Morris Cty. Fair Housing v. Boonton Twshp. 1985

Brief of Pls Morris Cty Fair Housing Council, Branch of NAACP, & Public Advocate of NJ

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SUPREME COURT OF NEW JERSEY
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MORRIS COUNTY FAIR HOUSING COUNCIL, et al.,	:	
Plaintiffs-Respondents,	:	Civil Action
vs.	:	ON APPEAL FROM THE INTERLOCUTORY ORDERS OF THE SUPERIOR COURT,
BOONTON TOWNSHIP, et al.,	:	LAW DIVISION, MIDDLESEX/MORRIS COUNTIES
Defendants-Appellants,	:	
and related cases on appeal.	:	Sat Below: Honorable Stephen Skillman, J.S.C.

BRIEF OF PLAINTIFFS-RESPONDENTS MORRIS COUNTY FAIR HOUSING COUNCIL, MORRIS COUNTY BRANCH OF THE NAACP, AND PUBLIC ADVOCATE OF NEW JERSEY

ALFRED A. SLOCUM
ACTING PUBLIC ADVOCATE OF NEW JERSEY
BY: STEPHEN EISDORFER
ASSISTANT DEPUTY PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
HUGHES JUSTICE COMPLEX
CN-850
TRENTON, NEW JERSEY 08625
(609) 292-1692

On the Brief:

Stephen Eisdorfer, Esq.
Susan Remis Silver, Esq.
John P. Thurber, Esq.

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendants Denville Township and Randolph Township appeal the trial court's denial of their motions for transfer of the seven-year old Morris County Fair Housing Council et al. v. Boonton Township, et al. litigation to the Affordable Housing Council pursuant to L. 1985 c. 222, §16.

A. Denville Township

1. History of the Litigation

This lawsuit represents a seven-year effort to enforce the constitutional rights of low and moderate income persons to realistic housing opportunities in Denville Township. The case has been through protracted pretrial proceedings; it has been fully tried; orders adjudicating Denville's housing obligation, and its failure to meet that obligation, have been entered; Denville has been ordered to comply; a special advisory master has been appointed; and the master has filed his report.

Specifically, this suit was filed on October 13, 1978, by the Morris County Fair Housing Council, Morris County Branch of the NAACP, and the Public Advocate of New Jersey against Denville, Randolph and 25 other municipalities in Morris County . Plaintiffs alleged that each of the defendant municipalities was engaged in unconstitutional exclusionary zoning. Denville answered, denying this claim, offering more than 30 affirmative defenses, and counter-claiming for expenses and attorney fees on the ground that plaintiffs' commencement of the action was "improper, illegal, arbitrary, [and] capricious." Denville and the other defendants also challenged the decision to bring the suit in a proceeding before the Appellate Division. This challenge was rejected after briefing and oral argument. Borough of Morris Plains v. Department of the Public Advocate, 169 N.J. Super. 403 (App. Div.), certif. denied, 81 N.J. 411 (1979).

Denville then filed motions to sever and to disquality the Honorable Robert Muir, J.S.C., from hearing the case. After briefing and argument, both motions were denied by order entered on January 19, 1979. On plaintiffs' motion, the counter-claim was severed and proceedings on this claim were stayed by order dated March 23, 1979.

Plaintiffs commenced discovery on December 26, 1978, by serving their first set of interrogatories. Judge Muir entered the first of many orders setting timetables for discovery on January 19, 1979. Defendant Denville Township submitted full answers to plaintiffs' first and second sets of interrogatories only after repeated motions and orders to compel discovery. See Order of June 21, 1979; motions of August 24 and September 21, 1979, resulting in order of November 15, 1979; motion of November 1, 1979, resulting in order of December 12, 1979. Plaintiffs deposed Denville's consulting planner and seven other so-called common defense experts whose testimony was offered jointly by Denville and other defendants. Plaintiffs also responded to Denville's interrogatories and provided the reports of four expert witnesses. Denville and the so-called common defense group conducted 19 days of depositions of these witnesses. Discovery closed on February 15, 1980.

The trial court conducted a pre-trial conference on March 19, 1980, which led to the entry of pre-trial orders dated March 19, 1980, and April 9, 1980. At that time, Denville joined in the first of three motions to stay indefinitely all proceedings. The motion was denied. The motion was renewed and again denied on May 23, 1980. (Two defendants other than Denville unsuccessfully appealed this decision to the Appellate Division and this Court).

In its pre-trial order, the trial court sought to simplify the issues by ordering the parties to file detailed proposed findings of fact. On April 30, 1980, plaintiffs filed a 600 page set of findings of fact. Denville filed no findings. On July 17, the trial court modified and clarified its order and set a new timetable.

On July 24, plaintiffs filed a revised 900 page set of findings of fact. Denville never filed any counter-findings. In September 1980, Judge Muir abandoned the effort to simplify the issues in this manner and scheduled the case for trial before the Honorable Reginald Stanton on January 5, 1981. On December 1, 1980, Judge Stanton entered a new order establishing trial procedures for a trial to commence on January 5, 1981, and denied Denville's third motion for an indefinite stay. On December 16, 1980, as plaintiffs were preparing for trial, this Court granted a motion for a stay sought by defendants other than Denville.

After this Court's decision in Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 155 (1983) (Mt. Laurel II), the present case was specifically assigned to the Honorable Stephen Skillman, J.S.C., and proceedings resumed on July 11, 1983. Pursuant to a scheduling and procedural order entered on July 13, 1983, plaintiffs served notice of the pending case on approximately 240 municipalities. Six additional municipalities and the Middlesex County Planning Board intervened, although all subsequently withdrew.

Pursuant to the trial court's order of July 13, 1983, plaintiffs filed reports of four expert witnesses on October 10, 1983. Denville conducted three days of depositions of these witnesses. Plaintiffs also recommenced discovery, serving a notice to produce documents and a third set of interrogatories upon Denville. Denville filed expert reports and responded to plaintiffs' interrogatories only after a motion and order to compel discovery was entered on December 2, 1983.

Pursuant to the trial court's order of February 14, 1984, plaintiffs filed a brief and prepared for trial on the issue of delineation of the region. This trial was postponed after the court appointed Carla Lerman as its expert witness and directed her to prepare a report. In response to Ms. Lerman's report, plaintiffs submitted an additional expert report on fair share and

participated in three evenings of depositions of Ms. Lerman by Denville and other defendants.

Commencing in December of 1983, plaintiffs had periodic meetings with representatives of Denville concerning settlement, including a court-supervised settlement conference on April 9, 1984. These efforts were unavailing prior to trial.

Trial commenced against Denville, Randolph and one other defendant on July 2, 1984, and continued with some interruptions until July 26, 1984. It was suspended when plaintiffs and Denville entered into a tentative settlement agreement, which the trial court determined to be likely to be finalized and secure trial court approval.

The parties proceeded to attempt to finalize this agreement. In the meantime, Siegler Associates, plaintiffs in the consolidated case of Siegler Associates v. Denville Township, moved for summary judgment. Judge Skillman determined that Denville's zoning ordinance was facially invalid and entered an order for partial summary judgment on November 9, 1984. On December 16, 1984, at a point when counsel had substantially completed drafting a settlement agreement, the municipal governing body of Denville voted to repudiate the tentative agreement. Trial resumed on January 11, 1985, and was completed in one day. The trial court issued an opinion on January 14, 1985, finding Denville's constitutional housing obligation is 924 lower income units. On January 31, 1985, the court issued an opinion concluding that Denville's unmet obligation is 883 lower income units and directed Denville to submit a revised zoning ordinance within 90 days. On March 3, 1985, Judge Skillman entered an order embodying that decision and appointed Dr. David Kinsey as special advisory master.

Dr. Kinsey, in performance of his duties, had weekly daylong meetings starting on April 18, and continuing through June 12, 1985. Dr. Kinsey sub-

mitted his report to the trial court on August 16, 1985.

On July 2, the Governor signed L. 1985 c. 222, the so-called "Mt. Laurel Bill." On July 8, 1985, Denville moved to terminate the appointment of the special master and transfer the case to the Affordable Housing Council. The trial court denied the request to terminate the appointment of the master on July 19, 1985.

On October 25, 1985, Judge Skillman denied the application for transfer to the Affordable Housing Council and issued a 62-page written decision. On November 6, the trial court directed that a hearing on remedies commence on December 18, 1985, and established a schedule of pre-trial proceedings.

Denville filed a motion for leave to appeal. This Court, on its own motion, certified this appeal, along with eleven others.

2. Denville's Response To Its Mt. Laurel Constitutional Obligations

In 1975, this Court ruled in Southern Burlington County NAACP v. Mt. Laurel Township, 67 N.J. 155 (1975) (Mt. Laurel I), that municipalities had a constitutional obligation to plan and provide for housing to meet the needs of their indigenous poor and their fair share of the present and prospective needs of the region's poor. As indicated by the 1979 report of Alan Mallach (PADenLDiva A-1),* no undeveloped areas in Denville were zoned for "least cost" housing -- garden apartments, townhouses, single family houses on small lots, two family houses, or mobile homes. This analysis is corroborated by the vacant land analysis prepared by the Township Planner Russell Montney in 1979 (PaDenLDiva B-1). The only arguable provision for lower income housing was a permissive senior citizen housing zone.

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* For purposes of this brief, PADenLDiva refers to the appendix of the Public Advocate's brief in the Law Division in opposition to Denville's application to transfer. PARanLDiva refers to the appendix to the Public Advocate's brief in opposition to Randolph's application. These briefs and appendices have been filed previously in accordance with the Court's direction.

In September 1983, eight months after the second Mt. Laurel decision, Mr. Mallach prepared a new report and found no increase in opportunities for "least cost" housing and no provision for low and moderate income housing in Denville (PADenLDiva C-1). The lack of opportunity for least cost housing in Denville is corroborated by the June 1984 vacant land analysis prepared by Mr. Montney (PaDenLDiva D-1).

In response to plaintiffs' third set of interrogatories, Denville reported in 1984 that it had taken no steps to create realistic opportunities for low and moderate income housing (PaDenLDiva E-1). In a stipulation entered in open court on January 31, 1985, Denville Township agreed that only 41 units of lower income housing had been created in the municipality since 1980, all in the form of rehabilitation of existing substandard units occupied by low and moderate income households under a program conducted by the Morris County Community Development Office. The municipality plays no role in this program.

In response to the trial court's decision of January 31, 1985, Denville never submitted a revised zoning ordinance either to their court or to the special advisory master. As indicated by Dr. Kinsey's report, the municipality did not avail itself of his assistance in formulating a compliance plan or drafting an ordinance, and cooperated only minimally in his efforts to secure information to perform his charge (PADenLDiva F-1). On July 13, 1985, the municipality submitted a six-page outline of a compliance plan. Plaintiffs' analysis of this compliance plan indicates that the plan, if implemented, would provide realistic opportunities for only 12 units of low and moderate income housing (PADenLDiva G-1). Dr. Kinsey reached the same conclusion in his report (PADenLDiva F-21).

In sum, Denville has taken no steps since 1975 to create realistic opportunities for housing affordable to low income households and has proposed no plan to create realistic affordable housing opportunities in the future.

B. Randolph Township

1. The History Of The Litigation

The history of the case against Randolph Township up to the commencement of trial in 1984 is similar to that of Denville. Randolph is one of three municipalities against whom plaintiffs went to trial in July 1984. After completion of the testimony of the court-appointed expert and plaintiffs' expert, but before Randolph presented any testimony, the parties entered into a tentative settlement agreement for the provision of 634 units of lower income housing on several sites (PaRanLDiva A-1). Based upon the representations of counsel that the parties had approved the tentative agreement and a finding by the trial court that the agreement was likely to be finalized and secure approval of the court, trial was suspended as to Randolph Township.

Counsel for Randolph Township drafted an agreement and ordinance, which plaintiffs found generally acceptable, except for a number of relatively modest points. At this point, however, problems began to develop. (Affidavit of S. Eisdorfer, PARanLDiva B-1).

First, Randolph unilaterally adopted an ordinance which, inter alia, rezoned a key site in the settlement agreement, the so-called Randolph Mountain Ski Area site, with limitations upon development quite different from and inconsistent with the terms of the tentative agreement. The property owner, who had previously been amenable to development of the site for lower income housing under the terms of the tentative agreement, objected to these new limitations on the ground that they made development of the number of units called for in the agreement impossible.

Second, the owner of a second site, whom municipal officials had represented to plaintiffs as ready, willing, and able to develop lower income housing on the site in accordance with the terms of the tentative agreement, indicated to plaintiffs orally and in writing that it had no such intention.

Third, the municipality declined to take any steps during the pendency of the negotiations to ascertain whether the so-called state inspection site, which the agreement called for the municipality to purchase from the State for the development of lower income housing, continued to be available. Nor did Randolph take any steps to negotiate an agreement with the State to acquire this site.

Despite plaintiffs' repeated admonitions that these problems were potentially fatal to any settlement and had to be resolved before an agreement could be finalized, the municipality took no steps to resolve these issues.

As a result, no final agreement has been executed. On August 29, 1985, counsel for defendants advised plaintiffs by telephone that, instead of seeking to resolve these issues, the municipality would move to transfer the case to the Affordable Housing Council pursuant to L. 1985 c. 222, ¶16, and would submit a proposed housing element to the Affordable Housing Council in accordance with the timetable set forth in that statute.

On October 25, 1985, the trial court also denied Randolph's application to transfer the case to the Affordable Housing Council. On November 6, the trial court directed that the trial on the merits resume on December 13, 1985. The parties at that time estimated that no more than three days would be required to complete the trial as to "fair share."

Randolph filed a motion for leave to appeal. This Court, on its own motion, certified this appeal along with eleven others.

2. Randolph Township's Response To Its Mt. Laurel Constitutional Obligation

As indicated in a 1979 report prepared by Alan Mallach, a housing expert for plaintiffs (PARanLDiva C-1), four years after the Mt. Laurel decision, Randolph had essentially no undeveloped areas zoned for "least cost" housing -- garden apartments, townhouses, single family houses on small lots, or mobile homes. In 1983, eight months after the second Mt. Laurel decision,

Mr. Mallach prepared a new report and found no significant increase in the opportunities for least cost housing and no provision in the zoning ordinance for low and moderate income housing (PA Ran L Diva D-1). The lack of opportunity for least cost housing is corroborated by Randolph's answer to question 5 of plaintiffs' third set of interrogatories submitted in the fall of 1983 (PARanLDiva E-1). In short, the only provision made by Randolph since 1975 for affordable housing was the approval of 132 units of public housing and the grant of a variance for the creation of eight units of housing by the Archdiocese of Paterson. Answer of Randolph Township to Plaintiffs' Third Set of Interrogatories (PARanLDiva E-1).

Randolph's fair share housing obligation to 1990, as determined by its own expert, is 819 lower income units. As computed by the court-appointed expert, Randolph's fair share obligation is 972 units (PA Ran L Diva F-1). Consequently, the 140 units which Randolph can arguably claim to have provided since 1975 represent only a very small step towards meeting its constitutional obligations.

Randolph has no functioning plan for providing further lower income housing opportunities. Plaintiffs and Randolph agreed to a tentative settlement for 634 lower income units. Randolph, however, so eroded this settlement that in plaintiffs' opinion it no longer represents a fair and reasonable plan for compliance. Randolph has now abandoned this plan outright. It should be noted that although Randolph adopted a zoning ordinance embodying some portions of the tentative agreement, that ordinance never went into effect because it was conditioned upon approval of the agreement by the trial court. Randolph continues to regulate land uses in accordance with the constitutionally unsatisfactory ordinance described in Mr. Mallach's 1983 report.

ARGUMENT

INTRODUCTION

This Court has before it appeals by eleven municipalities, including Denville and Randolph Townships, of trial court decisions denying motions of municipal defendants for transfer of pending exclusionary zoning cases, pursuant to section 16(a)* of L. 1985 c. 222, to the Affordable Housing Council (AHC) established by that statute. It also has before it one appeal by a builder-plaintiff from a decision granting a municipal motion for transfer under that section. As we will explain, these cases are atypical of the approximately 135 exclusionary zoning cases that are potentially eligible for transfer to the Affordable Housing Council.

