

Defendant Borough of South Plainfield's Brief in Support  
of Motion for Leave to Appeal an Interlocutory  
Order and for Stay of Trial Court Proceedings

Incl: Appendix, Notice of Motion + Certification

PS. 137

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.

FRANK A. SANTORO, ESQ.  
1500 Park Avenue  
P. O. Box 272  
South Plainfield, N.J. 07080  
(201) 561-6868  
ATTORNEY FOR DEFENDANT  
BOROUGH OF SOUTH PLAINFIELD

CIVIL ACTION  
ON APPEAL FROM

---

URBAN LEAGUE OF GREATER  
NEW BRUNSWICK, et al.,

Plaintiffs,

v.

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

Defendants.

---

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
MIDDLESEX/OCEAN COUNTY

NO. C-4122-73

DEFENDANT BOROUGH OF SOUTH PLAINFIELD'S  
BRIEF IN SUPPORT OF MOTION FOR LEAVE TO  
APPEAL AN INTERLOCUTORY ORDER AND FOR STAY  
OF TRIAL COURT PROCEEDINGS PENDING APPEAL

On the Brief:

FRANK A. SANTORO, ESQ.

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## STATEMENT OF FACTS

On July 23, 1974, the Urban League of Greater New Brunswick and seven individuals sued South Plainfield and 22 other Middlesex County towns on behalf of all low and moderate income families challenging the municipalities' zoning ordinances as exclusionary and, therefore, unconstitutional. After an extensive trial in 1976, Judge David Furman issued a ruling finding that the Borough of South Plainfield's zoning ordinance was unconstitutional and assigned South Plainfield a fair share obligation of 1,749 units, of which 45 percent were low income and 55 percent moderate income.

The Judgment of Judge Furman required rezoning within 90 days; however, no zoning revision occurred because in November 1976, the Appellate Division stayed the Judgment pending appeal. In 1979 the Appellate Division reversed the Judgment in its entirety. On January 20, 1983, the Supreme Court reversed the Appellate Division and remanded to the trial court for determination of the region and fair share allocation, as well as the implementation of land use ordinance revisions and the adoption of other affirmative measures. South Plainfield participated in the remand proceedings, discovery was had and negotiations leading up to the Stipulation followed by the Urban League's Motion for Summary Judgment. Summary Judgment was entered on May 22, 1984. The Stipulation and Summary Judgment provided for the rezoning of

eight specific sites, which would require between 553 and 603 low and moderate income units and with mandatory set asides, a total of 2,367 to 2,417 units to be added to the approximate 6,000 residential units currently in the Borough. The Borough's Planning Consultant was then in the process of preparing proposed zoning and affordable housing ordinances for review by the Borough's Planning Board and ultimate adoption by the Mayor and Council of the Borough of South Plainfield. In a motion brought in October 1984 by the Plaintiff Urban League, the trial court entered an Order dated December 13, 1984, consolidating the case of Elderlodge vs. Borough of South Plainfield and the Urban League case.

It was in January of 1985 that the matter was recommended by the Planning Board to the Governing Body for adoption. The ordinances were scheduled for introduction in February of 1985, with intended second reading and adoption March 11, 1985. Changes in the proposed ordinances were requested by Plaintiff Urban League and the Borough of South Plainfield Governing Body therefore referred the ordinances back to the Planning Board in accordance with State Statute, requesting their review of the recommended changes. The trial court issued an Order on July 3, 1985, restraining the Borough of South Plainfield from approving any site plans, subdivision applications, variances, conducting any land sales and consummating any pending land sales, pending the Borough of South Plainfield's adoption of the required ordinances.

On or about July 5, 1985, the State Legislature adopted the Fair Housing Act. On July 22, 1985, South Plainfield filed its Motion for Transfer. The trial court did not set the Transfer Motion down on short notice, as requested by the Borough of South Plainfield, and it was not until the August 2, 1985 hearing that the trial court issued a stay of the effectiveness of the ordinances until a decision on the Transfer Motion. Thereafter, the South Plainfield Borough Council finally adopted the ordinances under protest on August 7, 1985.

On October 2, 1985, Judge Serpentelli heard oral argument on the Borough of South Plainfield's request to transfer. At the time, the Court also heard the oral arguments of the Townships of Piscataway, Warren, Monroe and Cranbury.

The Court decided to deny all transfer requests. It is form that denial that this appeal is being taken.

POINT I

THIS INTERLOCUTORY APPEAL IS NOT  
BARRED BY MOUNT LAUREL II.

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The Supreme Court of New Jersey in Mount Laurel II (So. Burlington Cty. NAACP v. Mount Laurel Tp., 92 N.J. 158 (1983), hereinafter referred to as Mount Laurel II) declared that until final judgment of compliance is entered by the Trial Court, there shall be no right to appeal "as the Trial Court's determination of fair share and noncompliance is interlocutory".

However, the instant appeal differs factually from the type of interlocutory appeals that were barred by Mount Laurel II in that this appeal is from the Trial Court's denial of the Borough of South Plainfield's Transfer Motion. The transfer of Defendant/Appellant's case to the Council on Affordable Housing is a legislative remedy. The Trial Court's determination of noncompliance and of fair share is, as stated above, a judicial remedy. Certainly, it could not have been intended by the Supreme Court in Mount Laurel II to bar legislative remedies prospectively, particularly when the Court reiterated on numerous occasions its (the Court's) preference for legislative initiative and action in the field of exclusionary zoning matters.



POINT II

PURSUANT TO RULE 2:2-4 INTERLOCUTORY  
APPEALS SHOULD BE GRANTED IN THE  
INTERESTS OF JUSTICE.

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The "Fair Housing Act", Chapter 222, Public Laws of 1985, is an entirely new legislative remedy, addressing the issue recited in Mount Laurel II, i.e. "that every municipality in a growth area has a constitutional obligation to provide, through its land use regulations, a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families."

"The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation." Supra, Section 2(a) and 2(c).

It is, therefore, an object of the Act and justice demands that the Appellate Division of Superior Court review immediately this new legislative remedy and why a party such as the Defendant/Appellant Borough of South Plainfield should not have access to it.

The issue of which branch of government should now deal with the matter of affordable housing is obviously of great public importance. The Legislature in the Act has declared that it is in the public interest for the "resolution of existing and future disputes involving exclusionary zoning to be the mediation and

and review process set forth in this act and not litigation..."  
Supra, Sec. 3, The Act.

It can also be said by anyone who has studied the Act, that it sets forth a number of complex issues which require interpretive guidance from the Appellate Division and these complex issues require both immediate resolution and uniformity of treatment.

For example, what is "manifest injustice" and upon which party is the burden of proving manifest injustice? Another issue which would seem to require immediate and uniform resolution is that of the moratorium against what would appear to be the entering of final judgment in any pending exclusionary zoning case where a builder's remedy is included. Hence, Section 27 of the Act recites:

"No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a final judgment providing for a builder's remedy has already been rendered to that plaintiff. This provision shall terminate upon the expiration of the period set forth in Sub-section A of Section 9 of this Act for the filing with the Council of the municipality's housing element."

POINT III

TRIAL COURT HAS ERRED IN ITS INTERPRETATION  
AND APPLICATION OF "MANIFEST INJUSTICE" OF  
SECTION 16 OF CHAPTER 222, PUBLIC LAWS  
OF 1985.

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In accordance with Section 16 of the Act, Defendant/  
Appellant Borough of South Plainfield moved to seek a transfer of  
its case to the Council on Affordable Housing. Other municipali-  
ties, including the Township of Piscataway, Monroe Township,  
Cranbury Township, Holmdel and Warren Township, likewise applied  
for a similar transfer approval.

The Trial Court summarily denied the transfer requests  
of all of said municipalities on the basis that to grant such  
requests would result in a manifest injustice to a party to the  
litigation. In so doing, the Court supplied its own interpreta-  
tion of manifest injustice, stating that its findings in that  
regard were "fact specific" and that "you know manifest injustice  
when you see it".

But the term manifest injustice has already been  
utilized in cases dealing with retroactive application of statutes.  
Thus, "When considering whether statute should be applied prospec-  
tively or retroactively, Supreme Court's quest is to ascertain  
the intention of legislation. When the Legislature has clearly  
indicated that the statute should be given retroactive effect,  
the Courts will give it that effect unless it will violate the

Constitution or result in manifest injustice." State DEP v. Ventron Corp., 94 N.J. 473 (1983) at 498.

Another case interpreting the test to be applied when a statute should be applied retroactively is found in Gibbons v. Gibbons, 86 N.J. 515 (1981) where it was held that "when the Legislature has expressed the intent that a statute be applied retroactively, the Court should apply the statute in effect at the time of its decision; this expression of legislative intent may be either express, that is stated in the language of the statute or pertinent legislative history or implied, that is retroactive application may be necessary to make the statute workable or give it the most sensible interpretation";

AND

"Even if a statute may be subject to retroactive application, a final inquiry must be made, that is will retroactive application result in 'manifest injustice' to a party affected by such application of the statute; the essence of the inquiry is whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute, and whether the consequences of such reliance are so deleterious and irrevocable that it be unfair to apply the statute retroactively." (emphasis supplied)

In Rothman v. Rothman, 65 N.J. 219 (1974), it was held that:

"The rule favoring prospective applications of statutes, while a sound rule of statutory interpretation...is no more than a rule of statutory interpretation and is not to be applied mechanistically to every case."

In the Gibbons case there was no clear expression of legislative intent that the amendment to the statute on equitable distribution should be applied prospectively; in fact, it was inferred from legislative history that the Legislature intended the amendment to apply retroactively. In the matter of the Fair Housing Act, clearly the Legislature did intend the Act to have retroactive application and it cannot be said that in the specific instance of the Plaintiff Urban League that it (the Urban League) relied to its prejudice on the law that was changed as a result of the retroactive application of the Fair Housing Act.

The Trial Court in deciding whether or not manifest injustice would result from the granting of the transfers, referred to the original draft language of Section 16 of the Fair Housing Act:

"...no exhaustion of the review and mediation procedures established in Sections 14 to 15 of this Act shall be required unless the Court determines that a transfer of the case to the Council is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing..."

Essentially, the Trial Court focused upon the phrase "likely to facilitate and expedite the provision of the realistic opportunity for low and moderate income housing" and thereby decided that the speed with which a case would be likely to move through the Council on Affordable Housing should be synonymous with the question of manifest injustice. The Court, in reviewing the different time periods described in the Act, estimated that

the "best case" would move through the Council in some 22 months. This the Court concluded was too long and, hence, manifestly unjust. However, the Legislature deleted the language "facilitating and expediting the provision..." and the Legislature did intend that some delay was obviously inherent in an administrative body's handling of exclusionary zoning matters, otherwise no administrative action dealing with items of general welfare which took time could withstand the "velocity of resolution" test, as applied by the Court below.

POINT IV

THE UNIFORM DENIAL OF THE REQUESTS  
TO TRANSFER THE CASES INVOLVING THE  
BOROUGH OF SOUTH PLAINFIELD, THE TOWNSHIPS  
OF PISCATAWAY, WARREN, MONROE AND CRANBURY  
AND OTHERS FRUSTRATES THE BASIC PURPOSE OF  
THE PROVISIONS OF CHAPTER 222, PUBLIC LAWS  
1985, WHICH PURPOSE IS TO GET THESE  
EXCLUSIONARY ZONING CASES OUT OF THE COURTS.

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In addition to Defendant/Appellant Borough of South Plainfield's Transfer Motion request, various municipalities have requested transfer of their Mount Laurel cases to the Council on Affordable Housing. Among them are included the municipalities of Denville, Washington Township, Randolph, Tewksbury, Roseland, Township of Warren, Cranbury, Monroe, Piscataway, Manalapan, Bernards, Watchung, Bernardsville, Holmdel, Franklin, Scotch Plains, Hillsborough and Cherry Hill. With the possible exception of the Tewksbury and Scotch Plains application, every other request has so far been denied by the three Judges hearing Mount Laurel cases.

If this pattern of transfer request dispositions continues, it appears that all but the 16(b) cases (those filed within 60 days of the enactment of the Fair Housing Act) will be uniformly denied.

It is, therefore, asserted that if the Legislature did not intend to have pending exclusionary zoning cases transferred, there would be no Section 16 in the Act, but rather only Section 16(b). Obviously, the Legislature did intend to include the cases

such as Defendant/Appellant Borough of South Plainfield and the other similarly affected municipalities for it is clear that you know legislative purpose when you see it.



POINT V

THE TRIAL COURT'S DECISION TO DENY SOUTH PLAINFIELD'S REQUEST TO TRANSFER FLIES IN THE FACE OF THE JUDICIAL DECLARATIONS IN THE MOUNT LAUREL II DECISION STATING THEIR PREFERENCE FOR LEGISLATIVE ACTION IN THE AREAS OF EXCLUSIONARY ZONING.

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The Supreme Court in Mount Laurel II in its discussion of the constitutional basis for Mount Laurel and the judicial role stated:

"...the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is better left to the Legislature." Mount Laurel II at Page 212.

AND

"...so while we have always preferred legislative to judicial action in this field, we shall continue - until the Legislature acts..." Supra at Page 212.

ALSO

"The judicial role, however, which could decrease as a result of legislative and executive action, necessarily will expand to the extent that we remain virtually along in the field..." Ibid at Page 213.

AND

"Our deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions." Ibid (emphasis supplied).

And finally in closing its opinion, the Court reiterated:

"as we said at the outset, while we have always preferred legislative to judicial action in this field, we shall continue - until the Legislature acts..."

On July 2, 1985, the Legislature acted by its adoption of Chapter 222 of Public Laws of 1985 "Fair Housing Act". The Trial Court's decision to deny Defendant/Appellant Borough of South Plainfield and the other municipalities request to have their cases transferred to the Council on Affordable Housing is anathema to the Supreme Court's own policy statements and, hence, should be overturned.

POINT VI

THE STIPULATION ENTERED INTO IN MAY 1984 BY THE MUNICIPAL ATTORNEY ON BEHALF OF THE BOROUGH OF SOUTH PLAINFIELD LACKED FORMAL AUTHORIZATION OF THE GOVERNING BODY AND HENCE IS IN DIRECT CONTRAVENTION TO THE PROVISIONS OF N.J.S. 40A:2-3, ET SEQ.

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Defendant/Appellant never had a trial to determine fair share numbers because of the Stipulation entered into in May 1984 by its legal counsel. That Stipulation, which naturally resulted in a Summary Judgment being entered by the Court May 22, 1984, in favor of the Urban League, required that the Defendant/Appellant in one provision to contribute the land and provide necessary financial support, including seed money and tax abatement as to one of the Mount Laurel sites. (Exhibit D)

Such a Stipulation was executed by Defendant/Appellant's legal counsel without Defendant/Appellant Borough of South Plainfield first having adopted a formal resolution at a public hearing called for such purpose.

Since the Stipulation requires the expenditure of public funds, it was an ultra vires act and is in direct contravention to the basic requirements set forth in the statutory provisions of N.J.S. 40A:2-3, et seq., which said section requires public hearings to be held by municipalities prior to their incurring future indebtedness for any purpose. Hence, the Stipulation is void and the Summary Judgment should therefore be set aside.

POINT VII

THE TRIAL COURT SHOULD NOT BE ALLOWED TO CONTINUE THE RESTRAINTS ON THE SALE OF BOROUGH OWNED LAND, WHERE SUCH LAND IS NOT INVENTORIED "MOUNT LAUREL" LAND, SINCE SUCH RESTRAINTS CONSTITUTE A TAKING.

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By virtue of several Orders issued by the Trial Court, the Defendant/Appellant Borough of South Plainfield has been restrained and is continuing to be restrained from conducting land sales of Borough owned land, including the finalization of pending land sales. Such restraints have been imposed on all Borough owned land, regardless of its non-inclusion in Mount Laurel inventoried sites.

Defendant/Appellant Borough of South Plainfield has adopted under protest what it believes to reasonably comply in all respects to the Judgment against South Plainfield of May 22, 1984.

The remedies for noncompliance recited by the Supreme Court in Mount Laurel II did not authorize, nor could it authorize, such restraints, nor continue the restraints of Defendant/Appellant Borough of South Plainfield's constitutional right to deal with its property as it chooses. Hence, since the Defendant/Appellant Borough of South Plainfield has made reasonable efforts to comply under protest, these restraints should be immediately removed.

CONCLUSION

For the foregoing reasons, defendant, Borough of South Plainfield, respectfully requests this Court (a) to grant it leave to appeal an interlocutory order dated October 11, 1985, issued by the Superior Court of New Jersey, Middlesex/Ocean Counties, denying South Plainfield's application to transfer litigation presently pending in this matter before the Honorable Eugene D. Serpentelli, J.S.C., to the Affordable Housing Council, (b) staying further proceedings pendent in the Trial Court until the resolution of the within appeal, and (c) consolidating this appeal with appeals brought or to be brought by other municipalities similarly situated, including, but not limited to, Cranbury, Warren, MOnroe, Piscataway, Holmdel and Bernardsville.

Respectfully submitted,

FRANK A. SANTORO, ESQ.  
Attorney for Defendant,  
BOROUGH OF SOUTH PLAINFIELD

By: 

FRANK A. SANTORO

Dated: October 23, 1985

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.

FRANK A. SANTORO, ESQ.  
1500 Park Avenue  
P. O. Box 272  
South Plainfield, N.J. 07080  
(201) 561-6868  
ATTORNEY FOR DEFENDANT  
BOROUGH OF SOUTH PLAINFIELD

CIVIL ACTION  
ON APPEAL FROM

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URBAN LEAGUE OF GREATER  
NEW BRUNSWICK, et al.,

Plaintiffs,

v.

THE MAYOR AND COUNCIL OF THE  
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Defendants.

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SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
MIDDLESEX/OCEAN COUNTY

NO. C-4122-73

APPENDIX TO BRIEF OF DEFENDANT BOROUGH OF  
SOUTH PLAINFIELD'S MOTION FOR LEAVE TO  
APPEAL AN INTERLOCUTORY ORDER AND FOR STAY  
OF TRIAL COURT PROCEEDINGS PENDING APPEAL

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EXHIBIT A

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

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URBAN LEAGUE OF GREATER  
NEW BRUNSWICK,

Plaintiff,

vs.

THE MAYOR AND COUNCIL OF THE  
BOROUGH OF CARTERET,

Defendant.

X - - - - - X

:  
:  
: TRANSCRIPT OF  
:  
: JUDGE'S DECISION

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

PENGAD CO., BAYONNE, N.J. 07002 - FORM SEL 6482



## 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

1 \* \* \* \*

2 THE COURT: First I want to thank you all  
3 for coming today, and don't come back in a group  
4 like this again.

5 Secondly, I want to tell you that one of my  
6 law clerks commented upon the fact that the clerk was  
7 amazed at the youth of all of the attorneys involved  
8 in this case. And I think that's marvelous. Such  
9 young men involved in the case, except for the man  
10 at the end of the table, assured that he was a con-  
11 temporary of mine, as a matter of fact. But that  
12 is true. That says something for the Bar.

13 Just so the record is amply clear, I don't  
14 intend to decide anything today other than the motions  
15 for transfer. I don't intend to deal with any col-  
16 lateral issues, and certainly with none of the  
17 constitutional issues involved in the Legislation.

18 And I want to make it amply clear as well  
19 that the findings in the five cases before the  
20 Court are fact-specific. They are not intended to  
21 establish an exhaustive definition of the meaning  
22 of manifest injustice. And I stress that because I  
23 know that other municipalities are waiting to hear  
24 the results of these first five cases here, as they  
25 are in matters pending before the other Mount Laurel

1 judges.

2 I think it is worthy to place the transfer  
3 provisions in a proper perspective. Counsel have,  
4 as one might expect, argued at both extremes, from  
5 the proposition that any transfer is manifestly un-  
6 just in these cases because of a host of reasons,  
7 including some vested rights, delay and so forth;  
8 and on the other side, there is the most extreme  
9 argument that no transfer should be denied because  
10 of the need for statewide uniformity, the alleged  
11 greater speed in the executive-legislative process,  
12 and the Supreme Court's preference for a legislative  
13 solution.

14 It seems clear that the legislation itself  
15 evidences through Section 16, which provides for  
16 these motions, and elsewhere, including Section 19,  
17 which deals with remands, Section 23, which deals  
18 with Court supervision of phasing, Section 12B, which  
19 relates to the interplay between the Court and the  
20 Council concerning regional contribution agreements,  
21 that the Legislature did not intend to exclude  
22 totally the Court from the process.

23 The legislation evidences an effort to strike  
24 a balance between the desire to place the housing  
25 issue squarely in the legislative-executive arena,

1 and the need to recognize that, in some cases,  
2 because of fact-specific circumstances, it would  
3 be inappropriate, if not unlawful, to subject these  
4 cases to the Council on Affordable Housing Process.

5 And finally, as part of placing the issue  
6 in a proper perspective, something should be said  
7 about the emphasis by defendants on the oft-stated  
8 preference by the Court, our Supreme Court, and this  
9 Court, for whatever that is worth, that these matters,  
10 the housing matters, be left to the Legislature.

11 First, it is obviously clear that that's  
12 what Mount Laurel says, and that's what the Supreme  
13 Court wishes. That's what Mount Laurel I said, and  
14 that's what Mount Laurel II said. Ten years later,  
15 it still is the desire of the Court, and it should  
16 in fact motivate all appropriate deference to the  
17 legislation.

18 However, it must be noted that the Court's  
19 patience and the legislative default has created  
20 some circumstances in which it would no longer be  
21 viable to vindicate the constitutional obligation  
22 by a total abdication of the legislative-executive  
23 process; and indeed, Section 16 of the Act recognizes  
24 that.

25 Now, preference for a legislative-executive

1 solution cannot in all cases be translated to a  
2 circumstance where the constitutional imperative  
3 of Mount Laurel would be violated. At a minimum,  
4 the manifest injustice exception must contemplate  
5 that we avoid the situation in which a transfer  
6 would seriously undermine the constitutional im-  
7 perative which the legislation itself must satisfy  
8 if the legislation is not to experience a consti-  
9 tutional infirmity.

10 To that extent, the term, "manifest in-  
11 justice," must be interpreted in such a manner  
12 as to support the fundamental goal of the Act, which  
13 I perceive to be the satisfaction of a constitutional  
14 mandate in a reasonable manner.

