the Court hasn't gotten to it.
19 Go ahead.

20 MR. NEISSER: And finally, with regard to --

21 THE COURT: I'm making a record, if you just
22 wonder why I said that.

23 MR. NEISSER: I don't think I will touch
24 that. And with regard to South Plainfield, the
25 matter's essentially over. The masters just simply

1 report to Your Honor as to ordinances which the
2 plaintiffs have already accepted as compliant.

3 And there's some minor adjustments that have to be
4 made in the judgment because of the conduct of the
5 defendant in selling off land and approving inconsistent
6 developments, which again is very minor in both the
7 time and in numbers.

8 So we are at the end of an extended process.
9 So to talk now about a transfer is to talk about that
10 delay, in contrast to the very minimal time remaining
11 in this court for any of these towns.

12 Another topic not mentioned at all, required
13 by the case law that you consider, is irreparable
14 damage, specifically the issue of restraints necessary,
15 given inadequate land, sewerage or other infrastructure.

16 Your Honor already has in effect two orders,
17 one with regard to Piscataway and one with regard to
18 South Plainfield, because they do not have sufficient
19 land to meet what would have been the fair share
20 under the methodology of the AMG opinion.

21 We have had, over the summer, as Your Honor
22 recalls, questions as to what -- whether such
23 restraints might be necessary at least in part as to
24 Monroe or portions of Monroe development. We learned
25 from The Sun newspaper that in Cranbury, now is

1 considering -- the Planning Board is considering
2 approving a major commercial development which may
3 affect the amount of sewage and water capacity
4 available for Mount Laurel development on immediately
5 adjacent sites. If the matter were transferred to
6 the Council, the question would be, would arise, does
7 this Court or the Council have any power to issue
8 similar stays, or to continue, I should say, re-
9 straints?

10 We think the question is open whether this
11 Court has that jurisdiction. We think, however,
12 that using the standard that Mr. Apuzzo adopted in
13 answering Your Honor's question, which method is the
14 fastest and most efficient to achieve the satisfaction
15 of the constitutional obligation in the context of
16 this case, not talking generally about the administra-
17 tive process for all towns, I think the answer is
18 clear. It will be shorter, faster, more efficient,
19 and will require, therefore, shorter restraints,
20 if any restraints are required in the townships.

21 Finally, I think that we cannot -- I cannot
22 pass up the final element of the manifest injustice
23 formula. And although Your Honor has indicated not
24 total agreement with my position, I think that the
25 conduct of the defendant to date is partially relevant.

1 And I submit that the argument of South Plainfield
2 is a case in point.

3 They are only before Your Honor today, and
4 therefore remain a party able to make a motion under
5 Section 16 of this statute, because they blatantly
6 violated Your Honor's judgment of now some eighteen
7 months or seventeen months. If they had zoned as
8 they were ordered to do, more importantly, as they
9 agreed, settled to, then they would have had repose
10 a year ago.

11 So for them to now urge that somehow they
12 didn't have a chance for adjudication because they
13 settled, and they didn't have a chance to go before
14 the Council, and that's unfair, ignores the series
15 of conduct that has not only been an affront to this
16 Court's institutional integrity, but to the plaintiff
17 class.

18 I think that unless Your Honor has questions,
19 I would close with just identifying what we think
20 should occur at this point, an outright denial of
21 the motions to transfer, followed by, in the case of
22 South Plainfield, a lifting of the stay on the
23 ordinance's effectiveness, request for the master's
24 report forthwith, and set down the matter for a very
25 brief hearing, if it's even a hearing, on what

1 revisions are necessary to account for their conduct
2 over the summer.

3 Secondly, with regard to Cranbury, just
4 set down the motion for builder's remedy moratorium
5 immediately for hearing, and then the compliance
6 hearing that I referred to earlier.

7 With regard to Monroe, set down a compliance
8 hearing within a brief period after the master's
9 report; and with regard to Piscataway, I think they
10 have an adjoined motion for dissolution of restraints,
11 which we also would request be denied as part --

12 THE COURT: All right. Thank you.

13 Mr. Bisgaier.

14 MR. BISGAIER: Your Honor, as you know, I
15 have extensively briefed these issues, and I really
16 don't have anything substantive to add to the brief.