Six of the eleven municipal appeals before the Court have been filed by municipal defendants in two cases, Urban League of Greater New Brunswick, et al. v. Borough of Carteret, et al., Docket No. C. 4122-74, and Morris County Fair Housing Council, et al. v. Boonton Township, et al., Docket No. L-6001-78 P.W. These are the only two cases currently pending in the trial courts brought (and prosecuted) by civil rights organizations rather than by builders. The Urban League case, now 10 years old, is the oldest pending exclusionary case in New Jersey. The Morris County Fair Housing Council case, now seven years old, is the second oldest pending exclusionary zoning case in the State. The six municipal appellants in these cases -- Cranbury, Monroe, Piscataway, and South Plainfield in the Urban League case, and Denville and Randolph in the Morris County Fair Housing Council case -- have all been through protracted and tortuous judicial proceedings including trials and appeals. Five of these six municipalities have had

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* For clarity, the first paragraph of L. 1985 c. 222, §16, will be referred to in this brief as section 16(a) to distinguish it from the section designated in the statute as section 16(b).

judicial determinations both as to the magnitude of their constitutional housing obligations and the unconstitutionality of their current zoning ordinances and have had special masters appointed to oversee the implementation of municipal remedies.* Two of these municipalities, Denville and Randolph, have entered into and then repudiated tentative settlements to achieve compliance with their constitutional obligations, even though both settlements had received tentative judicial approval. As discussed above, during the protracted course of these proceedings -- and, presumably, as a result of it -- none of these municipalities has taken any substantial steps toward compliance with its constitutional obligations

In sum, these six cases are wholly unrepresentative examples of the types of matters that might be subject to applications for transfer to the Affordable Housing Council. If L. 1985 c. 222 is construed to require that these cases be transferred to the Affordable Housing Council, then surely every other pending exclusionary zoning suit will have to be transferred. If plaintiffs in these cases are required by L. 1985 c. 222, §16(a) to recommence proceedings before the AHC, as the municipal appellants urged below, then enforcement of the constitutional rights of lower income persons throughout New Jersey will have effectively been placed in limbo for at least two years. Such an untoward result would be wholly at odds with the dictates in Mt. Laurel II and with any acceptable legislative response to this Court's mandate.

By the same token, however, the Court must take care not to mold a construction of section 16(a) in the image of these extreme cases. Just as "hard cases make bad law," so bad cases can make hard law. As we shall explain more fully below, a construction of §16(a) which leads to the denial of

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* The trial of Randolph's case was suspended in midstream when the municipality entered into a tentative agreement with plaintiffs which the trial court found likely to be finalized and to receive final judicial approval. As set forth in the Statement of Facts above, the municipality failed to take essential steps to finalize and implement this agreement, and ultimately repudiated it.

applications of transfer of these exceptional cases and the granting of such applications in all other cases is incompatible with the legislative intent in L. 1985 c. 222, and with the constitutional doctrines embodied in the Mt. Laurel decisions.

These appeals, as noted in the Court's letter of November 15, 1985, raise two broad issues:

1. Is L. 1985 c. 222 facially unconstitutional in whole or in part?

2. What is the proper construction of L. 1985 c. 222, §16(a)?

The Honorable Stephen Skillman addressed these issues below in his decision in Morris County Fair Housing Council v. Boonton Township, Docket No. L-6001-78 P.W. (Law Div. Morris/Middlesex Counties, October 28, 1985). Judge Skillman's 62-page written opinion is exemplary in its thoroughness and reasoning. The trial court identified appropriate criteria for evaluating applications for transfer under section 16(a) and correctly applied those criteria to the facts of the Denville and Randolph applications. The Public Advocate urges this Court to affirm and adopt the determinatons of the court below. We shall, however, explain that the factors and criteria identified by the trial court are more deeply rooted in the constitutional doctrines underlying the Mt. Laurel decisions than the lower court's opinion itself might suggest.

This brief will first address the question of the facial constitutionality of L. 1985 c. 222. It will suggest that this Court need not address the question of the constitutionality of L. 1985 c. 222 in these appeals, but, if it chooses to do so, eight specific provisions and features of the statute must be held facially unconstitutional. The Act as whole, however, need not be found facially unconstitutional, since seven of these provisions and features can be given saving constructions which avoid any constitutional defects and the remaining provision, the moratorium on builder's remedies imposed by section 28, can be severed.

Next, the brief will analyze section 16(a) in light of the constitutional background and legislative history of the statute and identify four constitutionally-based criteria which must be met for a case to be transferred to the Affordable Housing Council. Two of these encompass the criteria identified by the trial court. Based on these criteria alone, the applications of Denville and Randolph were properly denied.

Finally, the brief will address the broader questions relating to the disposition of applications for transfer under section 16(a).*

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* This brief does not follow the order of the list of issues distributed by the Court on November 15, 1985. To assist the Court, Appendix A cross-indexes this brief to that list of issues.

I. CERTAIN PROVISIONS OF L. 1985 C. 222 ARE FACIALLY UNCONSTITUTIONAL. THE UNCONSTITUTIONAL PROVISIONS CAN, HOWEVER, BE SEVERED OR RECONSTRUED TO PRESERVE THEIR CONSTITUTIONALITY AND THE FACIAL CONSTITUTIONALITY OF THE ACT AS A WHOLE

All of the cases on appeal before this Court involve applications for transfer under L. 1985 c. 222 §16(a) (the Act). Such cases can only be transferred to the Affordable Housing Council if the transfer does not work a "manifest injustice on any party." As will be demonstrated in section II of this brief, this section bars, inter alia, the transfer of any case where transfer would result in violation of the constitutional rights of any party or of lower income persons. All cases on appeal can therefore be resolved by the Court entirely on statutory grounds without the need to reach any issue relating to the facial constitutionality of the Act or any of its provisions. For this reason, the Public Advocate urged the trial court not to reach any of the constitutional issues raised by the various other parties. The Public Advocate makes the same recommendation to this Court.

However, if this Court chooses to address the constitutionality of the Act, it must conclude that certain provisions and features are unconstitutional on their face. In particular, the following provisions and features of the Act are fatally defective:

1. S. 7(c)(1) - Arbitrary credits against municipal fair share housing obligations for existing housing;

2. S. 7(c)(2) - Mandatory downward adjustments of municipal fair share housing obligation for various local planning factors;

3. S. 7(d) - Prohibition on the AHC requiring that municipalities "raise or expend municipal revenues";

4. S. 22 - Deeming settlement agreements of exclusionary zoning litigation which were not approved by any court and which do not necessarily create any realistic opportunities for development of lower income as equivalent to substantive certification by the AHC;

5. S. 28 - Moratorium on "builder's remedies";

6. The absence of any express power or duty in the AHC to require that favorable treatment be given to builders who vindicate the rights of lower income persons by filing and prosecuting a request for mediation and review or an objection to a petition for substantive certification pursuant to L. 1985 c. 222, §15;

7. The absence of any express power or duty in the AHC to require that a municipality conform its proposed housing elements to conditions imposed by the AHC pursuant to L. 1985 c. 222, §14(b) or to require that a municipality actually implement a housing element which has been granted substantive certification;

8. The absence of any express power or duty in the AHC to impose interlocutory restraints on development in municipalities where the scarcity of vacant developable land, public water supply, public sewerage, or other resources may limit the ability of the municipality to meet its fair share housing obligation.

As will be discussed in more detail below, a determination by the Court that these provisions and features of the Act are facially unconstitutional does not require a finding that the Act as a whole is unconstitutional. To the contrary, the facial constitutionality of the Act as a whole may properly be upheld through constructions of these provisions which eliminate their constitutional flaws or by severance of the unconstitutional features.

We address each of these provisions and features in turn.

A. Arbitrary Credits Against Municipal Fair Share Housing Obligations For Existing Housing [§7(c)(1)]

L. 1985 c. 222, §7, requires the Affordable Housing Council to delineate housing regions in the state and, for each such region, to determine the present and prospective need for low income housing. Section 7(c)(1) of the Act then requires the ACH to establish guidelines for municipal determinations of their fair share of this regional unmet present and prospective need for low income housing. The statute gives the AHC no specific directions as to the content or specifics of those guidelines except in one singular respect. It provides:

> Municipal fair share shall be determined after crediting on a one to one basis each current

> unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households. . .

Read literally, this provision requires that the municipality's fair share of the unmet present and prospective regional need for safe and decent housing affordable to low and moderate income households should be reduced by the amount of existing lower income housing.

As Judge Skillman recognized, if this section were interpreted in this fashion "its constitutionality would be difficult to sustain." Slip op. at 35. Indeed, so read, this provision violates substantive due process under the New Jersey and United States Constitutions, for it bears no meaningful relationship to any legitimate legislative purpose. Greenberg v. Kimmelman, 99 N.J. 552 (1985). Fair share is concerned with unmet housing needs. See Oakwood at Madison v. Township of Madison, 72 N.J. 481, 526 (1976). In computing regional need and allocating this need among municipalities, lower income households who are already adequately housed are excluded by definition. Therefore, to subtract the housing occupied by those households from the municipal fair share is to make an utterly meaningless and arbitrary computation.

Moreover, this provision violates the most fundamental requirement of the Mt. Laurel decisions. Any compliance plan, whether formulated by the municipality, a court, or a state agency, must result in the provision of housing opportunities that are "the substantial equivalent of the [municipality's] fair share." Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158, 216 (1983) (hereinafter Mt. Laurel II). As set forth in the affidavit of the Public Advocate's housing expert, Alan Mallach (PADenLDiva J-1), section 7(c)(1) results in an enormous gap between the amount of lower income housing that municipalities would have to provide for and their constitutional fair share, however determined. Applied on a statewide basis, it

results in an aggregate negative housing obligation. Its application to specific municipalities is similarly dramatic. For example, it results in a housing obligation for Denville that is 35 percent below its court-determined fair share. Section 7(c)(1) of the Act thus guarantees that municipalities will not satisfy the minimum constitutional requirements in Mt. Laurel II.

Thus, read literally, this provision is facially unconstitutional. To the extent possible, however, it is appropriate for the Court to construe the statute in a manner which preserves its constitutionality. Town Tobacconist v. Kimmelman, 94 N.J. 85, 103-104 (1983); New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 85 (1980). This was the course adopted by the trial court below, although the court merely adverted to the possibility of alternative interpretations and did not actually formulate one. Slip op. at 36. This Court may properly construe this provision to require only the subtraction of units of safe, decent affordable housing which are subject to resale price controls or otherwise reserved for lower income households* and which have not otherwise been excluded from the computation of regional need. This construction carries out the apparent legislative intent to ensure that municipalities are not denied credit for any bona fide lower income housing that they have in fact provided for, while preserving the constitutionality of this statutory provision.

B. Mandatory Downward Adjustments Of Municipal Fair Share Housing Obligations [§7(c)(2)]

The Act provides for a two stage process for determining municipal fair share housing obligations. First, the municipality determines its fair

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* It is not sufficient that the units be occupied by lower income households at this moment. There must be some assurance that the units will continue to be affordable, to and occupied by, lower income households in the future. See Urban League of Essex County v. Township of Mahwah, ____ N.J. Super. ____ (Law Div. 1984).

share of the unmet regional need for lower income housing, in accordance with AHC guidelines and regulations. L 1985 c. 222, §7(c)(1). Then, the municipality reduces this fair share in light of various local planning factors. The ACH is required by section 7(c)(2) to approve such downward adjustments on a variety of grounds.

This provision guarantees that the full regional housing need can never be met, since every municiality will be entitled to reduce its housing obligation to something less than its fair share of the regional need. The statute neither requires nor authorizes the AHC to require any municipality to make upward adjustments to its fair share to offset the downward adjustments made by other municipalities in the region. Thus, this provision on its face violates the clear requirement of the Mt. Laurel decisions that the municipal housing obligation must be "the substantial equivalent" of its fair share of the unmet regional lower income housing need, Mt. Laurel II, 92 N.J. at 216.

The constitutionality of this provision, however, can be saved through "judicial surgery," see State v. 1979 Pontiac Trans Am, 98 N.J. 474 (1985); Town Tobacconist v. Kimmelman, supra; Right to Choose v. Byrne, 91 N.J. 287 (1982) (discussing precedents), by construing the adjustments to be discretionary with the AHC, rather than mandatory, by permitting the AHC to require upward as well as downward adjustments, and by requiring the AHC to ensure that regardless of what adjustments are made, the aggregate of municipal housing obligations in the region equals the full regional need as determined by the AHC. This construction preserves the constitutionality of the statute and implements the legislative intent that there be some room for flexibility in light of the particular circumstances of each municipality.

C. Prohibition On Requirement That A Municipality Raise Or Expend Municipal Revenues [§11(d)]

Section 11(d) of the Act provides that the Affordable Housing Council cannot condition approval of a proposed municipal housing element and fair

share ordinance upon any requirement that "a municipality raise or expend municipal revenues in order to provide low and moderate income housing." This section appears on its face to prohibit the Affordable Housing Council from conditioning approval of a proposed housing element upon the municipality amending its plan to accommodate subsidized rental housing financed by federal subsidies or by the New Jersey Housing and Mortgage Finance Agency, since rental housing subsidized from either source is available only if the municipality grants tax abatements. N.J.S.A. 55:14J-8(f); see generally Mt. Laurel II, 92 N.J. at 264-65. Such a result would be inconsistent with the clear mandate of this Court that the accommodation of subsidized housing is one of the repertoire of affirmative measures which municipalities must utilize to satisfy their Mt. Laurel obligation, 92 N.J. at 262-65.

More importantly, this provision conflicts with the holding of this Court that the duty to create realistic opportunities for housing affordable to low and moderate income households might require a municipality to incur financial obligations:

> In evaluating the obligation that the municipality might be required to undertake to make a federal or state subsidy available to a lower income housing development, the fact that some financial detriment may be incurred is not dispositive. Satisfaction of the Mt. Laurel obligation imposes many financial obligations on municipalities, some of which are potentially substantial. 92 N.J. at 265.

Ultimately, section 11(d) makes it impossible for municipalities to create realistic housing opportunities to meet their full fair share of the region's unmet present and prospective housing need as required by the Mt. Laurel II decision. 92 N.J. at 216, 217, 220-222, 260-61. If the Affordable Housing Council cannot demand that municipalities either expend their own funds or accept housing funds from other agencies, the only effective means of compliance which it can demand is inclusionary zoning. See 92 N.J. at 267-70. In-

clusionary zoning works and does create affordable housing opportunities. See Alan-Deane Corp. v. Bedminster Township, ___ N.J. Super. ___ (L. Div. 1985). Nonetheless, by its nature, it can only be a partial solution to meeting New Jersey's unmet housing needs. Experience indicates inclusionary development without public subsidies can include only about 20 percent low and moderate income units and 80 percent market priced housing. Urban League of Essex County v. Mahwah Township, ___ N.J. ___ (L. Div. 1974). Approximately forty percent of the prospective housing need in New Jersey, however, is for low and moderate income units, 92 N.J. at 221-11 n. 8. Thus even if every market rate unit constructed in the State from now on is part of an inclusionary development, this type of development can never meet more than half of the statewide prospective need for low and moderate income housing.

The provision prohibiting the appropriation or expenditure of municipal revenues for low and moderate income housing is therefore unconstitutional on its face. It can only be saved by construing it as a prohibition against the AHC ever requiring that the municipality actually construct housing. This would be consistent with the holdings of this Court, see Mt. Laurel II, 92 N.J. at 264, and would implement the apparent intent of the Legislature to place some limits on the extent to which the municipality can be obligated to involve itself in the actual provision of housing.

D. Deeming Settlements Not Approved By A Court And Not Necessarily Providing For Lower Income Housing To Be The Equivalent Of Substantive Certification [§22]

Section 22 of the Act provides:

> Any municipality which has reached a settlement of any exclusionary zoning litigation prior to the effective date of this act, shall not be subject to any exclusionary zoning suit for a six year period following the effective date of this

> act. Any such municipality shall be deemed to have a substantively certified housing element and ordinances, and shall not be required during that period to take any further actions with respect to provisions for low and moderate income housing in its land use ordinances or regulations.

This provision properly recognizes that a number of municipalities entered into settlement agreements prior to the effective date of the Act which resulted in judicial determinations of compliance. See Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359 (Law. Div. 1984); Allan-Deane Corporation v. Bedminster Township, ___ N.J. Super. ___ (Law Div. 1985).

Section 22, however, is not on its face limited to settlements that in fact have resulted in the provision of lower income housing or have received judicial approval. By its own terms, it would apply to settlements of exclusionary zoning litigation which have not been approved by any court and which do not necessarily provide for the development of lower income housing. Several instances are known to the Public Advocate in which builders entered into settlements of exclusionary zoning litigation with municipalities that resulted in the municipality approving construction of an office building rather than low income housing (Livingston) or the municipality simply purchasing the builder's property and taking it off the market (Cherry Hill). As Judge Skillman observed, if section 22 treated such settlements as the equivalent of substantive certification, "its constitutionality would be difficult to defend." Slip op. at 30.

Section 22 also violates the rights of lower income persons to procedural due process in these instances. Exclusionary zoning cases are representative suits brought on behalf of lower income persons. Morris County Fair Housing Council v. Boonton Township, supra. Termination of such suits to the detriment of the absent real parties in interest violates the due process rights of

those parties. Hansberry v. Lee, 311 U.S. 32 (1940). The lower courts have properly held that a judgment cannot be entered on the basis of settlement unless the court determiens that the settlement is fair to lower income persons. Morris County Fair Housing Council v. Boonton, supra; Allan-Deane Corp. v. Bedminster Township, supra. The effect of deeming a settlement to be the equivalent to substantive certification is to bar income persons from prosecuting a subsequent bona fide exclusionary zoning suit. Their rights have been cut off without ever having had a day in court, either directly or through a bona fide representative. This is a clear violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, section 1 of the New Jersey Constitution. Hansberry v. Lee, supra.

