Morris ~~Boonton~~ County PHC v. Boonton Twp, Denville (1985)

Brief + appendix of Π's morris county fair housing et al. in opposition to the motion of Denville Twp to transfer case to the Affordable Housing Council

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MORRIS/MIDDLESEX COUNTIES
DOCKET NO. L-6001-78 P.W.

MORRIS COUNTY FAIR HOUSING COUNCIL, et al.,	:	
Plaintiffs,	:	
vs.	:	Civil Action
BOONTON TOWNSHIP, et al.,	:	(Mt. Laurel Action)
Defendants,	:	
and Consolidated Cases.	:	

BRIEF AND APPENDIX OF PLAINTIFFS MORRIS COUNTY FAIR HOUSING COUNCIL ET AL. IN OPPOSITION TO THE MOTION OF DENVILLE TOWNSHIP TO TRANSFER CASE TO THE AFFORDABLE HOUSING COUNCIL

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STATEMENT OF FACTS

A. The History of the Litigation

Defendant's motion to transfer this matter to the Affordable Housing Council must be evaluated in light of the procedural history and present posture of this litigation. This lawsuit represents a seven-year effort by the plaintiffs to enforce the constitutional rights of low and moderate income persons to realistic housing opportunities in Denville Township. The case has been through protracted pre-trial 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 by the Morris County Fair Housing Council, Morris County Branch of the NAACP, and Public Advocate of New Jersey against Denville and 26 other municipalities in Morris County on October 13, 1978. 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 grounds that plaintiffs' commencement of the action was "improper, illegal, arbitrary, [and] capricious." Denville and ten 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 disqualify 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 expert reports by four expert witnesses. Denville and the common defense group conducted 19 days of depositions of these witnesses. Discovery closed on February 25, 1980.

The 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 this time, Denville joined in the first of three motions to indefinitely stay 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 the Supreme Court).

In its pre-trial order, the 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 June 17, the 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 set the case down for trial before Honorable Reginald Stanton for 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, as plaintiffs were preparing for trial, the Supreme Court granted a motion for a stay sought by defendants other than Denville.

After the Supreme Court's decision in Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 155 (1983), this case was assigned to 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 plus the Middlesex and Warren County Planning Boards intervened, although all subsequently withdrew.

Pursuant to the 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 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 and two other defendants 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 Court determined to be likely to be finalized and secure 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. The Court 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 Court issued an opinion on January 14, 1985, that Denville's constitutional housing obligation is 924 lower income units. On January 31, 1985, the Court issued an opinion 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, the Court entered an order embodying that decision and appointed Dr. David Kinsey as special advisory master.

Dr. Kinsey, in performance of his duties, held weekly daylong meetings starting on April 18, and continuing through June 12, 1985. In addition to participating in those meetings, plaintiffs made one of their expert witnesses available on two occasions for presentations to

Dr. Kinsey and to the municipal governing body. Plaintiffs also submitted a draft ordinance and comments on Denville's June 13, 1985, draft compliance plan. Mr. Kinsey submitted his report to the 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 Court denied the request to terminate the appointment of the master on July 19, 1985. The remainder of the motion is before the Court in this proceeding.

Plaintiffs estimate that several thousand hours of attorney time have been devoted to prosecuting this litigation over a seven-year period.

B. Denville's Response to Its Constitutional Obligations

In 1975, the New Jersey Supreme Court ruled in Mt. Laurel I that municipalities had a constitutional obligation to plan and provide fair 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 (Appendix A) 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 (Appendix B). The only arguable provision for lower income housing was a permissive senior citizen housing zone.

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. (Appendix C). The lack of opportunity for least cost housing in Denville is corroborated by the June 1984 vacant land analysis prepared by Mr. Montney (Appendix D).

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 (Appendix E). 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 households under a program conducted by the Morris County Community Development Office. The municipality plays no role in this program.