15 Next, I would like to turn briefly to the  
16 wording of Section 16 itself, and make some comments  
17 with respect thereto. I need not repeat the pro-  
18 visions of Section 16, except for the fact that  
19 there is a lot of reference in the briefs as to  
20 Section 16A and 16B; and, of course, there is no  
21 Section 16A in the statute. There is only a  
22 Section 16B.

23 So just so it is entirely clear what we are  
24 talking about, we are talking about that section  
25 which precedes Section 16B and reads: For those

1 exclusionary zoning cases instituted more than  
2 sixty days before the effective date of this Act,  
3 any party to the litigation may file a motion with  
4 the Court to seek a transfer to the Council.

5 In determining whether or not to transfer,  
6 the Court shall consider whether or not the transfer  
7 would result in a manifest injustice to any party  
8 to the litigation.

9 Now, it is to be noted that the pertinent  
10 section does not define transfer, it obviously  
11 doesn't define manifest injustice, and it doesn't  
12 define party.

13 The language I have quoted starting with the  
14 words, quote, "Any party to the litigation may  
15 file a motion with the Court to seek transfer,"  
16 unquote, replaced a different standard in the prior  
17 draft of the Act which reads in part, and I quote:  
18 "No exhaustion of the review and mediation pro-  
19 cedures established in Section 14 and 15 of this  
20 Act shall be required unless the Court determines  
21 that a transfer of the case to the Council is  
22 likely to facilitate and expedite the provisions  
23 of a realistic opportunity for low and moderate  
24 income housing."

25 Now, it is by no means clear what the

1           Legislature intended to accomplish by the change  
2           from a standard of facilitating and expediting the  
3           provision of low-cost housing to a standard of  
4           manifest injustice to any party. The briefs argue  
5           in all directions on that issue as well, and I  
6           don't have to summarize them.

7                     I believe that it is fair to say that the  
8           final version more explicitly emphasizes the  
9           interests of the parties, whereas the prior version  
10          more explicitly emphasizes the expedition of the  
11          provision of lower income housing.

12                    One cannot assume that the change in wording  
13          did not intend a change in meaning. Beyond that,  
14          however, absent some clear legislative history,  
15          which seems absent, it is extremely difficult to  
16          discern whether the Legislature sought to limit  
17          or broaden the Court's discretion, or whether it  
18          sought to limit or broaden the potential for trans-  
19          fer of cases which are more than sixty days old.  
20          And I would submit that strong interpretive argu-  
21          ments can be made on both sides.

22                    I do not intend by this oral opinion to  
23          either reconcile the language or to give a complete  
24          definition to the term, "manifest injustice." If  
25          I did intend to do that, it wouldn't be an oral

1 opinion, and I certainly would take a great deal  
2 of detail in selling that issue out.

3 That term, to me, tends to be fact-specific,  
4 and I therefore deem it more appropriate to define  
5 it in the context of each of the cases that appear  
6 before me today, and those which are scheduled for  
7 the next several weeks.

8 In that process, I believe that its full  
9 meaning will evolve as those motions are heard and  
10 as the motions now pending before the other Mount  
11 Laurel judges are heard and decided.

12 In cases at what I have referred to as the  
13 factual extremes, the term will be relatively easy  
14 to interpret. Like obscenity, to paraphrase Justice  
15 Stewart, you should be able to know it when you see  
16 it.

17 And finally, in terms of definition, as  
18 noted above, the statute does not define what is  
19 meant by the term, "transfer," or the term, "party."

20 Now, as to transfer, the issue might be  
21 relevant to the question of manifest injustice to  
22 the extent that if a case is transferred in its  
23 present posture, with the full record, and the Council  
24 being bound by issues decided, so to speak, the law  
25 of the case, the potential for delay and the

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1 possible cost of relitigation might be reduced.

2 The procedural scheme which the statute  
3 reveals to me will be discussed shortly. But I  
4 must say that on an initial reading, without  
5 emphasizing this issue, I do not believe that it  
6 discloses an intent to bind the Council with what  
7 has happened in this court, seems to me to be  
8 contrary to the legislative purpose in enactment  
9 of the statute, and it certainly is not refuted by  
10 the clear language of the statute.

11 The defendant municipalities stress that  
12 the statute has established the potential for a  
13 fresh, new and comprehensive approach. And if there  
14 is a failure to agree on a housing element, mediation  
15 replaces litigation, pursuant to Section 17.

16 At least the Urban League plaintiff and  
17 some of the other plaintiffs argue that the record  
18 and the decided issues must follow the case, al-  
19 though it's not clear how that would fit into the  
20 legislative scheme created by the Act.

21 In any event, the cases before me today  
22 do not require me to decide that specific issue.

23 Now, as to the term, "party," I should note  
24 that both -- some of the plaintiff builders and  
25 the defendant municipalities have dealt rather

1 gingerly and, in the case of some of the de-  
2 fendants, almost cavalierly, with the interests  
3 of lower income households in Mount Laurel litiga-  
4 tion.

5 Some of the builders have stressed the  
6 manifest injustice of a transfer in part on the  
7 grounds that they have a vested right, in effect,  
8 to build homes for the poor. I think to that  
9 extent, they inadequately assert their representa-  
10 tion of the poor in this litigation if they don't  
11 go beyond saying that.

12 The defendant municipalities have followed  
13 suit even to the extent that one brief concedes  
14 that the Court should take into account the interest  
15 of all of the parties, including, quote, "the  
16 hidden beneficiaries."

17 Now, it should have long since been clear  
18 that the status of lower income households rises  
19 far above the category of hidden or third-party  
20 beneficiaries in Mount Laurel actions. Even where  
21 an Urban League or a Civic League, if that's the  
22 name now, or a civic group or another non-builder  
23 plaintiff is not involved, the lower income class  
24 must be considered a full party to this action.  
25 The prospect of the builder's remedy is offered as a

1 quid pro quo to sue on behalf of those persons whom  
2 the remedy will benefit.

3 Our Supreme Court has described Mount Laurel  
4 actions as institutional or public law litigation.  
5 It is at page 288 and 289 of the Decision and in  
6 Footnote 43. They are brought to vindicate resistance  
7 to a constitutional obligation to the affected  
8 group. In that sense, they are class actions, and  
9 the class is very much a party.

10 Judge Skillman has said it well in Morris  
11 County Fair Housing Council vs. Boonton Township,  
12 197 New Jersey 359, at pages 365 and '66, where he  
13 says, and I quote:

14 "A Mount Laurel case may appropriately viewed  
15 as a representative action which is binding on non-  
16 parties. The constitutional right protected by  
17 the Mount Laurel doctrine is the right of lower  
18 income persons to seek housing without being subject  
19 to economic discrimination caused by exclusionary  
20 zoning.

21 "The public advocate and such organizations  
22 as the Fair Housing Council and the N.A.A.C.P.  
23 have standing to pursue Mount Laurel litigation  
24 on behalf of lower income persons.

25 Developers and property owners are also

1 conferred standing to pursue Mount Laurel litigation.  
2 In fact, the Supreme Court has held that any in-  
3 dividual demonstrating an interest in or any organi-  
4 zation that has the objective of securing lower  
5 income housing opportunities in a municipality will  
6 have standing to sue such municipality on Mount  
7 Laurel grounds."

8 And he is quoting from Mount Laurel at that  
9 point, at page 337, where the Court says that, in  
10 referring to lower income people, that they are the  
11 group that has the, quote, "greatest interest,"  
12 unquote, in ending exclusionary zoning.

13 Continuing from Judge Skillman's opinion, and  
14 I quote: However, such litigants are granted  
15 standing not to pursue their own interests but,  
16 rather, as representatives of lower income persons  
17 whose constitutional rights are allegedly being  
18 violated by the exclusionary zoning.

19 Therefore, it is amply clear to me that the  
20 Court must look at lower income persons as at least  
21 an equal party to the litigation, even if I choose  
22 to ignore the Supreme Court suggestion that they  
23 have the greatest interest in the litigation, and  
24 that is so doing, I have to consider their interests  
25 from many standpoints, including but not limited to

1 the delays which were involved in the vindication  
2 of their rights, the fact that every day in which  
3 this Court delays resolution of these cases, that  
4 they remain in substandard housing, and that they  
5 will continue there until these issues are resolved.

6 We have to consider the absence or diminished  
7 availability of the remedies to enforce compliance  
8 where cases are near completion or housing is im-  
9 minent. We have to consider whether housing is  
10 imminent. We have to consider to what extent a  
11 transfer would relegate low and moderate income  
12 persons to reliance upon voluntary compliance by  
13 municipalities for any extended period.

14 And those are just some of the factors that  
15 the Court would take into account.

16 Now, before turning to the actual factual  
17 analysis of each case here today, something should  
18 be said about the consequences of a transfer as it  
19 relates to the potential for delay or expedition of  
20 the process which leads to the production of lower  
21 income housing.

22 This issue has been heavily briefed and,  
23 notwithstanding the difference in conclusions, the  
24 parties seem to agree that speed in the resolution  
25 of the issues and expediting lower income housing

1 is at least one very important element involved in  
2 the definition of manifest injustice.

3 As a practical matter, then, the language  
4 of the prior draft of Section 16 becomes involved  
5 in the analysis. Will the transfer facilitate and  
6 expedite the provision of a realistic opportunity?

7 I am not suggesting that I have read that  
8 section back into the act, but only that the analysis  
9 of plaintiffs, indeed the defendants, have in fact  
10 read it back into the Act, and I think properly so.

11 I should also point out that it is not back  
12 into the Act as the exclusive definition, but rather,  
13 as I have indicated, an important element of mani-  
14 fest injustice. Presumably in the context of  
15 manifest injustice to the parties, we are asking  
16 whether or not the transfer will aid the lower in-  
17 come people by speeding a day when the realistic  
18 opportunity for housing will arrive.

19 And it is at this point that the arguments  
20 of the parties diverge, the parties claiming the  
21 transfer -- the plaintiffs claim the transfer will  
22 cause delay; and, of course, the municipalities  
23 claim it will cause expedition.

24 Part of that rests upon what reasonable  
25 time span we can assume will be involved under the

1 Act. As we know, it became effective on July 2nd,  
2 1985; that Section 5A creates the Council, and 5D  
3 requires the governor to nominate the members within  
4 thirty days.

5 The nominations have been made, and I don't  
6 suppose it matters a great deal that they were a  
7 little late. But they have not yet been confirmed,  
8 unless there's some late action of which I am not  
9 aware.

10 Section 8 requires the Council to propose  
11 procedural rules within four months after the  
12 confirmation of its last member initially appointed,  
13 or by January 1, 1986, whichever is earlier.

14 Given that the Council members have not been  
15 confirmed, it is likely that that confirmation will  
16 occur late in this year, and that procedural rules  
17 can be expected by May 1, 1986. I have reached  
18 that conclusion given the fact that the Legislature  
19 is not in session during another important time  
20 span during the month of October, in anticipation  
21 of November 5th.

22 Now, Section 9A requires any municipality  
23 which elects to submit a housing plan to the Council  
24 to notify the Council of its intent to participate  
25 within four months of the effective date of the

1 Act.

2 Section 7 requires the Council to adopt  
3 criteria and guidelines for the housing plan within  
4 seven months of the confirmation of the last member  
5 initially appointed, or January 1, 1986. Assuming  
6 confirmation of membership is accomplished near the  
7 end of this year, the Council will have until ap-  
8 proximately August 1, '86 to adopt guidelines and  
9 criteria.

10 Section 9A gives the municipality five  
11 months from the date of adoption of the criteria  
12 to file its housing element. If the criteria were  
13 not adopted until August 1, 1986, the municipality  
14 would then have until January 1, 1987.

15 Section 13 provides that a municipality may  
16 file for substantive certification of its plan at  
17 any time within a six-year period from the filing  
18 of the housing element.

19 Nothing seems to expressly require expeditious  
20 filing for a substantive approval, assuming it is  
21 requested. The township has to give notice within  
22 an unspecified period of the requested certification.  
23 Once public notice is given, the forty-five day  
24 objection period begins to run. And it is not clear  
25 from the Act that there is a time limitation on the



1 Council to act on the requested certification.

2 Thus, though the objection period is forty-  
3 five days, the review could be longer, and it might  
4 be expected, in fact, it would normally make common  
5 sense, not to commence the review until after the  
6 objection period expires.

7 I am going to assume, however, that the town  
8 petitions for substantive certification on January 1,  
9 1987; that it simultaneously gives notice on that  
10 day; and that the Council doesn't wait for the  
11 objection period to expire to start the review pro-  
12 cess.

13 None of those assumptions comport with the  
14 Court's experience of usual procedure; but, nonethe-  
15 less, I think it is best to assume the best-case  
16 alternative. And the procedure would, nonetheless,  
17 consume forty-five days, because that's the ob-  
18 jection period. And that would take the processing  
19 to approximately February 15th, 1987.

20 Now we have got the end of the forty-five  
21 day period, the Council is prepared to grant  
22 substantive certification on the theory that it  
23 has already reviewed the plan. The town must adopt  
24 its ordinance in forty-five days, or by April 1,  
25 1987, under the assumptions which I have made.

1           If at the end of the initial forty-five day  
2 period the Council denies certification or con-  
3 ditionally approves it, the municipality has sixty  
4 days to refile. That would be until April 15th,  
5 1987, and the Council then has another unspecified  
6 period to review.

7           Assume that the Council reviews it on the  
8 same day that it is filed, which again flies in the  
9 face of human experience, and grants substantive  
10 certification. The municipality then has an ad-  
11 ditional forty-five days to adopt its implementing  
12 ordinance; and thus, the procedure might extend  
13 to June 1, 1987.

14           On the other hand, if an objection is filed,  
15 it must be done within forty-five days of the  
16 public notice. And assuming that that notice date  
17 expires on March 15th, 1987, mediation and review  
18 is commenced, no time limit is set on that process.

19           I will assume for the purposes of developing  
20 a reasonable scenario that a minimum of sixty days  
21 is required. That would take us, then, to April 15th,  
22 1987. If mediation is unsuccessful, the matter is  
23 then referred to the Administrative Law Judge, who  
24 has ninety days to issue a decision unless the  
25 period is extended for good cause.

1 I will assume that it is not extended, and  
2 that the procedure could thus be completed by  
3 July 15th, 1987. The Administrative Law Judge  
4 findings are then forwarded to the Housing Council  
5 pursuant to Section 15, with his record.

6 The Act becomes silent as to what happens  
7 at that point, but the Administrative Procedure  
8 Act would then take over, I assume, and Section  
9 1:1-16.5 would allow the Council forty-five days  
10 to act on the decision by accepting, rejecting,  
11 modifying, or remanding the initial decision to  
12 the Administrative Law Judge.

13 Absent a remand, this then could extend the  
14 time involved to September 1, 1987.

15 Now finally, before reaching a conclusion  
16 with respect to these motions, it would be useful  
17 to briefly summarize the status of each of the  
18 cases before the Court today.

19 With respect to Warren, the AMG complaint  
20 was filed on December 31, 1980. Skytop was per-  
21 mitted to intervene in May of 1981, and Timber  
22 filed a complaint in July of 1981.

23 Judge Meredith rendered a decision after  
24 trial dated May 27th, 1982, invalidating the zoning  
25 ordinance and directing rezoning.

1           The township adopted a new ordinance in  
2           December of '82. The plaintiff -- the plaintiffs  
3           AMG and Skytop were granted leave to appeal -- I'm  
4           sorry -- granted leave to file a supplementary  
5           complaint challenging the new ordinance, and they  
6           did so on January 17th, 1983, in apparent anticipa-  
7           tion of Mount Laurel II, I guess, three days before.

8           There was a consolidation of several actions  
9           by this Court in July of 1983, and the first Mount  
10          Laurel trial to commence was started in January of  
11          1984, and it lasted for twenty-One days. We not  
12          only consumed vast quantities of time, but vast  
13          quantities of coffee and danish.

14          The AMG opinion then was issued on July 16th,  
15          1984, and interim judgment was entered on August 1,  
16          1984, which set the fair share, ordered rezoning  
17          within ninety days, found the plaintiffs entitled  
18          to a builder's remedy subject to the issue of  
19          suitability.

20          An ordinance was submitted in December of  
21          1984, and being reviewed by the Court Master, who  
22          has suspended his review pending determination of  
23          this transfer motion.

24          What's left to be done in Warren Township  
25          is, of course, the Master's completion of the review;

a compliance hearing, if necessary; the preparation of a revised ordinance; an ordinance adoption, if not already accomplished.

I would estimate that that procedure could be accomplished in approximately four months.

The Cranbury Township timetable is similar in some of its respects to the other cases; and to that extent, I will not repeat.

The Urban League filed suit against Cranbury and the other three defendants here today in July of 1974. Judge Furman signed an implementing judgment, or a judgment implementing his opinion, on July 9, 1976. The Appellate Division reversed -- I have the date right here -- on January 20th, 1979. That's ironic. Three years to the date, if I have that correctly.

And the Supreme Court, the Supreme Court did whatever you'd like to describe it did with the case, but it certainly remanded it here. I read part of it as an affirmance of Judge Furman's findings and a reversal of the Appellate Division, but certainly a remand for a consideration in terms of Mount Laurel II. It found expressly that certain issues had been demonstrated by the plaintiff.

We then engaged in an eighteen-day trial. I

1 did not go back to the minutes to check, but I  
2 believe it is clear that South Plainfield didn't  
3 engage in all of it. At some point, it left the  
4 scene, and at some point, Monroe chose not to  
5 participate, and I don't mean settled, but chose  
6 not to participate.

7 I issued an opinion in July of 1984, in-  
8 validating the Cranbury ordinance. I determined  
9 region, regional need and fair share. We set about  
10 compliance. We are at the stage where all experts'  
11 reports are in, we are awaiting the compliance  
12 hearing principally as to the issues of site suit-  
13 ability in the broadest sense.

14 And I mean that as it relates to builder's  
15 remedy, as it relates to the issues of preservation,  
16 agricultural preservation, historic preservation,  
17 phasing.

18 But there are no apparent significant issues  
19 with respect to other aspects of compliance, at  
20 least that I am aware of.

21 What is left to be done there is a com-  
22 pliance hearing, which I have indicated earlier  
23 has only not moved forward because of the Court's  
24 schedule; a Master's revision of the ordinance if  
25 it isn't approved in its present form.

1 I can indicate for the record that if the  
2 matter were retained here, it would be the first  
3 compliance hearing of any length to be scheduled.  
4 It would be started in October and should be com-  
5 pleted in November, and any necessary revision could  
6 be accomplished in sixty days. Ordinance adoption,  
7 if not already accomplished, could then be accomplished  
8 in another thirty days.

9 It appears to me that the case can be com-  
10 pleted before year's end, or certainly by January.

11 The South Plainfield timetable with regard  
12 to the early part of the litigation tracks that of  
13 Cranbury. Ultimately, a voluntary stipulation was  
14 presented to the Court with the purpose of having  
15 the Court enter an order, on May 10th, 1984.

16 A fair share was reduced dramatically, and  
17 a fair share can be considered either six hundred  
18 or nine hundred. But even at the nine hundred  
19 figure, it was reduced almost by fifty percent over  
20 the prior figure. Realistically, I think it's a  
21 fair share of six hundred, so that, of course, the  
22 reduction is even greater.

23 The Plaintiff received a summary judgment  
24 based on the voluntary stipulation. An ordinance  
25 was adopted under protest. The plaintiff Urban

1 League, to the best of my knowledge, approves the  
2 ordinance except for some technical problem con-  
3 cerning the specificity of the parcels involved in  
4 rezoning. And to the best of my knowledge, the  
5 review by Ms. Lerman has not raised any problem,  
6 either. The ordinance is in a form, according to  
7 her communications, acceptable to her.

8 And what is left to be done in that case is  
9 a very short compliance hearing, since everybody  
10 agrees; and that could certainly be accomplished  
11 within the next thirty days.

12 In the case of Monroe, again, the early  
13 status of that case tracks the other two. That  
14 also was governed by my letter opinion of July 27th.  
15 There was an implementing judgment in that one in  
16 August of 1984.

17 The opinion was July 27th, 1984. It set  
18 a fair share. It ordered rezoning. After some  
19 difficulties, the township retained a planning  
20 expert, and the township submitted a compliance  
21 package on March 28th, 1985.

22 That one could have been moved as well,  
23 except before the Court got to it, it got diverted  
24 into collateral issues, including the failure of  
25 the township, the refusal of the township to pay the



1 Court-appointed Master, putting aside its refusal  
2 to pay its counsel.

3 Furthermore, while the plan was being con-  
4 sidered by the Court, the township approved a land  
5 parcel originally designated for Mount Laurel pur-  
6 poses to be used without set-asides; and therefore,  
7 a hearing had to be held on that issue. And what  
8 appears to be, in this interpretation of the Court's  
9 order, then occurred, as I read it from the town-  
10 ship, it appears as though the Court was bargaining  
11 with the municipality.

12 The Court ordered that the town had two  
13 options, that it could, if it wished to avoid non-  
14 compliance, reduce its fair share by the number of  
15 units lost in the unlawful approval; or it could  
16 reinstate that tract and vacate the approval.

17 Of course, if the town chose to reduce its  
18 fair share, the Court expected voluntary compliance.

19 The township informed the Court in writing  
20 that it would do neither, on August 2nd, 1985. And  
21 in an order dated August 30th, 1985, the Court  
22 confirmed what it had said at the hearing of  
23 July 25th, that the compliance ordinance would  
24 automatically become non-compliant, because by the  
25 township -- its admission, one of the parcels

1 necessary to satisfy their fair share had been  
2 utilized for other purposes.

3 The Court order directed that the Master  
4 provide a compliance plan by October -- by October 7th.  
5 It chose a rather short time frame because of the  
6 fact that there was a plan in existence which the  
7 Master had worked very closely with, and that it was  
8 really only necessary for the Master to select  
9 another parcel and clean up any other defects, if  
10 any, in the ordinance.

11 What is left to be done in Monroe is for the  
12 Master to file a report. And I might mention that  
13 she, too, is withholding further action pending  
14 today's motion and, therefore, that the report might  
15 not be filed by next Monday.

