Real Estate Equities v. Holmdel 11/7 [redacted] (1987)

Δ/appellant's letter brief + appendix in support of the Motion for leave to appeal

67 pgs ML000141B

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November 7, 1985

Clerk of the Superior Court
Appellate Division
CN-006
Trenton, New Jersey 08625

Attention: Ms. Elizabeth McLaughlin, Clerk

LETTER BRIEF FOR DEFENDANT-APPELLANT HOLMDEL TOWNSHIP

Re: Real Estate Equities, Inc., Plaintiff-Respondent
v. Holmdel Township, Defendant-Appellant
Appellate Docket No.
Docket No. L-15209-84 P.W.

Civil Action: On Appeal from Order of October 28, 1985

On Appeal from Superior Court of New Jersey,
Law Division, Ocean County

Sat Below: Hon. Eugene D. Serpentelli, A.J.S.C.

Dear Ms. McLaughlin:

Pursuant to Rule 2:6-4(a), defendant-appellant submits herewith an original and four copies of Letter Brief and Appendix in support of the Motion for Leave to Appeal in the above-referenced matter.

ML000141B

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Re: Real Estate Equities, Inc. v. Holmdel Twp.

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APPENDIX

GAGLIANO, TUCCI, IADANZA AND REISNER
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Re: Real Estate Equities, Inc. v. Holmdel Twp.

PROCEDURAL HISTORY

This action was commenced by the filing of a complaint by plaintiff Real Estate Equities, Inc. on February 28, 1984. (Da30-2). Thereafter, plaintiff New Brunswick Hampton, Inc. filed a complaint on May 16, 1984, which was then consolidated with the Real Estate Equities case on June 7, 1984. (Da3-3, Da30-4).

On August 27,1984, defendant Holmdel Township adopted Ordinance 84-7 which substantially amended the previous zoning ordinance so that realistic opportunities in the Township for low and moderate income housing would be increased pursuant to the requirements of the Supreme Court decision in Mt. Laurel II. (Da30-5, Da45).

Plaintiff Gideon Adler and others trading as Palmer Associates filed a complaint on August 31, 1984. (Da43). A motion to consolidate the Adler suit into the Real Estate Equities and New Brunswick Hampton matters was granted September 14, 1984 (Da43), and a formal order to that effect was entered on October 31, 1985.

The pretrial conference was held on September 20, 1984, and a pre-trial order entered setting the trial date for the first phase of trial relating to fair share issues. (Da45).

Re: Real Estate Equities, Inc. v. Holmdel Twp.

On October 10, 1984, Hazlet Township, adjacent to Holmdel, filed suit which focused on the effects of Holmdel's Ordinance 84-7. Upon receipt of the complaint, the Trial Court indicated by letter of October 19, 1984 that unless some objection by counsel were raised, Hazlet's complaint could be consolidated with the existing consolidated action and that Hazlet's allegations and issues could be treated in the compliance phase of trial. Since no objections were raised, the Hazlet complaint has been proceeding on that basis without the necessity of a formal order.

The fair share phase of trial began on October 15, 1984, and testimony continued through October 25, 1984. (Da30-7). At the conclusion of the testimony, Richard Coppola was appointed as a special master, and a formal order of appointment was entered on November 3, 1984. (Da43). Mr. Coppola filed a partial report to the Court on December 21, 1984. (Da43). A hearing concerning the master's report was held April 18, 1985. (Da43). The final report of the master, to date, has not been filed, and thus no decision on the issues raised in the fair share trial has been entered by the Trial Court. (Da31-1).

On July 16, 1985, defendant Holmdel Township filed a motion to transfer this consolidated matter to the Council on Affordable Housing. That motion, for purposes of oral argument,

was heard on October 11, 1985, together with a motion to transfer to the Council brought by the Borough of Bernardsville. (Da1-Da40). Both motions were denied. On October 28, 1985, the Trial Court entered a formal order denying Holmdel's transfer motion. (Da41). This motion for leave to appeal the interlocutory order of October 28, 1985 denying transfer then followed.

STATEMENT OF FACTS

The relevant facts to this motion are essentially set forth in the statement of procedural history.

On July 2, 1985, the Fair Housing Act, N.J.S.A. 52:27D-301 et seq., became law. Ch. 22 P.L. 1985. (Da51). Section 16 of that statute as enacted provides:

> "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." (emphasis supplied). (Da52).

Section 16b of the Fair Housing Act requires the plaintiffs in such suits to proceed through the review and mediation remedies with the Council if their suit had been instituted less than 60

days prior to July 2,1985, that is after May 3, 1985.

It should be noted that a review of the Superior Court docket would indicate that approximately 18 municipalities have filed for transfer to the Council, and apparently almost uniformly, except for approximately two cases, these motions for transfer have been denied. The majority of these towns are located in the central area of the state where the private developers have focused their expansion efforts.

ARGUMENT

I. THIS APPEAL IS NOT BARRED BY THE DECISION IN MT. LAUREL II

The Supreme Court, when creating the judicial remedies in So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158 (1983) stated a broad policy that after a defendant township's ordinance is found invalid, defendants will not be able to delay compliance through "interminable trials and appeals." 92 N.J. at 290. The Court indicated that "generally, the matter be disposed of at the trial level in its entirety before any appeal is allowed." (emphasis supplied). 92 N.J. at 293. The trial courts' determinations concerning issues of "fair-share" and

"non-compliance" were declared as "interlocutory," and accordingly, would not be entitled to be appealed as a matter of "right." 92 N.J. at 285; See also, 92 N.J. at 218.