As noted by Judge Skillman below, slip op. at 38-39, this provision can be saved by construing it as limited to settlements which have received court approval embodied in a judgment of compliance.

E. Moratorium On Builder's Remedies [§28]

Section 28 of P.L. 1985 c. 222, provides in relevant part:

> 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 expiration of the period set forth in subsection a. of section 9 of this act for the filing with the council of the municipality housing element.

This provision would bar New Jersey courts from issuing a builder's remedy in Mt. Laurel litigation until January 1, 1987.

Section 28 is unconstitutional on its face for several reasons. First, it thwarts vindication of the constitutional rights of lower income persons in violation of the principles enunciated in the Mt. Laurel decisions and serves

no legitimate legislative purpose. Second, it violates Article VI, section 5, paragraph 4 of the New Jersey Constitution, which gives the New Jersey courts exclusive power to render relief in proceedings in lieu of prerogative writs. Third, such a legislative bar on judicial remedies contravenes Article III, section 1 of the Constitution, which prohibits the legislature from interfering with functions properly belonging to the New Jersey judiciary.

1. Section 28 Thwarts Vindication Of The Constitutional Dictates of Mt. Laurel II

In Mt. Laurel II, this Court held that site-specific remedies for successful builder-plaintiffs in exclusionary zoning litigation, which had previously been "discouraged" and "rare," 92 N.J. at 279, were in the future to be granted "ordinarily," 92 N.J. at 218. The Court declared:

> We hold that where a developer succeeds in Mt. Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning considerations, the plaintiff's proposed property is clearly contrary to sound land use planning. 92 N.J. at 279-80 (footnotes omitted).

The constitutional basis for this remedy is simple. Builders are virtually the only parties with the means and the incentive to initiate exclusionary zoning litigation at the present time. If builders do not prosecute suits against municipalities that violate the constitution, no one else will. The Court recognized in the Mt. Laurel II decision:

> Experience since [Oakwood at Madison v. Madison Township], however, has demonstrated to us that builder's remedies must be made more readily available to achieve compliance with Mount Laurel. 92 N.J. at 279.

The practical basis for this rationale was further explicated by Judge Serpentelli, the specially assigned Mt. Laurel judge for central New Jersey, in J.W. Field Co.

v. Township of Franklin, ___ N.J. Super. ___ (Law Div. 1985):

> The builder's remedy is the economic inducement held out to developers so that they will enforce the Mount Laurel obligation of our municipalities. It was the Court's goal to maintain a significant level of Mount Laurel litigation. This incentive has produced the desired result. The experience of this court demonstrates that the level of Mount Laurel litigation has increased dramatically since Mount Laurel II and every suit has been brought by a builder rather than a non-profit or public agency.

Section 28 of the Act bars the award of any builder's remedy for a period of eighteen months.* This section does not merely, or even primarily, affect builders. Builders who bring exclusionary zoning litigation do not assert any rights of their own; they assert the constitutional rights of lower income persons. Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 366 (Law Div. 1984). If builders are denied remedies, then lower income persons directly suffer. It is only the potential for site-specific remedies that induces builders to prosecute exclusionary zoning litigation. If builder's remedies are unavailable for a long period of time, then it is reasonably foreseeable that builders will abandon their efforts in this area.

Even more devastating to the implementation of Mt. Laurel II, the ban in section 28 will bar relief to plaintiffs in all cases other than those filed prior to 1983 or filed by parties other than builders -- even those where the munici-

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* The scope of section 28 is not perfectly clear. In our opinion, Judge Skillman's analysis below, slip op at p. 22 n. 10, is sound and should be adopted by this Court. Judge Skillman concluded that section 28 refers only to remedies which give a special preference to builder-plaintiffs in judicially compelled re-zoning and does not bar "rezoning with density bonus or mandatory set-asides of even a developer-plaintiff's property, so long as no special preference is extended to that developer-plaintiff in the comprehensive rezoning of a municipality to achieve compliance with Mount Laurel." The analysis of the unconstitutionality of this provision in the text is premised on this construction. Were the provision to be given a broader construction, its clash with the principles of Mt. Laurel would be even greater.

pality has already been adjudicated to be in violation of its constitutional duties. The potential impact of this section can be gauged by the stark fact that only two of the approximately 135 exclusionary zoning cases currently pending in the courts have been brought by parties other than builders. Therefore, in all but a handful of cases, section 28 will effectively deprive lower income persons -- the intended beneficiaries of Mt. Laurel II -- of any meaningful relief from the violation of their constitutional right to realistic housing opportunities.

As Judge Skillman recognized, "the availability of builder's remedies and the imposition of mandatory set-asides have been the cornerstones of achieving compliance with Mt. Laurel through litigation." (Slip op. at 28). By abrogating this remedy, Section 28 thus clearly conflicts with the entire thrust of the Mt. Laurel decisions, and their constitutional mandate to ensure the provision of realistic opportunities for housing, not merely endless litigation. Mt. Laurel II, 92 N.J. at 199-200, 214.*

It should be emphasized that there is no countervailing justification for this provision. The eighteen month stay of relief does not represent a temporary curb on the exercise of judicial power in an attempt to accomplish a better overall disposition of these cases. At the end of the eighteen months, the legislative stay will automatically be lifted and the builder-plaintiffs will once again have the same entitlement to relief under Mt. Laurel II as they have at the moment the stay goes into effect. Section 28 is simply a naked attempt for a specified period of time to obstruct the effective provision of lower income housing in

* Since the effect of section 28 is to effectively deprive lower income persons throughout most of the State of any meaningful remedy for even adjudicated violations of the constitutions it violates principles of procedural due process embodied in the fourteenth amendment to the United States Constitution and Article I, section 1 of the New Jersey Constitution of 1947. This Court has held that due process is violated if an individual is required to suffer deprivations of constitutional right without reasonably timely judicial or administrative relief. Helmsley v. Borough of Fort Lee, 78 N.J. 200 (1978). The Supreme Court has reached a similar result under the federal constitution. Smith v. Illinois Bell Telephone Co., 170 U.S. 557 (1926); see also Fusari v. Steinberg, 419 U.S. 379 (1975).

affluent suburban communities in New Jersey. As such, it bears no relationship to any legitimate legislative purpose.

2. The New Jersey Constitution of 1947 Prohibits Legislative Interference With Judicial Remedies Issued Pursuant to the Court's Prerogative Writ Jurisdiction

It is well settled that judicial remedies provided in lieu of prerogative writs are secured by Article VI of the New Jersey Constitution and cannot be impaired by the Legislature. E.g., Monks v. N. J. State Parole Board, 58 N.J. 238, 248 (1971); Fischer v. Tp. of Bedminster, 5 N.J. 534, 541 (1950); State v. Rivers, 16 N.J. Super. 159, 162 (App. Div. 1951).

Article VI, section 5, paragraph 4 of the New Jersey Constitution states in relevant part:

> [p]rerogative writs are superseded and, in lieu thereof, review, hearing, and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right . . .

N.J. Constitution of 1947, Art. VI, §5, para. 4 (emphasis provided). This constitutional language plainly grants New Jersey courts the unrestricted right to issue effective relief in cases instituted in lieu of prerogative writs. Fischer v. Township of Bedminster, 5 N.J. 534, 541 (1950).

Since section 28 completely strips the courts of their prerogative writ power for a specified period of time to issue an effective remedy to vindicate Mt. Laurel rights, the provision represents an unconstitutional legislative encroachment on judical power in violation of Article VI, §5, para. 4 of the New Jersey Constitution.

A brief review of the preorgative writ jurisdiction provides further support for this conclusion.

Historically, the former Supreme Court of New Jersey inherited all the prerogative writ powers of the King's Bench of England, McKenna v. N.J. Highway Authority, 19 N.J. 270, 274 (1955), including the power to grant

relief upon writs of certiorari. New Jersey courts recognized as early as 1877 that the legislature could not constitutionally impair the Court's jurisdiction or diminish its authority to issue prerogative writs. In Traphagen v. Township of West Hoboken, 39 N.J.L. 232, 236 (Sup. Ct.. 1877), aff'd mem. 40 N.J.L. 193 (Ct. of Err. & App. 1978) the former Supreme Court held that "prerogative writs are the arms of the court, . . . and every enactment which materially affects the vigor and reach of those arms, substantially impairs the power of the court. . . [It] is beyond the power of the lawmaker to arrest the employment of the appropriate writ. . . ." Similarly, in Flanigan v. Guggenhein Smelting Co., 63 N.J.L. 647 (Ct. of Err. & App. 1899), the Court of Errors and Appeals held that "the legislature cannot constitutionally deprive the Supreme Court of its exclusive right to issue. . . a prerogative writ, either by denying the use of such a writ or by creating in another tribunal a coordinate authority to employ it." Id. at 651.

Although the New Jersey Constitution of 1947 superseded the use of prerogative writs as such, the Superior Court still retains by express constitutional grant the comprehensive and exclusive prerogative writ jurisdiction of the former Supreme Court. Monks v. N.J. State Parole Board, 58 N.J. 238, 248-249 (1971); Como Farms, Inc. v. Foran, 6 N.J. Super. 306, 317 (App. Div. 1950). As this Court stated in Monks v. N.J. State Parole Board, "[w]hen our 1947 Constitution was prepared, pains were taken to insure. . . that the court's prerogative writ jurisdiction would remain intact." supra, at 249.

The present cases before the Court are all properly characterized as proceedings in lieu of the prerogative writ of certiorari. In New Jersey, the writ of certiorari was the most widely used of the prerogative writs, Ward v. Keenan, 3 N.J. 298, 305-306 (1949), and New Jersey courts interpreted the writ of certiorari to have a broader scope than the courts of any other

commonwealth. Id. at 306. Generally, the writ of certiorari was used as an instrument to redress the rights of citizens who are "invaded by the act of persons clothed with authority to act and who exercise[d] that authority illegally." McKenna v. N.J. Highway Authority, 19 N.J. 270, 275 (1955), (quoting, Tucker v. Bd. of Chosen Freeholders of Burlington, 1 N.J. Eq. 282, 287 (1831)). In fact, in a case directly on point, this Court held that a challenge to the constitutionality of a municipal zoning ordinance was a proceeding in lieu of the writ of certiorari since petitions of certiorari "comprehend[ed] the supervision of statutory tribunals and government establishments, including municipal corporations." Fischer v. Tp. of Bedminster, 5 N.J. 534, 540 (1950) (emphasis added). Therefore, the Mt. Laurel actions before this Court, however captioned, are unquestionably proceedings in lieu of the prerogative writ of certiorari.

It is equally clear that section 28 unconstitutionally limits this Court's power to render relief in proceedings in lieu of prerogative writs. In Fischer v. Tp. of Bedminster, supra, this Court addressed the issue of whether a statutory time limitation could "bar the review, hearing, and relief in lieu of the common law prerogative writs afforded by Art. VI, section v, para. 4 of the Constitution of 1947. . . ." Id. at 538. In a unanimous decision, the Court declared the statute unconstitutional as an invasion of the exclusive judicial power to regulate remedies provided in proceedings in lieu of prerogative writs. As the Court explained:

> By the clearest language, the Constitution commits to the Supreme Court the regulation of the new remedies provided in lieu of prerogative writs. Review, hearing and relief shall be had on such terms and in such manner as the Supreme Court alone may provide by rule. In the administration of these remedies, there is to be no division of authority. . . . [T]he provision is to be read and enforced in accordance with the plain terms of the grant. No distinction is made between the sub-

> stantive jurisdiction to afford the relief theretofore available through the prerogative writs and the mode and manner of the exercise of the power. The whole is within the exclusive jurisdiction of the Supreme Court. Neither the exercise of the power inherent in the old Supreme Court by means of the preorgative writs nor the regulation of the remedy is subject to legislative control.

Id. at 541. See also, State v. Rivers, 16 N.J. Super. 159, 162 (App. Div. 1951) (the regulation of the remedy provided by the N.J. Constitution, Art. VI, section 5, para. 4, is the exclusive province of the Supreme Court, and this power is not made subject to legislative authority).

Judge Skillman correctly viewed the same reasoning as applicable to Section 28. Since this section 28 imposes an absolute bar for a period of time on the judicial power to award certain remedies in Mt. Laurel proceedings, he concluded that "it is difficult to see how section 28 can be reconciled with the prohibition of the New Jersey Constitution against legislative interference without judicial remedies." Slip op. at 23. Therefore, section 28 violates Article VI, section 5, para. 4 of the New Jersey Constitution.

3. Section 28 Violates The Separation of Powers Clause Of the New Jersey Constitution

Although section 28 has thus far been analyzed only in terms of its violation of the constitutional principles embodied in the Mt. Laurel decisions and its violation of Prerogative Writ Clause, it cuts much deeper into the fabric of the New Jersey Constitution. This Court has repeatedly affirmed that it is uniquely the funciton of the courts to construe, defend, and enforce the constitution. Robinson v. Cahill, 69 N.J. 133, 147 (1975). Section 28, however, represents a legislative impairment of that essential function reserved to the judiciary by the constitution. If this provision is within the power of the Legislature, there is no limit to the ability of the Legislature to effectively immunize unconstitutional conduct from judicial review

by withdrawing the power of the judiciary to grant relief from such abuses.

Article III, Section 1, provides that:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

N.J. Const., Artc. III, §1.

The purposes of the separation of powers doctrine is to "safeguard the 'essential integrity' of each branch of government." Gilberts v. Gladden, 97 N.J. 275, 281 (1981) (quoting Massett Building Co. v. Bennett, 4 N.J. 53, 57 (1950)). The very essence of judicial power is the authority to fashion remedies once the court's jurisdiction is invoked. State v. Leonardis, 73 N.J. 360, 369 (1977). Section 28 would unconstitutionally bar courts from enforcing rights recognized by the New Jersey Constitution and would deprive the courts of their power to render effective judgments. As this Court stated in Winberry v. Salisbury, 5 N.J. 240 (1950), if the Legislature may control the degree to which legal and equitable relief may be granted, "[t]he Courts in some of their essential judicial operations, instead of being one of the three coordinate branches of the State Government, would have been rendered subservient to the Legislature in a fashion never contemplated by any." 5 N.J. at 247. Such an intrusion into the judiciary's inherent power violates separation of powers provision in the New Jersey Constitution. See, King v. South Jersey Nat'l. Bank, 66 N.J. 161, 177 (1974).

Since section 28 is severable, the invalidity of this part of the Act does not render the entire Act unconstitutional L. 1985 c. 222, §32.

F. Absence Of Express Power Or Duty Of The Affordable Housing Council to Require That Favorable Treatment Be Given To Builders Who Vindicate The Rights Of Lower Income Persons By Filing And Prosecuting A Request For Mediation And Review Or An Objection To A Petition For Certification

L. 1985 c. 222 does not appear on its face to grant the Affordable Housing Council the power to compel a municipality to take any action. It appears to grant only the power to determine whether a municipality's proposed housing element and fair share ordinance are acceptable. L. 1985 c. 222, §14. In particular, the Council apparently lacks the power to grant site-specific remedies to a successful builder-plaintiff.

Moreover, the statute does not even expressly authorize the Affordable Housing Council to condition its approval of a municipality's housing element and fair share ordinance upon the plan being amended to rezone the builder-plaintiff's site. While a municipal housing element must "include consideration of lands of developers who have expressed a commitment to provide low and moderate income housing," L. 1985 c. 222, §10(f), there is no statutory requirement that it provide for rezoning of the site of any builder-plaintiff, even if that site is otherwise suitable for the development of low and moderate income housing.

As a result, a builder may "successfully" litigate a case before the Affordable Housing Council, which results in the municipality submitting and implementing a housing element and a fair share housing ordinance that satisfy the criteria and guidelines of the Council, and still not achieve any economic benefit. The substantive certification of compliance awarded in such a case, as in other cases, would carry a strong presumption of validity in the courts and would make it difficult for the builder to secure any subsequent judicial remedy L. 1985 c. 222, §17(a).

Necessarily, this possibility sharply diminishes the incentive for any builder to pursue a case before to the Affordable Housing Council. This has two important consequences for lower income persons. First, as we have discussed above, builders are virtually the only parties with the incentive and the means to initiate or pursue exclusionary zoning litigation. From a practical standpoint, if builders do not assert the rights of lower income persons to realistic housing opportunities, nobody else will. The absence of any power or duty in the Affordable Housing Council to grant favorable treatment to builder-litigants creates a serious peril that there will be no longer be anyone seeking to vindicate the constitutional rights of lower income persons under Mt. Laurel II.