16 The Court would have to hold a relatively  
17 short compliance hearing thereafter, since the town  
18 found at least one of the parcels compliant, and  
19 the issues would be those raised by the plaintiffs  
20 to the extent that they felt improperly omitted.

21 If necessary, any Court-ordered revisions  
22 would follow, and I would anticipate that this  
23 procedure could be accomplished in three to four  
24 months.

25 Finally, the Piscataway timetable again

1 tracks the other three cases, except that at the  
2 end of the eighteen-day trial, the Court did not  
3 issue an opinion, because it felt that the  
4 methodology did not adequately reflect the capacity  
5 of Piscataway to absorb lower income housing.

6 And instead, the Court ordered the Master  
7 to inventory the suitable land. That report took  
8 a substantial period of time and was not received  
9 until the fall, and the township contested the  
10 report in November of 1984.

11 Restraints on approval of all sites found  
12 suitable by the Court-appointed expert were  
13 entered because of the limited amount of the land  
14 available. A supplemental report was received by  
15 the Court based upon additional issues raised by  
16 the parties on January 18th, 1985.

17 An evidentiary hearing on suitability, a  
18 site-by-site review, was held in February of '85,  
19 and a very time-consuming one at that.

20 At the end of that hearing, the Court felt  
21 that it would be appropriate and fair to the muni-  
22 cipality to permit a site inspection; and at the  
23 same time, it took the opportunity to also inspect  
24 the Cranbury issues, and both inspections were  
25 summarized in a very brief transcription given to

1 counsel.

2 Thereafter, a letter opinion was sent forth,  
3 and rezoning was ordered within ninety days of  
4 July 23rd. The order incorporating that letter  
5 was dated September 17th, 1985, and directed re-  
6 zoning by October 23rd, 1985.

7 What is left in Piscataway is somewhat more  
8 substantial than the other municipalities. A com-  
9 pliance hearing has to be held; and at that time,  
10 the Court has indicated that it will allow Piscataway --  
11 did I say Cranbury? -- Piscataway to introduce ad-  
12 ditional evidence as to the unsuitability of parcels  
13 which have been found least facially suitable, if I  
14 can use that term. And that will consume some time.

15 Conversely, however, there are no substantial  
16 objections indicated with respect to builder remedy  
17 claims in Piscataway, so that there should not be  
18 any substantial time on that issue. The possible  
19 need for a Master revision, of course, exists at  
20 the completion of the hearing. It would appear that  
21 this procedure will take approximately five months,  
22 perhaps less, and perhaps a month more.

23 Now finally -- and I am almost finished --  
24 with the overview of the statute's meaning, with a  
25 detailed review of the procedures and time frames

1 under the Act, and an analysis as to the progress,  
2 if I can use that term, and status of each case  
3 before the Court, there remains only the issue of  
4 whether the case should be transferred.

5 The parties have suggested a host of criteria  
6 by which the application to transfer should be  
7 judged. I believe it would be useful to list them,  
8 not necessarily in order of preference, and clearly  
9 with no intention to imply approval of each factor.

10 I list them to preserve them for considera-  
11 tion in future matters. Clearly in this -- in the  
12 cases before the Court, certain factors predominate  
13 and others have little relevance. Indeed, in some  
14 cases, I am not sure that I share the fact that  
15 they have any relevance, at least with respect to  
16 these cases.

17 The factors suggested include the age of the  
18 case; the complexity of the issue; the stage of the  
19 litigation, that is, whether it's at discovery, pre-  
20 trial, trial, compliance; the number and nature of  
21 previous determinations of substantive issues.

22 The relative degree of judicial and ad-  
23 ministrative expertise on the issues involved; the  
24 need for the development of an evidentiary record;  
25 conduct of the parties; the likelihood that the

1 Council determinations would differ from the  
2 Court's; the likelihood that the Council's determina-  
3 tions would have a basis in broader statewide policy.

4 Whether harm would be caused by a delay in  
5 the transfer or, conversely, whether a delay -- whether  
6 a denial of the transfer would cause a greater delay.

7 Whether the Council process, absent the  
8 ability to impose restraint, would cause the ir-  
9 reparable loss of vacant developable land for  
10 Mount Laurel construction.

11 Would the transfer tend to facilitate or  
12 expedite the realistic opportunity for lower income  
13 housing? The possibility of a change in the housing  
14 market, which could occur if venue, that is, the  
15 Council or the Court, causes a delay.

16 Now, I am sure there are other issues that  
17 were mentioned. They may be encompassed or hidden  
18 within what I have listed, but there are none that  
19 I did not mention which are relevant to my decision.  
20 As I noted, I see no need to dwell upon each of the  
21 factors.

22 The case before the Court, or the cases  
23 before the Court today, are at the one extreme of  
24 the transfer spectrum. If manifest injustice is  
25 to be found in any transfer motions before this

1 Court, it must include all five here today.

2 Again, without definition, you can tell mani-  
3 fest injustice when you see it. The mere recitation  
4 of the procedural history of these cases compels  
5 that conclusion.

6 Without repeating the facts of each case,  
7 all of them have certain things in common. They  
8 have been in the system a long time, particularly,  
9 of course, the four Urban League cases, which are  
10 nearly teenagers. They have been arduous, they  
11 have been complex, they have taxed the resources of  
12 all of the parties involved.

13 To repeat even a portion of the process  
14 before the Council seems unnecessarily burdensome  
15 and unfair to all of the parties, even if the  
16 municipalities are rarely desirous of doing that.

17 In South Plainfield and in Piscataway there  
18 are restraints pending which serve to preserve the  
19 scarce available municipal land for lower income  
20 housing. In my view, these restraints will be  
21 the less by transfer; and in the interim period,  
22 further development will occur. Whether they could  
23 be reinstated is a very, very questionable issue  
24 under the Act.

25 Most importantly, and indeed of predominant

1 importance in these cases, is the status of each  
2 case -- and that's why I took the time I did to  
3 review it -- and the inevitable delay which must  
4 be caused by the transfer.

5 As the facts which I have recited show, each  
6 of the cases before this Court are near completion.  
7 The Court's best estimate is that they could be  
8 done in anywhere from a month to six months. And  
9 even if that estimate is overly-optimistic, the  
10 time span is significantly shorter than the approxi-  
11 mate nearly two-year process through the Council.

12 Delay equates to postponing the day that  
13 the realistic opportunity is afforded and housing  
14 is built. In each of these cases, we have builders  
15 ready to proceed, just as builders have promptly  
16 moved to get construction underway in other towns  
17 where compliance has already occurred.

18 Now, avoidance of delay at all costs should  
19 never be the goal. No one has demonstrated that  
20 the Court does not have the expertise to handle  
21 these matters and to meet the special issues in-  
22 volved.

23 It is not an issue of whether another body  
24 has that expertise in this setting. There is,  
25 rather, an issue of whether the Court lacks it. If



1 it did, that might override all of the other  
2 considerations involved in this case. I don't  
3 believe it does.

4 In Cranbury, the Court has and will make  
5 every effort to evaluate Cranbury's claim of en-  
6 vironmental and agricultural preservation. The  
7 site inspection was aimed at that goal in part, and  
8 the Master's report was sensitive to it. And it is  
9 simply incorrect to suggest that the Court cannot or  
10 will not deal adequately with the issue.

11 I will state for the record clearly that I  
12 was most impressed by the character of the community,  
13 by its prevailing rural character, and that it is  
14 incumbent upon this Court to take that into account  
15 when it reaches that posture.

16 In Piscataway's case, the Court has gone  
17 through a time-consuming and painstaking process,  
18 through an individual site inventory, a personal  
19 inspection, a prolonged case -- site-by-site  
20 hearing, in order to ensure a fair treatment in the  
21 town, and will extend that into the next compliance  
22 hearing.

23 I can't guess how a housing council would  
24 handle the Piscataway problem. I can only feel  
25 relatively assured that it is going to be handled

1 fairly and sensitively before this Court.

2 Piscataway has the opportunity given to it expressly,  
3 in the opinion of the Court, to refine its capacity  
4 to handle its fair share.

5 It should be evident, finally, that all of  
6 the municipalities who have been before this Court  
7 have been evaluated on statewide criteria which have  
8 been carefully developed and which have been  
9 challenged and rechallenged and retested through  
10 the adversary process of various cases.

11 The fact of the matter is that no one has  
12 come forward with any comprehensive alternative  
13 methodology. The methodology which is utilized  
14 leaves room for adjustments based upon absence of  
15 vacant land, environmental constraints, need for  
16 the preservation of agriculture, historical preserva-  
17 tion, recreational preservation, and other categories  
18 of land uses, prior land use patterns, prior  
19 efforts at providing a variety of housing, and  
20 many other practical and equitable considerations  
21 which would or could affect the fair share which  
22 is produced by a literal application of the  
23 methodology.

24 That flexibility has already resulted in a  
25 reduction of the Plainfield and Piscataway fair

1 share by approximately fifty and forty percent  
2 respectively, and in Monroe by a Court offer to  
3 reduce the fair share based upon the special  
4 equities involved there. It will soon be addressed  
5 in both Cranbury and Warren.

6 Thus, I can comfortably conclude that in  
7 these cases not only is it manifestly unjust to the  
8 plaintiffs to transfer these cases, but it would not  
9 be and will not be unjust to the municipalities to  
10 retain them.

11 That, of course, is not the express test of  
12 the statute. The statute talks in terms of mani-  
13 fest injustice to a party, not the absence of in-  
14 justice to another party.

15 But in reaching the conclusion, one must  
16 go through a balancing process in any event, since  
17 there may be some injustice in given cases to both  
18 sides.

19 In this case, I don't find that. I see  
20 only injustice to the plaintiffs. In this case,  
21 the balance tips dramatically one-sidedly in favor  
22 of a denial of motions to transfer.

23 The statutory test, as I said, is manifest  
24 injustice to any party. The defendants have  
25 proved -- have failed to prove the slightest

1 injustice to them, whereas the injustice to the  
2 lower income households and the plaintiffs is  
3 manifest.

4 Based upon those findings, I will accept  
5 the order from Mr. Neisser as to the four Urban  
6 League cases, from Mr. Murray as to the Warren  
7 case; and I deny the applications for transfer.

8 Any other issues will not be addressed  
9 today. If there is to be an application for a stay  
10 of the Court's ruling for the purposes of appeal,  
11 it is denied for the reasons expressed in this  
12 opinion.

13 One at a time. Let's just . . . .  
14 Mr. Coley.

15 MR. COLEY: What's -- I am not asking the  
16 Court to give me a legal opinion on this, but do  
17 you believe that this motion as it was made is  
18 under the aspects of the Mount Laurel case where  
19 there's no interim appeals made in a case?

20 THE COURT: I can't give you a legal opinion.  
21 That's why I said if there's an application for a  
22 stay, I wouldn't deal with it. And I assumed you  
23 would first make that application. I think if there  
24 is any stay, the Appellate Division should consider  
25 it in light of the issue as to whether you have a

1 right to appeal in the first place and, secondly,  
2 in light of the issue of whether a stay is ap-  
3 propriate, given the status of these cases as I have  
4 set them forth.

5 Was there another defendant's counsel?

6 Mr. Paley?

7 MR. PALEY: Your Honor, I have another issue  
8 that I'd like --

9 THE COURT: All right. Mr. Neisser.

10 MR. NEISSER: Yes. I would request the  
11 lifting of the prior -- of the Court's prior stay  
12 in its August 9th order as to South Plainfield,  
13 which stayed the effectiveness of their ordinances,  
14 zoning and affordable housing ordinances, pending  
15 decision of the transfer motion.

16 Now that that's been decided, I would re-  
17 quest that the stay be vacated.

18 THE COURT: I thought that was automatically  
19 in the order. I thought it said it will remain  
20 in effect until this -- until it is heard, stay  
21 the vacated --

22 MR. NEISSER: I would request Your Honor  
23 could set a date for hearing of the other motion  
24 of Cranbury, which is the builder's remedy moratorium,  
25 so that we can move forward towards compliance

1 hearing.

2 THE COURT: I will do my best. In all  
3 candor, I'm swamped, and I do intend, as I have  
4 indicated today, to set a date for the Cranbury  
5 hearing. And that should be, and please get ready,  
6 toward the end of October.

7 I intend to set a very short date for the  
8 Plainfield hearing, South Plainfield hearing. And  
9 I have another eight transfer motions which I have  
10 to deal with, three more on Friday. So just be  
11 patient with me. I'll do my best.

12 If I may say, off the record . . . .

13 (Whereupon a brief discussion was held off  
14 the record.)

15 MR. SANTORO: Your Honor, when will Your  
16 Honor decide the other issue of the restraints  
17 that are currently on South Plainfield as far as  
18 the non-Mount Laurel lands, so that when the phone  
19 calls start coming in, I can advise them accordingly?  
20 This is the borough property that's not in the  
21 inventory, that's --

22 THE COURT: Do you have any objection to  
23 that, Mr. Neisser, as to the sales by the borough?

24 MR. NEISSER: Oh, yes, I certainly do.

25 THE COURT: Not the sales.

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MR. NEISSER: The stay.

THE COURT: Any non-municipal lands not included in the compliance package can be removed from the stay.

MR. NEISSER: I thought they -- that stay was lifted by Your Honor on August 9th.

MR. SANTORO: Bidding permits were. We are talking now about the completion of transactions of land sales involving borough land that was not included in the Mount Laurel inventory.

MR. PALEY: Your Honor, I had a motion which was addressed to the blanket restraints on Piscataway, which I understand Your Honor has not decided and will reserve for another day. Mr. Salsburg's partner was here earlier this morning, and left when you indicated that you would not address any other motions.

On his behalf, I would ask that at least his application, which he by letter had renewed for that particular parcel, be disposed of relatively expeditiously.

THE COURT: Do my best, although I have a tough time with removing any restraints in Piscataway, but I will do my best. You can pass that dicta on to him.

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MR. PALEY: Thank you, Your Honor.

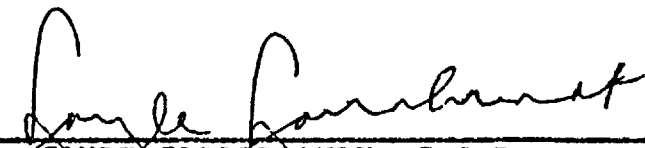
THE COURT: Okay. Anything further, gentlemen? Thank you for your patience and for your interesting arguments.

(End of proceedings.)

\* \* \* \*

C E R T I F I C A T E

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.

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

Date: 10-18-85

PENGAD CO., BAYONNE, N.J. 07002 - FORM SEL 6402



EXHIBIT B

C 222-1

C. 52:27D-301 et al.

P. L. 1985, CHAPTER 222, *approved July 2, 1985*

Senate Committee Substitute For  
1985 Senate Nos. 2046 and 2334 (*Second Official Copy Reprint*)

AN ACT concerning housing, **\*\*[and]\*\*** making an appropriation  
**\*\*and amending P. L. 1975, c. 291\*\***.

1 BE IT ENACTED *by the Senate and General Assembly of the State*  
2 *of New Jersey:*

1 1. This act shall be known and may be cited as the "Fair Housing  
2 Act."

1 2. The Legislature finds that:

2 a. The New Jersey Supreme Court, through its rulings in *South*  
3 *Burlington County NAACP v. Mount Laurel*, 67 N.J. 151 (1975)  
4 and *South Burlington County NAACP v. Mount Laurel*, 92 N.J.  
5 158 (1983), has determined that every municipality in a growth  
6 area has a constitutional obligation to provide **\*\*through its land**  
7 **use regulations\*\*** a realistic opportunity for a fair share of its  
8 region's present and prospective needs for housing for low and  
8A moderate income families.

9 b. In the second Mount Laurel ruling, the Supreme Court stated  
10 that the determination of the methods for satisfying this consti-  
11 tutional obligation "is better left to the Legislature," that the court  
12 has "always preferred legislative to judicial action in their field,"  
13 and that the judicial role in upholding the Mount Laurel doctrine  
14 "could decrease as a result of legislative and executive action."

15 c. The interest of all citizens, including low and moderate income  
16 families in need of affordable housing, would be best served by  
17 a comprehensive planning and implementation response to this  
18 constitutional obligation.

19 d. There are a number of essential ingredients to a comprehen-  
20 sive planning and implementation response, including the estab-

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill  
is not enacted and is intended to be omitted in the law.

Matter printed in italics *thus* is new matter.

Matter enclosed in asterisks or-stars has been adopted as follows:

\*—Assembly committee amendments adopted February 28, 1985.

\*\*—Senate amendments adopted in accordance with Governor's recommenda-  
tions May 13, 1985.

21 lishment of reasonable fair share housing guidelines and standards,  
22 the initial determination of fair share by officials at the municipal  
23 level and the preparation of a municipal housing element, State  
24 review of the local fair share study and housing element, and con-  
25 tinuous State funding for low and moderate income housing to  
26 replace the federal housing subsidy programs which have been  
27 almost completely eliminated.

28 e. The State can maximize the number of low and moderate  
29 income units provided in New Jersey by allowing its municipalities  
30 to adopt appropriate phasing schedules for meeting their fair  
31 share, so long as the municipalities permit a timely achievement  
32 of an appropriate fair share of the regional need for low and  
33 moderate income housing as required by the Mt. Laurel I and II  
34 opinions.

35 f. The State can, also, maximize the number of low and moderate  
36 income units by rehabilitating existing, but substandard, housing  
37 in the State, and, in order to achieve this end, it is appropriate  
38 to permit the transfer of a limited portion of the fair share obli-  
39 gations among municipalities in a housing region, so long as the  
40 transfer occurs on the basis of sound comprehensive planning,  
41 with regard to an adequate housing financing plan, and in relation  
42 to the access of low and moderate income households to employ-  
43 ment opportunities.

44 \*\*g. Since the urban areas are vitally important to the State,  
45 construction, conversion and rehabilitation of housing in our urban  
46 centers should be encouraged. However, the provision of housing  
47 in urban areas must be balanced with the need to provide housing  
48 throughout the State for the free mobility of citizens.

49 h. The Supreme Court of New Jersey in its Mount Laurel deci-  
50 sion demands that municipal land use regulations affirmatively  
51 afford a reasonable opportunity for a variety and choice of housing  
52 including low and moderate cost housing, to meet the needs of peo-  
53 ple desiring to live there. While provision for the actual construc-  
54 tion of that housing by municipalities is not required, they are en-  
55 couraged but not mandated to expend their own resources to help  
56 provide low and moderate income housing.\*\*

1 3. The Legislature declares that the statutory scheme set forth  
2 in this act is in the public interest in that it comprehends a low  
3 and moderate income housing planning and financing mechanism  
4 in accordance with regional considerations and sound planning  
5 concepts which satisfies the constitutional obligation enunciated  
6 by the Supreme Court. *\*The Legislature declares that the State's*  
7 *preference for the resolution of existing and future disputes in-*

8 *volving exclusionary zoning is the mediation and review process*  
9 *set forth in this act and not litigation, and that it is the intention of*  
10 *this act to provide various alternatives to the use of the builder's*  
11 *remedy as a method of achieving fair share housing.\**

1 4. As used in this act:

2 a. "Council" means the Council on Affordable Housing estab-  
3 lished in this act, which shall have primary jurisdiction for the  
4 administration of housing obligations in accordance with sound  
5 regional planning considerations in this State.

6 b. "Housing region" means a geographic area of no less than  
7 two nor more than four contiguous, whole counties which exhibit  
8 significant social, economic and income similarities, and which  
9 constitute to the greatest extent practicable the primary metro-  
10 politan statistical areas as last defined by the United States Census  
11 Bureau prior to the effective date of this act.

12 c. "Low income housing" means housing affordable according  
13 to federal Department of Housing and Urban Development or  
14 other recognized standards for home ownership and rental costs  
15 and occupied or reserved for occupancy by households with a gross  
16 household income equal to 50% or less of the median gross house-  
17 hold income for households of the same size within the housing  
18 region in which the housing is located.

19 d. "Moderate income housing" means housing affordable accord-  
20 ing to federal Department of Housing and Urban Development  
21 or other recognized standards for home ownership and rental costs  
22 and occupied or reserved for occupancy by household with a gross  
23 household income equal to more than 50% but less than 80% of the  
24 median gross household income for households of the same size  
25 within the housing region in which the housing is located.

26 e. "Resolution of participation" means a resolution adopted by  
27 a municipality in which the municipality chooses to prepare a fair  
28 share \***[study]**\* \**plan*\* and housing element in accordance with  
28A this act.

29 f. "Inclusionary development" means a residential housing de-  
30 velopment in which a substantial percentage of the housing units  
31 are provided for a reasonable income range of low and moderate  
32 income households.

33 g. "Conversion" means the conversion of existing commercial,  
34 industrial, or residential structures for low and moderate income  
35 housing purposes where a substantial percentage of the housing  
36 units are provided for a reasonable income range of low and  
37 moderate income households.

38 h. "Development" means any development for which permission

39 may be required pursuant to the "Municipal Land Use Law," P. L.  
40 1975, c. 291 (C. 40:55D-1 et seq.).

41 \*i. "Agency" means the New Jersey Mortgage and Housing  
42 Finance Agency established by P. L. 1983, c. 530 (C. 55:14K-1  
43 et seq.).\*

44 \*\*j. "Prospective Need" means a projection of housing needs  
45 based on development and growth which is reasonably likely to  
46 occur in a region or a municipality, as the case may be, as a result  
47 of actual determination of public and private entities. In deter-  
48 mining prospective need consideration shall be given to approvals  
49 of development application, real property transfers and economic  
50 projections prepared by the State Planning Commission established  
51 by P. L. . . . , c. . . . (now pending before the Legislature as Senate  
52 Bill No. 1464 of 1984).\*\*

1 5. a. There is established in, but not of, the Department of Com-  
2 munity Affairs a Council on Affordable Housing to consist of  
3 nine members appointed by the Governor with the advice and con-  
4 sent of the State, of whom four shall be elected officials represent-  
5 ing the interests of local government, at least one of whom shall be  
6 representative of an urban municipality having a population in  
7 excess of 40,000 persons and a population density in excess of  
8 3,000 persons per square mile, and no more than one of whom  
9 may be a representative of the interests of county government;  
10 \*\*[three]\*\* \*\*two\*\* shall represent the interests of households in  
11 need of low and moderate housing, \*\*[at least]\*\* one of whom  
12 shall represent the interests of the builders of low and moderate  
13 income housing, and shall have an expertise in land use practices  
14 and housing issues *\*\*and one of whom shall be the executive director*  
15 *of the agency, serving ex officio*\*\* ; and \*\*[two]\*\* \*\*three\*\* shall  
16 represent the public interest. Not more than five of the nine shall  
17 be members of the same political party. The membership shall be  
17A balanced to the greatest extent practicable among the various hous-  
17B ing regions of the State.