This general policy against piecemeal appeals, however, was not declared to be universal. The Supreme Court also stated:

> "In the most unusual circumstances stays may be granted either by the trial or appellate courts and interlocutory appeals taken (or attempted)." 92 N.J. at 290-291.

This appeal is just such a circumstance that deserves appellate review. This appeal concerns questions of law, statutory interpretation and legislative intent. It does not involve issues of fair share calculations or principles of planning in reviewing compliant or non-complaint municipal ordinances. The Fair Housing Act was passed two ½ years after the Mt. Laurel II decision. The transfer provisions of Section 16 could not have been contemplated at the time of the Court's opinion. Thus, the proscriptions against appeals contained in that opinion should not be expanded to bar this interlocutory appeal now that the Legislature and Executive have created an administrative rather than judicial remedy.

II. LEAVE TO APPEAL SHOULD BE GRANTED IN THE INTEREST OF JUSTICE UNDER R. 2:2-4

Under R. 2:2-4, the Appellate Division "may grant leave to appeal, in the interest of justice, from an interlocutory order of a court." Case law developed under the prior source rule, R.R. 2:2-3(a), indicating that such appeals should only be granted if "substantial grounds for appeal" exist in "exceptional cases." See, e.g., Romano v. Maglio, 41 N.J. Super. 561, 567-568 (App. Div.), certif. denied, 22 N.J. 574 (1956); Appeal of Pennsylvania Railroad Co., 20 N.J. 398, 408-409 (1956). The primary change in the current rule was the replacement of that more stringent standard in favor of the "interest of justice" test. See, Pressler, Current N.J. Court Rules, Comment R. 2:2-4, at p. 271 (1985 Ed.).

The interest of justice compels appellate review of the wholesale denial of transfer motions by the trial courts, especially where a new and important statutory process has not yet been reviewed or examined by any appellate court. Over 135 Mt. Laurel cases are pending in the court system, but in the Fair Housing Act, the Legislature declared a clear and unmistakable "preference for the resolution of existing and future disputes involving exclusionary zoning [in] the mediation and review process set forth in this act and not litigation."

(emphasis supplied). Sec. 3 Ch. 222 P.L. 1985. When the predecessor bill was presented to the Governor, it was conditionally vetoed and then enacted in its present form. In that conditional veto message, the Governor noted:

> "This bill represents the Legislature's first attempt to address Mt. Laurel and reflects its desire, in which I heartily concur, of taking the issue out of the courts and placing it in the hands of local and State officials where land use planning properly belongs."

Governor's Reconsideration and Recommendation Statement, Senate Nos. 2046 and 2334, L. 1985 c. 222, N.J. Session Law Service No. 7 at p. 90. The Fair Housing Act is designed to create a comprehensive planning scheme through an administrative process which must be permitted to breathe, grow and develop. The Act itself, in Section 2c, provides that:

> "the interest of all citizens including low and moderate income families in need of affordable housing would best be served by a comprehensive planning and implementation response to this constitutional obligation."

The wholesale denial of transfer motions by the trial courts effectively frustrates the expressed legislative intent and purpose of the Fair Housing Act. To deny appellate review under

these circumstances would constitute a grave injustice to all citizens.

The importance of appellate review of the issue of the development of the Council on Affordable Housing, which has now itself become a confrontation between the trial courts and the Legislature, cannot be considered without understanding that the Supreme Court, in creating judicial remedies, consistently declared its preference for legislative solutions to these problems. The Court stated:

> "The judicial role...which could decrease as a result of legislative and executive action, necessarily will expand to the extent we remain virtually alone in this field." 92 N.J. at 213.

The trial courts actions have violated this direct and clear preference for legislative solutions. The Supreme Court, in several instances, reiterated that it was only assuming a role in this "sensitive area" of these constitutional rights "until the Legislature acts." 92 N.J. at 212; See also, 92 N.J. at 212-214, 352. The Supreme Court left no doubt of its intentions by declaring:

> "In the absence of adequate legislative and executive help, the Court must use its own devices, even if they are relatively less suitable." 92 N.J. at 213-214.

The first attempts to apply this new legislative scheme by the trial courts, in view of these specific directions of the Supreme Court, should not proceed without appellate review, and the interest of justice under R. 2:2-4 should compel the granting of this interlocutory appeal.

III. THE TRIAL COURT ERRED IN THE INTERPRETATION AND APPLICATION OF SECTION 16 OF THE FAIR HOUSING ACT

The Legislature, in Section 16 of the Fair Housing Act, requires that "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." (emphasis added). The Legislature did not provide a specific definition of the term "manifest injustice." It has been suggested that the term originated from State, Dept. of Environ. Protect. v. Ventron Corp., 94 N.J. 473, 498 (1983), where the Supreme Court indicated that, as a general principal, statutes should be given retroactive effect unless it would result in a "manifest injustice." There, the Court relied upon Gibbons v. Gibbons, 86 N.J. 515, 523-524 (1981) which articulated this standard as focusing on whether the affected party relied, to his prejudice,

on the law which is to be changed as a result of the retroactive application of the statute and "whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively."