17 I am concerned about Your Honor's reading of
18 the statute with regard to the issue of what is
19 transferred; but again, you know, I have briefed that,
20 assume Your Honor has read the brief. And Your
21 Honor has made an apparent judgment in that regard.

22 THE COURT: No, no. I -- in fairness, that's
23 a very preliminary response. I didn't take the time
24 to study that, because I don't think it's critical
25 to the issue.

1 MR. BISGAIER: Well, the reason that, you
2 know, I thought it was critical to the issue, was --
3 went to the issue of manifest injustice and the
4 intention of -- the legislative intent as to the
5 retroactivity of the law.

6 And it struck me that there's -- where there's
7 nothing explicit in the legislation in this regard,
8 one must assume that the Legislature did not intend
9 to roll back the clock on Mount Laurel compliance
10 and, where Courts have adjudicated issues, that if
11 a matter is to be transferred, then the entire
12 matter was to be transferred.

13 I am mostly concerned about the discussions
14 that have transpired here with regard to the builder's
15 remedy and with regard to the builders' interest in
16 the litigation, and the effect that should have on
17 the issue of manifest injustice. And that's what
18 I'd like to address relatively briefly.

19 I would point out to the defendants, who
20 stand having been accused and found guilty of far
21 greater social wrongs than are heard in most of our
22 municipal courts, that the Supreme Court of this
23 state relied exclusively, essentially, on the
24 builders to vindicate constitutional wrongs that
25 these defendants and others have perpetrated on the

1 people of this state.

2 The Legislature further relied virtually
3 exclusively on the builders to assure itself that
4 these same defendants and other municipalities in
5 the state would utilize the legislative process.

6 And there is ample support for that in the
7 legislation itself, Sections 9, 16, 18, 19, all of the
8 sections of the Act which deal with what happens
9 if a municipality doesn't pursue the administrative
10 process, talk in terms of the impact that will have
11 on the municipalities in litigation.

12 And the fact is that the legislation on its
13 face does not talk to -- talk about supplanting the
14 builder's remedy. It talks about an alternative to
15 the builder's remedy which, if not taken by muni-
16 cipalities voluntarily, will subject municipalities
17 to builder litigation.

18 And the wisdom of that in the legislation
19 is seen in the wisdom of the Supreme Court, of find-
20 ing that that is the only available mechanism, in
21 light of the fact that voluntary compliance has been
22 found by the Supreme Court not to be an available
23 mechanism for the Court, and now the Legislature,
24 to assure itself that there would be some compliance
25 with regard to the Mount Laurel mandate.

1 The significance of that has to do with --
2 with regard to a transfer motion, is that if in fact
3 it is true, as the Supreme Court has found and the
4 Legislature apparently has concluded, that it's the
5 builder class as the representative, for the most
6 part, of the lower-income people, who otherwise,
7 but for the very few cases such as those being
8 represented here by the Urban League, but for those
9 very few cases, would have no resolution of their --
10 no satisfaction of their rights, that is extremely
11 important; that the Court, in considering the manifest
12 injustice here, consider that it would be a manifest
13 injustice to the poor if the builder class, who are
14 representing their interests, are treated in such a
15 manner that it's a builder class that would choose
16 no longer to participate in Mount Laurel litigation.

17 And I think the manifest injustice issue,
18 when one looks at the length of litigation, one looks
19 at the issues that have already been resolved in the
20 cases, when one looks at how close we are in these
21 cases to a final resolution, if in fact the message
22 is that the builders, having been invited in to
23 represent the interests of lower-income people, having
24 done so, having brought recalcitrant municipalities
25 to the point where they are within a few weeks to a

1 few months, at the most, of a final Trial Court ruling
2 vindicating those constitutional rights, are now
3 being told that in light of this legislation, it would
4 not be a manifest injustice to start all over again
5 or to transfer this case and bring us to maybe twenty-
6 two to twenty-four more months of delay, it's very
7 likely, if not apparent to everybody, including the
8 defendants here, which probably was motivating these
9 motions, that that class would eventually disappear
10 and that, as I indicated in the brief, having been
11 once burned, would not be twice foolish to represent
12 lower-income -- the rights of lower-income people in
13 a judicial forum, when, on the verge of victory, the
14 rug was pulled out from under them, and it was not
15 perceived as a manifest injustice to them, having
16 litigated these cases to this point, that the cases
17 now are transferred and we start from scratch some-
18 where else.