Second, the absence of a builder's remedy reduces the likelihood that municipalities will seek to fulfill their housing obligations to lower income persons. L. 1985 c. 222 does not mandate or compel compliance by municipalities with the New Jersey Constitution. Rather, it creates a mechanism for official recognition of voluntary compliance. The only inducement for a municipality to avail itself of this voluntary mechanism (other than the illicit inducement of securing an additional two years in which to continue not to comply) is the opportunity to interpose the substantive certification awarded by the Affordable Housing Council as a defense in exclusionary zoning litigation. L. 1985 c. 222, §17(a). If there is no incentive for builders to bring such litigation, then the inducement for municipalities to voluntarily seek substantive certification also disappears. As a result, the Act, which appears in theory to be a means of fostering municipal compliance with the Constitution, will have the practical effect of eliminating all the existing pressures for municipal compliance. Thus, the absence of any express power or duty in the Affordable Housing Council to require that favorable treatment be given to builder-plaintiffs who vindicate the rights of lower income persons

would reduce the Mt. Laurel decisions to mere theoretical pronouncements.

This facially unconstitutional feature of the Act can, however, be saved by construing sections 10(f) and 14(b) together to require that, where a builder proposes to build housing that includes a substantial proportion of low and moderate income housing and has vindicated the rights of lower income persons by successfully prosecuting an objection to a petition for substantive certification or request for mediation and review pursuant to L. 1985 c. 222, §15(a), the Council must condition approval of any grant of substantive certification upon the municipality giving the builder the opportunity to develop his property, unless the Council determines that the land is unsuitable for substantial environmental or planning reasons. Cf. Mt. Laurel II, 92 N.J. at 279-80. This construction is not inconsistent with the language of L. 1985 c. 222, and saves its constitutionality. See Town Tobacconist v. Kimmelman, supra; New Jersey Chamber of Commerce v. New Jersey Election Commission, supra.

G. Absence Of Express Power Or Duty Of The AHC To Require That A Municipality Conform Its Proposed Housing Element To Conditions Imposed By The AHC Or To Require That A Municipality Actually Implement A Housing Element Which Has Received Substantive Certification

As noted above, the AHC appears to have only the power to approve with conditions, or disapprove, a proposed municipal housing element and fair share housing ordinance. L. 1985 c. 222, §14. The effect of disapproval of a municipality's proposed housing element and fair share housing ordinance is that the municipality is in the same posture in any subsequent litigation that it would be in if it had never submitted a housing element to the Council, i.e., it would not be able to offer substantive certification by the AHC as a defense. L. 1985 c. 222, §§17, 18. The municipality is under no express

obligation to revise its plan to overcome any defects found by the Council or to comply with any conditions imposed by the Council. Indeed, even if the Council approves the municipality's plan, the municipality is under no obligation to actually implement that plan.

Thus, if parties seeking to vindicate the rights of lower income persons prevail at every step before the Affordable Housing Council and the Council rejects the proposed municipal housing element and fair share ordinance, the Affordable Housing Council may not be able to grant any remedy. The entire process could be an idle, and ultimately futile, exercise.

A statute which requires a party to go through a lengthy administrative process to vindicate a right, and then denies them any remedy for the violation of that right, conflicts with the most fundamental concepts of due process of law. See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1929); Helmsley v. Borough of Fort Lee, 78 N.J. 200, 223-230 (1979).

In Mt. Laurel II, this Court also addressed the constitutional significance of the failure of the courts to provide meaningful remedies for violation of the consitutional rights of lower income persons. The Court concluded that after eight years of "widespread non-compliance with the constitutional mandate," "a strong judicial hand" was essential to achieve compliance. 92 N.J. at 199. It emphasized that judicial reticence to grant the full range of remedies necessary to ensure municipal compliance was no longer justifiable:

> What we said in Mount Laurel in reference to remedy eight years ago was that such remedies were "not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion . . . ." 67 N.J. at 192. That view is no longer "advanced," at least not in this state. It is eight years old. Our warning to Mount Laurel -- and to all other municipalities -- that if they do "not perform as we expect, further judicial action may be sought . . . ." id. at

> 192, will seem hollow indeed if the best we can do to satisfy the constitutional obligation is to issue orders, judgments and injunctions that assure never-ending litigation, but fail to assure consitutional vindication. 92 N.J. at 289-90.

It was, as the Court declared, essential "to put some steel" into the Mt. Laurel doctrines, 92 N.J. at 200. To this end, this Court directed the lower courts to utilize the full range of judicial remedies, both conventional and unconventional, 92 N.J. at 278-92, to ensure that the constitutional obligation is not "disregarded and rendered meaningless" by the absence of adequate remedies. 92 N.J. at 287.

As written, L. 1985 c. 222 returns low income persons to the pre-Mt. Laurel II era in which they must toil endlessly through proceedings which do not lead to any remedy for violations of their constitutional rights. This clearly violates the constitutional principles enunciated by Court in the Mt. Laurel decisions and fundamental notions of due process.

While courts of this State are properly reluctant to impute to administrative agencies remedial powers which are not expressly granted by legislation, A.A. Mastrangelo v. Commissioner of Department of Environmental Protection, 90 N.J. 666,684 (1982); In re Jamesburg High School Closing, 83 N.J. 540, 549 (1980), this Court has done so where necessary to carry out the purpose of the statute, Zahorian v. Russell Pits, 62 N.J. 399 (1973) or to preserve the constitutionality of legislation. Hutton Park Garden v. Town Council of West Orange, 68 N.J. 543, 572 (1975) (reading into rent control ordinance power to grant relief to landlords who prove hardship); Robinson v. Cahill, 69 N.J. 449, 461-62 (1976) (reading into school finance statute power of Commissioner of Education to increase school budgets).

Robinson v. Cahill, supra, is an apposite analogy. That case involved a challenge to the facial constitutionality of legislation enacted in response to the Court's earlier decision striking down the State's system for financing

public education. The Court noted that the new legislation, though empowering the Commissioner of Education to make changes within school budgets, did not expressly empower him to increase a school budget above the level proposed by the school district. Noting that the absence of such a remedial power would both be contrary to the Court's prior holding that the state had the constitutional obligation to compel school districts to raise sufficient funds to provide the constitutionally required quality of education and would "emasculate, perhaps fatally" what the Court perceived to be the legislative scheme, the Court ruled that the Commissioner and State Board of Education must be deemed to have this remedial power. 69 N.J. at 461-62.

Likewise, in the present instance it is appropriate for the Court to construe the Act to permit the Affordable Housing Council to issue orders requiring municipalities to conform their proposed plans to its conditions and to actually implement those plans. This construction would save the facial constitutionality of the statute and is not inconsistent with the language of the statute.

Most importantly, such a construction carries out the overall legislative purpose. It implements the legislative intent to fashion "a comprehensive planning and implementation response to the constitutional obligation," L. 1985 c. 222, §2(c), and "to establish a statutory scheme . . . that satisfies the constitutional obligation enunciated by the Courts," L. 1985 c. 222, §3, by guaranteeing that the Affordable Housing Council has the power to ensure implementation of plans for achieving compliance with the Constitution. Such legislative purposes cannot be fulfilled if there is the possibility that a municipality may voluntarily proceed before the Affordable Housing Council, force low income persons or their representatives to litigate their claims before the state agency, and then disregard the agency's decisions whenever the agency finds its conduct unconstitutional. The construction we propose also carries out the

Legislature's expressed preference to have cases resolved by the Affordable Housing Council rather than the courts. L. 1985 c. 222, §3. Finally, it preserves the Legislature's apparent preference for a voluntary system, by providing municipalities with the choice of whether to seek substantive certification from the Affordable Housing Council or to take their chances in court. L. 1985 c. 222, §9.

H. Absence of Any Express Power Or Duty Of The AHC To Impose Interlocutory Restraints On Development

The Act contemplates proceedings before the AHC that will take anywhere from six months to more than two years to be completed. It does not, however, make any provision for interlocutory restraints during the pendency of these proceedings against development which does not include lower income housing and which may exhaust the scarce resources essential to the provision of such housing.

It is clear that in some municipalities the opportunity to develop lower income housing is constrained by the scarcity of such resources as vacant developable land, public water supply, and the capacity of public sanitary sewage treatment systems. Denville and Randolph, for example, both have asserted before the trial court that availability of vacant developable land or sewage treatment capacity limits their ability to provide for lower income housing.*

If, during the pendency of administrative proceedings, development that does not include lower income housing is permitted to proceed unchecked in such municipalities, these scarce resources will be exhausted, making full vindication of the rights of lower income persons impossible. The lower courts, responding to this problem, have recognized the necessity of imposing

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* Plaintiffs have denied this assertion.

interlocutory restraints on development to prevent the erosion of the opportunity for vindication of the constitutional rights of lower income persons. For example, Judge Skillman issued interlocutory restraints against approval of applications for development in Parsippany-Troy Hills in Morris County Fair Housing Council v. Boonton Township, and Judge Serpentelli issued similar restraints against Piscataway and South Plainfield in Urban League of Greater New Brunswick v. Borough Carteret.

The Act, however, does not expressly authorize the AHC to issue orders restraining development during the pendency of its proceedings. Nor does it authorize lower income plaintiffs or their representatives to return to the courts to secure such restraints. See L. 1985 c. 222 §§16(a), 18, 19 (cataloguing the circumstances in which the courts may reassert jurisdiction). The Act thus permits the constitutional rights established by Mt. Laurel to be effectively eviscerated without providing any opportunity for judicial or administrative relief. This is clearly contrary to the principles enunciated by this Court.

The Act can be preserved, however, if it is construed to permit parties to apply to the courts for interlocutory restraints in order to prevent irreparable injury due to unchecked noninclusionary development. The power of the courts to grant such relief is well established. See Boss v. Rockland Electric Company, 94 N.J. 33 (1983); FTC v. Dean Foods Co., 384 U.S. 597 (1966). Additionally, such relief is not inconsistent with the Act and does not impede achievement of any of its purposes.

In sum, if the Court chooses to address the facial constitutionality of L. 1985 c. 222, it must find eight of its provisions and features facially unconstitutional. Seven of these provisions can be rendered facially constitutional by proper judicial construction. The eighth, section 28, can properly be severed. Hence, the Act as a whole can be construed to be facially constitutional, as found by the trial court. Slip. op. at 41.

II. TRANFER OF CASES AGAINST DENVILLE AND RANDOLPH TO THE AFFORDABLE HOUSING COUNCIL WOULD RESULT IN "MANIFEST INJUSTICE" UNDER TO L. 1985 C. 222, §16(a) AS CONSTRUED IN LIGHT OF THE MT. LAUREL DECISIONS

Defendants-appellants Denville and Rockaway Townships have moved for transfer of this case to the Affordable Housing Council pursuant to newly enacted L. 1985 c. 222, §16(a). That statute declares in pertinent part:

> 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.

L. 1985 c. 222, §16(a) provides for transfer of pre-May 1985* cases to the Affordable Housing Council only where the court determines that "transfer would [not] result in manifest injustice to any party in the litigation." The application of L. 1985 c. 222, §16(a) thus involves analysis of two phrases: "manifest injustice" and "party to the litigation."

As will be discussed in detail below, these terms must be construed in light of the Mt. Laurel decisions, Southern Burlington County NAACP v. County NAACP v. Mt. Laurel Township, 67 N.J. 158 (1975) (Mt. Laurel I) and 92 N.J. 155 (1983) (Mt. Laurel II). When analyzed in this context, §16(a) requires denial

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* The statute was signed into law on July 2, 1985, and became effective immediately. Hence, cases filed prior to May 3, 1985 are covered by section 16(a).

of a transfer motion if the transfer of a case to the Affordable Housing Council would significantly perpetuate the types of wrongs condemned by the Supreme Court in the Mt. Laurel decisions as contributing to the pattern of "widespread noncompliance" with the Constitution.

As to the Denville and Randolph applications, the most significant facts are those which were found by the court below. Slip op. at 48-55. These cases have been pending for seven years. They remain unresolved only because the defendant municipalities repudiated or failed to implement tentative settlements to which the lower court had given its tentative approval. They have gone to trial, and, in the case of Denville, the court has already made a complete adjudication, ordered the municipality to adopt a plan for compliance, appointed a special master, received the report of the special master, and scheduled a hearing as to the adoption of that report. The trial court has, since June 1983, acquired intimate knowledge of the facts, personalities, and legal and policy considerations relevant to these cases. The cases are very near final resolution in the trial court. Moreover, despite seven years of litigation, these municipalities have made negligible voluntary efforts to bring themselves into compliance with the requirements of the constitution.

Transfer would result in 1) substantial postponement of the vindication of the rights of lower income persons; 2) very much greater burdens upon lower income persons in their efforts to enforce their constitutional rights in the form of the increased expense and complexity of redundant proceedings before an agency which lacks the trial court's intimate knowledge of the cases; 3) the absence, or diminished availability, of effective remedies to enforce compliance which relegates of low and moderate income persons to exclusive reliance upon voluntary compliance by the municipal defendants for an extended period of time; and 4) less than full and proper vindication of the constitutional rights of lower income persons. Any of these factors standing alone should bar

transfer under the terms of section 16(a). In combination, they provide overwhelmingly compelling reasons to deny a transfer in these cases.

More generally, the Public Advocate submits that in any case filed prior to January 20, 1983, or in which there has been a trial or adjudication of any major issue pertaining to the merits, evaluation of these specific factors is likely to result in the determination that transfer would result in manifest injustice to lower income persons. Consequently, in the interests of consistency, predictability, and judicial economy, the Public Advocate urges the Court to formulate a presumptive standard that such cases should not be transferred absent a showing of exceptional circumstances.

We discuss first the meaning of "party the to litigation" and then of "manifest injustice." Thereafter, we will explain how the proper application of these terms leads inexorably to the conclusion that the trial couat did not abuse its discretion in denying the applications to tranfer of Denville and Raldolph.*

A. "Party To The Litigation," As Used In L. 1985 C. 222, §16(a), Includes the Lower Income Persons Whose Rights Are Asserted In the Litigation And Who Will Be Bound By Its Outcome

The Court must decide in this matter whether transfer "would result in manifest injustice to any party to the litigation." L. 1985 c. 222, §16(a).

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* In reviewing the trial court's decisions applying L. 1985 c. 222, §16(a), this Court must apply three distinct standards of review. First, as to the construction of section 16(a) and the legal criteria under which applications for transfer to the AHC are to be reviewed, this Court necessarily must, as with all questions of law, make a review de novo. Second, as to the facts found by the trial court, this Court may properly review only to determine that findings below were not clearly erroneous. Rova Farms Resort v. Investors Insurance Co., 65 N.J. 474, 484 (1975). Third, as to the application of the correct legal criteria to the facts to determine whether "manifest injustice" would result, the decision is committed to the discretion of the trial courts, which have a "feel" for the facts of the cases. State v. DiRienzo, 53 N.J. 360, 383 (1969); therefore, the Court should review solely for abuse of discretion.

Only by analyzing the phrase "any party to the litigation" can the Court determine what types of "injustice" it must assess. The trial court, based on a detailed analysis of the Act, concluded that "any party to the litigation" includes low and moderate income persons, as well as the named parties. Slip op. at 47-48. This conclusion is sound and should be affirmed.

Clearly "any party to the litigation" includes the actual parties. Thus the Court must consider, in the first instance, the extent of possible injury to any organizational plaintiffs and the persons whom they represent, as well as the injury to any builder-plaintiffs. Specifically, in these cases, the Court must assess the extent of potential injustice, not merely to builder-plaintiffs but also to the low and moderate income persons whose interests are represented by the organizational plaintiff -- the Morris County Fair Housing Council, the Morris County Branch of the NAACP and the Public Advocate.

Indeed, as we will explain below, even where there are no organizational plaintiffs, but only builder-plaintiffs, the Court is still required by Section 16(a) to evaluate the potential injustice to low and moderate income households that would result from transfer to the Affordable Housing Council.