Applying this standard to this case, there is no argument that the first part of the test has been satisfied. Plaintiffs relied merely by filing suit. Yet, there has been no demonstration of "prejudice" by these plaintiffs. More importantly, in this case there has been no showing of reliance by plaintiffs "so deleterious and irrevocable" that it would be unfair to them to transfer this case to the Council. The language of Section 16 implicitly places the burden of proving "manifest injustice" upon the party opposing transfer. In this case, to satisfy this standard, it would be necessary for plaintiffs to demonstrate that the Council will not function as intended by the Legislature or that, because of some unique facts, it would not be possible for the constitutional goal of realistic opportunities for low and moderate housing to be achieved within a municipality if the case were transferred. Plaintiffs here have failed to meet this burden, and thus, the explicit legislative preference for transfer to the Council on Affordable Housing should be followed by reversing the Trial Court's result and ordering a transfer to the Council.

As a matter of law, the Trial Court erred by ruling on the motion to transfer in the absence of a definition or formulation of a standard such as enunciated in Gibbons for the application of the principles of "manifest injustice." Instead, the Trial Court simply paraphrased the infamous remark of Justice Potter that when it comes to "manifest injustice" - "you should know it when you see it." (Dal6-7). Obviously, such a standard is wholly inadequate for the issues raised in these motions to transfer.

More importantly, the most glaring error of law committed by the Trial Court, in view of the explicit legislative statements, was its failure "to effectuate the current policy declared by the legislative body." Kruvant v. Cedar Grove, 82 N.J. 435, 440 (1980). That policy favors transfer to the Council, and where reasonable man might differ as to the best method to achieve constitutional goals, the Courts are not free to ignore or alter the explicit declarations of the Legislature. Instead, they are required and obligated to defer to legislative policy. New Jersey Sports & Exposition Authority v. McCrane, 61 N.J. 1, 8, app. dism., 409 U.S. 943 (1972). There is no indication whatsoever that transfer to the Council would ultimately result in defendant's failure to meet constitutional obligations. A court, therefore, must, in

construing any statute, determine the legislative intent and then implement that intent. See AMN, Inc. v. So. Bruns. Twp. Rent Level Bd., 93 N.J. 518, 525 (1983).

In this case, the predecessor bill in its original form in Section 16 declared:

> "No exhaustion of the review and mediation procedures established in... this act shall be required unless the court determines that a transfer of the case to the council is likely to facilitate and expedite the provision of a realistic opportunity for law and moderate income housing." (Da52).

However, this language was not enacted by Legislature. This language was specifically omitted from Section 16, and the standard of "manifest injustice" to be demonstrated by the party opposing transfer put in its place. Here, the Trial Court simply adopted the criteria of the omitted language of the Legislature by declaring, in essence, that since the Trial Court could complete this case faster than the Council, transfer would be denied. (Da37-14; see also, Da21-1, Da26-21, Da34-8, Da37-7, Da38-2). The effect of the Trial Court's ruling is simply to ignore the clear legislative intent, and to rewrite the statute by inserting the removed language in place of "manifest injustice." In short, the Trial Court established a standard for interpreting Section 16 of the Fair Housing Act which is virtually impossible for any municipality presently engaged in litigation to meet, and, more importantly, a standard

which was explicitly rejected by the Legislature.

After the Trial Court adopted improper standards of interpreting Section 16 of the Fair Housing Act, it proceeded to misapply that standard to this case. The only apparent basis for the denial of transfer is the claim that the delay would be an injustice to lower income families. (Da19-9 to Da20-22). There was no specific finding of injustice to the developer plaintiffs. While the Trial Court discussed some factors which could be considered (Da33-16 to Da34-24), the only factor, in ruling upon the transfer motion, relied upon was the speed by which any housing would be built, a factor explicitly rejected by the Legislature. Any such delay was not seen as an injustice to the developer who could not reap its profits as quickly.[1]

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1. The Supreme Court in the Mt. Laurel II decision specifically recognized that developers were, in fact, and, properly, could be motivated by profit in constructing low and moderate housing. 92 N.J. at 268, 279 n.37. While their efforts may ultimately benefit the disadvantaged, just as the efforts of the Council may also, the developers motivation is profit and not some other. Their "rights" do not rise to the level of a "vested" right which cannot be altered by appropriate legislation. See, 92 N.J. at 218, 280-281, 352; cf. Morin v. Becker, 6 N.J. 457, 470-471 (1951). Zoning law in New Jersey has never established that one has a right to the most profitable use of property. Bern v. Fair Lawn, 65 N.J. Super. 435, 450 (App. Div. 1961).

The Fair Housing Act does not adversely affect the rights of the real parties in interest under Mt. Laurel II. The Act provides for the same ultimate relief, the creation of realistic opportunities for low and moderate income housing. The Act is entitled to a strong presumption that its provisions are constitutional. All doubts are to be resolved in favor of upholding the validity of the statute. In re Loch Arbour, 25 N.J. 258, 264-265 (1957); Hutton Pk. Gardens v. West Orange Town Council, 68 N.J. 543, 565 (1975). The Act, however, creates a different legislative and administrative solution and mechanism, as was desired by the Supreme Court all along, instead of individual judicial solutions.

The Trial Court here, by misinterpretation of the statute, has effectively impeded the primary purpose of the Fair Housing Act, which is to have the Council resolve developmental problems. It then compounded that error by applying an improper legal standard to the issues of transfer under Section 16 of the Act. Thus, the will of the Legislature has been completely and effectively frustrated. Such a result should be reversed by an appellate court promptly.

Re: Real Estate Equities, Inc. v. Holmdel Twp.