19 THE COURT: Well, what do you do with the
20 argument that if one assumes that a builder's remedy
21 is not a vested right, and that secondly, as one
22 must assume, that the Legislature has the right to
23 approach the satisfaction of a constitutional obliga-
24 tion in a reasonable manner, which might include no
25 builders' remedies as we know them, that if law

1 changes in the progress of a case, that's the way
2 the cookie crumbles?

3 MR. BISGAIER: I'm not even assuming in my
4 argument that the builder's remedy is a vested right
5 or it's a constitutional right.

6 THE COURT: Okay.

7 MR. BISGAIER: What I am assuming here is that
8 the law has not changed. Both the Supreme Court and
9 the Legislature have found that the -- that effecting
10 this constitutional mandate requires the reality
11 of a plaintiff class out there to litigate against
12 these municipalities if they do not voluntarily com-
13 ply. Prior to the legislation, it was if they do not
14 voluntarily comply, they would be brought before the
15 Court in a Mount Laurel II context.

16 THE COURT: The Court gave you a carrot and
17 the Legislature took it away. And who says they
18 can't?

19 MR. BISGAIER: Well, I would say you're
20 talking about a substantial constitutional issue.
21 If the legislation's interpreted as having taken
22 that carrot away, it's inconceivable to me that the
23 legislation can be so interpreted when the Legislature
24 constantly, throughout the Act, is relying on litiga-
25 tion, relying on, ultimately, on builders bringing

1 litigation to insure that municipalities will take
2 advantage of the Act voluntarily.

3 Section 9 says if you don't do this, you
4 will be subject to litigation. Section --

5 THE COURT: It says -- well, I don't know
6 if it says that. It says there's no exhaustion
7 right.

8 MR. BISGAIER: No exhaustion requirement.

9 THE COURT: Yeah.

10 MR. BISGAIER: That's what I think we heard
11 from counsel for the defendants, is that of course
12 they will voluntarily comply, because if they don't,
13 they're going to be brought back into court. I would
14 ask, by whom?

15 THE COURT: I'm not so sure of that at all,
16 Mr. Bisgaier, in other words, that you will be sub-
17 ject to litigation. There's a very clear possibility
18 that because of this Act, builders will simply not
19 choose to be in this arena, period, except -- I'm not
20 talking about transfer cases now. I'm talking about
21 cases before the Council.

22 And there's a very clear possibility that,
23 assuming a municipality doesn't do anything before
24 the Council other than notify them and submit a
25 plan, no builder will ever do anything in the court.

1 I perceive that as a very real result.

2 MR. BISGAIER: I think that's a very real
3 result, also. It's not before us today, in the
4 context of a transfer case.

5 THE COURT: But when you say, "be subject
6 to litigation," I'm not so sure that's going to
7 happen. Transfer cases are another story, I agree.

8 MR. BISGAIER: But the two cases where it
9 was clear the Legislature intended for litigation to
10 play an enormous role was in the context of trans-
11 ferred cases in terms of forcing municipalities to
12 voluntarily -- to comply either in court or through
13 the Council, and in cases where municipalities choose
14 not to adopt resolutions of participation, which
15 would then eliminate the exhaustion requirement and
16 permit the litigation to continue as it has been
17 continuing, going on in the past.

18 You raise the one instance where a muni-
19 cipality does adopt a resolution of participation,
20 submits its housing element and then does nothing
21 else. And, you know, I would submit in this context
22 that it would not be the most ludicrous act for a
23 builder to simply file his Section 16B complaint,
24 trigger the six-month mediation requirement -- or, not
25 requirement, but trigger the six months mediation that

1 Section 19 talks about, you know, for the filing of
2 the complaint and the participation before the
3 Council.

4 It's not a very great act, and the six
5 months of time it would take to see whether mediation
6 would be successful is not that great a length of
7 time for somebody instituting litigation from the
8 start. It's certainly no greater time than it was
9 anticipated by those who instituted the litigation
10 in these cases.