In response to the Court's decision of January 31, 1985, Denville never submitted a revised zoning ordinance either to the 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 (Appendix F). On June 13, 1985, the municipality submitted a six-page outline of a compliance plan. Plaintiffs' analysis of this compliance plan indicates that the plan provided realistic opportunities for only 12 units of low and moderate income housing (Appendix G). Dr. Kinsey reached the same conclusion in his report (Appendix F, p. 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.

ARGUMENT

INTRODUCTION

Defendant Denville Township has moved for transfer of this case to the Affordable Housing Council pursuant to newly enacted L. 1985, c. 222, §16. That statute declares in pertinent part:

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

L. 1985 c. 222, § 16 provides for transfer of pre-May 1985 cases to the Affordable Housing Council* only where the court determines that "transfer

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* Plaintiffs note that the remedy which Denville seeks in its motion is, at the present time, impossible. No case can be transferred to the Affordable Housing Council now because there is no such body in existence. The Governor only nominated the nine members of the Council late last week, and these individuals have not yet been confirmed by the Senate. The Council has no staff, no office, no telephone, and no mailing address. It may well be that transfer of any case to the Affordable Housing Council now would be a denial of due process. See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In other words, a transfer at the present time to what is, in effect, a non-existent Council would, in and of itself, "result in a manifest injustice."

Plaintiffs recognize, however, that the transfer issue will cloud proceedings in this case if not resolved at the present time. Plaintiffs have no objection to the Court's treating Denville's motion as a contingent one, seeking transfer to the Affordable Housing Council when and if it comes into existence, and ruling on it at this time.

would [not] result in manifest injustice to any party in the litigation."* The application of L. 1985 c. 222, §16 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 requires denial 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. In the present case, transfer would result in 1) further delays in the vindication of the rights of lower income persons caused by the termiantion of judicial proceedings that have nearly been completed and the initiation of new administrative proceedings; 2) greater burdens upon lower income persons in the form of the increased expense and complexity of proceedings to enforce their constitutional rights; 3) the absence, or diminished availability, of effective remedies to enforce compliance; 4) the relegation of low and moderate income persons to exclusive

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* The statute clearly does not impose a blanket rule that all pre-May 1985 cases must be transferred, as the logic of defendant's arguments appears to suggest. The statute distinguishes between post-May 1985 cases, and pre-May 1985 cases. In the former instance, plaintiff must, as a matter of course, exhaust administrative remedies before the Affordable Housing Council. In the latter instance, however, the case continues to proceed before the court unless the trial judge determines that transfer is appropriate.

L. 1985, c.222 plainly contemplates that at least some pending cases will continue to proceed before the courts. It provides for entry of stays of certain types of remedial orders in pending cases. L. 1985, c. 222 §28. It authorizes applications to the courts for orders extending the period of compliance. L. 1985, c. 222, §23. It authorizes applications to the courts for approval of so-called regional contribution agreements. L. 1985, c. 222, § 12. These provisions would be entirely superfluous if, as defendant suggests, there were a blanket rule that all pending cases are to be transferred to the Affordable Housing Council.

reliance upon voluntary compliance by the municipal defendant for an extended period of time; and 5) 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. In combination, they provide overwhelmingly compelling reasons to deny a transfer in this case.

This is a case of first impression in this vicinage. The Court's decision will provide judicial standards for the proper construction and application of Section 16. It will also be relied upon by municipal officials throughout northern New Jersey who are considering whether to seek transfer to the Affordable Housing Council pursuant to Section 16. For these reasons, plaintiffs urge the Court to develop general standards which will aid municipal officials in making informed decisions about transfer motions.

In the remainder of this brief, the plaintiffs will present their views on the proper construction of Section 16. We discuss first the meaning of "party to litigation" and then of "manifest injustice." Thereafter, we will explain how the proper application of these terms leads inexorably to the conclusion that defendant's transfer motion should be denied.

I.