CONCLUSION

For all of the foregoing reasons, leave to appeal the interlocutory order of October 28, 1985 should be granted, this appeal should be consolidated with appeals brought by other municipalities which were also denied transfer and the order of the Trial Court reversed so that this matter can be transferred to the Affordable Housing Council.

Respectfully submitted,

Gagliano, Tucci, Iadanza and Reisner
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Scott Jamison, Esq.

A P P E N D I X

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET No. L-37125-83

HELEN MOTZENBECKER,

Plaintiff,

vs.

MAYOR & COUNCIL OF BOROUGH OF BERNARDSVILLE, et als,

Defendants.

JUDGE'S DECISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET No. L-15209-84P.W.

REAL ESTATE EQUITIES,

Plaintiff,

vs.

MAYOR & COUNCIL OF THE TOWNSHIP OF HOLMDEL, et als,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET No. L-33910-84P.W.

NEW BRUNSWICK HAMPTON, INC.,

Plaintiff,

vs.

MAYOR & COUNCIL OF TOWNSHIP OF HOLMDEL, et al,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET No. L-54998-84P.W.

GIDEON ADLER, etc., et al,

Plaintiff,

vs.

MAYOR & COUNCIL OF TOWNSHIP OF HOLMDEL,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET No. L-67502-84P.W.

TOWNSHIP OF HAZLET,

Plaintiff,

vs.

MAYOR & COUNCIL OF TOWNSHIP OF HOLMDEL,

Defendant.

Ocean County Courthouse
Toms River, New Jersey
October 11, 1985

B E F O R E:

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

ROSEMARY FRATANTONIO, C.S.R.
Official Court Reporter
Ocean County Courthouse
Toms River, New Jersey

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RONALD L. REISNER, ESQUIRE,
Attorney for Defendant Township of Holmdel.

(October 11, 1985)

-AFTERNOON SESSION-

THE COURT: All right. I'm prepared to rule on these two matters. I might say that it would be my preference in these two cases to write an opinion. Reality is that these are the ninth and tenth transfer motions that have been heard in three weeks -- I'm sorry, strike that -- in two weeks, and before we're finished, we're going to be well over a baker's dozen. And given our discussion about the prolonged nature of this litigation, and given the fact that there are many other issues out there relating to the Act itself, as well as continued business of the Court concerning those cases not transferring, I don't believe it's in the best interest of the parties, nor is it possible for the Court to do the job that it would like to do with respect to written opinions; and, therefore, I will decide them based upon this oral opinion.

It is clear to all of the parties we're faced only with the issue of propriety of the

application for transfer, and that the Court will not pass upon any constitutional issues. To the extent I may make reference to the Act, and comment thereupon the Act, none of the comments should be taken as the Court's view of the constitutionality or nonconstitutionality of the Act as a whole.

Furthermore, it should be clear that in these two cases, just as in the previous cases, I do not intend to establish any exhaustive definition of manifest injustice. To some extent, today's cases represent one each of the categories of cases that have previously been before the Court.

On October 2nd I considered five cases that had been fully tried or, with respect to one of those cases, partially tried and settled during trial.

Holmdel, of course, has been through a fair share trial of some length and nonconformance of the ordinance at the time of the adoption of the amendment was conceded by the order of oral argument.

On October 4th I considered three cases in which settlement had been arrived at, or the

municipalities had agreed to voluntarily comply in exchange for a court ordered immunity.

Bernardsville has entered into an interim settlement agreement and has also received immunity from the Court.

In each of the previous cases I had denied transfer on facts, specific circumstances, not their consistency is the important issue, because I'm reminded that consistency is the hobgoblin of little minds.

The case that is before me must be placed in the proper perspective. The arguments which have been made in them, and have been made in the prior motions for transfer, range from the extreme that transfer is manifest injustice because of vested rights, and because of delay to the arguments made by the municipalities that there should be transfer of all cases, because of the need for statewide uniformity, because of great speed in the legislative executive process, because of the Supreme Court's stated preference for a legislative solution, and because of the alleged disparity of treatment which will occur between the cases that are transferred and the cases not transferred

and the disparity between the towns which have resisted and the towns which have voluntarily complied.

The fact of the matter is that the legislation clearly evidences through Section 16 and elsewhere, including Section 19 dealing with the remand provisions, Section 23 dealing with court supervision of phasing, Section 12B relating to the interplay between the Court and Council concerning regional contribution agreements that the Legislature did not intend to totally exclude the Court.

The legislation evidences an effort to strike a balance between the desire to place the housing issue squarely in the legislative-executive arena and the need to recognize that in some cases, because of the fact specific circumstances, it would be appropriate -- rather, it would be inappropriate, if not unlawful, to subject those cases to the Housing Council process.

The clear intent that some cases would stay in the court also leads me to comment on the argument that has been raised in the cases before the Court today, and others, as well as

by the public utterances and some public officials concerning a disparaging treatment of municipalities.

In the first instance, as I noted, the legislation has expressly provided for disparied treatment, if one defines that as having cases continued in two jurisdictions.

Secondly, there is nothing to demonstrate their staying here in court or going to the Council automatically benefits the municipalities involved.

I take it that there is a presumption that some have engaged or an assumption that that be the case but no one knows that at this point.

Thirdly, in those cases seeking transfer, so far, there's been no disparity created. That's because all of the motions have been denied.

In factually similar circumstances it is likely, indeed very likely, that there are cases on the court docket in which a motion for transfer would be granted if made. The mere granting of a motion under those circumstances would not create a disparity in tribute; it

means only in the cases staying here there was manifest injustice found and in the cases transferred there was not.