11 And so I'm not sure that that one ultimately
12 triggers some builders' activity, but --

13 THE COURT: It's speculative, but I think
14 the Legislature would be aghast if they thought that
15 they were relying upon the enforcement of this Act,
16 aside from the two types of cases you are talking
17 about, by the reinstatement, so to speak, of a
18 builder's remedy. I don't believe that the legisla-
19 tion could possibly be read to have that kind of
20 intent.

21 MR. BISGAIER: Well, I think it's -- I'm not
22 sure exactly what the thrust of the Court's position
23 is on this, but with regard to transfer cases, clearly
24 the legislation is as clear as can be on its face,
25 that the Legislature was talking about enforcement of

1 the mandate through litigation if the parties --
2 the defendants did not voluntarily participate with-
3 in the time frames as suggested in the Act.

4 THE COURT: But not necessarily through a
5 builder's remedy.

6 MR. BISGAIER: What other possibility is
7 there? That brings you to the basic constitutional
8 point if it's ultimately raised, if we get that far.

9 THE COURT: I agree, but assuming the
10 moratorium is constitutional for a moment, you can't
11 say that the Legislature was necessarily assuming
12 that when the case was remanded, there'd be a required
13 builder's remedy.

14 MR. BISGAIER: I don't think the moratorium
15 is inconsistent on its face with the builder's
16 remedy remaining as a viable alternative. I mean,
17 it possibly could have an effect on whether or not
18 certain builders would undertake litigation.

19 But the fact that it's a moratorium and not
20 an outright elimination of the builder's remedy, the
21 fact that the legislation on its face talks about
22 this Act as providing an alternative means to the
23 builder's remedy, the fact that the Act simply talks
24 about it being a preference for the resolution of
25 disputes, and the fact that the Act continually talks

1 about the remand to the Courts or -- in many cases,
2 or a removal of the exhaustion requirement, what
3 could the Legislature possibly have been talking
4 about when it said that there would be no exhaustion
5 requirement if municipalities don't act, than what
6 was obvious before it as the alternative, which was
7 that there would be builder litigation?

8 And I don't see any other interpretation of
9 the Act. I mean, on its face, that's what the
10 Legislature was addressing. And there's no other
11 alternative.

12 Whether you view the builder's remedy or
13 builder lawsuits as something which is a constitutional
14 right, or whether you view it as something which is
15 implementing a constitutional mandate, is essentially
16 irrelevant in this regard.

17 The Supreme Court found this to be the only
18 alternative to non-compliance, the only way the
19 constitutional mandate would be vindicated.

20 THE COURT: Maybe the term, "moratorium,"
21 is what's misleading us. Maybe it's not a moratorium.
22 Maybe it's a prohibition. Read Section 28.

23 MR. BISGAIER: Whether you read it as a
24 prohibition for the time period or moratorium for the
25 time period, there's a time period at the end of

1 which the prohibition or the moratorium ends.

2 THE COURT: Okay. I think we are -- I've
3 got your point.

4 MR. BISGAIER: Okay.

5 THE COURT: I think I've probably ruined
6 your day, but I've got your point.

7 MR. BISGAIER: One of the major reasons,
8 you know, I believe that the manifest injustice
9 standard applied to these cases should not, would
10 not result in a transfer is because of the, what one
11 could consider the preliminary interference by the
12 Court after preliminary work by the Court.

13 And I think any view of exhaustion law,
14 of the law of transfer in this context, whatever one
15 can make of it in terms of the precedent or the
16 view of other statutes or other rules of Court which
17 talk about transfer, would seem to indicate that
18 where there has been this much involvement by a
19 Court in a case, and where the Court is so close to
20 a resolution of the case, that all of the equities
21 point in favor of the Court finishing its work and
22 not transferring the matter to another agency of
23 Government.

24 Thank you, Your Honor. I have nothing
25 further.

1 THE COURT: Thank you. Mr. Hutt, you want
2 to say something funny and sit down?

3 MR. HUTT: I'd rather stand up. Sitting
4 here today reminds me of when I was in law school.
5 I told you --

6 THE COURT: Listen, can this be off the
7 record so the reporter --

8 MR. HUTT: No, this is on the record. There's
9 women in the audience, but I remember in the civil
10 procedure we started to learn about all these causes
11 of action, action on the case, and demurrers and all
12 this stuff. They said, well, back in the fifteenth
13 century, there was a big to-do as to whether you go
14 before the chancellor or you go before the law courts;
15 and before the case was tried, you were bounced back
16 and forth sixteen times.