"PARTY TO THE LITIGATION," AS USED IN L. 1985 c. 222, §16, 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. Only by analyzing the phrase "any party to the litigation" can the Court determine what types of "injustice" it must assess. 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 the builder-plaintiffs. Specifically, in this case, the Court must assess the extent of potential injustice, not merely to builder-plaintiffs (as suggested by the municipal defendant), but also to the low and moderate income persons whose interests are represented by the organizational plaintiffs -- the Morris County Fair Housing Council, the Morris County Branch of the NAACP, and the Public Advocate.

Indeed, as we will explain below, even if there were no organizational plaintiffs, but only builder-plaintiffs, the Court would still be required by Section 16 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 must be interpreted in light of the distinctive structure of exclusionary zoning litigation as framed 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 the 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. Indeed, this Court described the character of this type of litigation in an earlier decision in this matter:

> 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, the term "party to the litigation" in Section 16 must be construed to include the lower income persons whose interests are being asserted in the litigation, as well as the nominal plaintiffs. 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. Thus, in considering

applications under L. 1985 c. 222, §16, the Court must not only determine whether the nominal parties in the litigation will suffer "manifest injustice" but must also consider whether lower income persons will suffer such injustice.

II.

THE TERM "MANIFEST INJUSTICE" IN SECTION 16 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

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

The term "manifest injustice" is not defined in L. 1985, c. 222, nor is there any helpful legislative history on the meaning of this term. 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 this phrase is used in the jurisprudence of New Jersey in varying contexts and with widely divergent meanings. The following uses of the phrase are illustrative:

1) 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. 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.

2) 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)).

3) 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.

4) 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.

5) 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.

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. Its meaning varies with the context in which it occurs. 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 the courts to formulate appropriate standards and, insofar as possible, to adhere consistently to those standards.

Thus, in construing L. 1985 c. 222, ¶16, 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 to be applied in a reasoned and consistent manner, not merely on an ad hoc basis.

In the present case, these principles compel several conclusions. First, the Court should construe "manifest injustice" in the context of the Mt. Laurel decisions. The Supreme Court has repeatedly called upon the Legislature to enact legislation "enforcing the constitutional mandate." 92 N.J. at 212. L. 1985, c. 222 is, by its own terms, 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 as enunciated in the Mt. Laurel decisions.

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

> 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. 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 effect of a transfer upon the continued denial of the constitutional rights "enunciated by the Supreme Court" in the Mt. Laurel decisions.

Second, the term "manifest injustice" must be viewed in relationship to the posture of the exclusionary zoning litigation. Where, as in the present case, considerable judicial resources have been expended in resolving the controversy in a manner dictated by the Mt. Laurel decisions, transfer is particularly inappropriate. The "manifest injustice" to lower income persons, who have to start anew in vindicating their constitutional rights before the Affordable Housing Council, is clear in these circumstances.

B. Construed In Light of The Mt. Laurel Decisions, Section 16 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, the Supreme 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 of the region in which the municipality is located. 67 N.J. at 174, 179-81, 197-89. The Court condemned as unconstitutional both the adoption of ordinances that impose "requirements or restrictions which preclude or substantially hinder" 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 elimination of these constitutional mandates. 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, the Supreme 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 mandate. In the course of its opinion, the 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

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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).

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).

L. 1985, c. 222, §16, must not perpetuate the wrongs condemned by the Supreme Court in the Mt. Laurel decisions. See generally, Town Tobacconist v. Kimmelman, 94 N.J. 85, 103-4 (1983) (statute must be construed in a manner which renders it constitutional); New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 83 N.J. 57, 75 (1980) (same); cf. Robinson v. Cahill, 69 N.J. 449, 461-463, 468 (1976) (construing school finance legislation adopted in response to decision holding prior school finance law unconstitutional); Drummond v. Acree, 409 U.S. 1228, 93 S. Ct. 18 (1972) (Powell, J., Circuit Justice) (construing federal civil rights laws adopted in response to school desegregation decision). Indeed, a legislative

response to the Mt. Laurel decisions which has the result of perpetuating these wrongs would 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).

Likewise, if the tranfer of any case to the Affordable Housing Council, pursuant to L. 1985 c. 222 §16, would have the effect of perpetuating the very wrongs condemned by the Supreme Court and thus impede 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 Supreme 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," should 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. Increased complexity of litigation which significantly impedes vindication of the rights of lower income persons.