Clearly, the Legislature intended a different treatment of the two types of cases. But that is seen as being fair by the framers of the legislation. It adds nothing to the disposition of the -- on the merits to call this dual system created by the Legislature a disparied treatment; instead it is two alternate means of disposition, both of which are seen as being fair to the parties under the peculiar circumstances.

To the Council, if there's no manifest injustice, and in the Court, if there is. In short, the different or disparied treatment argument begs the question which remains, and that is should this case be treated differently from that case because of the principles or absence of manifest injustice.

Finally, as part of placing the issue in perspective, something should be said about the emphasis by the defendants in this case, in all other motions previously heard, that our Supreme Court has stated a preference that the

housing issue be relegated to the Legislative and Executive arena.

First, of course, it is clear there from what Mount Laurel says that it was the Court's wish. Both the Supreme Court, that is, the capital C and also the little C. Ten years later it still is and it should motivate all appropriate deference to the legislation. However, it must be noted that the Court's patience and the legislative default has created some circumstances in which it may no longer be viable to vindicate the constitutional obligation by total abdication to the legislative-executive process, and, indeed, Section 16 of the Act recognizes that fact.

Preference for a legislative-executive solution cannot, in all cases, be translated to a circumstance where the constitutional imperative of Mount Laurel will be violated. At a minimum, the manifest injustice exception must contemplate that we avoid a circumstance in which transfer would seriously undermine the constitutional imperative which the legislation itself must satisfy if it is not to experience constitutional impairment. To that extent, the

term "manifest injustice" should be interpreted in such a manner as to support the fundamental goal of the legislation, and that is to satisy the constitutional mandate in a reasonable manner.

As a minimum test, the legislation must create the realistic opportunity for housing which is found to be the constitutional core of Mount Laurel II. The Court should, in interpreting the doctrine of manifest injustice, seek to help the legislation to meet that test.

Now, with respect to the definition of "manifest injustice" and, in particular, Section 16, something should be said.

First of all, let's be clear that for the record we are talking here about the first portion of Section 16 of Chapter 222 of the Laws of 1985, commonly referred to as Section 16A but not referred to in the Act by a subletter characterization. That is to say, there is a 16B in the Act but there is no 16A. We're dealing with a portion that is unprecedented and reads:

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

It should be noted that the Act does not clearly establish whether manifest injustice is the only standard. I noted that only in passing because the cases before the Court today will be determined based upon that, but it shouldn't be taken from what the Court said that I have reached a conclusion that it is the understanding. It should also be known that the section doesn't define "transfer," doesn't define "manifest injustice"; obviously, if it did, we might spend less time with these arguments. And it doesn't define the term "party."

Now, the language that I quoted, starting with the words, "Any party to the litigation may file a motion with the Court to seek a transfer," replaced different wording in a prior draft of the Act which read in part:

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

It is by no means clear what the Legislature intended to accomplish by changing the literal wording of "facilitating and expediting the provision of low cost housing" to a standard of manifest injustice to any party. I believe that it is fair to say that the final version emphasizes more explicitly the interests of the parties, as where the prior version more explicitly emphasizes expedition of the provision of housing. One cannot assume that the change in wording didn't intend a change in meaning. Beyond that, however, absent some clear legislative history, it's extremely difficult to discern whether the Legislature sought to limit or broaden the Court's discretion, or whether it sought to limit or broaden the potential for transfer of

cases more than 60 days old. I know that the assumption is that it intended to further limit the Court's discretion, but I suggest strong interpretive arguments can be made on both sides.

It is interesting to note that, although the statute itself omitted specific reference to expedition, the Senate Committee statement which accompanied the amendment made on February 28, 1985, to the bill is inconsistent with the language of the bill itself. While the bill deleted specific reference to the expedition standard, the code standard emphasizes that at this time -- or the code statement emphasizes that it should continue to be considered along with manifest injustice.

That statement of the same date reads as follows:

"Section 5 established that a Court, in determining whether to transfer pending lawsuits to the Council, must consider whether or not manifest injustice to a party to the suit would result, and not just whether or not the provision of low and moderate income housing would be expedited by the transfer."

That sounds like a dual test was intended. Of course, even under the present wording, it can be strongly argued that the manifest injustice test is not the sole consideration, and that the statute read literally makes it one consideration.

I don't intend to try to reconcile this language, nor, as I indicated, do I intend to try to define "manifest injustice." I know there's been an attempt in various briefs filed in this case and in other matters to find a definition for that term. I think it's in the nature of us lawyers to try to identify "manifest injustice," manifest injustice came from Rule 4:69 or it came from an utterance of the Supreme Court, or it came from a rule of discovery, Rule 4:17, that the Legislature must have been smart enough to know that it meant manifest injustice in terms of some specific prior authority. I don't think any of those arguments are demonstrable, although one may be somewhat stronger than the other. The fact of the matter is that its meaning will evolve as all of the transfer motions now pending before this Court and the other Mount Laurel judges

are heard.

As I said before, and I apologize to those who had to sit through this tirade before in cases at the factual extremes, the term will be relatively easy to interpret. Just like "obscenity," to paraphrase Justice Stewart, you should be able to know it when you see it.

Finally, in terms of definition, as noted above, the statute does not define what is meant by the terms "transfer" or "party." As to transfer, that issue might be relevant to manifest injustice to the extent that, if a case is transferred in its present posture, with a full record, and the Council being bound by issues decided, the potential for delay and the possible cost of relitigation might be reduced.