18 b. The members shall serve for terms of six years, except that  
19 of the members first appointed, two shall serve for terms of four  
20 years, three for terms of five years, and \*\*[four]\*\* \*\*three\*\* for  
21 terms of six years. All members shall serve until their respective  
22 successors are appointed and shall have qualified. Vacancies shall  
23 be filled in the same manner as the original appointment, but for  
24 the remainder of the unexpired term only.

25 c. The members *\*\*excluding the executive director of the*  
26 *agency*\*\* shall be compensated at the rate of \$150.00 for each six-  
27 hour day, or prorated portion thereof for more or less than six

28 hours, spent in attendance at meetings and consultations and all  
29 members shall be eligible for reimbursement for necessary ex-  
30 penses incurred in connection with the discharge of their duties.

31 d. The Governor shall **\*[appoint]\*** *\*nominate\** the members  
32 within 30 days of the effective date of this act and shall designate a  
33 member to serve as chairman throughout the member's term of  
34 office and until his successor shall have been appointed and qualified.

35 e. Any member may be removed from office for misconduct in  
36 office, willful neglect of duty, or other conduct evidencing unfitness  
37 for the office, or for incompetence. A proceeding for removal may  
38 be instituted by the Attorney General in the Superior Court. A  
39 member or employee of the council shall automatically forfeit his  
40 office or employment upon conviction of any crime. Any member  
41 or employee of the council shall be subject to the duty to appear  
42 and testify and to removal from his office or employment in accor-  
43 dance with the provisions of P. L. 1970, c. 72 (C. 2A:81-17.2a  
44 et seq.).

1 6. a. The council may establish, and from time to time alter, such  
2 plan of organization as it may deem expedient, and may incur  
3 expenses within the limits of funds available to it.

4 b. The council shall elect annually by a majority of its members  
5 one of its members, other than the chairman, to serve as vice-  
6 chairman for a term of one year and until his successor is elected.  
7 The vice-chairman shall carry out all of the responsibilities of the  
8 chairman as prescribed in this act during the chairman's absence,  
9 disqualification or inability to serve.

10 c. The council shall appoint and fix the salary of an executive  
11 director who shall serve at its pleasure. The council may employ  
12 such other personnel as it deems necessary. All employees of  
13 the council shall be in the unclassified service of the Civil Service.  
14 The council may employ legal counsel who shall represent it in  
15 any proceeding to which it is a party, and who shall render legal  
16 advice to the council. The council may contract for the services  
17 of other professional, technical and operational personnel and  
18 consultants as may be necessary to the performance of its duties.  
19 **\*[Members and employees]\*** *\*Employees\** shall be enrolled in the  
20 Public Employees Retirement System of New Jersey established  
21 under P. L. 1954, c. 84 (C. 43:15A-1 et seq.).

1 7. It shall be the duty of the council, **\*[six]\*** *\*seven\** months after  
2 the **\*\*[effective date of this act]\*\*** *\*\*confirmation of the last mem-*  
2A *ber initially appointed to the council, or January 1, 1986, whichever*  
2B *is earlier\*\**, and from time to time thereafter, to:

3 a. Determine housing regions of the State **\*[**, in the establishment

4 of which the council shall give particular attention to the recom-  
5 mendations of the Center for Urban Policy Research, Rutgers,  
6 the State University]\*;

7 b. Estimate the present and prospective need for low and  
8 moderate income housing at the State and regional level;

9 c. Adopt criteria and guidelines for:

10 (1) Municipal determination of its present and prospective fair  
11 share of the housing need in a given region\*. *Municipal fair share*  
11A *shall be determined after crediting on a one to one basis each*  
11B *current unit of low and moderate income housing of adequate*  
11C *standard, including any such housing constructed or acquired as*  
11D *part of a housing program specifically intended to provide housing*  
11E *for low and moderate income households\*;*

12 (2) Municipal adjustment of the present and prospective fair  
13 share based upon available vacant and developable land, infra-  
14 structure considerations or \*environmental or\* historic preserva-  
15 tion factors \*\*and adjustments shall be made whenever:

16 (a) *The preservation of historically or important architecture*  
17 *and sites and their environs or environmentally sensitive lands may*  
18 *be jeopardized,*

19 (b) *The established pattern of development in the community*  
20 *would be drastically altered,*

21 (c) *Adequate land for recreational, conservation or agricultural*  
22 *and farmland preservation purposes would not be provided,*

23 (d) *Adequate open space would not be provided,*

24 (e) *The pattern of development is contrary to the planning desig-*  
25 *nations in the State Development and Redevelopment Plan pre-*  
26 *pared pursuant to P. L. . . . , c. . . . (now pending before the Legis-*  
27 *lature as Senate Bill No. 1464 of 1984),*

28 (f) *Vacant and developable land is not available in the munici-*  
29 *pality, and*

30 (g) *Adequate public facilities and infrastructure capacities are*  
31 *not available, or would result in costs prohibitive to the public if*  
32 *provided\*\*;* and

33 (3) Phasing of present and prospective fair share housing re-  
34 quirements pursuant to section 23 of this act.

35 d. Provide population and household projections for the State  
36 and housing regions.

37 \*\*e. May in its discretion, place a limit, based on a percentage  
38 of existing housing stock in a municipality and any other criteria  
39 including employment opportunities which the council deems ap-  
40 propriate, upon the aggregate number of units which may be allo-  
41 cated to a municipality as its fair share of the region's present and  
42 prospective need for low and moderate income housing.\*\*

43 In carrying out the above duties, *\*including, but not limited to,*  
 44 *present and prospective need estimations\** the council shall give  
 45 appropriate weight to pertinent research studies, government  
 46 reports, decisions of other branches of government, implementation  
 47 of the State Development and Redevelopment Plan prepared pur-  
 48 suant to P. L. . . . , c. . . . (now pending before the Legislature as  
 49 Senate Bill No. 1464 of 1984) and public comment. *\*To assist the*  
 50 *council, the State Planning Commission established under that act*  
 51 *shall provide the council annually with economic growth, develop-*  
 52 *ment and decline projections for each housing region for the next*  
 53 *six years.\** The council shall develop procedures for periodically  
 54 adjusting regional need based upon the low and moderate income  
 55 housing that is provided in the region through **\*\*[the Fair Hous-**  
 56 **ing Trust Fund Account established in section 20 of this act or]\*\***  
 57 any **\*\*[other]\*\*** federal, State, municipal or private housing pro-  
 58 gram.

1 8. Within four months after the **\*\*[effective date of this act]\*\***  
 2 **\*\*confirmation of the last member initially appointed to the council,**  
 3 **or January 1, 1986, whichever is earlier\*\***, the council shall, in ac-  
 4 cordance with the "Administrative Procedure Act," P. L. 1968,  
 5 c. 410 (C. 52:14B-1 et seq.), **\*[adopt]\*\* \*propose\*** procedural rules.

1 9. *\*a.\** Within four months after the effective date of this act, each  
 2 municipality which so elects shall, by a duly adopted resolution  
 3 of participation, notify the council of its intent to submit to the  
 4 council its fair share housing plan. Within **\*[four]\*\* \*five\*** months  
 5 after the council's adoption of its criteria and guidelines, the muni-  
 6 cipality shall prepare and file with the council a housing element,  
 7 based on the council's criteria and guidelines, and any  
 8 **\*\*[adopted]\*\* \*\*fair share housing\*\* ordinance **\*\*[revisions]\*\*****  
 8A **\*\*introduced and given first reading and second reading in a hear-**  
 8B **ing pursuant to R. S. 40:49-2\*\*** which **\*\*[implement]\*\* \*\*imple-**  
 8C **ments\*\*** the housing element.

9 *\*b.\** A municipality which does not notify the council of its parti-  
 10 cipation within four months may do so at any time thereafter. In  
 11 any exclusionary zoning litigation instituted against such a mu-  
 12 nicipality, however, there shall be no exhaustion of administrative  
 13 remedy requirements pursuant to section 16 of this act unless the  
 14 municipality also files its fair share plan and housing element with  
 15 the council prior to the institution of the litigation.

1 10. A municipality's housing element shall be designed to achieve  
 2 the goal of access to affordable housing to meet present and  
 3 **\*[future]\*\* \*prospective\*** housing needs, with particular attention  
 4 to low and moderate income housing, and shall contain at least:

5 a. An inventory of the municipality's housing stock by age,  
6 condition, purchase or rental value, occupancy characteristics, and  
7 type, including the number of units affordable to low and moderate  
8 income household *\*\*and substandard housing capable of being re-*  
8A *habilitated, and in conducting this inventory the municipality shall*  
8B *have access, on a confidential basis for the sole purpose of conduct-*  
8C *ing the inventory, to all necessary property tax assessment records*  
8D *and information in the assessor's office, including but not limited*  
8E *to the property record cards\*\*;*

9 b. A projection of the municipality's housing stock, including the  
10 probable future construction of low and moderate income housing,  
11 for the next six years, taking into account, but not necessarily  
12 limited to, construction permits issued, approvals of applications  
13 for development and probable residential development of lands;

14 c. An analysis of the municipality's demographic characteristics,  
15 including but not necessarily limited to, household size, income  
16 level and age;

17 d. An analysis of the existing and probable future employment  
18 characteristics of the municipality;

19 e. A determination of the municipality's present and prospective  
20 fair share for low and moderate income housing and its capacity  
21 to accommodate its present and prospective housing needs, includ-  
22 ing its fair share for low and moderate income housing; and

23 f. A consideration of the lands that are most appropriate for  
24 construction of low and moderate income housing and of the exist-  
25 ing structures most appropriate for conversion to, or rehabilitation  
26 for, low and moderate income housing, including a consideration of  
27 lands of developers who have expressed a commitment to provide  
28 low and moderate income housing.

1 11. a. In adopting its housing element, the municipality may  
2 provide for its fair share of low and moderate income housing  
3 by means of any technique or combination of techniques which pro-  
4 vide a realistic opportunity for the provision of the fair share. The  
5 housing element shall contain an analysis demonstrating that it  
6 will provide such a realistic opportunity, and the municipality  
7 shall establish that its land use and other relevant ordinances have  
8 been revised to incorporate the provisions for low and moderate  
9 income housing. In preparing the housing element, the municipality  
10 shall consider the following techniques for providing low and  
11 moderate income housing within the municipality, as well as such  
12 other techniques as may be published by the council or proposed  
13 by the municipality:

14 (1) Rezoning for densities necessary to assure the economic



15 viability of any inclusionary developments, either through manda-  
16 tory set asides or density bonuses, as may be necessary to meet  
17 all or part of the municipality's fair share;

18 (2) Determination of the total residential zoning necessary to  
19 assure that the municipality fair share is achieved;

20 (3) Determination of measures that the municipality will take  
21 to assure that low and moderate income units remain affordable  
22 to low and moderate income households **\*[over a 30-year period]\***  
22A *\*for an appropriate period of not less than six years\**;

23 (4) A plan for infrastructure expansion and rehabilitation if  
24 necessary to assure the achievement of the municipality's fair  
25 share of low and moderate income housing;

26 (5) Donation or use of municipally owned land or land con-  
27 demned by the municipality for purposes of providing low and  
28 moderate income housing;

29 (6) Tax abatements for purposes of providing low and moderate  
30 income housing;

31 (7) Utilization of funds obtained from **\*\*[the Fair Housing**  
32 **Trust Fund Account established pursuant to section 20 of this act**  
33 **or]\*\*** any **\*\*[other]\*\*** State or federal subsidy toward the con-  
34 struction of low and moderate income housing; and

35 (8) Utilization of municipally generated funds toward the con-  
36 struction of low and moderate income housing.

37 b. The municipality may provide for a phasing schedule for the  
38 achievement of its fair share of low and moderate income housing  
39 which is not inconsistent with section 23 of this act.

40 c. The municipality may propose that a portion of its fair share  
41 be met through a regional contribution agreement. The housing  
42 element shall demonstrate, however, the manner in which that  
43 portion will be provided within the municipality if the regional  
44 contribution agreement is not entered into. The municipality shall  
45 provide a statement of its reasons for the proposal.

46 *\*d. Nothing in this act shall require a municipality to raise or*  
47 *expend municipal revenues in order to provide low and moderate*  
48 *income housing.\**

1 12. a. A municipality may propose the transfer of up to  
2 **\*\*[33 $\frac{1}{3}$ %]\*\*** **\*\*50%\*\*** of its fair share to another municipality  
3 within its housing region by means of a contractual agreement into  
4 which two municipalities voluntarily enter. A municipality pro-  
5 posing to transfer to another municipality shall provide the council  
6 with the housing element and statement required under subsection  
7 c. of section 11 of this act, and shall request the council to deter-  
8 mine a match with a municipality filing a statement of intent pur-

9 suant to subsection e. of this section. Except as provided in sub-  
10 section b. of this section, the agreement may be entered into upon  
11 obtaining substantive certification under section 14 of this act, or  
12 anytime thereafter. The regional contribution agreement entered  
13 into shall specify how the housing shall be provided by the second  
14 municipality, hereinafter the receiving municipality, and the amount  
15 of contributions to be made by the first municipality, hereinafter  
16 the sending municipality.

17 b. A municipality which is a defendant in an exclusionary zoning  
18 suit and which has not obtained substantive certification pursuant  
19 to this act may request the court to be permitted to fulfill a portion  
20 of its fair share by entering into a regional contribution agree-  
21 ment. If the court believes the request to be reasonable, the court  
22 shall request the council to review the proposed agreement and  
23 to determine a match with a receiving municipality or municipi-  
24 talities pursuant to this section. The court may establish time  
25 limitations for the council's review, and shall retain jurisdiction  
26 over the matter during the period of council review. If the court  
27 determines that the agreement provides a realistic opportunity  
28 for the provision of low and moderate income housing within the  
29 housing region, it shall provide the sending municipality a credit  
30 against its fair share for housing to be provided through the  
31 agreement in the manner provided in this section.

32 The agreement shall be entered into prior to the entry of a final  
33 judgment in the litigation. In cases in which a final judgment was  
34 entered prior to the date this act takes effect and in which an  
35 appeal is pending, a municipality may request consideration of a  
36 regional contribution agreement provided that it is entered into  
37 within 120 days after this act takes effect. In a case in which a  
38 final judgment has been entered, the court shall consider whether  
39 or not the agreement constitutes an expeditious means of provid-  
40 ing part of the fair share.

41 c. Regional contribution agreements shall be approved by the  
42 council, after review by the county planning board or agency of  
43 the county in which the receiving municipality is located. The  
44 council shall determine whether or not the agreement provides  
45 a realistic opportunity for the provision of low and moderate  
46 income housing within convenient access to employment oppor-  
47 tunities. The council shall refer the agreement to the county plan-  
48 ning board or agency which shall review whether or not the  
49 transfer agreement is in accordance with sound comprehensive  
50 regional planning. In its review, the county planning board or  
51 agency shall consider the master plan and zoning ordinance of

52 the sending and receiving municipalities, its own county master  
53 plan, and the State development and redevelopment plan. \*\*[The  
54 county planning board or agency shall receive a fee from the Fair  
55 Housing Trust Fund to reimburse it for the expenses of reviewing  
56 the regional contribution agreement.]\*\* In the event that there is  
57 no county planning board or agency in the county in which the  
58 receiving municipality is located, the council shall also determine  
59 whether or not the agreement is in accordance with sound com-  
60 prehensive regional planning. After it has been determined that  
61 the agreement provides a realistic opportunity for low and mod-  
62 erate income housing within convenient access to employment  
63 opportunities, and that the agreement is consistent with sound  
64 comprehensive regional planning, the council shall approve the  
65 regional contribution agreement by resolution. All determinations  
66 of a county planning board or agency shall be in writing and shall  
67 be made within such time limits as the council may prescribe,  
68 beyond which the council shall make those determinations and no  
69 fee shall be paid to the county planning board or agency pursuant  
70 to this subsection.

71 d. In approving a regional contribution agreement, the council  
72 shall set forth in its resolution a schedule of the contributions to  
73 be appropriated annually by the sending municipality. A copy of  
74 the adopted resolution shall be filed promptly with the Director  
75 of the Division of Local Government Services in the Department  
76 of Community Affairs, and the director shall thereafter not approve  
77 an annual budget of a sending municipality if it does not include  
78 appropriations necessary to meet the terms of the resolution.  
79 Amounts appropriated by a sending municipality for a regional  
80 contribution agreement pursuant to this section are exempt from  
81 the limitations or increases in final appropriations imposed under  
82 P. L. 1976, c. 68 (C. 40A:4-45.1 et seq.).

83 e. The council shall maintain current lists of municipalities which  
84 have stated an intent to enter into regional contribution agreements  
85 as receiving municipalities, and shall establish procedures for  
86 filing statements of intent with the council. No receiving munici-  
87 pality shall be required to accept a greater number of low and  
88 moderate income units through an agreement than it has expressed  
89 a willingness to accept in its statement, but the number stated  
90 shall not be less than a reasonable minimum number of units, not  
91 to exceed 100, as established by the council. The council shall  
92 require a project plan from a receiving municipality prior to the  
93 entering into of the agreement, and shall submit the project plan  
94 to the \*[Department of Community Affairs]\* \*agency\* for its

95 review as to the feasibility of the plan prior to the council's  
96 approval of the agreement. The **\*[department]\*** *agency* may  
97 recommend and the council may approve as part of the project plan  
98 a provision that the time limitations for contractual guarantees or  
99 resale controls for low and moderate income units included in the  
100 project shall be less than 30 years, if it is determined that modifica-  
101 tion is necessary to assure the economic viability of the project.

102 f. The council shall establish guidelines for the duration and  
103 amount of contributions in regional contribution agreements. In  
104 doing so, the council shall give substantial consideration to the  
105 average of: (1) the median amount required to rehabilitate a  
106 low and moderate income unit up to code enforcement standards;  
107 (2) the average internal subsidization required for a developer to  
108 provide a low income housing unit in an inclusionary development;  
109 (3) the average internal subsidization required for a developer to  
110 provide a moderate income housing unit in an inclusionary develop-  
111 ment. Contributions may be prorated in municipal appropriations  
112 occurring over a period not to exceed six years *\*\*and may include*  
113 *an amount agreed upon to compensate or partially compensate the*  
114 *receiving municipality for infrastructure or other costs generated*  
114A *to the receiving municipality by the development\*\**. Appropria-  
114B tions shall be made and paid directly to the receiving municipality  
114C or municipalities.

115 g. The council shall require receiving municipalities to file an-  
116 nual reports with the **\*[Department of Community Affairs]\***  
117 *agency* setting forth the progress in implementing a project  
118 funded under a regional contribution agreement, and the **\*[depart-**  
119 **ment]\*** *agency* shall provide the council with its evaluation of  
120 each report. The council shall take such actions as may be necessary  
121 to enforce a regional contribution agreement with respect to the  
122 timely implementation of the project by the receiving municipality.

1 13. A municipality which has filed a housing element may, at any  
2 time during a six year period following the filing of the housing  
3 element, petition the council for a substantive certification of its  
4 element and ordinances or institute an action for declaratory judg-  
5 ment granting it six-year repose in the Superior Court. The mu-  
6 nicipality shall publish notice of its petition in a newspaper of  
7 general circulation within the municipality and county and shall  
8 make available to the public information on the element and ordi-  
9 nances in accordance with such procedures as the council shall  
10 establish. The council shall also establish a procedure for pro-  
11 viding public notice of each petition which it receives.

1 14. Unless an objection to the substantive certification is filed

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2 with the council by any person within 45 days of the publication  
3 of the notice of the municipality's petition, the council shall review  
4 the petition and shall issue a substantive certification if it shall  
5 find that:

6 a. The municipality's fair share plan is consistent with the rules  
7 and criteria adopted by the council and not inconsistent with  
8 achievement of the \***[region's]**\* low and moderate income housing  
9 needs *\*of the region as adjusted pursuant to the council's criteria*  
9A *and guidelines adopted pursuant to subsection c. of section 7 of this*  
9B *act\**; and

10 b. The combination of the elimination of unnecessary housing  
11 cost generating features from the municipal land use ordinances  
12 and regulations, and the affirmative measures in the housing  
13 element and implementation plan make the achievement of the  
14 municipality's fair share of low and moderate income housing  
15 realistically possible after allowing for the implementation of any  
16 regional contribution agreement approved by the council.

17 In conducting its review, the council may meet with the munici-  
18 pality and may deny the petition or condition its certification upon  
19 changes in the element or ordinances. *\*Any denial or conditions for*  
20 *approval shall be in writing and shall set forth the reasons for the*  
21 *denial or conditions.\** If, within 60 days of the council's denial or  
22 conditional approval, the municipality refiles its petition with  
23 changes satisfactory to the council, the council shall issue a sub-  
24 stantive certification.

25 *\*\*Once substantive certification is granted the municipality shall*  
26 *have 45 days in which to adopt its fair share housing ordinance*  
27 *approved by the council.\*\**

1 15. a. The council shall engage in a mediation and review process  
2 in the following situations: (1) if an objection to the municipality's  
3 petition for substantive certification is filed with the council within  
4 the time specified in section 14 of this act; or (2) if a request for  
5 mediation and review is made pursuant to section 16 of this act.

6 b. In cases in which an objection is filed to substantive certifica-  
7 tion the council shall meet with the municipality and the objectors  
8 and attempt to mediate a resolution of the dispute. If the media-  
9 tion is successful, the council shall issue a substantive certification  
10 if it finds that the criteria of section 14 of this act have been met.

11 c. If the mediation efforts are unsuccessful, **\*\*[**then the council  
12 shall conduct a review process in which objectors shall have the  
13 right to present their objections in the form of written submissions  
14 or expert reports and a reasonable opportunity shall be given  
15 to the objectors, the municipality, and their experts to be heard,

16 but the review process shall not be considered]\*\* \*\**the matter shall*  
17 *be transferred to the Office of Administrative Law as\*\**a contested  
18 case as defined in the "Administrative Procedure Act," P. L. 1968,  
18A c. 410 (C. 52:14B-1 et seq.).