3. Diminished availability of effective mandatory remedies which significantly impedes the vindication of the rights of lower income persons.

4. Exclusive reliance for some additional period upon voluntary compliance by the defendant municipality.

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

6. Less than full and proper vindication of the constitutioanl 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.

A careful evaluation of these factors is a prerequisite to any informed decision on the propriety of a transfer in a particular case.

III.

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 present case 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, a 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 Denville's compliance with its obligations under the Mt. Laurel decisions. We shall discuss each of the requisite factors in turn.

1. Delay - 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 Appendix I. While the statute is ambiguous or inconsistent in some respects,* a reasonable reading of its provisions indicates that the AHC is

* Among the ambiguities is whether the review and mediation procedure set forth in s. 15 is triggered at all by a transfer under §16. Section 16 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 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). This literal reading of the statute must therefore be rejected, if possible, so as to preserve the constitutionality of the statute. 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).

Plaintiffs suggest that the reading of the statute that best reconciles sections 15(a), 16, 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. First, 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. Plaintiffs have so contrued the statute for purposes of constructing the timetable set out in the Appendix, although this construction does not comport perfectly with the literal meaning of section 19.

The AHC is required to promulgate criteria and guidelines for housing elements within seven months of the date the last member of the commission is confirmed by the Senate or by January 1, 1986, whichever is earlier L. 1985 c. 222, §8. A municipality whose case is transferred to the AHC under L. 1985 c. 222, §16 must file its housing element and fair share plan with the Council within five months of the date the criteria and guidelines are promulgated. L. 1985 c. 222, §16. If timetables are computed starting at January 1, 1986, municipal housing elements must be filed by January 1, 1987. (While prompt action by the Governor and Senate to appoint and confirm members of the AHC might advance these dates slightly, such action cannot be assumed. Indeed, the Governor has already fallen behind the statutory timetable by failing to nominate members of the commission by August 1, 1985, as required by §5(d)). Thus the AHC would have to complete its review and mediation process under §19 three months before municipal elements are required to be filed under §16. There is no satisfactory explanation for these apparently inconsistent timetables.

At that point, the matter is tranferred 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 ordinarly 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 proceedings and the commencement of another phase. 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. It is well established that agencies cannot exercise remedial powers not expressly delegated to them by the Legislature. A.A. Mastrangelo v. Commissioner of the Department of Environmental Protection, 90 N.J. 666, 684 (1982); In re Jamesburg High School Closing, 83 N.J. 540, 549 (1980); Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 598 (1970). 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, even if one were now in existence, is an effective means of forestalling any enforcement of the Constitution for at least an additional two years. This period is even greater at the present time in light of the uncertain status of the Council (see note at page 7). 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 the Supreme 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 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

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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 Superior Court. In re Senior Appeals Examiners, 60 N.J. 556 (1972); R. 2:2-3(a). It is also unclear whether plaintiffs' rights to pursue its original litigation could then be further delayed by the municipality's appeal in the Appellate Division.

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, other development can proceed unchecked in the defendant municipality. In a municipality such as Denville, which claims a scarcity of vacant land and limited infrastructure capacity (Db 15), 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, annexed as Appendix J, 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 2, 1985, case described above. As set forth in detail in the Statement of Facts, this case was filed in 1978 and has diligently been pursued by plaintiffs since then. The case has been fully tried; the 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 Denville Township with the Constitution and will force the plaintiffs to begin again the lengthy process of obtaining affordable housing in Denville. 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. In

comparable circumstances, the New Jersey Supreme Court expressed grave concern about the protracted proceedings in n Urban League of Greater New Brunswick v. Borough of Carteret, a companion case to Mt. Laurel II:

> 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.

Transfer of the present case at this stage of the proceedings is, therefore, manifestly unjust.

2. Expense and complexity - 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. This proceeding will involve mediation, contested administrative hearings, and administrative review revolving 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
>
> 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 a two-and-a-half week trial.