The procedural scheme evidenced by the statute, which I will shortly discuss, does not seem to disclose an intent to bind the Council with what has happened in the court before it. The defendant municipalities have consistently stressed that the statute represents an opportunity for a fresh, new, comprehensive approach. Indeed, the Governor's statement indicates that

the statute gives a breathing period. And if there's a failure to agree on a housing element, mediation replaces litigation pursuant to Section 17.

The Act seems to ring of a new approach unencumbered by prior court rulings. In any event, in the cases before me, I do not have to reach that issue today.

As to the term "party," something should be said about the interests of the group we call lower income households. It should have long been clear that the status of the lower income household in Mount Laurel litigation rises far above the category of a hidden or third-party beneficiary. Even where an urban league or other civic or non-builder plaintiff is involved, the lower income class must be considered a party to the action. The prospect of a builder's remedy is offered as the quid pro quo to sue on behalf of those persons for whom the remedy will benefit.

Our Supreme Court has described Mount Laurel litigation as institutional or public law litigation at Pages 288, 289 of the opinion in Footnote 43. These cases are brought to vindicate

resistance to a constitutional obligation to the affected group. In that sense, they are class actions and the class is very much a party. Judge Skillman has passed upon this issue in his decision in Morris County Fair Housing Council vs. Boonton Township, 197 New Jersey Super. 359, where, at Pages 365, 366, he says:

A Mount Laurel case may appropriately be viewed as a representative action which is binding on nonparties. The constitutional right protected by the Mount Laurel doctrine is the right of lower income persons seeking housing without being subjected to discrimination. The public advocate in such organizations as Fair Housing Council and the NAACP have standing to pursue Mount Laurel litigation on behalf of lower income persons. Developers and property owners are also conferred standing to pursue Mount 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 the municipality will have standing to sue such municipality on

Mount Laurel grounds. However, such litigants are granted standing not pursue their own interest but, rather, as representatives of lower income persons whose constitutional rights are allegedly being violated by exclusionary zoning.

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 support the Mount Laurel decisions and statutes, and the statute itself, for it would result in 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 are bound by the judgments which are entered in these proceedings. They are at the very interests which our Supreme Court describes at Page 337 of its opinion as the greatest interests in ending exclusionary zoning.

The decision of whether the class is a

party cannot turn on the name of the plaintiff. If the Court would consider manifest injustice for lower income persons in cases involving the Urban League or the Public Advocate, should it not do so in cases where those same lower income people are represented by builders who clearly also had other motives.

There was, as we referred to earlier, the genius of the builder's remedy. Therefore, the Court must look at such considerations as further delays in the rights of the public. The fact that they remain in substandard housing as the debate continues and for some time thereafter, certainly for some period after resolution until housing is built. The fact that there is a further burden that might be created on lower income people in enforcing their rights, either by containing the case here or transferring it, any argument that lower income people will be relegated to exclusive reliance on voluntary compliance by municipalities for an extended period of time.

Now, before turning to a factual analysis of each case here today, something should be said about the consequences of a transfer as it

relates to the potential for delay or expedition of the process which leads to the production of lower income housing. This issue has been briefed at some length in previous cases, has not been addressed at a great deal of length here, but it is clearly relevant to appropriate decision in the case, the cases before the Court today.

The timing and procedure under the Act is as follows: The Act became effective on July 2, 1985. Section 5A creates the Council on Affordable Housing, and Section 5D requires the Governor to nominate the members within 30 days of the effective date. The nominations have been made and are awaiting confirmation. Section 8 requires the Council to propose procedural rules within four months after the confirmation of its last member initially appointed, or by January 1, 1986, whichever is earlier. Given the Council members have not been confirmed, and given our proximity to November 5th, it is likely that the procedural rules will be adopted somewhere around May 1, 1986, the assumption being that the confirmation will occur near the end of this year.

Section 9A requires any municipality which elects to submit a housing plan to the Council to notify the Council of its intent to participate within four months of the effective date of the Act.

Section 7 requires the Council to adopt criteria and guidelines for the housing plan within seven months of confirmation of the last member initially appointed, or January 1, 1986, whichever is earlier. Assuming confirmation of the membership is accomplished near the end of this year, the Council would have until approximately August 1, 1986, to adopt criteria.

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

Now, I should say before continuing in the process that one may ask why would the Court assume that the full time period in each of these cases will be utilized. And, of course, it may not. But as will be seen in a moment, the Court's going to make an assumption with respect

to other time periods which will certainly compensate for any overassumption which has already been made.

Section 13 provides that the municipality may file for substantive certification of its plan at any time within a six-month period from the -- I'm sorry. A six-year period from the filing of the housing element. Nothing seems to expressly require expeditious filing for substantive approval; but assuming it is requested, the Township has to give public notice within an unspecified period of the requested certification. Once again public notice is given, that is, once public notice is given, the 45-day period begins to run. It is not clear from the Act that there is a time limit on the Council to act on the requested certification, thus, the objection period is 45 days. The review period could reasonably be expected not to commence until after the 45-day objection period has terminated. One would not expect any deliberative body would start to consider the validity of a proposal to it before it has heard the objections, and the objections, of course, may be filed at any time within 45 days.