The phrase "party to the litigation" in Section 16(a) must be interpreted in light of the distinctive structure of exclusionary zoning litigation as established by the Mt. Laurel decisions. All exclusionary zoning litigation is representative litigation brought in the interest of lower income persons. Regardless of who is the nominal plaintiff, the constitutional rights asserted are those of lower income persons. This type of litigation cannot be adjudicated unless the scope of the duty of the municipal defendant to lower income persons is determined. 92 N.J. at 215-16, 256. The final outcome of such a case must be a remedy fully vindicating the rights of lower income persons. 92 N.J. at 285, 290. This is so even if the interests of a nominal plaintiff, e.g., a builder, are much more limited. Moreover, regardless of the identity of the

nominal plaintiff, all lower income persons are bound by any judgment of compliance entered in such litigation. 92 N.J. at 291-92. The trial court described the character of this type of litigation in the following terms:

> A Mt. Laurel case may appropriately be viewed . . . as a representative action which is binding on non-parties. The constitutional right protected by the Mt. Laurel doctrine is the right of lower income persons to seek housing without being subject to economic discrimination caused by exclusionary zoning. The Public Advocate and such organizations as the Fair Housing Council and N.A.A.C.P. have standing to pursue Mount Laurel litigation on behalf of lower income persons. Developers and property owners also are conferred standing to pursue Mt. Laurel litigation. In fact the [Supreme] Court has held that "any individual demonstrating an interest in or any organization that has the objective of, securing lower income housing opportunities in a municipality will have standing to sue such municipality on Mount Laurel grounds." However, such litigants are granted standing, not to pursue their own interests, but rather as representatives of lower income persons whose constitutional rights are allegedly being violated by exclusionary zoning. Morris County Fair Housing Council v. Boonton Township, 197 N.J. 359, 365-66 (Law Div. 1984). (citations omitted).

In light of the representative character of exclusionary zoning litigation, Judge Skillman correctly concluded in the instant cases that "lower income persons must be treated as parties to all such litigation" and that "'manifest injustice' determinations must take into consideration the impact of transfer not only upon the named parties but also upon lower income persons." Slip op. at 48. Any other interpretation would effectively thwart the Mt. Laurel decisions and the statute, for it would result in transfer decisions being made without regard to any potential injustice to the lower income persons whose interests are, in reality, at stake in the proceedings and who will be bound by judgments entered in those proceedings.

B. The Term "Manifest Injustice" In Section 16(a) Must Be Construed To Mean That A Transfer Should Be Denied When It Results In Perpetuation Of The Constitutional Wrongs Condemned By The Supreme Court In The Mt. Laurel Decisions

1. "Manifest Injustice," As Used In L. 1985 c. 222, §16, Must Be Construed In Light Of the Mt. Laurel Decisions

The court below drew an analogy between the term "manifest injustice" as used in L. 1985 c. 222, §16(a), and the phrase "except where it is manifest that the interest of justice requires otherwise," as used in the court rule dealing with exhaustion of administrative remedies, R. 4:69-5. Slip op. at pp. 45-57. Based on this analogy, the court below identified five criteira to be utilized in evaluating manifest injustice: (1) likelihood that administrative remedies would be futile; (2) relative degree of expertise of the AHC and the trial courts; (3) the likelihood of substantial delay; (4) the likelihood of substantial additional and unwarranted expense; (5) relative need for prompt resolution to protect the interest of the public and of lower income persons. Slip op. at 50-52. The Public Advocate submits that these are appropriate criteria and that they were appropriately applied by the trial court to the facts of the Denville and Randolph applications. We therefore urge that this Court affirm the rulings of the trial court.* For

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* The trial court's analogy between L. 1985 c. 222, §16(a) and R. 4:69-5 is incomplete because it does not fully take into account the significance of L. 1985 c. 222, §16(b). Section 16(b) deals with exclusionary zoning cases filed on or after May 3, 1985. In cases where a municipality has filed a resolution of participation, it provides thhat plaintiffs "shall exhaust the review and mediation process of the council before being entitled to trial on the complaint." This provision by its terms incorporates the judicially created doctrine of exhaustion of administrative remedies. See also L. 1985 c. 222 §18 (providing that if a municipality fails to file a timely housing element "the obligation to exhaust administrative remedies contained in subsection b. of section 16 of the act automatically expires"). That doctrine includes a number of inherent exceptions, Ward v. Keenan, 3 N.J. 298, 302-303 (1949), which have been

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the reasons set forth below, the criteria used by the trial court are even more deeply and properly rooted in the constitutional doctrines upon which the Mt. Laurel decisions were based, and in L. 1985 c. 222 itself, than the trial court's opinion might suggest.

The term "manifest injustice" is not defined in L. 1985 c. 222 and the legislative history on this issue is rather limited. The Court must necessarily look elsewhere for guides to the proper interpretation of this phrase. This task is made more difficult by the fact that, as Judge Skillman recognized, this phrase "is used in a number of different contexts in the New Jersey Court Rules and judicial decisions." (Slip op. at 44). The following uses of the phrase are illustrative:

(a) R. 4:17-7 provides that late answers to interrogatories are to be permitted only if "manifest injustice" would otherwise result. The courts have read this language as indicating that leave to make late amendments to interrogatories, while not automatic, is to be granted "liberally." Pressler, Current N.J. Court Rules, Comment R. 4:17-7; See Westphal v.

(continued from previous page)

codified in R. 4:69-5. See Roadway Express v. Kingsley, supra. As the court below properly noted, section 16(b) must necessarily be read to incorporate R. 4:69-5. Slip op. at p. 60.

Clearly, however, the Legislature contemplated that section 16(a) would establish a standard for older cases that is less stringent in its mandate that remedies before the AHC be exhausted than that contained in section 16(b). Otherwise there would have been no point in having two distinct statutory provisions. Since section 16(b) incorporates the standard set forth in R. 4:69-5, the trial court's analogy would inappropriately construe section 16(a) as incorporating that same stringent standard. For this reason, the Public Advocate does not endorse the analogy drawn by the trial court between section 16(b) and R. 4:69-5.

Nonetheless, the trial court still formulated appropriate criteria for assessing transfer applications under 16(a) and properly applied them to the present cases. Its decision should be affirmed on those grounds. Moreover, the trial court's analysis demonstrates that the Denville and Randolph applications were properly denied even under the more stringent standard applied below.

Guarino, 163 N.J. Super. 140 (App. Div. 1978), aff'd mem. on opinion below, 78 N.J. 308 (1978). The potential injustice which the courts evaluate in this context is the possibility that a party will be denied the opportunity to present his case fully and fairly to the trier of fact. In light of this potential injustice, the courts have formulated three criteria to determine whether "manifest injustice" will occur in a particular case: 1) Was there intent by the proponent of the amendment to mislead? 2) Is there any element of surprise? 3) Will the opposing party be unduly prejudiced? Westphal v. Guarino, 163 N.J. Super. at 146.

(b) Remittitur will be granted only when the damages awarded by the fact finder would result in "manifest injustice." Baxter v. Fairmount Foods Co., 74 N.J. 588, 596 (1977); Leingruber v. Claridge Associates, 73 N.J. 450 (1977). The courts, in construing this standard, have emphasized that use of remittitur is a desirable practice in appropriate cases and is to be encouraged. Baxter v. Fairmount Food Co., 74 N.J. at 595. The potential injustice which the courts evaluate in this context is the possibility that the fact finder, through mistake, prejudice, or lack of understanding, has reached a result that seems "wrong." The courts have struggled to formulate criteria for determining whether a case meets this standard. Despite repeated efforts, they have been able to formulate no criterion more precise than "the jury went so wide of the mark [that] a mistake must have been made." Baxter v. Fairmount Food Co., 74 N.J. at 599 (quoting Justice Hall in State v. Johnson, 42 N.J. 146, 162 (1964)).

(c) R. 3:21-1 permits the withdrawal of a guilty plea at the time of sentencing only to correct a "manifest injustice." This rule has been construed liberally to permit withdrawals of guilty pleas. State v. Taylor, 80 N.J. 353, 365 (1979). The injustice to be evaluated in this context is that the defendant may have been, or may appear to have been, induced

improperly to waive his constitutional rights. State v. Taylor, 80 N.J. at 361-62. The courts have carefully formulated the criteria to to be used in this context: withdrawal of a guilty plea is to be permitted when, to one not "approaching defendant's attack on the plea bargain with a set attitude of skepticism," it appears that there is "a significant possibility that the misinformation imparted to the defendant could have directly induced him to enter the pleas." State v. Taylor, 80 N.J. at 365.

(d) Where the legislature's intention as to whether or not a statute is to be applied retroactively to pending cases in unclear, the statute will not be applied retroactively where "manifest injustice" would result. Gibbons v. Gibbons, 86 N.J. 515 (1981); Kingman v. Finnerty, 198 N.J. Super. 14 (App. Div. 1985). The injustice to be evaluated in this context is unfairness to parties who might reasonably have relied on the prior law to their prejudice. Gibbons v. Gibbons, 86 N.J. at 523-24. The New Jersey courts have followed such federal decisions as Bradley v. School Board of Richmond, 416 U.S. 696, 716-17 (1974), and Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1964), in formulating three criteria to determine whether this standard is met: (1) the nature and identity of the parties; (2) the nature of the rights at issue; and (3) the nature of the impact of the change in law upon those rights. Bradley v. School Board of Richmond, supra.

(e) Some lower courts have construed R. 3:22-1, which permits petitions for post-conviction relief from incarceration, as permitting relief only in cases of "manifest injustice." State v. Cummins, 168 N.J. Super. 429, 433 (Law Div. 1979). The injustice to be evaluated in this context is the possibility of incarceration obtained through illegal or unconstitutional means. State v. Cummins, 168 N.J. Super. at 433. The courts have stated that the criterion to be used in this context is whether the

claimed error "denies fundamental fairness in a constitutional sense and denies due process of law." 168 N.J. at 433.

(f) R. 4:69-5 provides that administrative remedies must be exhausted prior to the filing of a prerogative writ against a local agency "except where it is manifest that the interest of justice requires otherwise." The courts have construed this rule to embody a variety of exceptions to the requirement of exhaustion of administrative remedies: administrative review will be futile; the public interest calls for a prompt decision; the issues do not call for administrative expertise or discretion and only a question of law is involved; irreparable harm will otherwise result; or the jurisdiction of the agency is doubtful. Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 561 (1970); Brunetti v. Borough of New Milford, 68 N.J. 576, 589 (1975). The courts, seeking to avoid the potential injustice of putting the parties to "the additional expense and delay of bringing their case" before the administrative agency, N.J. Civil Service Association v. State, 88 N.J. 605, 613 (1982); Boss v. Rockland Electric Company, 95 N.J. 33, 40 (1983), have catalogued a list of factors to be considered when a party seeks to avoid the requirement of exhaustion of administrative remedies:

> the relative delay and expense, the necessity for taking evidence and making factual determinations thereon, the nature of the agency and the extent of judgment discretion and expertise involved and such other pertinent factors.

N.J. Civil Service Association v. State, 88 N.J. at 603; Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 141 (1962).

These examples of the use of the term "manifest injustice" in New Jersey jurisprudence demonstrate three significant points:

1) "Manifest injustice" is not a term that has a single, consistent meaning throughout New Jersey jurisprudence and, as Judge Skillman concluded below, "its meaning varies with the context in which it is used." Slip op. at 45.

Sometimes it is used to signify a standard that can be met only in very exceptional cases. In other contexts, it is used to signify a standard that can be met in a great many cases.

2) "Manifest injustice" is always evaluated in terms of the type of injustice that is relevant in the context in which it is used. When it is used in the context of post-conviction relief, the courts evaluate it in terms of possible violations of procedural due process. When it is used in the context of determining whether a statute should be construed to be retroactive in effect, the courts evaluate it in terms of the unfairness of reasonable reliance on prior law. When it is used in the context of a late amendment to interrogatories, it is evaluated in terms of the potential loss of an opportunity to have one's day in court. Generally, however, the more compelling the interest in avoiding the type of injustice at issue, the more readily "manifest injustice" will be found.

3) "Manifest injustice" is not a matter for ad hoc determinations. It is a phrase that invites this Court to formulate appropriate standards for the lower courts to apply in a consistent and evenhanded fashion. While the application of the term requires the discretionary exercise of judicial authority, this discretion should be informed by consideration of the appropriate factors in the particular context.

In construing L. 1985 c. 222, §16(a), the Court must interpret "manifest injustice" in the context in which the Legislature utilized the phrase and in light of the injustices which the Legislature was seeking to remedy. Insofar as possible, the Court must also seek to formulate standards of general applicability that permit section 16(a) to be applied in a reasoned and consistent manner, not merely on an ad hoc basis.

In the present case, these principles compel the conclusion that the Court should construe "manifest injustice" in the context of the dictates of the

effect of a transfer upon the prompt satisfaction of the constitutional rights "enunciated by the Supreme Court" in the Mt. Laurel decisions.

The legislative history bearing on the meaning of the phrase "manifest injustice" as used in section 16 of L. 1985 c. 222, while limited, provides strong support for this conclusion. An examination of the changes in the legislative language of the successive draft bills as well as the relevant committee statements confirms that the Legislature intended the courts to exercise their discretion to deny motions to transfer, inter alia, if transfer to the Affordable Housing Council would perpetuate the constitutional wrongs the Legislature was seeking to remedy.

The provision addressing the issue of the transfer of pending cases to the Council was modified several times during the legislative process. As first proposed in Senate Bill No. 2046, introduced by Senator Lipman on June 28, 1984, it provided that:

> Any court of competent jurisdiction shall have discretion to require the parties in any lawsuit challenging a municipality's zoning ordinance with respect to the opportunity to construct low or moderate income housing, which lawsuit was instituted either on or before June 1, 1984, or prior to six months prior to the effective date of this act, to exhaust the mediation and review procedure established in section 13 of this act. No exhaustion of remedies requirement shall be imposed unless the municipality has filed a timely resolution of participation. In exercising its discretion, the court shall consider:
>
> (1) The age of the case;
>
> (2) The amount of discovery and other pre-trial procedures that have taken place;
>
> (3) The likely date of trial;
>
> (4) The likely date by which administrative mediation and review can be completed; and

Mt. Laurel decisions. This Court has repeatedly called upon the Legislature to enact legislation "enforcing the constitutional mandate." 92 N.J. at 212. The Act, by its own terms, is a response to that request. L. 1985 c. 222, §2(b). The statute recites the central holding of the Mt. Laurel decisions, L. 1985 c. 222, §2(c), and declares the desirability of a "comprehensive planning and implementation response to this constitutional obligation," L. 1985 c. 222, §2(c). Thus, the injury which the Legislature sought to redress by the enactment of L. 1985 c. 222, is the denial of the constitutional rights of lower income persons enunciated in the Mt. Laurel decisions.

The clearest and most direct expression of the purpose of the legislation is L. 1985 c. 222, §3.:

> The Legislature declares that the statutory scheme set forth in this act is in the public interest in that it comprehends a low and moderate income planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court. The Legislature declares that 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, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

This section is directly relevant to the construction of L. 1985 c. 222, §16(a). While it expresses a legislative "preference" for the transfer of pending cases to the Affordable Housing Council, it does so only in the context of ensuring that the "constitutional obligation enunciated by the Supreme Court" is satisfied by the operation of the statute. Thus, in construing the phrase "manifest injustice," the injustice which must be considered is the probable

(5) Whether the transfer is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing. [Section 14(a)].

Senate Bill No. 2046 was first referred to the Senate State Government, Federal and Interstate Relations and Veterans' Affairs Committee. On November 26, 1984, this Committee substantially amended the bill; the above langauge was deleted and the following transfer provision was substituted:

> For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, no exhaustion of the mediation and review procedure established in section 13 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. [Section 14(a)].

The bill in this form was referred to the Senate Revenue, Finance and Appropriations Committee, which on January 28, 1984, reported a Senate Committee Substitute for Senate Bills Nos. 2046 and 2334, a second bill concerning low income housing. This transfer provision was little changed in this version,* which was passed by the full Senate on January 31, 1985.

After being received by the Assembly on February 4, 1985, the Senate Committee Substitute for Senate Bills Nos. 2046 and 2334 was referred to the Assembly Municipal Government Committee. On February 28, 1985, the Municipal Government Committee reported the bill to the Assembly with several

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* The transfer section in the Senate Committee Substitute for Senate Bills Nos. 2046 and 2334 was amended to read:

> For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, no exhaustion of the review and mediation procedures established in . . . 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. [Section 16(a)].

amendments, including a revision of the transfer provision. This revised section, which was ultimately enacted as section 16(a) of L. 1985 c. 222, provided that:

> For those exclusionary zoning cases instituted more than 60 days before the effective date of the 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 a transfer would result in a manifest injustice to any party to the litigation. [Section 16(a)].

The Assembly Committee statement to the bill, while not providing much elaboration on the intent behind this change, did note that it sought to:

> [E]stablish that a court in determining whether to transfer pending lawsuits to the council must consider whether or not a manifest injustice to a party to the suit would result, and not just whether or not the provision of low and moderate income housing would be expedited by the transfer. [Assembly Municipal Government Statement to Senate Bill Nos. 2046/2334 SCA, February 28, 1985 at 1].

The legislative intent underlying the new "manifest injustice" language in the bill's transfer provision is highlighted by the emphatic protests of the dissenting members of the Assembly Municipal Government Committee over the Committee's changes to the bill. Most notable, perhaps, is their expression of dissatisfaction with the majority's failure to require <u>all</u> pending cases to be transferred to the Council:

> This bill does not prevent the courts from continuing in their current direction. Pending Mount Laurel cases may continue to be litigated . . . The Republicans also offered an amendment that required the courts to transfer all pending litigation to the Housing Council. The language, as amended, is a step in the right direction, but does not go far enough. It is patently unfair to set up two bodies which can establish two separate housing standards. This bill could create that very situation. <u>Id</u>. at 2 (Minority Statement).