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 present one, 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. For example, in the present case, plaintiffs have devoted literally hundreds of hours of lawyer and expert witness time to meetings with, and written submissions to, the special master addressing factual and legal issues relating to Denville's proposed compliance plan.

In the present case, which has 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 this Court. If this case is transferred, parties 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.

In Mt. Laurel II the Supreme 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, after substantial judicial resources have been expended and the nature of Denville's affordable housing obligation is nearly resolved, would perpetuate the same expense and complexity for parties seeking to obtain affordable housing for low and moderate income individuals.

3. Availabilty of effective remedies - 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 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. However, the Affordable Housing Council's power, if any, to compel a municipality to take any action to comply with the Constitution has not yet been clarified.

The absence of any delegation of remedial powers to the Affordable Housing Council appears not to have been an oversight by the Legislature. The Legislature plainly considered the question of what remedial and enforcement powers should be granted to the Affordable Housing Council. It granted the AHC remedial and enforcement power in other contexts: the AHC is granted the power "to take such actions as may be necessary" to compel timely implementation of regional contribution agreements against receiving municipalities which have been granted substantive certification, L. 1985 c. 222, §17(c), and also to appear in exclusionary zoning cases to defend municipalities which have been granted substantive certification, L. 1985 c. 222,

§17(c). In light of these clear grants of authority to the AHC, the omission of any enforcement and remedial powers against municipalities which are violating the council's own criteria and guidelines and the New Jersey Constitution can reasonably be viewed as a deliberate choice by the Legislature.

This can be seen even more clearly when L. 1985 c. 222 is compared with other similar legislation creating state agencies to protect the rights of individuals. For example, the New Jersey Law Against Discrimination explicitly places broad remedial and enforcement powers in the hands of the Division on Civil Rights. N.J.S.A. 10:4-5 et seq. Similarly, the Consumer Fraud Act places broad remedial and enforcement powers in the hands of the Division of Consumer Protection. N.J.S.A. 50:8-1 et seq. The Legislature failed to provide any similar explicit grant of authority to the Affordable Housing Council.

In the absence of a clear delegation of remedial and enforcement powers, an agency may not exercise such powers. A.A. Mastrangelo v. Commissioner of the Department of Environmental Protection, 90 N.J. at 684; In re Jamesburg High School Closing, 83 N.J. at 549; Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. at 598. As the Supreme Court noted in A.A. Mastrangelo:

> [It is the] court's responsibility to restrain agency action where doubt exists as to whether such power is vested in the administrative body. [citation omitted] Where such doubt exists and where the enabling legislation cannot be fairly said to authorize the action in question, the power is denied. 90 N.J. at 684.

Thus, 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 could be an idle, and ultimately futile, exercise.

In Mt. Laurel II, the Supreme Court concluded, based on eight years of "widespread non-compliance with the constitutional mandate," that "a strong judicial hand" is essential to achieve compliance. 92 N.J. at 199. It forcefully stated 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 constitutional vindication. 92 N.J. at 289-90.

It is, as the Court declared, essential "to put some steel" into the Mt. Laurel doctrines, 92 N.J. at 200. To this end, the Supreme 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.

Yet, if this Court transfers the present case to the Affordable Housing Council, it will be exercising its power in a fashion proscribed by Mt. Laurel II. The result of a transfer might very well be that the constitutional obligation of Denville will be disregarded and rendered meaningless for a period of at least two years by the absence of remedies before the Affordable Housing Council.