However, I'm going to assume for the moment that the municipal petition for substantive certification and the public notice are done simultaneously in one day, and I'm going to assume that the Council does not wait for objections -- for the objection period to expire, but that it starts immediately to review the housing element and fair share plan. That procedure would, nevertheless, have to consume 45 days because the objection period must be permitted to run and, therefore, would take the process to approximately February 15, 1987. Now, if at the end of that 45-day period the Council is prepared to grant substantive certification, the town must adopt its ordinance in 45 days or by April 1, 1987. That would appear under any stretch of the imagination to be the minimum elapsed time before an ordinance would be in place creating realistic opportunity. If at the end of the 45-day period the Council denies certification, or conditionally approves it, the municipality has 60 days to refile, and that would take us to April 15, 1987. And the Council has an unspecified period of time thereafter to review

it. Once the Council gives substantive certification, the municipality has 45 days to adopt its implementing ordinance and, under that set of assumptions, or that procedure, the deadline would extend to June 1, 1987, assuming that the Council reviewed the matter in one day, which would be a first for any governmental body, including the Court. If, on other hand, an objection is filed, it must be done within 45 days of public notice, in accordance with Section 14. Assuming public notice has been given by January 1, 1987, objections must be filed by February 15, 1987.

Pursuant to Section 15A, mediation and review is commenced if an objection is received. No time limit is set on that process. I will assume that it takes 60 days in which event we will have reached April 15, 1987. That assumption, of course, has many unknowns. The question remains as to how many cases will be before the Council and the size of its staff, its capacity to mediate and review. The assumption I am making is based upon a single case scenario; that is, the Council not having to deal with all the other pressures that might be

upon it to deal with many other cases. Mediation is, by any gauge, a time-consuming process. If mediation is unsuccessful, that matter is then referred to an administrative law judge, who has 90 days to issue a decision, unless that period is extended for good cause. This procedure could then extend to July 15, 1987, assuming there is no extension. The administrative law judge findings are then forwarded to the Housing Council, with the record before the administrative law judge, and under N.J.A.C. 1:1-16.5, the Council has 45 days to act on the decision by accepting, rejecting, modifying or remanding the case to the administrative law judge. And absent a remand, the procedure then would extend to, or could extend to, September 1, 1987.

I believe that under the scenario of a, if we can call it, contested proceeding before the Council, that date, in all likelihood, is the minimum date by which there could be a conclusive decision before the Council. Thereafter, presumably, and if there is an appeal, it would proceed along the same time track as an appeal from this court, while there may be

slightly different rules, the time before the Appellate Division and beyond presumably we can't say.

Now, before reaching a conclusion concerning the two motions to transfer, I think it is important to briefly summarize the status of each case before the Court.

With regard to the Bernardsville case, the plaintiffs filed on June 21, 1983. There were case management conferences on August 3, 1983, and December 20, 1983. A stipulation of partial settlement was entered on February 9, 1984, granting the plaintiff a builder's remedy, appointing a special master to help fix the details of the remedy. An interim order was entered in November, on November 20th of 1984, which grants a builder's remedy to the plaintiff at nine units per acre, for a total of 76 units. It provides that the master is appointed to assist in the terms of a complete compliance package, and it grants the Township an immunity from any further builder's remedy actions. The Township's compliance package was presented at public meetings on January 14, 1985, and March 18, 1985. The Township apparently adopted its

ordinance on March 18, 1985.

Mr. Raymond, the court-appointed expert, submitted his report on April 30, 1985. The report is generally supportive of the compliance package.

There were motions to declare that the Township did not have a right to condemn the plaintiff's tract, a cross-motion to vacate the plaintiff's builder's remedy. The first motion was disposed of by the Court, the second one remains undisposed of as of today.

During a telephone conference on September 10, 1985, the Court advised that the condemnation of the Motzenbecker tract would be looked at in the context of the entire compliance package. The immunity which was granted on November 20, 1984, for a period of 90 days has been extended three times.

On February 4, 1985, it was extended until April 1, 1985. On April 4th it was extended until April 30th. And on May 6th it was extended indefinitely to the date of a compliance hearing. So that, in effect, Bernardsville has been under immunity now for 11 months.

A compliance hearing was scheduled for this case on September 10, 1985. The Court was ready to proceed, but at that stage the legislation had intervened and the municipality, as is its right, chose to move for transfer.

What is left to be done in this case, in this court, if it is not transferred, is to reschedule that compliance hearing, which would take a very brief period of time, given the master's approval, given the absence of objection, except for, of course, the issue of builder's remedy, and the revision of any ordinance, any portion of the ordinance which is necessary.

With regard to the builder's remedy issue, the Court has already indicated that it believes that the town has a right to condemn this parcel; and if that is the case, then there is no imperative or there is no obstacle to the approval of the ordinance if it otherwise meets approval. The ordinance has already been adopted, assuming it had to be revised, the -- a reasonable estimate time to complete this case would be two to three months.

Now, with respect to the Holmdel Township

case, Real Estate Equities filed a complaint on February 28, 1984. The New Brunswick case was filed on May 16th. And after the Court consolidated those two actions June 7, 1984. the Township adopted an ordinance on August 27, 1984, as was referred to in oral argument. Trial began on October 15, 1984. At that time the Court was feeling pretty good about the standing of the cases, and I think the trial continued, and I don't have this in my notes, but my recollection is for a period of approximately eight to 10 days. The trial was by and large limited to the issue of region, regional need, and the entire fair share issue.