19 \*\*[The council may impose reasonable time limitations, such as  
20 one or two days, or such other period as the council determines to  
21 be appropriate in a particular case, upon the length of the hearing.  
22 The council may also impose reasonable limitations upon the  
23 length of presentation by both the municipality and by the ob-  
24 jectors who challenge the adequacy of the housing element or the  
25 revisions of the land use ordinance, and upon the length of cross  
26 examination. The review process may be conducted by a panel of  
27 three council members, one from each category, \*[staff,]\* or an  
28 administrative law judge, as the council determines. After consider-  
29 ing the submissions, reports, and testimony, the council, or a panel  
30 of three council members consisting of one local government, one  
31 housing and one public member, shall determine whether to grant  
32 substantive certification pursuant to section 14 of this act, to deny  
33 the petition, or to grant conditional approval. The representative  
34 of an urban municipality shall be considered a public member  
35 for the purpose of establishing panels. The council shall give  
36 detailed reasons for its decision. Any appeal of a council decision  
37 granting or denying substantive certification shall be to a trial  
38 court, which shall conduct an adjudicatory hearing.

39 d. In review and mediation processes instituted in accordance  
40 with section 16 of this act, the council shall attempt to mediate a  
41 resolution of the dispute between the litigants, provided that no  
42 agreement shall be entered by which a developer provides less  
43 than a substantial percentage of low and moderate income housing.  
44 The mediation process shall commence as soon as possible after  
45 the request for mediation and review is made, but in no case prior  
46 to the council's determination of housing regions and needs pur-  
47 suant to section 7 of this act. In the event that the mediation  
48 between the litigants is successful, the municipality shall have the  
49 option of choosing whether or not to also seek substantive certi-  
50 fication as provided in section 13 of this act. If mediation is not  
51 successful, the council shall conduct a review process as set forth  
52 in subsection c. to determine whether or not the municipality is  
53 entitled to substantive certification.])\*\* \*\*The Office of Administra-  
54 tive Law shall expedite its hearing process as much as practicable  
55 by promptly assigning an administrative law judge to the matter;  
56 promptly scheduling an evidentiary hearing; expeditiously conduct-  
57 ing and concluding the evidentiary hearing; limiting the time al-

58 lotted for briefs, proposed findings of fact, conclusions of law, forms  
59 of order or other disposition, or other supplemental material; and  
60 the prompt preparation of the initial decision. A written transcript  
61 of all oral testimony and copies of all exhibits introduced into evi-  
62 dence shall be submitted to the council by the Office of Adminis-  
63 trative Law simultaneously with a copy of the initial decision. The  
64 evidentiary hearing shall be concluded and the initial decision issued  
65 no later than 90 days after the transmittal of the matter as a con-  
66 tested case to the Office of Administrative Law by the council, un-  
67 less the time is extended by the Director of Administrative Law for  
68 good cause shown.\*\*

1 16. For those exclusionary zoning cases instituted more than 60  
2 days before the effective date of this act, \*[no exhaustion of the  
3 review and mediation procedures established in sections 14 and 15  
4 of this act shall be required unless the court determines that a  
5 transfer of the case to the council is likely to facilitate and expedite  
6 the provision of a realistic opportunity for low and moderate  
7 income housing]\* *any party to the litigation may file a motion with*  
8 *the court to seek a transfer of the case to the council. In determining*  
9 *whether or not to transfer, the court shall consider whether or not*  
10 *the transfer would result in a manifest injustice to any party to the*  
11 *litigation\**. If the municipality fails to file a housing element and  
11A fair share plan with the council within \*[four]\* *five* months from  
11B the date of transfer, or promulgation of criteria and guidelines by  
11C the council pursuant to section 7 of this act, whichever occurs later,  
11D jurisdiction shall revert to the court.

12 b. Any person who institutes litigation less than 60 days before  
13 the effective date of this act or after the effective date of this act  
14 challenging a municipality's zoning ordinance with respect to the  
15 opportunity to provide for low or moderate income housing, shall  
16 file a notice to request review and mediation with the council  
17 pursuant to sections 14 and 15 of this act. In the event that the  
18 municipality adopts a resolution of participation within the period  
19 established in *subsection a. of* section 9 of this act, the person  
20 shall exhaust the review and mediation process of the council be-  
21 fore being entitled to a trial on his complaint.

1 17. a. In any exclusionary zoning case filed against a municipality  
2 which has a substantive certification and in which there is a re-  
3 quirement to exhaust the review and mediation process pursuant  
4 to section 16 of this act, there shall be a presumption of validity  
5 attaching to the housing element and ordinances implementing the  
6 housing element. To rebut the presumption of validity, the com-  
7 plainant shall have the burden of proof to demonstrate *\*\*by clear*

8 *and convincing evidence*\*\* that the housing element and ordinances  
9 implementing the housing element do not provide a realistic op-  
10 portunity for the provision of the municipality's fair share of low  
11 and moderate income housing after allowing for the implementation  
12 of any regional contribution agreement approved by the council.

13 b. There shall be a presumption of validity attaching to any  
14 regional contribution agreement approved by the council. To  
15 rebut the presumption of validity, the complainant shall have the  
16 burden of proof to demonstrate *\*\*by clear and convincing evi-*  
17 *dence*\*\* that the agreement does not provide for a realistic op-  
18 portunity for the provision of low and moderate income housing  
18A within the housing region.

19 c. The council shall be made a party to any exclusionary zoning  
20 suit against a municipality which receives substantive certification,  
21 and shall be empowered to present to the court its reasons for  
22 granting substantive certification.

1 18. If a municipality which has adopted a resolution of partici-  
2 pation pursuant to section 9 of this act fails to *\*[submit]\* \*meet*  
3 *the deadline for submitting\** its housing element to the council prior  
4 to the institution of exclusionary zoning litigation, the obligation to  
5 exhaust administrative remedies contained in subsection b. of  
6 section 16 of this act automatically expires. The obligation also  
7 expires if the council rejects the municipality's request for sub-  
8 stantive certification or conditions its certification upon changes  
9 which are not made within the period established in this act or  
10 within an extension of that period agreed to by the council and all  
11 litigants.

1 19. If the council has not completed its review and mediation  
2 process for a municipality within six months of receipt of a request  
3 by a party who has instituted litigation, the party may file a motion  
4 with a court of competent jurisdiction to be relieved of the duty  
5 to exhaust administrative remedies. In the case of review and  
6 mediation requests filed within nine months after this act takes  
7 effect, the six-month completion date shall not begin to run until  
8 nine months after this act takes effect.

1 20. *\*\*[*There is established in the State General Fund an account  
2 entitled the "Fair Housing Trust Fund Account." There shall be  
3 established within that account the following subaccounts: a gen-  
4 eral account and an account for each housing region established  
5 by the council to be entitled the "(insert names of counties in the  
6 housing region) Regional Housing Trust Fund Account." Funds  
7 in the account shall be maintained by the State Treasurer and  
8 may be held in depositories as the State Treasurer may select,



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9 and be invested and reinvested as are other funds in the custody  
10 of the State Treasurer in the manner provided by law, provided  
11 that all revenues from investments shall be credited to the account.

12 The State Treasurer shall credit to the general account all  
13 moneys appropriated to the "Fair Housing Trust Fund Account"  
14 pursuant to this act and 10% of the annual amount of realty  
15 transfer fees collected pursuant to P. L. 1968, c. 49 (C. 46:15-5  
16 et seq.) and paid to the State Treasurer pursuant to section 4 of  
17 that act (C. 46:15-8).

18 There shall be credited to each regional housing trust fund  
19 account 90% of the annual amount of realty transfer fees collected  
20 pursuant to P. L. 1968, c. 49 (C. 46:15-5 et seq.) in the housing  
21 region to which a regional housing trust fund account pertains  
22 and paid to the State Treasurer pursuant to section 4 of that act  
23 (C. 46:15-8).

24 Notwithstanding any other law to the contrary, the Fair Housing  
25 Trust Fund Account shall be an eligible fund for the purposes of  
26 providing housing to low and moderate income households, and  
27 any federal, State or local government, agency or instrumentality  
28 may appropriate, deposit or invest or reinvest its funds in the  
29 account for those purposes. No such funds shall be deposited  
30 therein without the approval of the council and the State Treas-  
31 urer, and the State Treasurer shall provide for the separate  
32 maintenance, holding and accounting for those funds within the  
33 general account of the Fair Housing Trust Fund Account to the  
34 extent required by law. ]\*\* \*\*The Neighborhood Preservation Pro-  
35 gram within the Department of Community Affairs' Division of  
36 Housing and Development, established pursuant to the Commis-  
37 sioner of the Department of Community Affairs' authority under  
38 section 8 of P. L. 1975, c. 248 (C. 52:27D-149), shall establish a  
39 separate Neighborhood Preservation Nonlapsing Revolving Fund  
40 for monies appropriated by section 33 of this act.

41 a. The commissioner shall award grants or loans from this fund  
42 to municipalities whose housing elements have received substantive  
43 certification from the council, to municipalities subject to builder's  
44 remedy as defined in section 31 of this act or to receiving munici-  
45 palities in cases where the council has approved a regional con-  
46 tribution agreement and a project plan developed by the receiving  
47 municipality. The commissioner shall assure that a substantial  
48 percentage of the loan or grant awards shall be made to projects  
49 and programs in those municipalities receiving State aid pursuant  
50 to P. L. 1978, c. 14 (C. 52:27D-178 et seq.).

51 b. The commissioner shall establish rules and regulations gov-

52 etermining the qualifications of applicants, the application procedures,  
53 and the criteria for awarding grants and loans and the standards  
54 for establishing the amount, terms of conditions of each grant or  
55 loan.

56 c. During the first 12 months from the effective date of this act  
57 and for any additional period which the council may approve, the  
58 commissioner may assist affordable housing programs which are  
59 not located in municipalities whose housing elements have been  
60 granted substantive certification or which are not in furtherance of  
61 a regional contribution agreement; provided that the affordable  
62 housing program will meet all or part of a municipal low and mod-  
63 erate income housing obligation.

64 d. Amounts deposited in the Neighborhood Preservation Fund  
65 shall be targeted to regions based on the region's percentage of the  
66 State's low and moderate income housing need as determined by  
67 the council. Amounts in the fund shall be applied for the following  
68 purposes in designated neighborhoods:

69 (1) Rehabilitation of substandard housing units occupied or to  
70 be occupied by low and moderate income households;

71 (2) Creation of accessory apartments to be occupied by low and  
72 moderate income households;

73 (3) Conversion of nonresidential space to residential purposes  
74 provided a substantial percentage of the resulting housing units  
75 are to be occupied by low and moderate income households;

76 (4) Acquisition of real property; demolition and removal of  
77 buildings; or construction of new housing that will be occupied by  
78 low and moderate income households; or any combination thereof;

79 (5) Grants of assistance to eligible municipalities for costs of  
80 necessary studies, surveys, plans and permits, engineering, archi-  
81 tectural and other technical services, costs of land acquisition and  
82 any buildings thereon, and costs of site preparation, demolition  
83 and infrastructure development for projects undertaken pursuant  
84 to an approved regional contribution agreement;

85 (6) Assistance to a local housing authority, nonprofit or limited  
86 dividend housing corporation or association for rehabilitation or  
87 restoration of housing units which it administers which: (a) are  
88 unusable or in a serious state of disrepair; (b) can be restored in  
89 an economically feasible and sound manner; and (c) can be retained  
90 in a safe, decent and sanitary manner, upon completion of rehabili-  
91 tation or restoration; and

92 (7) Other housing programs for low and moderate income hous-  
93 ing, including infrastructure projects directly facilitating the con-  
94 struction of low and moderate income housing not to exceed a

95 reasonable percentage of the construction costs of the low and mod-  
96 erate income housing to be provided.

97 e. Any grant or loan agreement entered into pursuant to this  
98 section shall incorporate contractual guarantees and procedures by  
99 which the division will ensure that any unit of housing provided  
100 for low and moderate income households shall continue to be oc-  
101 cupied by low and moderate income households for at least 20 years  
102 following the award of the loan or grant except that the division  
103 may approve a guarantee for a period of less than 20 years where  
104 necessary to ensure project feasibility.\*\*

1 21. \*\*[Funds in the Fair Housing Trust Fund Account shall be  
2 appropriated annually by the Legislature, and shall be used solely  
3 by the council for awards of assistance, loans or grants to or on  
4 behalf of public or private housing projects or programs which  
5 will provide affordable low and moderate income housing.

6 Amounts appropriated to the general account pursuant to this  
7 act shall be used within the first 18 months following the organi-  
8 zation of the council. Except as provided below, amounts deposited  
9 in the general account thereafter shall be applied by the council  
10 generally in the State for the purposes set forth in subsections a.  
11 through h. of this section. Amounts deposited annually in the  
12 general account from realty transfer fees shall be used annually  
13 by the council for personnel, administrative and technical services,  
14 for litigation costs incurred by the council, and for reimbursing  
15 county planning boards and agencies for costs incurred in review-  
16 ing regional contribution agreements. The State Treasurer shall  
17 adopt regulations under which county planning boards and agencies  
18 shall report costs incurred in performing these duties, for the  
19 purpose of making payments from the general account within the  
20 limits established by legislative appropriations.

21 Amounts deposited annually in a regional housing trust fund  
22 account shall be used exclusively within the housing region to  
23 which the account pertains.

24 Except as provided above, amounts in the general account of the  
25 Fair Housing Trust Fund Account, and amounts in the regional  
26 housing trust fund accounts shall be applied for the following  
27 purposes:

28 a. Rehabilitation of substandard housing units occupied or to be  
29 occupied by low and moderate income households pursuant to con-  
30 tractual guarantees for at least 30 years following the awarding  
31 of the loan or grant;

32 b. Accessory conversions for housing units occupied or to be  
33 occupied by low and moderate income households pursuant to

34 contractual guarantees for at least 30 years following the awarding  
35 of the loan or grant;

36 c. Conversion of nonresidential space to residential purposes  
37 provided a substantial percentage of the resulting housing units  
38 are occupied or to be occupied by low and moderate income house-  
39 holds pursuant to contractual guarantees for at least 30 years  
40 following the awarding of the loan or grant;

41 d. Inclusionary developments of which a substantial percentage  
42 of the housing units will be occupied by low and moderate income  
43 households for at least 30 years pursuant to contractual guarantees;

44 e. Grants of assistance to receiving municipalities under regional  
45 contribution agreements entered into under this act for costs of  
46 necessary studies, surveys, plans and permits, engineering, archi-  
47 tectural and other technical services, costs of land acquisition and  
48 any buildings thereon, and costs of site preparation, demolition  
49 and infrastructure development for projects undertaken pursuant  
50 to a regional contribution agreement;

51 f. Assistance to a local housing authority, nonprofit or limited  
52 dividend housing corporation or association for rehabilitation or  
53 restoration of housing units which it administers which: (1) are  
54 unusable or in a serious state of disrepair; (2) can be restored in  
55 an economically feasible and sound manner; and (3) can be re-  
56 tained in a safe, decent and sanitary manner, upon completion of  
57 rehabilitation or restoration.

58 g. Such other housing programs for low and moderate income  
59 housing, including infrastructure projects directly facilitating the  
60 construction of low and moderate income housing not to exceed a  
61 reasonable percentage of the construction costs of the low and  
62 moderate income housing to be provided, as the council may deem  
63 necessary.

64 The council shall assure that a substantial percentage of the loan  
65 or grant awards made from the general account of the Fair  
66 Housing Trust Fund Account shall be made available to projects  
67 and programs in those municipalities receiving State aid pursuant  
68 to P. L. 1978, c. 14 (C. 52:27D-178 et seq.). The council shall assure  
69 that priority shall be accorded in loan and grant awards from a  
70 regional housing trust fund account to projects and programs in  
71 municipalities in the housing region which have filed statements  
72 of intent to enter into regional contribution agreements as receiv-  
73 ing municipalities for grants of assistance pursuant to subsection e.  
74 of this section. Receiving municipalities entering into regional  
75 contribution agreements shall receive priority for additional assis-  
76 tance set forth in subsections a. through g. of this section from a  
77 regional housing trust fund account for at least one other low and

78 moderate income housing unit for each housing unit accepted under  
79 a regional contribution agreement. Priority accorded under this  
80 section shall be subject to the availability of funds in the regional  
81 housing trust funds account and to a favorable evaluation of  
82 feasibility pursuant to section 22 of this act.

83 The council shall establish rules and regulations governing the  
84 qualifications of applicants, the application procedures, and the  
85 criteria for awarding grants and loans and the standards for  
86 establishing the amount, terms and conditions of each grant or  
87 loan. ]\*\* \*\*The agency shall establish affordable housing programs  
88 to assist municipalities in meeting the obligation of developing  
89 communities to provide low and moderate income housing:

90 a. Of the bond authority allocated to it under section 20 of P. L.  
91 1983, c. 530 (C. 55:14K-20) the agency will allocate, for a reason-  
92 able period of time established by its board, no less than 25% to  
93 be used in conjunction with housing to be constructed or rehabili-  
94 tated with assistance under this act.

95 b. The agency shall to the extent of available funds, award assis-  
96 tance to affordable housing programs located in municipalities  
97 whose housing elements have received substantive certification from  
98 the council, or which have been subject to a builder's remedy or  
99 which are in furtherance of a regional contribution agreement ap-  
100 proved by the council. During the first 12 months from the effective  
101 date of this act and for any additional period which the council may  
102 approve, the agency may assist affordable housing programs which  
103 are not located in municipalities whose housing elements have been  
104 granted substantive certification or which are not in furtherance of  
105 a regional contribution agreement provided the affordable housing  
106 program will meet all or in part a municipal low and moderate in-  
107 come housing obligation.

108 c. Assistance provided pursuant to this section may take the form  
109 of grants or awards to municipalities, prospective home purchasers,  
110 housing sponsors as defined in P. L. 1983, c. 530 (C. 55:14K-1 et  
111 seq.), or as contributions to the issuance of mortgage revenue  
112 bonds or multi-family housing development bonds which have the  
113 effect of achieving the goal of producing affordable housing.

114 d. Affordable housing programs which may be financed or as-  
115 sisted under this provision may include, but are not limited to:

116 (1) Assistance for home purchase and improvement including  
117 interest rate assistance, down payment and closing cost assistance,  
118 and direct grants for principal reduction;

119 (2) Rental programs including loans or grants for developments  
120 containing low and moderate income housing, moderate rehabilita-

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121 tion of existing rental housing, congregate care and retirement  
122 facilities;

123 (3) Financial assistance for the conversion of nonresidential  
124 space to residences;

125 (4) Other housing programs for low and moderate income hous-  
126 ing, including infrastructure projects directly facilitating the con-  
127 struction of low and moderate income housing; and

128 (5) Grants or loans to municipalities, housing sponsors and com-  
129 munity organizations to encourage development of innovative ap-  
130 proaches to affordable housing, including:

131 (a) Such advisory, consultation, training and educational ser-  
132 vices as will assist in the planning, construction, rehabilitation and  
133 operation of housing; and

134 (b) Encouraging research in and demonstration projects to de-  
135 velop new and better techniques and methods for increasing the  
136 supply, types and financing of housing and housing projects in the  
137 State.

138 e. The agency shall establish procedures and guidelines govern-  
139 ing the qualifications of applicants, the application procedures and  
140 the criteria for awarding grants and loans for affordable housing  
141 programs and the standards for establishing the amount, terms  
142 and conditions of each grant or loan.

143 f. In consultation with the council, the agency shall establish  
144 requirements and controls to insure the maintenance of housing  
145 assisted under this act as affordable to low and moderate income  
146 households for a period of not less than 20 years; provided that  
147 the agency may establish a shorter period upon a determination  
148 that the economic feasibility of the program is jeopardized by the  
149 requirement and the public purpose served by the program out-  
150 weights the shorter period. The controls may include, among  
151 others, requirements for recapture of assistance provided pursuant  
152 to the act or restrictions on return on equity in the event of failure  
153 to meet the requirements of the program. With respect to rental  
154 housing financed by the agency pursuant to this act or otherwise  
155 which promotes the provision or maintenance of low and moderate  
156 income housing, the agency may waive restrictions on return on  
157 equity required pursuant to P. L. 1983, c. 530 (C. 55:14K-1 et seq.)  
158 which is gained through the sale of the property or of any interest  
159 in the property or sale of any interest in the housing sponsor.

160 g. The agency may establish affordable housing programs  
161 through the use or establishment of subsidiary corporations or de-  
162 velopment corporations as provided in P. L. 1983, c. 530 (C.  
163 55:14K-1 et seq.). The subsidiary corporations or development

164 corporations shall be eligible to receive funds provided under this  
165 act for any permitted purpose.\*\*

1 22. \*\*[a. Except for housing receiving assistance under subsection  
2 tion b. of this section, the council shall refer all housing proposed  
3 to be funded in whole or in part from amounts deposited in the Fair  
4 Housing Trust Fund Account to the \*[Division of Housing in the  
5 Department of Community Affairs]\* \*agency\* for evaluation as to  
6 the feasibility of the housing. The council shall not finance any  
7 housing for which the \*[division]\* \*agency\* does not provide a  
8 favorable evaluation of feasibility. With respect to housing to be  
9 undertaken in municipalities which have filed statements of intent  
10 to enter into regional contribution agreements, or which have  
11 entered into agreements, the \*[division]\* \*agency\* may recommend  
12 as part of the feasibility evaluation, and the council may approve, a  
13 provision that the low and moderate income housing units shall be  
14 subject to contractual guarantees or resale controls for a time of  
15 less than 30 years, if it is determined that modification is necessary  
16 to assure the economic viability of the housing. The council may  
17 establish procedures and time limitations for the conduct of the  
18 feasibility evaluations, beyond which the council may proceed with  
19 the housing notwithstanding the \*[division's]\* \*agency's\* failure  
19A to complete a feasibility evaluation.