4. Requiring plaintiffs to rely on voluntary compliance - As noted above, 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.*

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, the Supreme Court held that mere reliance on 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 that municipality cannot show a history of good faith efforts to comply. In the present case, Denville has 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, the municipality took no steps to reduce barriers to the provision of low and moderate income housing. It made no changes in its zoning ordinances to eliminate cost-increasing provisions. It initiated no affirmative steps to create housing affordable to low and moderate income households. Since 1983, the municipality has not amended its ordinance or taken any steps to create realistic opportunities for housing affordable to lower income persons. Indeed, this Court had to strike down the munici-

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* However, if a municipality enters into a regional contribution agreement which is approved by the Affordable Housing Council, it can be compelled to implement that agreement. L. 1985 c. 222, §§ 12(d), (g).

pality'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 substandard 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 this 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 this Court, as required by Mt. Laurel II, 92 N.J. at 281, 284. As indicated by Dr. Kinsey'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 ultimately submitted its outline of a plan for compliance, that plan provided for realistic opportunities for 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 Denville's past actions to suggest that another two years of voluntary compliance by Denville 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 Denville will simply result in two additional years of municipal denial of the constitutional rights of lower income persons.

5. Absence of Site-Specific Remedies for Builders*. As noted above, the Affordable Housing Council appears not to have the power to award any remedies to a successful plaintiff and, in particular, the Council apparently lacks the power to grant site-specific remedies to a successful builder-plaintiff. L. 1985 c. 222, §14. Moreover, the statute does not appear to even 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 fair share housing ordinance that satisfies the criteria and guidelines of the Council, and still not achieve any economic benefit himself. Substantive certification of compliance awarded in such a

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* Plaintiffs note that this criterion is not directly applicable to the motion of Denville Township, since there are plaintiffs in this case other than builders. It is, however, relevant to the Court's broader task of formulating standards for the exercise of its discretion under L. 1985, c. 222, §16. It is, for example, directly relevant to the Court's determination of the motion of Washington Township in Van Dalen v. Township of Washington, which is being argued in tandem with this case.

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.

Necessarily, this possibility sharply diminishes the incentive for any builder to pursue a case transferred to the Affordable Housing Council. This has two important consequences for lower income persons. First, builders are the only parties with the incentive and the means to pursue exclusionary zoning litigation. Only six of the 140 currently pending exclusionary zoning cases involve plaintiffs other than builders. Only one case has been filed by any plaintiff other than a builder since 1978. The expense and complexity of exclusionary zoning litigation is so great that it appears unlikely that any parties other than builders are likely to file such cases in the foreseeable future. Realistically, if builders do not assert the rights of lower income persons to realistic housing opportunities, nobody else will.

Reflecting these facts, the Supreme Court ruled in the Mt. Laurel II decision that, "Experience since Madison . . . has demonstrated to us that builder's remedies must be made readily available to achieve compliance with Mount Laurel." 92 N.J. at 279. Transferring pending cases to the Affordable Housing Council creates a serious peril that there will be no one seeking to vindicate the rights of lower income persons.

Second, the absence of a builder's remedy has larger systemic impacts on lower income persons. As noted above, 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. The statute, which appears in theory to be a means of fostering municipal compliance with the Constitution, will, in reality, operate to eliminate all the existing pressures for municipal compliance. Transfer of pending cases accelerates this process and severely thwarts the vindication of Mt. Laurel's constitutional mandate.

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

In Mt. Laurel II, the Supreme 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 adopt criteria and guidelines for the determination of municipal fair share. The Affordable Housing Council, however, is required to use a formula that arbitrarily subtracts from municipal fair share the number of existing adequate housing units occupied by lower income

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* In addition to the provisions discussed in this section, there are a number of 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 transfer 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 these provisions at the present time.

persons. This formula is irrational. Fair share is concerned with unmet needs. The fact that some needs have been met has nothing at all to do with the magnitude of a municipality's unmet needs.

The formula has enormous practical consequences. As set forth in the affidavit of Alan Mallach (Appendix J), this formula, if applied to determinations of statewide housing need, results in a negative statewide housing obligation.* It results in equally irrational results when applied to specific municipalities. When applied to the fair share determinations made by this Court, it results in a 35 percent diminution in the fair share of Denville Township and a negative fair share for Washington Township. Consequently, the Affordable Housing Council would be required by section 7(c)(1) to grant substantive certification to housing elements and fair share ordinances based on such bizarre calculations of municipal fair share.