A number of conclusions may be drawn from this legislative history. First, it is beyond doubt that the Legislature clearly contemplated that the courts would properly deny motions to transfer in at least some of the pre-May 1985 cases. This is confirmed by both the majority and minority reports of the Assembly Municipal Government Committee.

Second, the successive drafts of the transfer provision reveal a legislative intent to vest the courts with increasingly greater discretion to consider any and all factors they deemed relevant in deciding motions to transfer. In these successive drafts, the Legislature clearly moves away from specifying a list of factors that courts must consider in deciding transfer motions in pre-May 1985 cases and towards providing the courts with broader latitude to decide such motions on the basis of all factors deemed relevant to the transfer decision. The original version of Senate Bill No. 2046 set forth a detailed set of five factors that the courts were mandated to consider in deciding these motions. No authority was provided for thee courts to consider any other factors, and their discretion was thus substantially circumscribed. Later versions of the bill eliminated the first four of these original five factors in favor of the final and more general standard of whether the transfer would be "likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing." In the language substituted by the Assembly Municipal Government Committee and ultimately enacted as section 16(a) of L. 1985 c. 222, this trend culminated in the elimination of any specific factors and the substitution of the more general instruction that the court "consider whether or not transfer would result in a manifest injustice. . . ."

That this final change represents a broadening of the courts' authority and discretion in deciding transfer motions is clearly confirmed by the Assembly Municipal Government Committee's majority statement. As noted above, the majority states that the new transfer provision requires the courts

to consider whether manifest injustice would result, "and not just whether or not the provision of low and moderate income housing would be expedited by the transfer." Id. at 1 (Majority Statement). Certainly, if the Committee had intended to restrict the court's discretion in this area, it would have conveyed such a purpose more clearly or explicitly. The majority statement, together with the patterns of changes in each successive draft of the transfer provision, clearly suggest that the Legislature intended to vest the courts with broad discretion to decide transfer motions on the basis of all relevant factors.

Third, while the Legislature did vest the courts with broad discretion to consider a variety of factors in deciding transfer motions, it also clearly contemplated that one of those factors would be whether the provision of low and moderate income housing would be expedited by the transfer. Indeed, this very point was expressed in almost the same words by the Assembly Municipal Government Committee in its Committee Statement, which, as previously noted, explicitly recognized the continuing vitality and relevence of this factor. Id. at 1 (Majority Statement). The legislative history, therefore, provides a clear indication of the Legislature's intent that the courts, in assessing motions under section 16(a), should consider the effect of a transfer on the provision of low and moderate income housing.

In sum, section 16(a), whether analyzed in light of its legislative history or in light of the usage of the phrase "manifest injustice" in the jurisprudence of New Jersey, requires the Court to construe "manifest injustice" in light of the constitutional rights "enunciated by the Supreme Court" in the Mt. Laurel decisions L. 1985 c. 222, §3.

2. Construed In Light of The Mt. Laurel Decisions, Section 16(a) Must Mean That A Transfer Results In "Manifest Injustice" When It Perpetuates The Constitutional Wrongs Condemned by the Supreme Court In Those Decisions

In the first Mt. Laurel decision, this Court held that a municipality must plan and provide for sufficient safe and decent housing affordable to low and

moderate persons to meet the need of its indigenous poor and its fair share of the present and prospective need of the poor in the region in which the municipality is located. 67 N.J. at 174, 179-81, 187-89. The Court condemned as unconstitutional both the adoption of ordinances that impose "requirements or restrictions which preclude or substantially hinder" the provision of low and moderate income housing and the failure to adopt regulations that "make realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing." 67 N.J. at 180-81.

The Court, however, did not require immediate mandatory orders to compel implementation of these constitutional dictates. Instead, it stayed its hand, in large measure because of its "trust" that municipalities would voluntarily act "in the spirit" of the Court's decision. 67 N.J. at 192.

Eight years later, in the second Mt. Laurel decision, this Court concluded that there was a pattern of "widespread noncompliance with the constitutional mandate of our original opinion in this case." 92 N.J. at 199. The Court announced in the strongest possible terms that continued noncompliance would no longer be tolerated: "To the best of our ability, we shall not allow [noncompliance with the constitutional mandate] to continue. The Court is more firmly committed to the original Mount Laurel decision than ever, and we are determined, within appropriate judicial bounds, to make it work." 92 N.J. at 199.* The Court reaffirmed the original Mt. Laurel decision and clarified the procedural and substantive significance of its constitutional

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* In this respect, the Mt. Laurel decision parallels the school desegregation decisions of the United States Supreme Court after Brown v. Board of Education, 347 U.S. 483 (1954). Ten years after Brown, the Supreme Court abandoned its initial "all deliberate speed" standard for compliance on the ground that there had been "too much deliberation and not enough speed." E.g., Griffin v.County School Board, 377 U.S. 218, 229, 234 (1964).

mandate. In the course of its opinion, this Court also identified and condemned a number of wrongs that, separately and together, had contributed to the emergence and continuation of the pattern of "widespread noncompliance" with the Constitution. Among the wrongs identified and condemned by the Court were:

1) Doctrines and procedures that foster excessively complex and expensive litigation and that thereby impede efforts to compel compliance and encourage noncompliance. 92 N.J. at 200, 214, 252-54.

2) Doctrines and procedures that permit delay through protracted proceedings and "interminable" appeals. 92 N.J. at 200, 214, 290-91.

3) Inadequate remedies, which make enforcement difficult and permit continued noncompliance even after constitutional violations have been adjudicated. 92 N.J. at 199, 214, 281-92, 340-41.

4) Unjustified reliance by the courts upon voluntary municipal action which, in effect, makes compliance with the Constitution nothing more than "a matter between [municipalities] and their conscience." 92 N.J. at 199, 220-21, 341.

5) The lack of site specific remedies for builders, which results in the absence of parties who have both the means and incentive to seek to enforce compliance with the Constitution. 92 N.J. at 218, 279-80, 308.

6) Doctrines and procedures that permit cases to be disposed of on the basis of "good faith" or "bona fide" efforts without any determination of the magnitude of the municipality's obligation or the degree to which the obligation remained unsatisfied. Without remedies to ensure compliance with the entire constitutional obligation of a municipality, there is "uncertainty and inconsistency" in the constitutional doctrine and a toleration of less than full compliance with the requirements of the Constitution. 92 N.J. at 220-22, 248-53.

In condemning these wrongs, the Court stressed that the Constitution requires not merely "paper, process, witnesses, trials, and appeals" but also the creation of actual opportunities for housing. 92 N.J. at 200. It declared that the outcome must be that "the opportunity for low and moderate income housing found in the new ordinance will be as realistic as judicial remedies can make it." 92 N.J at 214. According to the Supreme Court, the Constitution requires no less:

> If the municipality has in fact provided a realistic opportunity for the construction of its fair share of low and moderate income housing it has met the Mount Laurel obligation to satisfy the constitutional requirement, if it has not then it has failed to satisfy it. 92 N.J. at 221 (emphasis in original).

Accordingly, a transfer pursuant to L. 1985 c. 222, §16(a), must not perpetuate the wrongs condemned by this Court in the Mt. Laurel decisions. A legislative response to the Mt. Laurel decisions which has the result of perpetuating these wrongs would necessarily have to be declared unconstitutional. Cf. Jackman v. Bodine, 49 N.J. 406 (1967) (striking down inadequate reapportionment plan adopted in response to prior court decree).

Hence, if the transfer of any case to the Affordable Housing Council, would have the effect of perpetuating the very wrongs condemned by this Court and thus impeding the vindication of the rights of lower income persons to realistic housing opportunities in the defendant municipality, transfer must, as a matter of law, be denied. Consequently the term "manifest injustice" as used in Section 16 must, at the very least, mean that a transfer cannot result in the perpetuation of any of the constitutional wrongs condemned by the Court in Mt. Laurel II as contributing to the pattern of "widespread noncompliance" with the Constitution. Therefore, this Court, in determining whether a transfer will result in "manifest injustice to any party to the litigation," must

deny a transfer to the Affordable Housing Council if any of the following would result from the transfer:

1. Significant delay in the vindication of the rights of lower income persons.

2. Procedures that, through multiple, repetitious, or needlessly complex proceedings, substantially increase the cost and burden of vindicating the rights of lower income persons.

3. Diminished availability of effective mandatory remedies, including builder's remedies, which significantly impedes the vindication of the rights of lower income persons or obliges them to rely for an additional period upon voluntary compliance by the defendant municipality.

4. Less than full and proper vindication of the constitutional rights of lower income persons, e.g., zoning plans that do not require that the "housing opportunity provided must, in fact, be the substantial equivalent of the [municipality's] fair share." 92 N.J. at 216.

As will be more fully explained in the next section, the first two of these constitutionally-based criteria encompass the criteria utilized by the court below. Slip op. at 50-52. Furthermore, a careful evaluation of these constitutionally-based criteria is a prerequisite to any informed decision on the propriety of a transfer in a particular case.

C. Transfer Of The Present Case To The Affordable Housing Council Would Result In Manifest Injustice To Lower Income Persons And Must, Therefore, Be Denied

Evaluation of the factors set forth in the previous section of this brief demonstrates that transfer of the litigation against Denville and Randolph to the Affordable Housing Council (AHC) under L. 1985 c. 222, §16 would result in manifest injustice to the plaintiffs and lower income persons. As plaintiffs will explain, transfer would perpetuate the wrongs which were condemned by

the Supreme Court as contributing to "widespread non-compliance" with the Constitution and would impede the vindication of the constitutional rights of lower income persons. A transfer would also require the plaintiffs to start anew in vindicating their constitutional rights before the Affordable Housing Council, after years of proceedings and considerable judicial and financial resources have been devoted to obtaining defendants' compliance with its obligations under the Mt. Laurel decisions.

For this reason, the trial court did not abuse its discretion in denying the transfer applications of Denville and Randolph. To the contrary, had the trial court granted the applications, its decision would have represented an abuse of discretion.

We shall discuss each of the requisite factors in turn.

1. Delay - As the trial court found, transfer of a pending case to the Affordable Housing Council subjects the plaintiffs to substantial delay. Slip op. at pp. 14-18. Transfer of a case to the Affordable Housing Council entails commencement of an entirely new proceeding. This proceeding is governed by a timetable contained in L. 1985 c. 222 itself and in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. This timetable is set out in detail in the appendix (PA A3). While the statute is ambiguous or inconsistent in some respects,* a reasonable reading of its provisions indicates that the AHC is

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* Among the ambiguities is whether the review and mediation procedure set forth in §15 is triggered at all by a transfer under §16(a). Section 16(a) does not authorize requests for review and mediation by plaintiffs in pre-May 1985 cases. That remedy is expressly limited to plaintiffs who have filed cases after May 2, 1985. §16(b). Nor does §16(a) require the defendant municipality to file a petition for substantive certification, merely a housing element and fair share plan. However, a request for mediation by a plaintiff or the filing of a petition for substantive certification by a municipality are the only events that trigger review and mediation under §15(a). Thus, if the statute is read literally, transferred cases could remain forever

(footnote continued on next page)

not obliged to complete its initial review and mediation efforts until October 1, 1986, fifteen months after the effective date of the statute L. 1985 c 222, §19.*

(Footnote continued from previous page)

before the AHC without any action ever being taken.

Such a procedure would effectively terminate plaintiffs' constitutional right to realistic housing opportunities. It would clearly violate both the New Jersey Constitution and the Due Process Clause of the federal constitution. See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (state may not terminate state created right of action without due process). As the trial court noted, slip op. at 16 n. 3, a literal reading of the statute must therefore be rejected, if possible, so as to preserve its constitutionality Town Tobacconist v. Kimmelman, 94 N.J. 85, 103-4 (1983) (statute must be construed in a manner which renders it constitutional if possible); New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 75 (1980)(same).

Plaintiffs suggest that the reading of the statute that best reconciles sections 15(a), 16(a), and 16(b) is that any transfer under section 16 automatically entails a request by the plaintiffs for review and mediation under section 15(a).

* The statute is unclear as to how the six month limitation period for review and mediation imposed by L. 1985 c. 222, §19 applies to cases transferred under section 16. Specifically, it is unclear what phases of the proceeding are included within the six-month limitation period. The statute provides for four steps in the AHC's review and mediation process: 1) initial mediation (no time period specified); 2) transfer to the OAL and proceedings before the OAL (90 days or more if determined by the Director of the OAL); 3) review of the OAL decision by the AHC (45 days); 4) if the AHC disapproves or conditionally approves the municipal plan, resubmission and review of a revised plan (60 days for resubmission and no time period specified for review). Thus, even those steps for which a time period is specified would take more than six months.

Based upon the history of the legislation, the six-month limitation period appears to be a relic of an earlier version of the legislation which provided for a highly abbreviated proceeding before the Affordable Housing Council and which did not contemplate transfer to the Office of Administrative Law or any subsequent steps. See Senate Committee Substitute for Senate Bill Nos. 2046 and 2334, adopted Jan. 28, 1985. In light of this history, a plausible construction of section 19 is that the six-month limitation applies only to those steps that precede transfer to the Office of Administrative Law. The Public Advocate has so contrued the statute for purposes of constructing the timetable set out in the appendix.

At that point, the matter is transferred as a contested case to the Office of Administrative Law. Action by the Office of Administrative Law must be completed within 90 days unless the Director of the Office of Administrative Law determines that a longer period is required. L. 1985 c. 222, s. 15(d). The AHC must adopt, reject, or modify the decision of the OAL within 45 days. N.J.S.A. 52:14B-12(c). If the AHC disapproves or conditionally approves the municipal plan, the municipality has the right to resubmit a revised plan within 60 days for further review by the AHC. L. 1985 c. 222, §14(b). As a result of this statutory timetable, proceedings before the Affordable Housing Council would ordinarily not be completed before June 1987, nearly two years from now.

Even that date, however, does not mark the beginning of compliance by the municipality with its constitutional obligations. It merely marks the end of one phase of the proceedings and the commencement of another phase. As discussed in part I of this brief, the Affordable Housing Council appears to have only the power to determine whether a municipality's proposed housing element and fair share plan are acceptable. L. 1985 c. 222, §14. It apparently has no explicit statutory power to compel a municipality to take any action. Compare L. 1985 c. 222, s. 14 with New Jersey Law Against Discrimination, N.J.S.A. 10:4-5 et seq. and with Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. Thus, even if plaintiffs prevail at every step of the administrative process and the Affordable Housing Council determines that the municipality's proposed housing element and fair share plan are unacceptable, plaintiffs might still not be able to secure any remedy from the AHC. Plaintiffs' only recourse at that point would be to recommence

judicial proceedings.*

Thus, for the recalcitrant municipality, transfer of a pending case to the Affordable Housing Council, is an effective means of forestalling any enforcement of the Constitution for at least an additional two years. This raises serious constitutional issues even where suit was filed just before May 2, 1985. Even in such a case, the effect of a transfer will be to perpetuate by new means the impediments to enforcement of the Constitution created by "long delays" and "interminable" proceedings -- the very evils which this Court condemned and sought to bring to an end in the second Mt. Laurel decision. 92 N.J. 200, 214, 290-91, 341. Compliance with the Constitution, already ten years overdue, will be set back at least two years longer. Low and moderate income persons will continue to be denied realistic opportunities for affordable housing during this protracted period.

Moreover, the effect of this delay is not merely to forestall compliance with the Constitution for two years. In many municipalities, the delay is likely to have a long-term impact on the ability of lower income persons to ever vindicate their right to realistic housing opportunities. While parties seeking low and moderate income housing are toiling through the administrative process,

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* The statute is not entirely clear as to what happens after the AHC determines that a proposed housing element and fair share plan are unacceptable. Section 16(b) expressly provides that every party challenging an exclusionary zoning ordinance will initially file his litigation in the courts and, if the municipal defendant has filed a timely resolution with the AHC, will be required to exhaust the review and mediation procedure "before being entitled to trial on his complaint." The obligation to exhaust remedies expires if the AHC disapproves the municipal housing element, L. 1985 c.222, §18, leaving the plaintiff free to go to trial on his complaint as provided in section 16(b). L. 1985 c.222, §17.