17 In this modern day and age, especially under
18 our new -- when I went to law school, new rules of
19 federal procedure just came into effect. It's not
20 such new rules now. We don't have that anymore.

21 And New Jersey then adopted a procedure, which,
22 same thing, that even, perchance, you're even filed
23 in Chancery Division by mistake, they still have the
24 right to maintain the action, even if you should have
25 been in the Law Division.

1 We are sitting here today going back to the
2 fifteenth century. Shall we be before this body,
3 before that body? Eighteen lawyers here, arguing
4 all day long, reminds me back of -- back in the
5 Dark Ages.

6 I don't make an analysis of all these sections
7 and everything else. I just look at it as what I
8 call the common sense approach. The common sense
9 approach says, which way is these cases going to be
10 finished fastest?

11 Everybody in this room admits that the
12 administrative procedure, there's a bare minimum of
13 two months. And every -- I'm only here in the
14 Monroe case. All the acts I hear here today on the
15 other cases, all of these cases, even if the Court
16 wants to go on the record again and say it's slow,
17 it isn't going to be that slow, that it's going to
18 resolve all of these matters in less than -- I'll
19 give it six months, taking into account the Christmas
20 vacation, Judge.

21 Now, the common sense approach is that what
22 manifest injustice is about, if you go to a man in
23 the street and you say -- you know, it's like
24 Carl Bisgaier said, you say: Why don't you bring the
25 Mount Laurel suit, you know, he has -- the lawyers

1 get rich, the plaintiffs get rich, you get busted,
2 take years, you're going to be instrumental.

3 And I got a kick out of Mr. Apuzzo's,
4 somebody's remark that -- no, I think it was Mr. Coley
5 said, we really accomplish something by all this
6 litigation and motion, we got an act passed that's
7 going to put us out of business.

8 You know, if I'd known this, I would have
9 slit my wrists. Make it slit my throat.

10 When you talk about transfer, we are talking
11 about legal fictions. And I am reminded of the
12 story about the broker that called up the man, said:
13 I got some hot stock for you. It's selling at five,
14 going to go to seven. He says, all right, buy me
15 a thousand shares.

16 Then two weeks later, he says: You know
17 that stock I told you was for five, seven? Up to
18 ten already. He says: Buy me another thousand
19 shares.

20 And this goes three or four times. And I'll
21 make it short, because of the lateness of the hour.
22 And finally, the broker called up, remember I told
23 you the stock was five to ten? It's up to twenty,
24 going to go to twenty-six. He says, wait a minute,
25 he says. How much have I got at which price? He told

1 him, he says, I'm satisfied with my profit. Sell.

2 The broker says, sell? Sell to who?

3 And that reminds me about here. Transfer
4 to who? The Council hasn't even been confirmed.
5 You don't even know who to call. You can't write a
6 letter. They have no rules. They have no regulations.

7 So it's ludicrous in this context to sit here,
8 supposedly intelligent people, saying we should
9 transfer.

10 If you would grant a motion to transfer,
11 the next question I would say to you, Judge: Who do
12 I write to? I know what your answer's going to be.

13 Now, they're obviously intending to, in some
14 cases, to be transferred. And it's very simple what
15 the test is, without all these fancy numbers. Test
16 is, as Mr. Neisser said, relative delay.

17 If a case started before this Court or any
18 other Court a month or two ago, complaint was just
19 filed, there has been no discovery or something, I
20 could conceive, based upon the history of all the
21 lawyers in this room, that even the Court action
22 might take eighteen months or two years to get
23 resolved, because somehow or other, those ninety-day
24 orders turn into 290-day orders.

25 So, therefore, such a case, hasn't been a lot

1 of time, money, effort expended, the Court won't
2 do it, probably, any faster, that's the kind of case
3 you would transfer.

4 A case like the ones here, in which tons and
5 tons of files, whatnot, are dumped onto an agency's
6 office, which I'm sure they haven't even rented the
7 office yet, they haven't got the staff yet -- all
8 this expertise that they say is going to happen maybe
9 someday will happen, but right now you can't even
10 name an employee of that agency you're going to
11 transfer to.