Second, section 7(c)(2) requires the Affordable Housing Council to make a series of downward adjustments in municipal fair share based upon a variety of planning factors. The statute does not require or even expressly authorize any upward adjustments. Implementation of this provision will ultimately result in individual municipal fair share determinations that aggregate to less than the regional housing need previously determined by the Affordable Housing Council under Section 7(b).

Third, section 7(d) provides that the Affordable Housing Council cannot condition approval of a proposed municipal housing element and fair

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* As set forth in the affidavit of Mr. Mallach, the result is a negative statewide housing need regardless of whether need is determined using the methodology set forth in Burchell, et al., Mount Laurel II: Challenge and Delivery of Low and Moderate Income Housing (Center for Urban Policy Research) (1983) or the methodology utilized by the court in AMG Realty, Inc. v. Township of Warren and subsequently adopted with minor modifications by the Court in this proceeding.

share ordinance upon any requirement that "a municipality raise or expend municipal revenues in order to provide low and moderate income housing." Although the meaning of this section is not perfectly clear, it would appear 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. This is inconsistent with the clear mandate of the Supreme Court that accommodation of subsidized housing is one of the repertoire of affirmative measures which municipalities must utilize, 92 N.J. at 262-65.

More broadly, this provision conflicts with the holding of the Supreme 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 Mount Laurel obligation imposes many financial obligations on municipalities, some of which are potentially substantial. 92 N.J. at 265.

Ultimately, Section 7(d) makes it impossible for municipalities to satisfy their full fair share of the region's present and prospective housing need. 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. Inclusionary zoning works. Experience

demonstrates that it does create affordable housing opportunities. Nonetheless, by its nature, it can only be a partial solution to meeting New Jersey's unmet housing needs. The effectiveness of this device is limited by the demand for market priced housing. The typical inclusionary development includes 20 percent low and moderate income units and 80 percent market priced housing. Since 40 percent of the prospective housing need in New Jersey is for low and moderate income units, 92 N.J. at 221-22 n. 8, inclusionary zoning can never meet more than half of even the statewide prospective need for low and moderate income housing.

As a result of these three provisions, it is reasonably foreseeable that transfer 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 present case to the Affordable Housing Council would perpetuate the identical 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, this case cannot properly be transferred to the Affordable Housing Council.*

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* Even as to post-May 1985 cases, exhaustion of administrative remedies under L. 1985, c. 222, §16(b) may be inappropriate in some circumstances. See Brunetti v. New Milford, 68 N.J. 576, 588-91 (1975); New Jersey Civil Service Association v. State, 88 N.J. 605, 613 (1982).

CONCLUSION

For all the foregoing reasons, plaintiffs urge the Court to deny defendant's motion to transfer this matter to the Affordable Housing Council.

Moreover, the same factors which make transfer of this case inappropriate should also apply to any case which has been pending in the courts for an extended period or in which there has been an adjudication of any major issue pertaining to the merits of the case. Consequently, plaintiffs submit that the Court, in performing its duty to formulate criteria by which to evaluate "manifest injustice," should adopt the following general standards:

> (1) In the absence of a showing of exceptional circumstances, transfer of any case filed prior to January 20, 1983, or in which there has been an adjudication as to any major issue pertaining to the merits would result in "manifest injustice."
>
> (2) All other pre-May 1985 cases should be evaluated on a case-by-case basis, in light of the six criteria set forth above.

These standards are consistent with the recognition elsewhere in the statute that cases filed prior to January 20, 1983, should proceed without interference. L. 1985 c. 222, §28 (exempting cases filed prior to January 23, 1983, from provision staying entry of builder's remedy). Finally, they provide the Court with clear criteria and guidelines for the proper consideration and disposition of transfer applications under Section 16.

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Dated: September 3, 1985

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MORRIS/MIDDLESEX COUNTIES
DOCKET NO. L-6001-78 P.W.