20 b. The council, may enter into agreement with the New Jersey  
21 Housing and Mortgage Financing Agency under which amounts  
22 credited to the Fair Housing Trust Fund Account shall be used  
23 to assist, in whole or in part, low and moderate income housing  
24 to be financed by the agency. An agreement shall be specific as to  
25 the housing, and shall set forth the times and schedule according  
26 to which amounts in the account shall be provided to the agency.  
27 A copy of the agreement shall be filed with the State Treasurer,  
28 who shall administer the agreement in the course of his maintenance  
29 of the account. Agreements entered into under this subsection  
30 shall be subject to the requirement that amounts credited  
31 to a regional housing trust fund account shall be used exclusively  
32 within the housing region to which the account pertains.]\*\*\* *Any*  
33 *municipality which has reached a settlement of any exclusionary*  
34 *zoning litigation prior to the effective date of this act, shall not be*  
35 *subject to any exclusionary zoning suit for a six year period following*  
36 *the effective date of this act. Any such municipality shall be*  
37 *deemed to have a substantively certified housing element and ordinances,*  
38 *and shall not be required during that period to take any*  
39 *further actions with respect to provisions for low and moderate*  
40 *income housing in its land use ordinances or regulations.\*\**

1 23. a. A municipality which has an action pending or a judgment  
2 entered against it after the effective date of this act, or which had  
3 a judgment entered against it prior to that date and from which  
4 an appeal is pending, or which brings an action for declaratory  
5 judgment pursuant to section 13 of this act, shall upon municipal  
6 request be allowed to phase in its obligation for a fair share of low  
7 and moderate income housing. If such a phase-in is requested by  
8 the municipality, the court shall implement a phase-in for the  
9 issuance of final approvals, as defined in section 3.1 of P. L. 1975,  
10 c. 291 (C. 40:55D-4), for low and moderate income housing, which  
11 shall be based on an analysis of the following factors:

- 12 (1) The size of the municipal \*[obligation]\* *\*fair share\**;
- 13 (2) The present and projected capacity of the community's in-  
14 frastructure, taking into account expansion and rehabilitation of  
15 existing facilities;
- 16 (3) Vacant developable land;
- 17 (4) Likely absorption rate for housing in light of market forces;
- 18 (5) Reasonable development priorities among areas of the com-  
19 munity; and
- 20 (6) Past performance in providing low and moderate income  
21 housing, including credit for low and moderate income senior or  
22 disabled citizen housing.

23 b. The phase-in schedule shall provide for the grant of pre-  
24 liminary approvals to the developer subject to the phase-in  
25 schedule for final approvals in accordance with time periods set  
26 forth in sections 34, 36 and 48 of P. L. 1975, c. 291 (C. 40:55D-46,  
27 48 and 61), provided that such preliminary approvals shall confer  
28 vested rights as defined in subsection a. of section 37 of P. L. 1975,  
29 c. 291 (C. 40:55D-49) for the period until the developer has the  
30 ability to proceed to final approval pursuant to the phase-in  
31 schedule. In any phase-in schedule for a development, all final  
32 approvals shall be cumulative.

33 c. The court shall, where appropriate, also implement a phase-in  
34 schedule for the market units in the inclusionary development  
35 which are not low and moderate income, giving due consideration  
36 to the plan for low and moderate income housing established in  
37 this section and the need to maintain the economic viability of the  
38 development.

39 d. In entering the phase-in order, the court shall consider whether  
40 or not it is necessary to condition the phase-in order upon a phase-  
41 in schedule for the construction of other development in the mu-  
42 nicipality to minimize an imbalance between available housing units  
43 and available jobs, or to prevent the sites which are the most  
44 appropriate or the only possible sites for the construction of low



45 and moderate income housing from being used for other purposes,  
46 or to prevent limited public infrastructure capacities from being  
47 entirely utilized for other purposes.

48 e. In entering a phasing order, the court, upon municipal request,  
49 shall implement a specific phasing schedule for the issuance of  
50 final approvals in inclusionary developments. The court shall take  
51 into account the six analysis factors enumerated in subsection a.  
52 of this section, giving particular attention to:

53 (1) The size of the municipal **\*[obligation]\*** *\*fair share\** which  
54 is to be provided in inclusionary developments;

55 (2) The extent and projected capacity of the community's infra-  
56 structure, taking into account expansion and rehabilitation of  
57 existing facilities; and

58 (3) The extent and pattern of growth within the municipality  
59 and region during the six years prior to the implementation of the  
60 phase-in plan.

61 The following time periods shall be guidelines for a phasing  
62 schedule for the issuance of final approvals in inclusionary de-  
63 velopments, subject, however, to upward or downward modification  
64 based upon a review of the analysis factors:

65 Any municipality which has a fair share obligation to provide  
66 2,000 or more low and moderate income units in inclusionary  
67 developments shall be entitled to consideration of a phase-in  
68 schedule for the issuance of final approvals in inclusionary develop-  
69 ments of at least 20 years from the effective date of this act.

70 Any municipality which has a fair share obligation to provide  
71 between 1,500 and 1,999 low and moderate income units in inclu-  
72 sionary developments shall be entitled to consideration of a phase-  
73 in schedule for the issuance of final approvals in inclusionary  
74 developments of at least 15 years from the effective date of this act.

75 Any municipality which has a fair share obligation to provide  
76 between 1,000 and 1,499 low and moderate income units in inclu-  
77 sionary developments shall be entitled to consideration of a phase-  
78 in schedule for the issuance of final approvals in inclusionary  
79 developments of at least 10 years from the effective date of this act.

80 Any municipality which has a fair share obligation to provide  
81 between 500 and 999 low and moderate income units in inclusionary  
82 developments shall be entitled to consideration of a phase-in  
83 schedule for the issuance of final approvals in inclusionary de-  
84 velopments of at least six years from the effective date of this act.

85 Any municipality which has a fair share obligation to provide  
86 less than 500 low and moderate income units in inclusionary de-  
87 velopments shall be entitled to consideration of a phase-in schedule  
88 for the issuance of final approvals in inclusionary developments

89 for such period of time, including a period of at least six years,  
90 as is determined to be reasonable pursuant to the analysis factors.

91 f. As part of a phasing order concerning inclusionary develop-  
92 ments, the court may approve a municipal plan, or implement  
93 another plan, concerning priorities among developers and sites,  
94 and the timing in the issuance of final approvals to particular  
95 developers. Any plan concerning priorities and the timing of final  
96 approvals shall take into consideration:

97 (1) The location of various sites and their suitability for de-  
98 velopment pursuant to environmental protection and sound plan-  
99 ning criteria, including their consistency with reasonable provisions  
100 of municipal master plans;

101 (2) Infrastructure capacity or the ability to provide the capacity  
102 for the site, and the readiness of a particular developer to com-  
103 mence construction;

104 (3) Any settlements or court orders establishing priorities  
105 among developers.

106 Consistent with the overall phasing schedule adopted pursuant  
107 to the analysis factors, the municipality shall make a good faith  
108 effort to time the issuance of final approvals for particular de-  
109 velopments which it approves in a manner which enables the  
110 realistic and economically viable construction of the development.  
111 To this end, the municipality shall take into consideration the need  
112 for sufficient development in a particular project to permit timely  
113 recovery of infrastructure costs, and, in the case of a development  
114 which will have a homeowners' association, to prevent the imposi-  
115 tion of excessive homeowners' fees because of the failure to achieve  
116 economies of scale. In the case of developers who have previously  
117 constructed residential developments in this State, a municipality  
118 shall also take into consideration the greatest number of units  
119 which the developer has constructed in any one development in  
120 the State within any one year period; this factor shall be considered  
121 if the municipality seeks to phase the issuance of final approvals  
122 for the inclusionary development over a period greater than one  
123 year.

1 24. The \*[Division of Housing in the Department of Community  
2 Affairs]\* \*agency\* shall establish procedures for entering into, and  
3 shall enter into, contractual agreements with willing municipalities  
4 or developers of inclusionary developments whereby the \*[divi-  
5 sion]\* \*agency\* will administer resale controls and rent controls in  
6 municipalities where no appropriate administrative agency exists.  
7 The contractual agreements shall be for the duration of the controls  
8 and shall involve eligibility determinations, determination of initial  
9 occupants, the marketing of units, maintenance of eligibility lists

11A act which the **\*[council]\* \*agency\* \*\*[believes]\*\*\*\* *and the coun-*  
11B *cil believe\*\* necessary to more nearly effectuate this end.***

12 Within 36 months after the effective date of this act, the council  
13 shall report to the Governor and the Legislature concerning the  
14 actions necessary to be taken at the State, regional, county and  
15 municipal levels to provide for the implementation and admin-  
16 istration of this act on a regional basis, including any revisions  
17 or changes in the law necessary to accomplish that end. The council  
18 may include in the report any recommendations or considerations  
19 it may wish to provide regarding the advisability of implementing  
20 and administering the act on a regional basis.

1 27. Amounts expended by a municipality in preparing and im-  
2 plementing a housing element and fair share plan pursuant to this  
3 act shall be considered a mandated expenditure exempt from the  
4 limitations on final appropriations imposed pursuant to P. L. 1976,  
5 c. 68 (C. 40A:4-45.1 et seq.).

1 \*28. **\*\*[For a period of 12 months following the effective date of**  
2 *this act, no judicial judgment or judgments issued on or after Janu-*  
3 *ary 20, 1983, which require the provision of low and moderate in-*  
4 *come housing in a municipality, shall be implemented to the extent*  
5 *that the judgment or judgments require provision of any housing*  
6 *in the municipality which is not affordable to low or moderate in-*  
7 *come households, provided that nothing in this section shall affect*  
8 *any rights heretofore granted to a developer pursuant to municipal*  
9 *approval of a development application, or as a result of any court*  
10 *judgment or order, or any settlement of litigation.*

11 *The Attorney General shall, not later than 30 days after this act*  
12 *becomes effective, file a complaint in the Superior Court for a*  
13 *declaratory judgment determining the constitutionality of this*  
14 *section. If that complaint is not filed within 30 days after the*  
15 *effective date of this act, this section shall be null and void.]\*\**

16 **\*\*No builder's remedy shall be granted to a plaintiff in any ex-**  
17 *clusionary zoning litigation which has been filed on or after January*  
18 *20, 1983, unless a final judgment providing for a builder's remedy*  
19 *has already been rendered to that plaintiff. This provision shall*  
20 *terminate upon the expiration of the period set forth in subsection*  
21 *a. of section 9 of this act for the filing with the council of the mu-*  
22 *nicipality's housing element.*

23 *For the purposes of this section, "final judgment" shall mean a*  
24 *judgment subject to an appeal as of right for which all right to*  
25 *appeal is exhausted.*

26 *For the purposes of this section "exclusionary zoning litigation"*  
27 *shall mean lawsuits filed in courts of competent jurisdiction in this*

10 for subsequent purchasers or renters, and determination of maxi-  
11 mum resale prices or rents. \***[The division may enter into agree-**  
12 **ments whereby some or all of these responsibilities are performed**  
13 **by the New Jersey Housing and Mortgage Finance Agency.]**\* The  
14 **\*[division]\* \*agency\*** may charge the municipality or inclusionary  
15 developer a reasonable per unit fee for entering into such an agree-  
16 ment, or may charge a reasonable fee to a low or moderate income  
17 household at the time the home is sold subject to the resale control  
18 or both. **\*[Division]\* \*Agency\*** fees shall be established according  
19 to methods or schedules approved by the **\*[council]\* \*State**  
20 **Treasurer\***;

1 25. Notwithstanding any other law to the contrary, a municipi-  
2 pality may purchase, **\*\*[condemn or otherwise acquire]\*\* \*\*lease**  
3 **or acquire by gift\*\*** real property and any estate or interest therein,  
4 which the municipal governing body determines necessary or useful  
5 for the construction or rehabilitation of low and moderate income  
6 housing or conversion to low and moderate income housing.

7 The municipality may provide for the acquisition, construction  
8 and maintenance of buildings, structures or other improvements  
9 necessary or useful for the provision of low and moderate income  
10 housing, and may provide for the reconstruction, conversion or  
11 rehabilitation of those improvements in such manner as may be  
12 necessary or useful for those purposes.

13 Notwithstanding the provisions of any other law regarding the  
14 conveyance, sale or lease of real property by municipalities, the  
15 municipal governing body may, by resolution, authorize the private  
16 sale and conveyance or lease of a housing unit or units acquired  
17 or constructed pursuant to this section, where the sale, conveyance  
18 or lease is to a low or moderate income household or nonprofit  
19 entity and contains a contractual guarantee that the housing unit  
20 will remain available to low and moderate income households for  
21 a period of at least 30 years.

1 26. Within **\*\*[24]\*\* \*\*12\*\*** months after the effective date of this  
2 act and every **\*\*[two years]\*\* \*\*year\*\*** thereafter, the **\*[council]\***  
3 **\*agency\* \*\*and the council\*\*** shall report **\*\*separately\*\*** to the Gov-  
4 ernor and the Legislature on the effects of this act in promoting the  
5 provision of low and moderate income housing in the several hous-  
6 ing regions of this State. **\*\*[The report shall give specific attention**  
7 **to the manner in which amounts expended from the Fair Housing**  
8 **Trust Fund Account, and amounts transferred between sending**  
9 **municipalities and receiving municipalities, have or have not been**  
10 **sufficient in promoting this end.]\*\*** The **\*\*[report]\*\* \*\*reports\*\***  
11 may include recommendations for any revisions or changes in this

28 *State challenging a municipality's zoning and land use regulations*  
29 *on the basis that the regulations do not make realistically possible*  
30 *the opportunity for an appropriate variety and choice of housing*  
31 *for all categories of people living within the municipality's housing*  
32 *region, including those of low and moderate income, who may desire*  
33 *to live in the municipality.*

34 *For the purpose of this section "builder's remedy" shall mean a*  
35 *court imposed remedy for a litigant who is an individual or a profit-*  
36 *making entity in which the court requires a municipality to utilize*  
37 *zoning techniques such as mandatory set asides or density bonuses*  
38 *which provide for the economic viability of a residential develop-*  
39 *ment by including housing which is not for low and moderate in-*  
40 *come households.\*\**

1 **\*\*29. Section 19 of P. L. 1975, c. 291 (C. 40:55D-28) is amended**  
2 **to read as follows:**

3 **Preparation; contents; modification.**

4 a. The planning board may prepare and, after public hearing,  
5 adopt or amend a master plan or component parts thereof, to guide  
6 the use of lands within the municipality in a manner which protects  
7 public health and safety and promotes the general welfare.

8 b. The master plan shall generally comprise a report or state-  
9 ment and land use and development proposals, with maps, diagrams  
10 and text, presenting, where appropriate, the following elements:

11 (1) A statement of objectives, principles, assumptions, policies  
12 and standards upon which the constituent proposals for the physi-  
13 cal, economic and social development of the municipality are based;

14 (2) A land use plan element (a) taking into account the other  
15 master plan elements and natural conditions, including, but not  
16 necessarily limited to, topography, soil conditions, water supply,  
17 drainage, flood plain areas, marshes, and woodlands; (b) showing  
18 the existing and proposed location, extent and intensity of develop-  
19 ment of land to be used in the future for varying types of resi-  
20 dential, commercial, industrial, agricultural, recreational, educa-  
21 tional and other public and private purposes or combination of  
22 purposes; (c) showing the existing and proposed location of any  
23 airports and the boundaries of any airport hazard areas delineated  
24 pursuant to the "Air Safety and Hazardous Zoning Act of 1983,"  
25 P. L. 1983, c. 260 (C. 6:1-80 et seq.); and (d) including a statement  
26 of the standards of population density and development intensity  
27 recommended for the municipality;

28 (3) A housing plan element pursuant to section 10 of P. L. . . . ,  
29 c. . . . (C. . . . .) (now pending before the Legislature as  
30 Senate Committee Substitute for Senate Bill No. 2046 and Senate

31 *Bill No. 2334*), including, but not limited to, residential standards  
32 and proposals for the construction and improvement of housing;

33 (4) A circulation plan element showing the location and types of  
34 facilities for all modes of transportation required for the efficient  
35 movement of people and goods into, about, and through the munici-  
36 pality;

37 (5) A utility service plan element analyzing the need for and  
38 showing the future general location of water supply and distribu-  
39 tion facilities, drainage and flood control facilities, sewerage and  
40 waste treatment, solid waste disposal and provision for other  
41 related utilities;

42 (6) A community facilities plan element showing the location  
43 and type of educational or cultural facilities, historic sites, librar-  
44 ies, hospitals, firehouses, police stations and other related facilities,  
45 including their relation to the surrounding areas;

46 (7) A recreation plan element showing a comprehensive system  
47 of areas and public sites for recreation;

48 (8) A conservation plan element providing for the preservation,  
49 conservation, and utilization of natural resources, including, to the  
50 extent appropriate, open space, water, forests, soil, marshes, wet-  
51 lands, harbors, rivers and other waters, fisheries, wildlife and other  
52 natural resources;

53 (9) An energy conservation plan element which systematically  
54 analyzes the impact of each other component and element of the  
55 master plan on the present and future use of energy in the mu-  
56 nicipality, details specific measures contained in the other plan  
57 elements designed to reduce energy consumption, and proposes  
58 other measures that the municipality may take to reduce energy  
59 consumption and to provide for the maximum utilization of re-  
60 newable energy sources; and

61 (10) Appendices or separate reports containing the technical  
62 foundation for the master plan and its constituent elements.

63 c. The master plan and its plan elements may be divided into  
64 subplans and subplan elements projected according to periods of  
65 time or staging sequences.

66 d. The master plan shall include a specific policy statement in-  
67 dicating the relationship of the proposed development of the mu-  
68 nicipality, as developed in the master plan to (1) the master plans  
69 of contiguous municipalities, (2) the master plan of the county in  
70 which the municipality is located and (3) any comprehensive guide  
71 plan pursuant to section 15 of P. L. 1961, c. 47 (C. 13:1B-15.52).

1 30. Section 49 of P. L. 1975, c. 291 (C. 40:55D-62) is amended  
2 to read as follows:

3 49. Power to zone.

4 a. The governing body may adopt or amend a zoning ordinance  
5 relating to the nature and extent of the uses of land and of build-  
6 ings and structures thereon. Such ordinance shall be adopted after  
7 the planning board has adopted the land use plan element *and the*  
8 *housing plan element* of a master plan, and all of the provisions of  
9 such zoning ordinance or any amendment or revision thereto shall  
10 either be substantially consistent with the land use plan element  
11 *and the housing plan element* of the master plan or designed to  
12 effectuate such plan [element] *elements*; provided that the govern-  
13 ing body may adopt a zoning ordinance or amendment or revision  
14 thereto which in whole or part is inconsistent with or not designed  
15 to effectuate the land use plan element *and the housing plan ele-*  
16 *ment*, but only by affirmative vote of a majority of the full autho-  
17 rized membership of the governing body, with the reasons of the  
18 governing body for so acting recorded in its minutes when adopting  
19 such a zoning ordinance; and provided further that, notwithstand-  
20 ing anything aforesaid, the governing body may adopt an interim  
21 zoning ordinance pursuant to subsection 77 b. of this act.

22 The zoning ordinance shall be drawn with reasonable considera-  
23 tion to the character of each district and its peculiar suitability for  
24 particular uses and to encourage the most appropriate use of land.  
25 The regulations in the zoning ordinance shall be uniform through-  
26 out each district for each class or kind of buildings or other struc-  
27 tures or uses of land, including planned unit development, planned  
28 unit residential development and residential cluster, but the regu-  
29 lations in one district may differ from those in other districts.

30 b. No zoning ordinance and no amendment or revision to any  
31 zoning ordinance shall be submitted to or adopted by initiative or  
32 referendum.

33 c. The zoning ordinance shall provide for the regulation of any  
34 airport hazard areas delineated under the "Air Safety and Haz-  
35 arduous Zoning Act of 1983," P. L. 1983, c. 260 (C.6:1-80 et seq.), in  
36 conformity with standards promulgated by the Commissioner of  
37 Transportation.

1 31. Until August 1, 1988, any municipality may continue to regu-  
2 late development pursuant to a zoning ordinance in accordance with  
3 section 49 of the "Municipal Law Use Law," P. L. 1975, c. 291 (C.  
4 40:55D-62) as same read before the effective date of this act.\*\*

1 \*\*[29.]\*\* \*\*32.\*\* *If any part of this act shall be held invalid, the*  
2 *holding shall not affect the validity of remaining parts of this act.*  
3 *If a part of this act is held invalid in one or more of its applications,*  
4 *the act shall remain in effect in all valid applications that are*  
5 *severable from the invalid application.\**

C 222-32

1     \***[28.]**\* \*\***[30.]**\*\* \*\*33.\*\* There is appropriated to the Council  
2 on Affordable Housing from the General Fund the sum of  
3 \$1,000,000.00, and there is appropriated \*\***[to the Fair Housing**  
4 **Trust Fund Account]**\*\* from the General Fund the sum of  
5 \*\***[\$25,000,000.00 to effectuate the purposes of that account.]**\*\*  
6 \*\*\$17,000,000.00 to be allocated as follows:  
6A    a. \$2,000,000.00 to the Neighborhood Preservation Fund estab-  
7 lished pursuant to the "Maintenance of Viable Neighborhoods Act"  
8 P. L. 1975, c. 248 (C. 52:27D-146 et seq.) which shall be used to  
9 effectuate the purposes set forth in section 20 of this act. b.  
10 \$15,000,000.00 to the Housing and Mortgage Finance Agency to be  
11 used to effectuate the purpose of section 21 of this act.

12     Of the amounts herein appropriated a reasonable sum, approved  
13 by the Treasurer may be expended for the administration of this  
14 act by the Department of Community Affairs and the agency.\*\*

1     \***[29.]**\* \*\***[31.]**\*\* \*\*34.\*\* This act shall take effect immedi-  
2 ately but shall remain inoperative until the enactment of P. L.  
3 . . . . , c. . . . (now pending before the Legislature as Assembly Bill  
4 No. 3117).



EXHIBIT C

FRANK A. SANTORO  
2013 PARK AVENUE  
P. O. BOX 272  
SOUTH PLAINFIELD, N. J. 07080  
(201) 561-6868  
ATTORNEY FOR Defendants

SUPERIOR COURT OF  
NEW JERSEY  
CHANCERY DIVISION  
MIDDLESEX COUNTY  
Civil Action  
No. C-4122-73

*Plaintiff*

URBAN LEAGUE OF GREATER  
NEW BRUNSWICK, et al.,  
Plaintiffs,

vs.