12 So I submit that it's like the stockbroker,
13 sell, sell to who? There's nobody to transfer these
14 cases to, and we get the matters resolved faster in
15 staying before this Court.

16 THE COURT: Mr. Warren?

17 MR. WARREN: William L. Warren, representing
18 Garfield & Company.

19 THE COURT: Please let's do our best. I
20 don't mean that the last should be penalized, but
21 this is a difficult, long day for the reporter.

22 MR. WARREN: Your Honor, I agree with every-
23 thing that has been pointed out to the Court by the
24 plaintiffs thus far. I'd like to take it one step
25 further and apply that cite specifically to Garfield &

1 Company, because I think that application, Your
2 Honor, is dramatic.

3 Mr. Neisser pointed out that in forty-five
4 days or sixty days, depending upon the Court's
5 calendar, we could complete the compliance hearing,
6 builder remedy hearing for the Cranbury case. In
7 fact, with respect to Garfield, I'm not at all sure
8 that there is any dispute anymore, and probably
9 within a couple of hours, we could complete that
10 aspect of the case.

11 Garfield's property is presently zoned for
12 low and moderate income housing. Cranbury's experts
13 have testified that it's appropriate and desirable
14 for low and moderate income housing. The master has
15 said it's the most appropriate location for low and
16 moderate income housing.

17 There may have been a dispute at one time
18 as to what the density should have been. I said
19 9.2, Cranbury said 7.

20 I have Cranbury's report here. The first
21 sentence on the first page says: The plaintiff's
22 contention that the subject site is suitable for
23 residential development at a density of 9.2 units
24 per acre is not contested in principle. But ap-
25 parently, I am to be consigned to the Affordable

1 Housing Council for a period of between twenty-two
2 months and three years, when this matter could
3 literally be resolved in two to three hours, at least
4 with respect to Garfield.

5 What would the delay do? What would that
6 period of delay do specifically in connection with
7 this site, Your Honor? A major residential develop-
8 ment is a fragile item. It's affected by interest
9 rates. It's affected by demands for housing. It's
10 affected by availability of infrastructure.

11 As we stand here today, because of the
12 interest rates, as I understand it, this is the
13 most propitious time for housing in the last six
14 years. And I'm not prepared, and I don't know that
15 anybody here is prepared, to say what the housing
16 market will be, what the interest rate market will
17 be, in two-and-a-half or three or four years, when
18 the Affordable Housing Council gets done.

19 As to infrastructure, and this is especially
20 true with respect to Cranbury, as I understand it,
21 the area which Cranbury has designated for develop-
22 ment, general development, which is east of Route 130,
23 is being purchased at a rather considerable rate by
24 commercial developers.

25 And Mr. Neisser has already referred to the

1 fact that Sutler Corporation has purchased 147 acres
2 of land just north of the Garfield & Company property,
3 on which it proposed to build 1.8 million square feet
4 of commercial space.

5 And in connection with that, they propose
6 either to go into a Monroe consortium for sewage or,
7 if that's unavailable, to use -- to drill wells for
8 water and to use Cranbury's available infrastructure.

9 And if they use what is available from
10 Cranbury for sewage and for water, then it goes with-
11 out saying that Garfield & Company cannot use that
12 for its low and moderate income development. That
13 will either substantially delay the development, or
14 eliminate it.

15 We have submitted an affidavit from
16 Mr. Feckser, who has pointed out, Your Honor -- he
17 is an engineer that we retained -- that the most
18 effective, efficient and inexpensive method of
19 sewerage the Garfield site is to enter into a
20 consortium that is now being organized by the Monroe
21 Utilities Authority, with the approval of the Middle-
22 sex County Utilities Authority. And that consortium
23 is being planned now.

24 We have four, six, maybe eight months before
25 the plans are completed, before the availability of

1 the plant which is being proposed is going to be
2 assigned out. And if we wait two-and-a-half years
3 or two years for the Affordable Housing Council to
4 make a determination, then obviously there won't be
5 any participation by Garfield & Company or anybody
6 else in that consortium.