MORRIS COUNTY FAIR HOUSING COUNCIL, et al.,	:	
Plaintiffs,	:	
vs.	:	Civil Action
BOONTON TOWNSHIP, et al.,	:	(Mt. Laurel Action)
Defendants,	:	
and Consolidated Cases.	:	

BRIEF AND APPENDIX OF PLAINTIFFS
MORRIS COUNTY FAIR HOUSING COUNCIL ET AL.
IN OPPOSITION TO THE MOTION OF DENVILLE TOWNSHIP
TO TRANSFER CASE TO THE AFFORDABLE
HOUSING COUNCIL

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II.

THE TERM "MANIFEST INJUSTICE" IN SECTION 16 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

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

The term "manifest injustice" is not defined in L. 1985, c. 222, nor is there any helpful legislative history on the meaning of this term. 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 this phrase is used in the jurisprudence of New Jersey in varying contexts and with widely divergent meanings. The following uses of the phrase are illustrative:

1) 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. 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.

2) 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)).

3) 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.

4) 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.

5) 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.

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. Its meaning varies with the context in which it occurs. 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 the courts to formulate appropriate standards and, insofar as possible, to adhere consistently to those standards.

Thus, in construing L. 1985 c. 222, ¶16, 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 to be applied in a reasoned and consistent manner, not merely on an ad hoc basis.

In the present case, these principles compel several conclusions. First, the Court should construe "manifest injustice" in the context of the Mt. Laurel decisions. The Supreme Court has repeatedly called upon the Legislature to enact legislation "enforcing the constitutional mandate." 92 N.J. at 212. L. 1985, c. 222 is, by its own terms, 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 as enunciated in the Mt. Laurel decisions.

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

> 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. 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 effect of a transfer upon the continued denial of the constitutional rights "enunciated by the Supreme Court" in the Mt. Laurel decisions.

Second, the term "manifest injustice" must be viewed in relationship to the posture of the exclusionary zoning litigation. Where, as in the present case, considerable judicial resources have been expended in resolving the controversy in a manner dictated by the Mt. Laurel decisions, transfer is particularly inappropriate. The "manifest injustice" to lower income persons, who have to start anew in vindicating their constitutional rights before the Affordable Housing Council, is clear in these circumstances.

B. Construed In Light of The Mt. Laurel Decisions, Section 16 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, the Supreme 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 of the region in which the municipality is located. 67 N.J. at 174, 179-81, 197-89. The Court condemned as unconstitutional both the adoption of ordinances that impose "requirements or restrictions which preclude or substantially hinder" 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 elimination of these constitutional mandates. 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, the Supreme 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 mandate. In the course of its opinion, the 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

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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).

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).

L. 1985, c. 222, §16, must not perpetuate the wrongs condemned by the Supreme Court in the Mt. Laurel decisions. See generally, Town Tobacconist v. Kimmelman, 94 N.J. 85, 103-4 (1983) (statute must be construed in a manner which renders it constitutional); New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 83 N.J. 57, 75 (1980) (same); cf. Robinson v. Cahill, 69 N.J. 449, 461-463, 468 (1976) (construing school finance legislation adopted in response to decision holding prior school finance law unconstitutional); Drummond v. Acree, 409 U.S. 1228, 93 S. Ct. 18 (1972) (Powell, J., Circuit Justice) (construing federal civil rights laws adopted in response to school desegregation decision). Indeed, a legislative

response to the Mt. Laurel decisions which has the result of perpetuating these wrongs would 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).

Likewise, if the tranfer of any case to the Affordable Housing Council, pursuant to L. 1985 c. 222 §16, would have the effect of perpetuating the very wrongs condemned by the Supreme Court and thus impede 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 Supreme 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," should 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. Increased complexity of litigation which significantly impedes vindication of the rights of lower income persons.

3. Diminished availability of effective mandatory remedies which significantly impedes the vindication of the rights of lower income persons.

4. Exclusive reliance for some additional period upon voluntary compliance by the defendant municipality.

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

6. Less than full and proper vindication of the constitutioanl 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.

A careful evaluation of these factors is a prerequisite to any informed decision on the propriety of a transfer in a particular case.