In addition, however, the decision of the AHC is a final action of a state agency which the municipality is arguably entitled to appeal to the Appellate Division of the Superior Court. In re Senior Appeals Examiners, 60 N.J. 556 (1972); R. 2:2-3(a). It is unclear whether a plaintiff's right to pursue the original litigation could be further delayed by the municipality's appeal in the Appellate Division.

other development can proceed unchecked in the defendant municipality. In municipalities such as Randolph and Denville, which claim a scarcity of vacant land and limited infrastructure capacity, intervening development not including low and moderate income housing is likely to consume these scarce resources and could permanently thwart vindication of the rights of lower income persons. In addition, as set forth in the affidavit of Alan Mallach (PADenLDiva J-1), there are currently exceptionally favorable economic circumstances for the development of low and moderate income housing: interest rates are comparably low; demand for the market rate units, which are necessary to support the inclusionary development of low and moderate income housing, is high; and the housing industry is at a cyclical peak. These conditions are unlikely to continue indefinitely.

In the present case, the effect upon the rights of lower income persons is even greater than in the hypothetical pre-May 1985, case described above. As set forth in detail in the Statement of Facts, this litigation was filed in 1978 and has diligently been pursued by plaintiffs since then. As to Randolph, the case went to trial. Trial as to Randolph was suspended after completion of plaintiffs' case only because Randolph agreed to a negotiated settlement, which it has since sought to repudiate. As to Denville, the case has been fully tried; the trial court has determined municipal liability; it has issued a remedial order requiring the municipality to submit a plan for compliance within 90 days; it has appointed a special master; and the master has filed his report. Transferring this case will nullify seven years of litigation by plaintiffs to secure compliance by Randolph and Denville Townships with the Constitution and will force the plaintiffs to begin again the lengthy process of obtaining affordable housing in those communities. Two years from now, plaintiffs will be no closer to securing compliance with the Constitution than they are today. At

that point, the litigation will have proceeded for nine years without a definitive result.

This Court has already expressed grave concern about the protracted proceedings in such matters. Two years ago, it wrote in the context of the Urban League case:

> If, after eight years, the judiciary is powerless to do anything to encourage lower income housing in this protracted litigation because of the rules we have devised, then either those rules should be changed or enforcement of the obligation abandoned. 92 N.J. at 341.

The very thrust of the Mt. Laurel II decision is that "interminable" proceedings and protracted delays are no longer constitutionally acceptable. Indeed, even if two years of additional delay in the vindication of the constitutional rights of lower income persons were the only consequence of transfer of the cases against Denville and Randolph, transfer would still be impermissoble. As the trial court below correctly noted: "If every party with a pending Mt. Laurel case, including one close to conclusion, were required to exhaust the rather lengthy administrative procedures established by the Act, its constitutionality would be difficult to defend." Slip op. at 18.

Transfer of the cases against Denville and Randolph at this stage of the proceedings is, therefore, manifestly unjust.

2. Multiple, Repetitious and Complex Proceedings - As noted above, transfer of a case to the Affordable Housing Council entails the commencement of a new proceeding of at least two years in duration. Transfer requires the party to relitigate issues which have already been litigated before the trial court. By statute, the new proceeding will revolve around the following issues:

> a. The municipality's fair share plan is consistent with the rules and criteria adopted by the council and not inconsistent with achievement of the low and moderate income housing needs

> of the region as adjusted pursuant to the council's criteria and guidelines adopted pursuant to subsection c. of section 7 of the act, and
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> b. The combination of the elimination of unnecessary housing cost generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible after allowing for the implementation of any regional contribution agreement approved by the council. L. 1985 c 222, §14.

The first of these issues concerns the magnitude of the municipality's fair share housing obligation under the New Jersey Constitution. In any case, such as the present one, in which a judicial determination of liability has been made, proceedings before the Affordable Housing Council will necessarily involve relitigation of the very factual and legal issues already resolved once by the courts. In the present case, these issues were the subject of extensive pretrial discovery and trial proceedings.

The second of these issues concerns the extent to which the municipality is already meeting its constitutional obligations or would be meeting its obligations if its proposed housing element and fair share housing plan were implemented. In any case, such as the one involving Denville, in which there has been a determination of liability, proceedings before the Affordable Housing Council will necessarily involve relitigation of factual and legal issues concerning the municipality's current degree of compliance which have already been resolved by the courts. In addition, where a master has been appointed and has carried out his charge, the parties and the court, through the master, have already invested substantial time and resources in the resolution of factual and legal issues concerning the municipality's proposed compliance plan.

Thus, in the present cases, which have been litigated almost to final judgment, virtually all the issues before the Affordable Housing Council will have already been the subject of extensive proceedings before the trial court. If this case is transferred, plaintiffs seeking to vindicate the rights of lower income persons will be required to bear the burden of proving their case twice, once before the courts and once before the Affordable Housing Council. This greatly adds to the expense and complexity of vindicating the constitutional rights of lower income persons.

Requiring the parties to go through this exercise wil not, in any manner, further vindication of the constitutional rights of lower income persons. First, it requires mediation, but the parties in these seven-year-old proceedings have already negotiated at great length under the supervision of the trial judge and reached agreements, which the defendants subsequently repudiated. The trial judge appropriately found that mediation in this context is likely to be futile. Slip op. at p. 50. Second, the administrative agency will have no greater expertise than the trial courts. The administrative agency is brand new. It has no staff, procedures, policies, or experience in these matters. By contrast, the trial judge, one of the three specially assigned Mt. Laurel judges has in the past two years become intimately acquainted with not only the the relevant law and policy, but also with the specific factual details and actors in the proceedings. Transfer of these cases effectively nullfies the considerable benefits to this case stemming from the greater experience and familiarity of the trial judge. Slip op. at 51. Third, the proceedings before the Affordable Housing Council will not be more expeditious. To the contrary, the trial judge found that court resolution of these far-advanced cases will be substantially more rapid than proceedings before the AHC. Slip op. at pp. 61, 54. Finally, the proceedings in these cases will not be simpler than completion of proceedings before the courts. The judicial

proceedings are going forward along the path clearly marked out by this Court in the Mt. Laurel II decision and are nearing their conclusion. Proceedings before the Affordable Housing Council will proceed under a statute fraught with uncertainties and ambiguities. It will be governed by procedural rules which have yet to be worked out before an agency whose powers and duties are not yet established.

Transfer would thus require the plaintiffs to bear enormous additional expenses and burdens without moving them any closer to securing relief from the violations of their constitutional rights.

In Mt. Laurel II the Court condemned procedures and doctrines which create a situation in which "the length and complexity of trial is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs afford to sue." 92 N.J. at 200; see also 92 N.J. at 214, 252-54. Transfer of this case would impose precisely the type of compounded expense and complexity for parties seeking to obtain affordable housing for low and moderate income individuals that this Court has previously condemend.

3. Absence of Effective Remedies - L. 1985 c. 222 is not a statute that mandates or compels municipal compliance with the Constitution. It is a statute which establishes a scheme for official recognition of voluntary compliance by municipalities. Submission of a housing element and fair share housing ordinance to the Affordable Housing Council is a wholly voluntary act by any municipality. Participation in the AHC's mediation and review process is also voluntary. Once the Affordable Housing Council makes its determination, the municipality is free to adopt implementating ordinances or not, as it chooses.

As noted above, the AHC appears to have only the power to approve, approve with conditions, or disapprove a proposed municipal housing element

and fair share housing ordinance. L. 1985 c. 222, §14. The Act contains no express grant of power to a municipality to take any action to comply with the Constitution or to award any remedy to plaintiffs. The detrimental impact of this aspect of the law on lower income persons is set forth in detail in section I(G) of this brief.

In effect, even if parties seeking to vindicate the rights of lower income persons prevail at every step before the Affordable Housing Council and the Council rejects the proposed municipal housing element and fair share ordinance, the Affordable Housing Council may not be able to grant any remedy. The entire two year process would be an idle, and ultimately futile, exercise.*

Transferring a case to the Affordable Housing Council thus obliges lower income persons to rely on the willingness of the defendant municipality to undertake voluntary compliance with its constitutional obligations. In the Mt. Laurel II decision, however, this Court held that mere reliance on

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* The absence of power to grant site-specific remedies builders poses particular problems. Because of the lack of such remedies, a builder may "successfully" litigate a case before the Affordable Housing Council, which results in the municipality submitting and implementing a housing element and fair share housing ordinance that satisfies the criteria and guidelines of the Council, and still not achieve any economic benefit himself. The substantive certification of compliance awarded in such a case, as in other cases, would carry a strong presumption of validity in the courts. L. 1985, c. 222, §17(a). It would, therefore, also be very difficult for the builder to secure any subsequent judicial remedy.

For the reasons set forth in section I(E) above, the absence of some favored treatment for builder-litigants makes it extremely unlikely that there will be parties with the means and incentive to assert the rights of lower income persons before the Affordable Housing Council in most instances.

In the present case, however, the lead plaintiffs, the Morris County Fair Housing Council, the Morris County Branch of the NAACP, and the Public Advocate, are not builders. Hence this consideration does not apply to the present case.

voluntary compliance by municipalities was neither justifiable nor constitutional. 92 N.J. at 199, 220-21, 341. Compliance with the Constitution, the Court declared, can no longer merely be "a matter between [municipalities] and their conscience." 92 N.J. at 341.

Obliging lower income persons to rely on the voluntary compliance by a defendant municipality is particularly inappropriate where the municipality cannot show a history of good faith efforts to comply. In the present case, Denville and Randolph share a continuous record of lack of good faith efforts to comply with the requirements of the Constitution. As set forth in the Statement of Facts, between 1975 and 1983, neither municipality took any steps to reduce zoning barriers to the provision of low and moderate income housing. Neither municipality made any changes in its zoning ordinance to eliminate cost-increasing provisions. Randolph has taken affirmative steps to meet less than one-fifth of the need identified by its own expert. Denville has not initiated any affirmative steps to create housing affordable to low and moderate income households.

Since 1983, neither municipality has not amended its ordinance nor taken any other steps to create realistic opportunities for housing affordable to lower income persons.* As to Randolph, the municipality entered into a tentative settlement agreement in July 1984 after approximately two weeks of trial. However, the municipality so eroded away the agreement that in the end it could never be finalized. Ultimately, the municipality abandoned that agreement. It continues to regulate its land use in accordance with its pre-Mt. Laurel ordinances and has no functioning plan to provide for lower income housing opportunities.

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* Randolph adopted a revised ordinance but has never put it into effect.

As to Denville, the trial court struck down the municipality's zoning ordinance as facially unconstitutional in November 1984. On January 31, 1985, the municipality stipulated in open court that the only low income units created since 1980 for which it was entitled to credit were 41 existing sub-standard units rehabilitated with federal funds under a program administered by Morris County. The municipality itself played no role in this effort.

In July 1984, after two-and-a-half weeks of trial, Denville Township entered into an agreement with plaintiffs on a plan for compliance with the Constitution. On December 16, 1984, however, the municipality repudiated that settlement. Local municipal officials announced that it was their intention to fight this case to the end. They sought and secured electoral approval for a cap waiver to enable them to appropriate $250,000 for a defense fund.

Notwithstanding the trial court's decision of January 31, 1985, and order of March 3, 1985, the municipality has never submitted a revised ordinance, under protest or otherwise, to the trial court, as required by Mt. Laurel II, 92 N.J. at 281, 284. As indicated by the special master's report, the municipality did not avail itself of the advice and assistance of the special master, did not engage in "negotiations" with the other parties over the requirements of new municipal regulations, affirmative devices, or other compliance activities, 92 N.J. at 284, and provided only minimal cooperation with the special master's effort to secure information to formulate a compliance plan. When the municipality finally submitted its outline of a plan for compliance, that plan provided for realistic opportunities for the creation of only 12 additional units of lower income housing through 1990, none of which will be the result of any action by the municipality.

In sum, there is nothing in the past actions of either Denville or Randolph to suggest that another two years of voluntary compliance will bring

lower income persons any closer to securing their constitutional right to realistic opportunities for affordable housing in the municipality. To the contrary, there is every reason to believe that reliance on voluntary compliance by these municipalities will simply result in at least two additional years of municipal denial of the constitutional rights of lower income persons.

4. Less Than Full Vindication of the Rights of Lower Income Persons

In Mt. Laurel II, this Court reaffirmed that:

> The municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a good faith attempt. The housing opportunity provided must be the substantial equivalent of the [municipality's] fair share. 92 N.J. at 216.

In at least three respects, transfer of cases to the Affordable Housing Council will foreseeably* result in the housing opportunity provided to low and moderate income households being less than the substantial equivalent of the municipality's constitutional fair share.

First, section 7(c)(1) of the statute requires that the Affordable Housing Council use a formula for the determination of municipal fair share which arbitrarily and irrationally subtracts from municipal fair share of the unmet regional housing need the number of existing adequate housing units occupied by lower income persons.

Second, section 7(c)(2) requires the Affordable Housing Council to approve a series of downward adjustments in municipal fair share based upon a variety of planning factors, which guarantees that individual municipal fair share

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* In addition to the matters discussed in this section, there are a number of other provisions in the statute which may well result in less than full vindication of the rights of low and moderate income persons: the cap on municipal fair share, §7(e); the regional contribution agreements, §12; and the definition of prospective need, §4(j). Since the implementation of these provisions is at least partially discretionary with the AHC, we offer no comment on them at the present time.

determinations can never aggregate to the full regional housing need as determined by the Affordable Housing Council under Section 7(b).

Third, section 11(d) provides that the Affordable Housing Council cannot condition approval of a proposed municipal housing element and fair share ordinance upon any requirement that "a municipality raise or expend municipal revenues in order to provide low and moderate income housing." This makes it impossible for the AHC to demand plans which create "realistic" opportunities for more than a fraction of the municipal fair share.

The deleterious effect of these sections on the provision of lower income housing is set forth in detail in sections I(A), I(B), and I(C) of this brief. These three provisions make it reasonably foreseeable that transfer of these cases to the Affordable Housing Council will inevitably result in a failure to provide housing opportunities substantially equivalent to the municipality's constitutional fair share.

In sum, transfer of the Denville and Randolph cases to the Affordable Housing Council would perpetuate the very wrongs which the Supreme Court condemned in Mt. Laurel II as contributing to the pattern of widespread non-compliance with the requirements of the New Jersey Constitution. Therefore, the requested transfer would result in "manifest injustice" to the parties to this litigation and to lower income persons. Consequently, under L. 1985 c. 222, §16, these cases cannot properly be transferred to the Affordable Housing Council.

Of the factors listed above clearly the most important are (1) the delay in the vindication of the constitutional rights of lower income persons to realistic housing opportunities in Denville and Randolph that would result from transfer of these cases to the Affordable Housing Council, and (2) the additional burden imposed on plaintiffs by the multiple, repetitious and unduly complex procedures that would result from transfer. These were the factors

which the trial court properly relied upon in denying transfer. Slip op. at 50-52, 54. In this seven year old case, which has gone to trial and is near final resolution in the courts, requiring plaintiffs to undergo a further delay of at least two years and to relitigate the entire case anew before a different forum represents a "manifest injustice." Hence, even if the Court were to reduce the impact of the other factors analyzed by construing provisions of L. 1985 c. 222 to preserve their constitutionality, as analyzed in part I of this brief, or by imposing conditions upon transfer, as described in part III of this brief, transfer of these cases would violate both §16(a) and the constitutional rights of the plaintiffs.

D. In The Interests Of Consistency, Predictability, And Judicial Economy The Court Should Formulate Clear Standards For The Transfer Of Cases Pursuant To L. 1985 C. 222, §16(a)

As analyzed in section II(B) of this brief, the Legislature's use of the term "manifest injustice" places upon the courts the obligation to formulate standards for evaluating whether exclusionary zoning cases can properly be transferred to the Affordable Housing Council. The Public Advocate has outlined factors, which as a matter of constitutional mandate, must be considered in applying section 16(a) and has analyzed the Denville and Randolph transfer applications in light of these factors.

Denville and Randolph represent very extreme cases. Clearly, however, there are other cases which, when analyzed in light of these factors, would also necessarily lead to a determination of manifest injustice under section 16(a). Indeed, the Public Advocate suggests that any case which (1) was filed prior to January 20, 1983, or (2) has gone to trial or been subject to adjudication of any significant issue on the merits would, if so analyzed, necessarily result in a determination of "manifest injustice." In the interests of consistency, predictability, and judicial economy, we suggest that the

Court formulate a standard that, absent an extraordinary showing to the contrary, transfer any case in either of these categories to the Affordable Housing Council pursuant to section 16(a) would presumptively represent "manifest injustice."

The formulation of such a rule enables municipal defendants and plaintiffs to make informed decisions as to whether to seek or oppose transfer to the Affordable Housing Council, promotes consistency of decision-making among the three Mt. Laurel judges, and makes the most efficient use of limited judicial resources.