*Defendant*

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

vs.

BOROUGH OF SOUTH PLAINFIELD  
BY ITS MAYOR AND COUNCIL,  
et al.,

Defendants.

LAW DIVISION  
MIDDLESEX COUNTY  
No. 56349-81

*Docket No. C-4122-73*

**CIVIL ACTION**

NOTICE OF MOTION TO  
TRANSFER ACTION TO  
COUNCIL ON AFFORDABLE  
HOUSING AND OTHER  
RELIEF

PLEASE TAKE NOTICE that on Tuesday, July 23, 1985 at 2:00 p.m.,  
upon short notice determined by the Court, the Borough of South  
Plainfield, defendants in the above matter shall move before the  
Hon. Eugene D. Serpentelli at the Court House, Toms River,  
New Jersey for an Order:

TO: The Honorable Eugene D. Serpentelli  
Assignment Judge, Superior Court  
Ocean County Court House  
Toms River, New Jersey 08754

John M. Mayson  
Clerk, Superior Court  
Hughes Justice Complex  
Trenton, New Jersey 08625

Eric Neisser, Esq.  
Barbara J. Williams, Esq.  
John M. Payne, Esq.  
Constitutional Litigation Clinic  
Rutgers Law School  
15 Washington Street  
Newark, New Jersey 07102

Peter J. Calderone, Esq.  
Attorney for South Plainfield Planning Board  
19 Holly Park Drive  
South Plainfield, New Jersey 07080

William V. Lane, Esq.  
Attorney for South Plainfield Board of Adjustment  
324 East Broad Street  
Westfield, New Jersey 07091

Angelo H. Dalto, Esq.  
Attorney for Elderlodge Plaintiff  
1550 Park Avenue  
South Plainfield, New Jersey 07080

Raymond Miller, Esq.  
Attorney for Tonsar Corp.  
2301 Maple Avenue  
South Plainfield, New Jersey 07080

Leonard H. Selesner, Esq.  
Attorney for Gal-Ker, Inc.  
225 Millburn Avenue  
Millburn, New Jersey 07041

John George, Esq.  
Attorney for Larry Massaro  
277 South Plainfield Avenue  
South Plainfield, New Jersey 07080

Donald R. Daines, Esq.  
Attorney for K. Hovnanian Companies of New Jersey  
10 Highway 35, PO Box 500  
Red Bank, New Jersey 07701


Joseph Buccellato  
2232 Park Avenue  
South Plainfield, New Jersey 07080

(1) Permitting the Borough of South Plainfield to transfer the matter of the adoption of Affordable Housing Ordinances Nos. 1009 and 1010, which said ordinances were introduced by defendants at a public hearing July 8, 1985, to the Council on Affordable Housing under the applicable provisions of the "Fair Housing Act".

(2) To dissolve the restraints imposed upon defendants under Court Order dated July 3, 1985 in so far as those restraints prevent the defendants from issuing building permits, site plan and subdivision approvals and consummating current and pending land sale transactions involving the sale and/or exchange and transfer of Borough owned lands for all real estate located in the Borough not subject to the "least cost housing" provisions of Ordinance 1009.

(3) Such other and further relief that the Court deems equitable and just.

In support of this motion, defendants will rely upon the certification of Frank A. Santoro, Esq., attorney for defendants, and a Memorandum of Law in support. A proposed form of Order is attached.

  
\_\_\_\_\_  
FRANK A. SANTORO  
Attorney for Defendants  
Borough of South Plainfield

Dated: July 18, 1985

FRANK A. SANTORO  
2013 PARK AVENUE  
P. O. BOX 272  
SOUTH PLAINFIELD, N. J. 07080  
(201) 561-6868  
ATTORNEY FOR Defendants

SUPERIOR COURT OF  
NEW JERSEY  
CHANCERY DIVISION  
MIDDLESEX COUNTY  
Civil Action  
No. C-4122-73

*Plaintiff*

URBAN LEAGUE OF GREATER  
NEW BRUNSWICK, et al.,  
Plaintiffs,

vs.

*Defendant*

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

vs.

BOROUGH OF SOUTH PLAINFIELD  
BY ITS MAYOR AND COUNCIL,  
et al.,  
Defendants.

LAW DIVISION  
MIDDLESEX COUNTY  
No. 56349-81

*Docket No. C-4122-73*

**CIVIL ACTION**

CERTIFICATION IN  
SUPPORT OF MOTION TO  
TRANSFER ACTION TO  
COUNCIL ON AFFORDABLE  
HOUSING

Frank A. Santoro, hereby certifies as follows:

(1) I am an attorney at law of the state of New Jersey and the municipal attorney for the Borough of South Plainfield, one of the defendants in the above captioned matter. I have served in this capacity since January 1, 1985 and am fully familiar with the litigation of this matter, including the hearings

before the Hon. Eugene D. Serpentelli on November 2, 1984, and June 24, 1985, and the Orders of the Court issued as a result of those hearings.

(2) On June 24 and 27, 1985, the New Jersey Legislature adopted Senate Bills Nos. 2046 and 2334 entitled "The Fair Housing Act". On July 3, 1985, Governor Thomas H. Kean signed the aforesaid legislation into law.

(3) The Judgement as to the Borough of South Plainfield dated May 22, 1984, requires the Borough to zone for 900 "least cost" housing units by 1990 and designates seven sites in the Borough to accommodate such zoning; requiring as it does, densities of from 12 to 15 units per acre and mandatory 10 percent low income and 10 percent moderate income set asides. With such set asides, the Borough of South Plainfield shall be required to allow for the construction of up to 4500 new residential housing units.

(4) The Borough of South Plainfield has a current housing stock of approximately 6000 residential units comprising mainly single family residences. The required increase in the number of housing units will drastically impact the Borough's fiscal capabilities for such things as the construction of new schools, new roads, expanded police and fire services. More importantly, the required increase in the number of housing units and the density of same shall severely impair the established pattern of development in the Borough; deplete available land for recreational, conservation, agricultural and farmland


preservation purposes; and seriously overload the public facilities and infrastructure capacities of the Borough.

(5) The Borough of South Plainfield shall adopt, in accordance with the provisions of the aforesaid "Fair Housing Act", a Resolution of Participation and prepare and file a Housing Element and Fair Share Plan within the time proscribed by Section 9 of the Act.

(6) The Borough of South Plainfield may propose to transfer up to 50 percent of its fair share to another municipality within its housing region in accordance with Section 12 of the Act.

(7) In order that the defendant Borough of South Plainfield be allowed to avail itself of the benefits of the aforesaid "Fair Housing Act" provisions, it is requested that the Court approve the transfer of the case forthwith and grant the further relief requested regarding the dissolution of the restraints against the issuance of building permits, site plan and subdivision approvals and consummating existing land sale transactions for non-Mount Laurel inventoried lands.

I hereby certify that the above statements are true. I am aware that if any of the above statements are wilfully false, I am subject to punishment.

  
FRANK A. SANTORO  
Attorney for Defendant  
Borough of South Plainfield

Dated: July 18, 1985

FRANK A. SANTORO  
2013 PARK AVENUE  
P. O. BOX 272  
SOUTH PLAINFIELD, N. J. 07080  
(201) 561-6868  
ATTORNEY FOR Defendants

SUPERIOR COURT OF  
NEW JERSEY  
CHANCERY DIVISION  
MIDDLESEX COUNTY  
Civil Action  
No. C-4122-73

*Plaintiff*

URBAN LEAGUE OF GREATER  
NEW BRUNSWICK, et al.,  
Plaintiffs,

vs.

*Defendant*

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

vs.

BOROUGH OF SOUTH PLAINFIELD  
BY ITS MAYOR AND COUNCIL,  
et al.,  
Defendants.

LAW DIVISION  
MIDDLESEX COUNTY  
No. 56349-81

*Docket No. C-4122-73*

*CIVIL ACTION*

MEMORANDUM OF LAW IN  
SUPPORT OF DEFENDANT'S  
MOTION TO TRANSFER  
ACTION TO COUNCIL ON  
AFFORDABLE HOUSING

Defendant, Borough of South Plainfield, moves to request the Court's permission to transfer the action as against it to the Council on Affordable Housing. Defendant, Borough of South Plainfield, also requests that the Court dissolve the restraints as to the issuance of building permits, site plan and subdivision approvals and consummating land sale or

exchanges of Borough owned lands, all said items as they pertain to non-Mount Laurel inventoried lands.

The legislation just enacted and entitled "Fair Housing Act" provides the basis for the defendant's requested relief:

"16. For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation. If the municipality fails to file a housing element and fair share plan with the council within five months from the date of transfer, or promulgation of criteria and guidelines by the council pursuant to section 7 of this act, whichever occurs later, jurisdiction shall revert to the court."

FAIR HOUSING ACT  
Section 16  
Senate Bills 2046 & 2334

and

Section 9, FAIR HOUSING ACT, supra

"9.a. Within four months after the effective date of this act, each municipality which so elects shall, by a duly adopted resolution of participation, notify the council of its intent to submit to the council its fair share housing plan. Within five months after the council's adoption of its criteria and guidelines, the municipality shall prepare and file with the



council a housing element, based on the council's criteria and guidelines, and any fair share housing ordinance introduced and given first reading and second reading in a hearing pursuant to R.S. 40:40-2 which implements the housing element.

b. A municipality which does not notify the council of its participation within four months may do so at any time thereafter. In any exclusionary zoning litigation instituted against such a municipality, however, there shall be no exhaustion of administrative remedy requirements pursuant to section 16 of this act unless the municipality also files its fair share plan and housing element with the council prior to the institution of the litigation."

This Court has stated, as indeed it must, that "rezoning under Mount Laurel II doesn't prejudice the town's right to appeal...seeing that the legislature acts as it should act so the courts don't have to..." Transcript pp 10-11, Hearing of November 2, 1984 before Hon. Eugene D. Serpentelli.

The legislature has acted. It has provided a mechanism whereby the defendant Borough of South Plainfield can have its fair share numbers determined not by court appointed masters and experts, but by the Council on Affordable Housing.

The procedure and requested Order to Transfer on behalf of the defendant Borough of South Plainfield is hence in perfect harmony with what this Court has said and with what the New Jersey Supreme Court has said in Mount Laurel II, e.g., "We agree that the matter is better left with the legislature...We note that

there has been some legislative initiative in this field. We look forward to more." So. Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158(1983)@212.

The legislature has now established the mechanisms whereby "every municipality in a growth area...can provide through its land use regulations, a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families."

Those mechanisms which satisfy the constitutional obligations established by Mount Laurel II are adequately set forth in the "Fair Housing Act", the legislature declaring "the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation..." FAIR HOUSING ACT, Legislative Findings (emphasis added).

While the term "builder's remedy" is used in the Act, it is not defined therein. Hence, it is submitted that the Act was not intended to apply only to "builder's remedy" types of exclusionary zoning suits, but to any exclusionary zoning suit such as the instant case before the Court in which a final judgement has not been entered.

For purposes of the Act, "final judgement" is defined to mean a judgement subject to an appeal as of right for which all right to appeal is exhausted.

The judgement as to defendant Borough of South Plainfield entered by the Court on May 22, 1984 contained no right to appeal, indeed Mount Laurel II precluded any and all

interlocutory appeals. "Mount Laurel II", 92 N.J. 158(1983) at pp 290-291.


Finally, the test to be employed by the Court in acting upon this defendant's request to transfer is also set forth in Section 16 of the "Act".

"In determining whether or not to transfer, the Court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation."

It is respectfully submitted that the refusal to permit the requested transfer would be the "manifest injustice" for all of the above set for reasons and the reasons contained in the Certification of defendant's attorney.

The additional relief requested by this defendant comprises the dissolving of the restraints prohibiting the Borough of South Plainfield and its boards, agencies and officials from issuing building permits, site plan and subdivision approvals, consummating the finalization of land sale transactions involving Borough owned land. It is submitted that pending the "substantive certification" by the Council on Affordable Housing of the Borough's housing element that, restraining non-Mount Laurel II lands from development would be improper under all doctrines of equity and fairness to the property owners of the Borough not directly affected by the Court orders Mount Laurel II inventoried lands.

Hence, for all of the aforesaid reasons, the Court is respectfully requested to grant this defendant the relief herein sought.

  
FRANK A. SANTORO  
Attorney for Defendant  
Borough of South Plainfield

Dated: July 18, 1985

FRANK A. SANTORO  
2013 PARK AVENUE  
P. O. BOX 272  
SOUTH PLAINFIELD, N. J. 07080  
(201) 561-6868  
ATTORNEY FOR Defendants

SUPERIOR COURT OF  
NEW JERSEY  
CHANCERY DIVISION  
MIDDLESEX COUNTY  
Civil Action  
No. C-4122-73

*Plaintiff*

URBAN LEAGUE OF GREATER  
NEW BRUNSWICK, et al.,  
Plaintiffs,

vs.

*Defendant*

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

vs.

BOROUGH OF SOUTH PLAINFIELD  
BY ITS MAYOR AND COUNCIL,  
et al.,  
Defendants.

LAW DIVISION  
MIDDLESEX COUNTY  
No. 56349-81

*Docket No. C-4122-73*

**CIVIL ACTION**

**ORDER**

This matter having been opened to the Court on motion of defendant, Borough of South Plainfield, and the Court having considered the Certification of Defendants and Memorandum of Law submitted in support thereof and the Affidavits, Memorandum of Law submitted by Plaintiffs in opposition to said motion, and the Court having heard oral argument in open court on July ,1985 from all parties present,

It is hereby ORDERED this            day of July, 1985 that:



008.

(1) The defendant, Borough of South Plainfield, be and hereby is permitted to transfer the matter of the adoption of defendant's proposed Ordinances 1009 and 1010 to the Council on Affordable Housing;

(2) That the restraints imposed upon defendant, Borough of South Plainfield, preventing the defendant from issuing building permits, site plan and subdivision approvals and consummating current and pending land sale transactions for property not subject to the "least cost housing" provisions of proposed Ordinance 1009 be and hereby are dissolved.

(3) That a copy of this Order be served upon all parties on the service list within            days from the date hereof.

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





2. The total present and prospective fair share allocation for South Plainfield through 1990 resulting from the Lerman methodology is 1725 units affordable by low and moderate income households and the fair share for South Plainfield resulting from the Mallach methodology is 1523 units. There is, however, insufficient vacant developable land suitable for development of low and moderate income housing to meet the full fair share resulting from either methodology. As of February 1984, there were only 641 vacant acres remaining in the Borough, of which a significant proportion were in floodplains, in an environmentally sensitive swampland, or in the midst of substantial existing industrial or commercial development. In addition, much of the remaining developable land is in small lots of less than 3 acres. In light of the remaining land, the fair share obligation of South Plainfield should be reduced to 900 units, to be allocated as 280 units of present need by 1990 and 620 units of prospective need by 1990.

3. The zoning ordinance of South Plainfield does not now have, and has not at any time since July 9, 1976, had, a zone for multi-family housing.

4. The only proposal for rezoning to permit more than two-family construction, which is set forth in the South Plainfield Planning Board's 1978 Review of the Master Plan, was rescinded by the Planning Board in its January 1980 Addendum No. 1 to the 1978 Review.

5. The zoning ordinance of South Plainfield does not provide, and has not at any time since July 9, 1976, provided, any mandatory set-aside, density bonus, waiver of zoning requirements, or affirmative municipal assistance for construction of housing affordable by persons of low or moderate income.

6. No multi-family housing other than two-family units has been constructed in South Plainfield since 1976.

7. The only proposal for multi-family housing in South Plainfield since 1976, a proposed six-story, 100-unit senior citizen housing project, was rejected by the Board of Adjustment on May 4, 1982. That decision of the Board of Adjustment was remanded to the Board of Adjustment for amplification and supplementation of the record in light of the decision in South Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II), in an order of this Court filed December 23, 1983 in Elderlodge, Inc. v. South Plainfield Board of Adjustment, No. L-56349-81 (Law Div., Middlesex County).

8. The only proposal for attached single family development in South Plainfield, a proposal by Bayberry Construction to construct 70 townhouses on 6.9 acres, was denied a variance by the South Plainfield Board of Adjustment on January 3, 1984, in part because "the price range indicated is not within the 'low-income' as is required by recent Court decision."

9. It is likely that none of the single family and two-family homes approved or constructed in the Borough since 1976 is affordable by persons of low or moderate income, as defined by Paragraph 23 herein.

10. The Borough has not since 1976 provided for construction of any subsidized low or moderate income housing under any government subsidy program.

11. The Borough has obtained Middlesex County Community Development funds for rehabilitation of 33 housing units since 1976.

12. The 84.8 acre site on New Brunswick Avenue, known as the Harris Steel site and designated as Block 459 Lot 1, Block 460 Lot 1, Block 461

Lots 1-3, Block 462 Lot 2, Block 465 Lot 1, Block 466 Lot 1, Block 467 Lots 1, 3, 4, 5 and 21, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

13. The 27 acre site on New Durham Road, known as the Coppola farm and designated as Block 528 Lot 43, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

14. The municipally owned site of approximately 25 acres at the northern tip of Kennedy Road, known as the Pomponio Avenue site and designated as Block 448 Lots 2.01 and 4.01 and Block 427 Lot 1.01, is appropriate for multi-family development at a density of 15 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units. Said 15 units include a density bonus of 3 units per acre by the Borough of South Plainfield to encourage construction of Mount Laurel housing and as such shall be considered a municipal contribution to the Pomponio Avenue site. The site shall include a 200-foot deep commercial development buffer on the westernmost portion of the site facing Clinton Avenue.

15. The 18+ acre site near Universal Avenue, known as the Universal Avenue site and designated as Block 255, Lots 14, 33 and 34, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

16. The municipally owned site of approximately 8 acres and the adjoining privately owned parcels totalling approximately 4½ acres on either side of Frederick Avenue to the north of Sylvania Place, known as the

Frederick Avenue site and designated as Block 308 Lot 34, Block 310 Lots 1.01, 4.01, 5-7, 9, 11, 13-15, 17 and 18, and Block 311 Lots 16-36, are appropriate for multi-family development at a density of 12 units per acre with a mandatory set aside of 10 percent low income and 10 percent moderate income units.

17. The municipally owned site of 6.15 acres on Morris Avenue, known as the Morris Avenue site and designated as Block 111, Lots 1-4, Block 112, Lots 1, 2.01, Block 113, Lots 1.01, 2, 4, 5.01 and Block 115, Lots 1, 2, 2.01 and 3, is appropriate for development as a senior citizens housing project with a total of 100-150 units of which at least 50 percent will be affordable by low income households with the balance affordable by moderate income households, [if the Borough would contribute the land and provide necessary financial support, including seed money and tax abatement.

18. The 7½ acre site south of Tompkins Avenue designated as Block 12, Lots 9, 16 and 17, and currently owned by the Archdiocese of Metuchen and planned to be used for church purposes, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units. In any event, if the Archdiocese of Metuchen should decide to utilize said property for use as a cemetery, then it shall apply for said use within a two-year period of the date of the entry of an Order of Compliance for the Borough of South Plainfield in this matter.

19. The 1.46 acre site on Hamilton Boulevard, known as the Elderlodge site and designated as Block 259, Lots 5, 6.01, 6.02, 7, and 12, is appropriate for development of a 100-unit multi-family development, with a mandatory set-aside of 10 percent low income and 10 percent moderate income units,

subject to reasonable conditions to be imposed by the Board of Adjustment.

20. The Borough permits use of modular or manufactured housing meeting state building code requirements and zoning requirements for residential development.

21. The likelihood that additional sites will become available in the future for development, as a result of demolition, accidental destruction or otherwise, dictates that an ongoing method be available to insure that sites that are suitable for multi-family development be developed with an appropriate percentage of lower income housing. The adoption of a conditional use provision to enable owners of such sites in excess of 3 acres in size, where appropriate, to develop multi-family housing with a mandatory set-aside of 10 percent low income and 10 percent moderate income housing, subject to appropriate conditions which can be set forth in detail in the Borough zoning ordinance, is an appropriate means to achieve this objective.

22. The Borough will apply for all federal, state, and county funds that become available between the present and 1990 for rehabilitation of existing deficient housing units and for all funding that becomes available for subsidization of the construction or rent of new housing units.

23. Low income households are those earning less than 50 percent of the median household income in the 11-county region designated in the Lerman Report of April 2, 1984. Moderate income households are those earning between 50 and 80 percent of the median household income in that 11-county region.

24. To be affordable by low income households, units for sale may require the expenditure of no more than 28 percent of the household income for principal, interest, taxes, insurance, and condominium fees, and units for rent may require the expenditure of no more than 30 percent of

the household income for rent and utilities.

25. All units affordable by low and moderate income households must be affirmatively marketed by the developer throughout the 11-county region and all marketing practices must comply with federal and state laws against discrimination.

26. All units for sale affordable by low and moderate income households must contain deed restrictions limiting resale for a 30-year period to households of similar qualifications and these restrictions must be enforced by an appropriate agency independent of the developer.

27. All multi-family developments provided for herein shall contain a bedroom mix reflecting the distribution of housing needs in the 11-county region by household size.

28. If, for any reason, the Court fails or refuses to enter Judgment directing appropriate rezoning and assuring an Order of Compliance to the Borough with accompanying six-year repose upon appropriate ordinance amendments, within 30 days of the signing of this Stipulation, either party is free to withdraw from this Stipulation and to proceed to trial on the issues herein, at which trial this Stipulation will not be admissible in evidence.

Plaintiffs Urban League, et al.

By

Eric Neisser  
Eric Neisser

Date

5/10/84

Defendant Borough of South Plainfield

By

Patrick Diegnan  
Patrick Diegnan

Date

May 10, 1984

EXHIBIT E

FILED S-22-84  
E. D. SERPENTELLI, J.S.C.

ERIC NEISSER, ESQ.  
JOHN M. PAYNE, ESQ.  
Constitutional Litigation Clinic  
Rutgers Law School  
15 Washington Street  
Newark, New Jersey 07102  
201/648-5687

BRUCE S. GELBER, ESQ.  
JANET LA BELLA, ESQ.  
National Committee Against  
Discrimination in Housing  
733 Fifteenth St., NW, Suite 1026  
Washington, D.C. 20005  
202/783-8150

ATTORNEYS FOR PLAINTIFFS

URBAN LEAGUE OF GREATER  
NEW BRUNSWICK, et al.,

Plaintiffs,

vs.