7 And Mr. Feckser estimates in present dollars
8 that the cost of not getting in on that will be
9 somewhere between one and five million dollars. And
10 there also, obviously, will be a substantial delay
11 in the development, because you will have to come up
12 with some alternative.

13 Indeed, the development may simply die.
14 Residential low and moderate income development in
15 Cranbury may simply die and be replaced by commercial
16 development, which does not provide a single unit of
17 low and moderate income housing.

18 I am not saying that that's what Cranbury's
19 planned. I am saying that that is what is likely
20 to happen, given the commercial development pressures
21 emanating down from Route 8A -- from Exit 8A on the
22 Turnpike route down through the eastern edge of
23 Cranbury.

24 And that is the manifest injustice that will
25 result to Garfield & Company if this matter is

1 transferred to the Affordable Housing Council.

2 Thank you.

3 THE COURT: Thank you. Mr. Mytelka.

4 MR. MYTELKA: Your Honor, I didn't use the
5 lexis to find out any precedence or to find a
6 precedence on that test, but -- and I don't mean to
7 in any way ridicule Mr. Apuzzo, but merely to ridicule
8 his argument. Mr. Apuzzo carries out orders, and
9 he's doing it diligently.

10 His argument --

11 THE COURT: He's laboring under a disadvantage
12 of having clerked for a judge who makes fine dis-
13 tinctions without a difference. Go ahead.

14 MR. MYTELKA: I am laboring under that.

15 THE COURT: Yes, you. That's what I was
16 addressing myself --

17 MR. MYTELKA: I believe Your Honor has had
18 a very interesting academic discussion of all the
19 central and even the interesting peripheral issues
20 with regard to this matter. The only one of those
21 issues that were discussed all day, the legal issues,
22 that I will comment on, and only for a moment, is
23 that, as I read the statute, Your Honor, it says
24 that the Court has this discretion, full discretion,
25 to determine whether or not to transfer. Full

1 discretion.

2 In that exercise, that discretion must
3 consider -- doesn't say exclusively consider,
4 doesn't say only consider, it says must consider
5 manifest injustice.

6 I read that provision as sort of like a
7 crudely designed variance proceeding, and the mani-
8 fest injustice being the analogue to the hardship,
9 and that there may be other reasons which they
10 haven't bothered to spell out, but maybe the Court
11 will think of one when the case comes along.

12 That's the way I read it. I don't think
13 it's -- I mentioned that because it did come up, and
14 it is, in a sense, central to this motion.

15 But in the case of Monroe's motion to which
16 I address it, because I represent Lori Associates
17 and Habd Associates, involved in Monroe Township,
18 it's really just a silly motion, Your Honor. It has
19 nothing to it whatsoever.

20 It's an eleven-year-old suit. There's been
21 numerous proceedings in this suit, not just trials
22 and appeals and motions and discovery and whatnot,
23 but determinations. And it -- the words, "manifest
24 injustice," of course would have absolutely no
25 meaning whatsoever if Monroe Township were ever able

1 to succeed in the motion, and I'd just as soon that
2 they won't.

3 I would end the way Your Honor ended, in
4 questioning Mr. Apuzzo and getting his stipulation
5 that what he said in the brief is the test that
6 Your Honor should focus on. And that says, and I
7 quote again from Mr. Apuzzo's brief, which I did
8 agree with in my letter brief: "This Honorable Court
9 should focus on what will allow for the quickest and
10 best planned construction of low and moderate income
11 housing in the township."

12 Thank you, Your Honor.

13 THE COURT: Thank you. Unless there's any
14 burning need for rebuttal, I'd like to proceed.

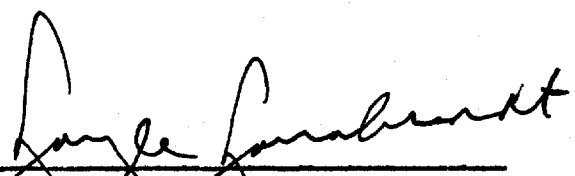
15 (The Judge's decision has been previously
16 transcribed in a separate volume.)
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C E R T I F I C A T E

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I, GAYLE GARRABRANDT, a Certified Shorthand Reporter of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the proceedings as taken by me stenographically on the date hereinbefore mentioned.



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