III. CONSTITUTIONAL PRINCIPLES ENUNCIATED IN THE MT. LAUREL DECISIONS REQUIRE THAT TRANSFER OF ANY CASE TO THE AFFORDABLE HOUSING COUNCIL PURSUANT TO L. 1985 C. 222, §16(a) BE ONLY PERMITTED SUBJECT TO CERTAIN CONDITIONS

Where a party moves for transfer of a pending exclusionary zoning case to the Affordable Housing Council pursuant to L. 1985 c. 222, §16(a), the trial court has at least three distinct alternatives. The court may (1) transfer the case to the Affordable Housing Council without conditions; (2) transfer the case to the Affordable Housing Council subject to conditions; or (3) decline to transfer the case to the Affordable Housing Council and permit judicial proceedings to continue.*

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* Arguably there is also a fourth possibility. The trial court could retain jurisdiction and permit judicial proceedings to take their course, but permit some or all of its decisions or orders to be reopened if subsequent regulations or decision principles formulated by the Affordable Housing Council prove to be substantially different from those utilized by the court.

There are, however, serious objections to this alternative. If this course were followed, the case would never be finally resolved. Either party would be free to relitigate the same issues again and again. In addition to frustrating the sound judicial policy of promoting final decisions, this would permit a recalcitrant municipal defendant to endlessly multiply the burden in time and expense of vindicating the constitutional rights of lower income persons.

Moreover, adoption of this alternative would make it impossible for any prospective builder or sponsor of lower income housing -- or, indeed, for municipal officials themselves -- to know with certainty whether a court ordered or approved municipal compliance plan would remain in effect for another year, month, or week. It would therefore discourage the public planning and private investment necessary for the actual provision of lower income housing.

Finally, such a course would place the trial courts in the untenable position of constantly being obliged to try to anticipate the future actions of the Affordable Housing Council and of having their decisions subject to continual second-guessing by that agency.

For all these reasons, the Public Advocate does not recommend this fourth possibility to the Court as a viable alternative.

In administering L. 1985 c. 222, §16(a), the duty of the court is to honor the Legislature's preference for administrative proceedings rather than litigation, insofar as that can be accomplished without violation of the constitution or otherwise causing injustice. Because of the inherent problems in L. 1985 c. 222, as set forth in the preceding section, any transfer of an exclusionary zoning case which was pending as of May 2, 1985, involves some significant degree of impairment of the constitutional rights of lower income persons. In some cases, such as those involving Denville and Randolph, the impairment of constitutional rights would be so great that transfer is impermissible under the constitution and under the terms of section 16 itself. In other instances, the trial court may properly transfer cases to the AHC, but only if it can limit the degree of impairment of constitutional rights and injustice by placing reasonable conditions upon transfer to the Affordable Housing Council.

In particular, Mt. Laurel principles ordinarily require that a trial court permit transfer of a pending case to the Affordable Housing Council pursuant to L. 1985 c. 222, §16(a) only subject to the following conditions:

1) Interlocutory court orders designed to ensure that existing scarce resources, such as vacant developable land, public water supply, or public sewerage capacity, which might be exhaused or diverted irreversibly to purposes other than lower income housing during the several years of proceedings before the Affordable Housing Council, be preserved during the pendency of such proceedings.*

2) Court order requiring that if the Affordable Housing Council ultimately approves the compliance plan submitted by the municipality, the municipality must proceed to implement the plan. If the Affordable Housing

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* Conditions one through three respond to constitutional defects in L. 1985 c. 222 discussed in sections I(E), I(F), and I(G) above. Imposition of these conditions is especially critical if the Court chooses not to address the issue of the facial constitutionality of this statute.

Council approves the municipal compliance plan only subject to conditions, the municipality must conform its plan to those conditions and proceed to implement it.

3) Court order requiring that any compliance plan submitted by the municipality to the Affordable Housing Council or implemented by the municipality must provide for rezoning the property of any builder-plaintiff who has played a significant role in juidicial proceedings prior to transfer so as to create realistic opportunities for the development of a substantial quantity of lower income housing unless the Affordable Housing Council determines that rezoning the property is clearly contrary to sound land use planning because of environmental or other substantial planning concerns.

4) Court order requiring that, pending resolution of proceedings before the Affordable Housing Council, the municipality take immediate steps to formulate and implement a plan acceptable to the court to create sufficient opportunities for the development of lower income housing to meet the present unmet needs of at least the municipality's indigenous poor.

5) Court order requiring that the proceedings before the Affordable Housing Council be expedited and that court automatically reassume jurisdiction if all proceedings before the Affordable Housing Council are not completed within the timetable set forth in L. 1985 c. 222, §19.

6) Court order barring the parties from relitigating before the Affordable Housing Council any issues of fact or law already adjudicated by the court and requiring the Affordable Housing Council to take those issues as already decided.

The power of the courts to place conditions on the transfer of cases to the Affordable Housing Council derives from at least two distinct sources. First, the Court has the inherent power to place conditions upon transfer of cases to the Affordable Housing Council to protect the constitutional rights

of the parties. The Act was adopted in response to the Court's call for "significant legislation leading to enforcement of the constitutional mandate." Mt. Laurel II, 92 N.J. at 212. If some conditions on the operation of the Act are necessary to fulfill this purpose the Court clearly has the inherent right to impose such conditions. See Right to Choose v. Byrne, supra.

Second, it is well established that whenever the courts have the discretion to dismiss a case or to transfer it to some other agency, they have the inherent power to place such conditions upon dismissal or transfer as may be required by fairness and justice. See Vargas v. A.H. Bull Steamship Co., 25 N.J. 294, 296 (1957) (conditions on dismissal for forum nonconveniens); State v. Leonardis, 73 N.J. 360 (1977) (conditions on suspension of criminal proceeding and transfer of defendant to PTI program); State v. Carter, 64 N.J. 382 (1974) (termination of commitment orders against persons acquitted by reason of insanity). Placing conditions upon transfer of cases to the Affordable Housing Council under section 16(a) would represent nothing more than an exercise of this inherent judicial power. This power is particularly appropriate where transfer to an administrative agency is involved for, under the Prerogative Writ Clause, N.J. Const. Art. VI, para. 5, sec. 4, the courts have a particular duty and power to ensure that proceedings of administrative agencies are conducted in accordance with principles of administrative "rightness and fairness." Under this constitutional provision, the courts have broad powers to regulate proceedings of State administrative agencies, such as the Affordable Housing Council, to protect the substantive and procedural rights of affected parties. See Avant v. Clifford, 67 N.J. 496, 52025 (1975); Cunningham v. Department of Civil Service, 69 N.J. 13, 1920 (1975); Monks v. New Jersey State Parole Board, 58 N.J. 238, 24849 (1971). Indeed, the New Jersey Courts have often imposed conditions on transfer to administrative agencies. See Boss v. Rockland Electric Company,

95 N.J. 33 (1983), (transferring the case to BPU, but maintaining in force an interlocutory injunction barring the utility company from acting during the pendency of the agency proceeding); Abbott v. Burke, 100 N.J. 168 (1985) (transferring constitutional challenge to New Jersey's system of financing public school education to Commissioner of Education, but imposing an extensive set of conditions to secure prompt resolution of constitutional claims).

It should be emphasized that placing conditions upon transfer of cases to the Affordable Housing Council does not conflict with either the letter or spirit of L. 1985 c. 222. In adopting section 16(a), the Legislature explicitly recognized that a balance must be struck between its potentially conflicting purposes, which include both "satisf[ying] the constitutional obligation enunciated by the Supreme Court" and exercising a "preference for the resolution of existing and future disputes involving exclusionary zoning through "the mediation and review process set forth in this act and not litigation." L. 1985 c. 222, §3. As to cases pending as of May 2, 1985, it placed the responsibility for striking this balance in the hands of the trial courts. L. 1985 c. 222, §16(a). Although this section does not speak explicitly in terms of a conditioned transferr, there is nothing in this section or elsewhere in the Act that suggests that the courts should not, if appropriate, provide a more finely tuned mechanism for satisfying the potentially conflicting legislative purposes, nor is there any effort in the Act to prohibit the courts from crafting intermediate disposition which ensure both satisfaction of the constitutional obligations and resolution of disputes before the Affordable Housing Council, rather than litigation. Indeed, to read the Act to prevent this would in some instances compel the courts to deny transfer outright and frustrate the preference of the Legislature in L. 1985 c. 222 for administrative proceedings rather than litigation.

IV. THE COURT SHOULD RETAIN JURISDICTION AND DIRECT THE AHC AS SPECIAL MASTER TO SUBMIT PROPOSED POLICIES CONCERNING, REGION, REGIONAL NEED, FAIR SHARE, INDIGENOUS NEED, AND STANDARD FOR COMPLIANCE DIRECTLY TO THE COURT FOR REVIEW

As set forth in the previous sections of the brief, certain exclusionary zoning cases, including those involving Denville and Randolph, cannot lawfully be transferred to the Affordable Housing Council under L. 1985 c. 222, §16(a). Other cases can be transferred, subject to certain conditions set forth in part III of this brief. Vindication of the constitution rights of lower income persons, however, will be in peril in cases transferred to the AHC, even if made subject to the conditions described above. At the trial court below aptly observed:

> It is fair to say that the Council will find itself walking through a constitutinal minefield when it undertakes, in conformity with the Act, to establish housing regions, to determine regional needs for lower income housing, to adopt "criteria and guidelines" for municipal fair share allocations and to review municipal petitions for substantive certification of housing. Slip op. at 41.

If the AHC has failed to properly steer through this "constitutional minefield," hundreds of thousands of poor people will have been denied their constitutional rights to realistic housing opportunities before the first appeals from AHC decisions reach this Court.

This outcome would be undesirable from all legitimate points of view. The AHC will have been deprived of guidance from this Court until after the fact as to whether it is successfully steering through the "constitutional minefield." This Court's task will be made more difficult by the fact that it must deal with the consequences of numerous AHC decisions based on perhaps flawed interpretations of the constitution. The public interest is

greatly disserved by an extended period of uncertainty and confusion while cases wend their way through the AHC and to this Court. The Legislature will have been thwarted in its desire to "satisfy the Constitutional obligation enunciated by the Supreme Court." L. 1985 c. 222, §3. Most importantly, lower income persons, who have waited ten years for the housing opportunities guaranteed by the constitution, and several more years after the strong pronouncements in Mt. Laurel II, will have implementation of their constitutional rights further delayed.

To avoid the possibility of these unacceptable consequences, the Public Advocate urges this Court to take an alternative course. Specifically, the Public Advocate urges the Court to retain jurisdiction, to appoint the members of the Affordable Housing Council collectively as a special master, and to direct the members of the Affordable Housing Council to submit to the Court proposed policies within 180 days on the delineation of region, determination of unmet present and prospective need for safe, decent housing affordable to lower income persons, allocation of regional need among municipalities in the region, determination of indigenous need for safe, decent housing for housing affordable to lower income persons, scope of remedies to be utilized by the Affordable Housing Council, and standards to municipal plans to meet their fair share housing obligations.

This step would not be unprecedented. This Court has several times retained jurisdiction to ensure that State government implement legislation correcting violations of the Constitution. See e.g. Robinson v. Cahill, 62 N.J. 173 (1973); 69 N.J. 449 (1973); Jackman v. Bodine, 43 N.J. 453 (1964). It has often directed State agencies to take steps to formulate, modify or clarify regulations or policies and submit them to the courts for accelerated review. See Abbott v. Burke, 100 N.J. 168 (1985); Jackman v. Bodine, 49 N.J. 430 (1967). This Court has actively endorsed the use of

special masters in exclusionary zoning cases. Mt. Laurel II, 92 N.J. at 281-85. Other courts have often found it valuable to appoint government officials as special masters to ensure compliance. See Newman v. State of Alabama, 466 F. Supp. 628 (D. Ala 1979) (appointing governor as receiver of state prisons to correct constitutional violations).

This course would carry out the policy of fostering a more cooperative relationship in the area of housing between the coordinate branches of government. This is a policy which both this Court, Mt. Laurel II, 92 N.J. at 212-214, and the Legislature, L. 1985 c. 222, §§ 2, 3, have endorsed. It will enable the AHC and the Court to engage in a dialogue concerning the implementation of the constitutional rights of lower income persons rather than merely long range gunnery. It will ensure the L. 1985 c. 222 does truly become "a comprehensive planning and implementation response to [the] constitutional obligation" L. 1985 c. 222, §2(c). Most important, it will increase the likelihood that the result of the adoption of L. 1985 c. 222 is "a realistic opportunity for housing, not litigation" as the Constitution demands. Mt. Laurel II, 92 N.J. at 199.

CONCLUSION

For all the foregoing reasons, as well as those set forth in plaintiffs' trial briefs, the Public Advocate urges that this Court affirm the decision of the lower court denying the applications of Denville and Randolph Townships for transfer to the Affordable Housing Council. Further, the Public Advocate urges this Court to establish clear standards for transfer of other cases to the Affordable Housing Council, and to impose certain conditions upon cases transferred to the Affordable Housing Council to protect the constitutional rights of lower income persons. Finally, the Public Advocate urges the Court to retain jurisdiction, appoint the members of the Affordable Housing Council collectively as special master in this matter, and direct them to submit to the Court for its review proposed policies on the major constitutional issues before the Council.

Respectfully submitted,

ALFRED A. SLOCUM
Acting Public Advocate of New Jersey
Attorney For Plaintiffs Morris County
Fair Housing Council, et al.

By: Stephen Eisdorfer
STEPHEN EISDORFER
Assistant Deputy Public Advocate

Dated: December 9, 1985

COURT'S LIST OF ISSUES TO BE ADDRESSED
CROSS-INDEXED TO THE PUBLIC ADVOCATE'S BRIEF

ISSUES TO BE ADDRESSED

PAGES

1. All parties in the initial exchange of briefs should address:

   a. the meaning of "manifest injustice" including what factors should be considered in determining what is manifest injustice. If delay in the implementation of the Act (i.e., in the construction of housing) or any similar factor is listed, counsel should present, in support of the position taken, an analysis of the time it would take to afford relief pursuant to the Act. 39-59, 60-62, 3

      i) Assuming that a balancing test is advocated, what relative weight should be given to each factor? 58-59

      ii) What is proper scope of review by an appellate court of the trial court's determination of the manifest injustice issue? 41

   b. Does the builders' remedy moratorium apply to a municipality if a motion to transfer to the Housing Council is denied and either all appeals have been exhausted or no appeals have been taken? 25

   c. The Act provides for different treatment of transfer applications depending upon whether the party making application commenced suit 60 days or more before the adoption of the Act. How should applications be treated in an action when made by more than one party, one of whom filed a complaint 60 days or more before the effective date of the Act and one of whom did not? Trial Brief

2. Any builder or any other party who intends to argue that the Act is invalid in whole or part shall notify adversaries in the case immediately by phone that such position will be taken in the brief. In case of such notice, the parties on both sides in that case shall brief the invalidity issues on the initial exchange of briefs, including any claims of: 38

   a) facial invalidity of the entire statute;

   b) invalidity of any part of the Act, considering it both on its face and as it might be applied, including the following parts:

      1) moratorium on builders' remedies; 22-30

2) alleged conflict between mandatory consideration by the Council on Affordable Housing and the constitutional power of courts to dispense with exhaustion requirements in matters in lieu of prerogative writs; Not addressed

3) definition of region; Not addressed

4) credits against fair share; 15-20

5) alleged delay in enforcement of constitutional obligation; 60-65

6) requirement, in determining prospective need, that consideration be given to approvals of development applications, real property transfers, and economic projections prepared by State Planning Commission; and Not addressed

7) effect of settlement set forth in §22 of the Act; and 20-22

c) severability. 30

Timeline for Cases Transferred
Under L. 1985 c. 222 §16

Date	Event
July 2, 1985	Effective date of statute (§34)
August 1, 1985	Deadline for nomination of members of AHC (§5(d))
November 2, 1985	Deadlne for filing by municipalities of resolutions of participation (§9(a)).
April 1, 1986*	Last date for promulgation of procedural rules by AHC (§8)
August 1, 1986*	Last date for issuance of determination of regions, estimatin of need and promulgation of guidelines and criteria (§7)
October 2, 1986	Date by which AHC review and mediation procedure must be completed and matter is transferred to Office of Administrative Law (§19)
January 1, 1987**	Date by which municipality in litigation transferred to ACH must file housing element and fair share plan with AHC (§16)
April 1, 1987	Date by which OAL is to complete hearing and issue initial decision, unless extended by Director of OAL (§15(d))
May 15, 1987	Date by which AHC must issue final decision accepting, accepting with conditions or rejecting municipal plan (N.J.S.A. 52: 14B-12(c))
July 14, 1987	Date by which municipalty may submit revised plan. (§14(b))
Within an unspecified time thereafter***	AHC accepts or rejects revised plan

* If all members of the AHC are nominated and confirmed prior to January 1, 1986, this date could be earlier. $$8, 9(a).

**This date is based on the assumption that the deadline for filing a housing element in a transferred matter is governed by §16 and not by §19. If §19 governed,housing elements would have to be filed in time for review and mediation procedures completed by October 2, 1976.

*** The statute sets no time table for this phase.