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

Defendants.

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION-MIDDLESEX  
COUNTY

Docket No. C 4122-73

Civil Action

JUDGMENT AS TO SOUTH PLAINFIELD

Plaintiffs having moved for summary judgment based upon the Stipulation between plaintiffs and the Borough of South Plainfield, and the Court having reviewed the Stipulation and referred it to the Court-appointed expert to report whether the terms of the Stipulation, including the fair share allocation, the designation of sites for multi-family development, and the procedures for insuring appropriate marketing and affordability controls are reasonable, and having heard counsel for both parties,

It Is, therefore, this 22 day of May, 1984,

ORDERED and ADJUDGED:

1. The Borough of South Plainfield's fair share of the regional low and moderate income housing need through 1990 is 900 housing units, allocated as 280 units of present need and 620 units of prospective need.

2. The Borough of South Plainfield's existing zoning ordinance is not in compliance with the constitutional obligation set forth in Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II), and the Borough is not entitled to any credit towards its fair share for any housing built since 1980.

3. Forthwith, but not later than 120 days after the entry of this Judgment, the Borough of South Plainfield shall amend its zoning ordinance to incorporate the following provisions:

A. The Borough shall rezone the 84.8 acre Harris Steel site on New Brunswick Avenue, designated as Block 459 Lot 1, Block 460 Lot 1, Block 461 Lots 1-3, Block 462 Lot 2, Block 465 Lot 1, Block 466 Lot 1, Block 467 Lots 1, 3, 4, 5 and 21, exclusively for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

B. The Borough shall rezone the 27 acre site on New Durham Road, known as the Coppola farm and designated as Block 528 Lot 43, exclusively for multi-family development at a density of 12 units



per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

C. The Borough shall rezone the municipally owned site of approximately 25 acres at the northern tip of Kennedy Road, known as the Pomponio Avenue site and designated as Block 448 Lots 2.01 and 4.01 and Block 427 Lot 1.01, exclusively for multi-family development at a density of 15 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units, except that the rezoning may provide for a commercial development buffer no more than 200 feet deep on the westernmost portion of the site facing Clinton Avenue.

D. The Borough shall rezone the Universal Avenue site, designated as Block 255 Lots 14, 33 and 34, exclusively for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

E. The Borough shall rezone the municipally owned site of approximately 8 acres and the adjoining privately owned parcels totalling approximately 4½ acres on either side of Frederick Avenue to the north of Sylvania Place, known as the Frederick Avenue site and designated as Block 308 Lot 34, Block 310 Lots 1.01, 4.01, 5-7, 9, 11, 13-15, 17 and 18, and Block 311 Lots 16-36, exclusively for multi-family development at a density of 12 units per acre with a mandatory set aside of 10 percent low income and 10 percent moderate income units.

F. The Borough shall rezone the municipally owned site of 6.15 acres on Morris Avenue, known as the Morris Avenue site and designated as Block 111 Lots 1-4, Block 112 Lots 1, 2.01, Block 113 Lots 1.01, 2, 4, 5.01 and Block 115 Lots 1, 2, 2.01 and 3, exclusively for development as a senior citizens housing project with a total of 100-150 units of which at least 50 percent will be affordable by low income households with the balance affordable by moderate income households. See ¶ 4 . infra.

G. The Borough shall rezone the 7¼ acre site south of Tompkins Avenue designated as Block 12 Lots 9, 16 and 17, and currently owned by the Archdiocese of Metuchen for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units. To the extent that the existing land use ordinance may permit use of the site for cemetery purposes, such ordinance provision may continue in effect for a period of two years from the date of the entry of the Order of Compliance for South Plainfield in this action but shall thereafter expire automatically.

H. The Borough shall rezone the 1.46 acre site on Hamilton Boulevard, known as the Elderlodge site and designated as Block 259 Lots 5, 6.01, 6.02, 7, and 12, which is the property at issue in Elderlodge, Inc. v. South Plainfield Board of Adjustment, No. L-56349-81 (Law Div., Middlesex County), exclusively for a 100-unit multi-family development, with a mandatory set-aside of 10 percent low income and 10 percent moderate income units, subject to reasonable

conditions to be imposed by the Board of Adjustment.

I. The Borough shall expressly provide in its zoning ordinance that modular or manufactured housing meeting state building code requirements and other appropriate zoning ordinance requirements shall be permitted in residential zones throughout the Borough.

J. The Borough shall permit, as a conditional use on any site of 3 acres or more in any residential zone, where appropriate, multi-family development at a higher density than otherwise permitted by the applicable zoning with a mandatory set-aside of 10 percent low income and 10 percent moderate income housing, subject to such additional appropriate conditions as the Borough may wish to incorporate in the zoning ordinance. Through 1990 the Borough shall not permit on a site 3 acres or larger any use substantially similar to that permitted under this section unless it is subject to the same mandatory set-aside.

K. The Borough shall adopt appropriate provisions to require that the low and moderate income housing units to be constructed pursuant to any mandatory set-aside provision shall be phased in proportionately during the construction of the entire project so that certificates of occupancy for more than 25 percent of the market units shall not be granted until 25 percent of the low and moderate income units are completed, certificates of occupancy for more than 50 percent of the market units shall not be granted until 50 percent of the low and moderate income units are completed, and certificates of

occupancy for more than 85 percent of the market units shall not be granted until 85 percent of the low and moderate income units are completed.

L. The Borough shall adopt appropriate provisions to require that all multi-family developments provided for herein shall contain a bedroom mix reflecting the distribution of housing needs by household size in the 11-county region set forth in the Report of the Court-appointed expert in this action dated April 2, 1984, and to limit the granting of construction permits, pursuant to the formula set forth in subparagraph 3(K) above, to insure that each segment of a project contains an appropriate bedroom mix, unless the size of the project makes this infeasible.

4. In order to facilitate development of the Morris Avenue site, after rezoning as set forth in ¶ 3(F) supra, the Borough of South Plainfield shall contribute the land at that site and shall provide the necessary financial support for the project, including necessary seed money and tax abatements.

5. Forthwith, but not later than 120 days after the entry of this Judgment, the Borough of South Plainfield shall adopt an Affordable Housing Ordinance which shall provide that units designated as low or moderate income units shall be sold or rented only to families who qualify as low or moderate income families. The ordinance shall further provide that such units shall be re-rented or re-sold only to qualifying families and that such units are affordable to low or moderate income families. To be affordable,

the monthly expenses of a sales unit for principal, interest, taxes, insurance, and condominium fees shall not exceed 28% of family income while the monthly rental charge, including utilities, shall not exceed 30% of family income. Low income shall be defined as less than 50% of median regional income with adjustments for family size, and moderate income shall be defined as between 50% and 80% of median regional income, with adjustments for family size. For the purposes of this section, the region for determining median income shall be the 11-county region set forth in the Court-appointed expert's Report dated April 2, 1984, in this case. The average price of moderate income units in any development provided for herein shall not exceed the level affordable by households earning 90 percent of the ceiling income for moderate income households, and the average price of low income units in any development provided for herein shall not exceed the level affordable by households earning 90 percent of the ceiling income for low income households. Restrictions on resale will expire 30 years from the date of the initial sale of the premises. The ordinance shall provide a mechanism to assure that only qualifying families own or rent such units and to administer otherwise these provisions. For this purpose, the Borough may establish a municipal agency or may contract with a suitable non-profit organization or other public agency for the purpose of administering the requirements set forth herein.

6. Forthwith, but no later than 120 days after the entry of this Judgment, the Borough of South Plainfield shall adopt a

resolution committing the Borough to apply for all federal, state and county funds that become available between the present and 1990 for rehabilitation of existing deficient housing units and for all such funding that becomes available between the present and 1990 for subsidization of the construction or rent of new housing units, and to encourage and assist private developers to so apply.

7. Forthwith, but not later than 120 days after entry of this Judgment, the Borough of South Plainfield shall amend its zoning ordinances so that all developers of low and moderate income units are required to affirmatively market those units to persons of low and moderate income, irrespective of race, color, sex, or national origin. Such affirmative marketing shall include advertisement in newspapers with general circulation in the urban core areas located in the 11-county present need region identified in the Court-appointed expert's Report dated April 2, 1984. The Borough shall also require the developer to advertise the low and moderate income units with local fair housing centers, housing advocacy organizations, Urban Leagues, and governmental social service and welfare departments located within the 11-county region. The Borough shall also require that all marketing practices comply with applicable federal and state laws against discrimination.

8. The Borough of South Plainfield shall report in writing to the Court and to plaintiff Urban League or its designee, within 120 days of the entry of this Consent Order or when all ordinance amendments and resolutions have been duly enacted by the Borough

Council, whichever first occurs, certifying that all ordinance amendments and resolutions have been enacted or providing an explanation as to why they have not been enacted. Upon certification that all required amendments and resolutions have been enacted, the Court will enter an Order of Compliance which will be valid and binding for six years from the date of receipt of said certification. If all ordinance amendments and resolutions required herein have not been enacted, the Court shall set this case for trial.

9. The Borough of South Plainfield shall report quarterly in writing to plaintiff Urban League or its designee, commencing with September 30, 1984, providing the following information:

(a) itemization of all proposed developments covered by this Judgment for which applications have been filed with the Borough's Planning Board, and for which preliminary or final approval has been given by the Planning Board; including the location of the proposed site, number of low and moderate income units, name of developer, and dates that Planning Board actions were taken or are anticipated to be taken;

(b) a copy of the affirmative marketing plans provided for each development together with copies of advertisements and a list of newspapers and community or governmental organizations or agencies which received the advertisements; and

(c) applications for government funds for low and moderate income housing and the result thereof.

10. Failure on the part of the Borough to comply with this

Judgment subsequent to entry of the Order of Compliance, by rezoning in contravention hereof or by failing to enforce the other provisions hereof, may constitute contempt of Court enforceable, upon motion of the plaintiffs or of the Court sua sponte, by appropriate remedies as provided by law.

11. The Court-appointed expert shall report to the Court no later than June 1, 1984. This Judgment shall become final and the time for taking the actions set forth in this Judgment shall begin to run five days after the Court-appointed expert shall report to the Court.

12. The time periods set forth in this Judgment may be extended by mutual written consent of parties or upon written application to the Court.

  
EUGENE D. SERPENTELLI, J.S.C.



EXHIBIT F

ERIC NEISSER, ESQ.  
JOHN M. PAYNE, ESQ.  
Constitutional Litigation Clinic  
Rutgers Law School  
15 Washington Street  
Newark, New Jersey 07102  
ATTORNEYS FOR PLAINTIFFS  
On Behalf of the ACLU of NJ

SUPERIOR COURT OF NEW JERSEY  
MIDDLESEX/OCEAN COUNTY  
NO. C 4122-73

URBAN LEAGUE OF GREATER ]  
NEW BRUNSWICK, et al., ]  
 ]  
Plaintiffs, ]  
 ]  
vs. ]  
 ]  
THE MAYOR AND COUNCIL OF ]  
THE BOROUGH OF CARTERET, ]  
et al., ]  
 ]  
Defendants. ]

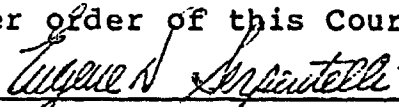
(South Plainfield)

ORDER

The Borough of South Plainfield having moved to transfer this case to the Council on Affordable Housing pursuant to Section 16 of the Fair Housing Act, Laws of 1985, c.222, and having filed in support thereof a Certification of Frank Santoro, Esq. and a Memorandum of Law in Support, and the Urban League plaintiffs having filed Affidavits of Eric Neisser, Esq. and Alan Mallach, a Certification of Lawrence J. Massaro, and a Memorandum of Law in Opposition, and the Court having heard oral argument in open court on October 2, 1985 from Frank Santoro, Esq. for the Borough of South Plainfield and Eric Neisser, Esq. for the Urban League plaintiffs, and the Court having rendered an oral decision on October 2, 1985, with findings of fact and conclusions of law,

IT IS HEREBY ORDERED THIS 11 DAY OF OCTOBER 1985:

1. South Plainfield's motion to transfer is denied.
2. Stay of this Order pending any possible appeal is denied.
3. Pursuant to Paragraph 2 of the Order of August 9, 1985, the stay of the effectiveness of Ordinances 1009 and 1010 adopted on August 7, 1985 is herewith vacated and the Ordinances are to have full legal force and effect.
4. The restraints imposed in Paragraphs 3 and 4 of the Amended Order of July 19, 1985 and continued by Paragraphs 3 and 4 of the Order of August 9, 1985 shall remain in full force and effect pending further order of this Court.

  
\_\_\_\_\_  
EUGENE D. SERPENTELLI, A.J.S.C.

OCT 27 1995

JUDGE SERPENTELLI'S CHAMBERS

**FRANK A. SANTORO**  
1500  
2013 PARK AVENUE  
P. O. BOX 272  
SOUTH PLAINFIELD, N. J. 07080  
(201) 561-6868  
ATTORNEY FOR Defendants

SUPERIOR COURT OF  
NEW JERSEY  
CHANCERY DIVISION  
MIDDLESEX COUNTY/  
OCEAN COUNTY  
Civil Action  
No. C-4122-73

*Plaintiff*

URBAN LEAGUE OF GREATER  
NEW BRUNSWICK, et al.,  
Plaintiffs,

vs.

*Defendant*

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

vs.

BOROUGH OF SOUTH PLAINFIELD  
BY ITS MAYOR AND COUNCIL,  
et al.,  
Defendants

LAW DIVISION  
MIDDLESEX COUNTY  
No. 56349-81

*Docket No. C-4122-73*

**CIVIL ACTION**

NOTICE OF MOTION FOR  
LEAVE TO APPEAL AN  
INTERLOCUTORY ORDER, FOR  
STAY OF TRIAL COURT PRO-  
CEEDINGS PENDING APPEAL,  
TO CONSOLIDATE FOR ORAL  
ARGUMENT APPEALS OF OTHER  
MUNICIPALITIES AND REQUEST  
FOR ORAL ARGUMENT

TO: Eric Neisser, Esq.  
John Payne, Esq.  
Constitutional Litigation Clinic  
Rutgers Law School  
15 Washington Street  
Newark, New Jersey 07102

Hon. Eugene D. Serpentelli  
Superior Court of New Jersey  
Ocean County Courthouse  
CN-2191  
Toms River, New Jersey 08753

**FRANK A. SANTORO**  
1500  
2013 PARK AVENUE  
P. O. BOX 272  
SOUTH PLAINFIELD, N. J. 07080  
(201) 561-6868  
ATTORNEY FOR Defendants

SUPERIOR COURT OF  
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BOROUGH OF SOUTH PLAINFIELD  
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LAW DIVISION  
MIDDLESEX COUNTY  
No. 56349-81

*Docket No. C-4122-73*

**CIVIL ACTION**

CERTIFICATION OF  
FRANK A. SANTORO

FRANK A. SANTORO, of full age, hereby certifies as follows:

1. I am the Borough Attorney for the Borough of South Plainfield, a Municipal Corporation of the State of New Jersey. I have personally represented the Borough of South Plainfield in all aspects of the within matter since January 1, 1985. I have close familiarity with, and personal knowledge of, all matters set

forth in this Certification, which I submit in support of the application of the Borough of South Plainfield for leave to appeal an interlocutory order entered by the trial court on October 11, 1985, denying the Borough of South Plainfield's application to transfer the pending litigation to the Council on Affordable Housing, and in further support of the Borough of South Plainfield's application for a stay of all proceedings pending in the trial court until this Court rules definitively upon the merits of the Borough of South Plainfield's application.

2. In the accompanying brief I have set forth briefly the procedural history of the within matter insofar as it is relevant to this application.

3. On May 22, 1984, a Judgment, interlocutory in nature, as to the Borough of South Plainfield, was entered, which said Judgment required the Borough to zone for 900 units of low and moderate income housing by 1990 and designated eight sites in the Borough to accommodate such zoning; requiring, as it does, densities of from 12 to 15 units per acre and mandatory 10% low income and 10% moderate income set asides, the Borough of South Plainfield shall be required to allow for the construction of at least 2,000 additional residential housing units and in the event that the Morris Avenue Senior Citizens site is not constructed, an additional 750 units.

4. The Borough of South Plainfield has a current housing stock of approximately 6,000 residential units, comprising mainly single family residential. The required increase in the

number of housing units will drastically impact the Borough's fiscal capabilities for such things as the construction of new schools, new roads, expanded police and fire services. More importantly, the required increase in the number of housing units and the density of same shall severely impair the established pattern of development in the Borough; deplete available land for recreational, conservation, agricultural and farmland preservation purposes and seriously overload the public facilities in infrastructure capacities to the Borough.

5. On or about July 5, 1985, the Legislature of the State of New Jersey adopted a Fair Housing Act, Chapter 222 of the Public Laws of 1985. While most of the important aspects of this Statute are addressed in the accompanying brief, it is efficient to indicate here that among the criteria and guidelines that the Council on Affordable Housing will utilize in approving a municipality's housing element and fair share plan include considerations of "the established pattern of development in the community will be drastically altered; adequate land for recreational, conservation or agricultural and farmland preservation purposes would not not be provided; and adequate public facilities in infrastructure capacities are not available or would result in cost prohibitive to the public if provided". The Act also provides for both the municipality transferring up to 50% of its fair share to another municipality within this housing region by means of a contractual agreement, and to which two municipalities voluntarily enter. The Act as well provides a phase-in procedure

for the development of the fair share of low and moderate income housing.

6. In order to avail itself of the aforesaid provisions of the Fair Housing Act, the Borough of South Plainfield requested that the Court approve the transfer of its case to the Council on Affordable Housing in accordance with the clear mandate set forth in the Act, which allows for the transfer of pending, i.e. existing, disputes involving exclusionary zoning.

7. The aforesaid Housing Act adopts a procedure permitting the transfer of the existing litigation from the Court to the Council on Affordable Housing. Section 16 of the Fair Housing Act provides:

"For those exclusionary zoning cases instituted more than 60 days before the effective date of this Act, any party to the litigation may file a motion with the Court to seek a transfer of the case to the Council. In determining whether or not to transfer, the Court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation."

It was pursuant to this authority a motion seeking a transfer of the litigation against the Borough was filed with the Court on or about July 18, 1985. The Court elected to set all motions for transfers for argument on Friday, September 27, 1985, including the Borough of South Plainfield, Warren Township, Cranbury Township, Monroe Township and Piscataway Township. The Court House, however, was closed on that date because of the hurricane, and the argument took place on Wednesday, October 2, 1985.

8. On that date, before Judge Serpentelli, in the Courthouse in Toms River, New Jersey, a number of municipalities and builders and representatives of the Urban League presented arguments in support of and in opposition to the transfer applications. Following extensive argument, Judge Serpentelli concluded that all transfer applications returnable before him that date would be denied. His decision was based on a consideration of many factors, specifically including the following:

A. The Legislature did not intend to exclude the Court from the process of housing or fair share determination of housing by the adoption of the Fair Housing Act.

B. The preference for legislative resolution of certain housing matters is not always possible.

C. Where the transfer of a pending exclusionary zoning suit would seriously impair constitutional objectives of the Act, it should be denied.

D. The Judge discussed the manifest injustice test, as set forth in the Act, and indicated that nowhere has a definition of manifest injustice or transfer or party been provided by the legislation.

E. That manifest injustice, as it applies to the Court's ruling on each of the motions, including the motion of South Plainfield for a transfer of its case to the Fair Housing Council, is deemed to be fact specific by the Court.



F. The law of the case, including interrogatories, depositions, expert reports and the like, are not necessarily binding upon either the Council on Affordable Housing or on the Office of Administrative Law in accordance with the provisions of the Fair Housing Act.

G. The Urban League has already been declared to be a class action.

H. Lower income persons are parties to this litigation.

I. The Court must resolve the question of what the impact of the transfer of the case to the Council on Affordable Housing would have upon lower income persons.

J. The speed of resolution of the issues is at least one very important factor in deciding manifest injustice.

K. The Court raised the question as to whether the transfer would speed up the availability of housing for low and moderate income persons.

L. The Court carefully analyzed the time spans, as set forth in the Act, and concluded that the best case transferred (of those cases currently before it) would indicate a minimal time span of some 22 months after transfer before final resolution of the issues by the Fair Housing Council.

M. The Judge, at length, summarized the status of each of the cases, including litigation history of the Urban League cases, going back to the initiation of those cases in 1974.

N. The Court recites a list of reasons why cases should nor should not be transferred. The Court then indicated that in

an analogous manner to the obscenity test, "you can tell manifest injustice when you see it."

0. South Plainfield's case was resolved by virtue of the voluntary stipulation of May 10, 1984, and that South Plainfield had already received a dramatic reduction of its fair share number and that the fair share number of 600 is the realistic number and that the Ordinance was adopted under protest and that as long as the Ordinance is acceptable to Carla Lerman, a short compliance hearing on the Ordinances adopted under protest would be held by the Court within the next 30 days.

9. The Borough of South Plainfield respectfully contends that Judge Serpentelli's decision is in direct opposition to the intent of the New Jersey State Legislature, as expressed in the Fair Housing Act. The Borough of South Plainfield further contends that to continue with the matters without obtaining appellate review of this decision will effect manifest injustice to the Borough of South Plainfield and to other municipalities similarly situated, who will be compelled to adopt ordinances changing the land use patterns in violation of sound planning criteria and in opposition to strong and substantial public sentiment. The enactment of zoning ordinances, whether by consent or under protest, will effect irreparable damage to each municipality. Hence, the Borough of South Plainfield respectfully submits this Certification and the accompanying brief in support of its urgent request for a stay of the trial court proceedings, pending the

appellate review of Judge Serpentelli's ruling on the transfer motion.



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FRANK A. SANTORO, ESQ.  
Attorney for Defendant/Appellant  
Borough of South Plainfield

DATED: October 23, 1985

I certify that all of the above statements made by me are true and I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



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FRANK A. SANTORO, ESQ.  
Attorney for Defendant/Appellant  
Borough of South Plainfield

DATED: October 23, 1985