At the end of the case the Court appointed a special master to assist the Court with respect to clarification. Some of the basic data needed to establish a fair share number under the methodology under this Court, under AMG vs. Warren, blank New Jersey Super., blank -- I used to say heretofore unreported -- and the master was directed to calculate such things as the amount of growth area, employment figures, commuter shed question, all of which seem to have been pro forma. The report still

has not been filed.

The Court also was faced with the determination of some possible revision to the methodology, particularly with respect to the question calculation of present need, because the same issue was involved in the case of Field vs. Franklin pending before the Court at about the same time and tried at about the same time. And the Court withheld issuance of an opinion until it had the opportunity to receive the data under both of the cases that was requested by the Court.

The standing master was asked to provide the same information provided in the Field case in this case. Neither of the information having been filed, the Court released an opinion yesterday on the question of modification of the present-need approach. And based upon that opinion, one can calculate now the present need for both Holmdel and, of course, for Franklin Township.

What remains to be done is to do the manual work necessary to provide the Court with the information requested of the expert, for the Court to respond to any suggested modifica-

tion in a prospective need methodology, which the Court is prepared to do on a very short notice, and then to fix fair share.

Thereafter, a compliance ordinance will either have to be prepared by Holmdel or it has the option, under the pretrial order, to rely upon the ordinance which it adopted on August 27th.

I'm going to assume for the purposes of estimating elapsed time that the Township would choose the right to take 90 days to either reevaluate its present ordinance or to amend it; thereafter, a compliance hearing would be held and revisions which are required by the Court would then be undertaken and an ordinance adopted. It is likely that that procedure could be completed within a six-month period or less.

Now, having taken a general overview of the statute's meaning, a more detailed review of its procedures and time frames, and a specific analysis as to the progress and status of each case before the Court today, there remains only the ultimate issue of whether these cases should be transferred to the Council or

retained here in court.

The parties to these motions and to others filed with the Court have suggested a host of criteria by which the application of transfer should be judged.

As I have in the other oral opinions, I believe it's useful to list them for the benefit of the Bar and for any reviewing court, not necessarily in order of preference and clearly with no intention to imply approval of any of the factors which I mentioned. I list them to preserve them for consideration in future matters.

Clearly, in these cases, and in others, certain factors predominate and others have little relevance. The factors include the age of the case, the complexity of the issues, the stage of the litigation -- that is, whether it is at discovery, pretrial, trial compliance, settling -- the number and nature of previous determinations of substantive issues, the relative degree of judicial and administrative expertise on the issues involved, the need for the development of an evidentiary record, the conduct of the parties, which I've mentioned

earlier in this argument is not a factor in the Court's view in these cases; the likelihood that Council determinations would differ from the Court's; the likelihood that Council determinations would have a basis in broader statewide policy; whether harm would be caused by a delay in transfer or, conversely, whether a denial of transfer would cause a greater delay; whether the Council process, absent the ability to impose restraint, would cause the irreparable loss of vacant, developable land for Mount Laurel construction. And related to that, the argument made by Mr. Bisqaier today that there may be a lot of infrastructure availabability; sewer capacity, water capacity; would the transfer facilitate or expedite the realistic opportunity for lower income housing; the possible change in the housing market which would occur if the venue -- that is, the Council or the Court -- selected cause delays; the loss of the plaintiff's right to participate in the Council process up to the point of medication; and the loss of alleged rights under existing orders.

Without repeating the facts of each case,

both of these cases have certain things in common and some individual characteristics. They've both been arduous, complex cases which have taxed the resources of all involved. To repeat even a portion of the process before the Council seems unnecessarily burdensome and unfair to the parties, even if the municipalities are willing to do that.

There have been substantive determinations of noncompliance in both. A determination of fair share in Bernardsville and, as indicated, a determination of fair share in Holmdel awaits only the report of this master or a substituted master.

With the decision of the Court in Field vs. Franklin, the moment of arriving at a fair share for Holmdel moves a good deal closer. The evidentiary record is complete, or virtually complete, concerning region, regional need, and fair share either by trial or by stipulation.

In the Bernardsville case, mention should be made of its argument that it deserves transfer because of its voluntary compliance. It argues that it has not dug in its heels like others. It does not acknowledge, however, that it has

had the benefit of an immunity order for almost a year. But for that order, and the concomitant protection that goes with it, and the concomitant commitment to compliance, Bernardsville would have been treated as a municipality that had, in its own terms, dug in its heels, and it would have been brought to trial a long time ago and the Court would have been -- would not have been as lenient in the compliance time allowed. It asked to be treated specially because it's obeyed the law. In fact, it received every consideration for voluntary compliance, both in terms of a reduction of its fair share number, a lengthy compliance. It has now adopted the compliance ordinance, which has been, as indicated, generally approved by the master and within a very short period of receiving the approval. It has been dealt with fairly; in fact, extremely fairly. I make those comments not by way of any criticism because I believe that it is through the efforts of its counsel that Bernardsville has taken a very intelligent hand to compliance; but at this stage of the litigation it can't have it both ways.

Holmdel has taken a different course.

It has vigorously preserved every right to which it's entitled under the law, but it, too, has reached a stage where in a relatively brief period of time it will be called upon to submit a compliance ordinance absent approval of the motion to transfer.

Most importantly, and indeed of predominant importance in the cases, is the status of each case and the inevitable delay which must be caused by transfer.

As the facts recited above show, each of these cases are near completion. The Court's best estimate is that they could be done in anywhere from three to six months. And even if that estimate is overly optomistic, the time span is significantly shorter than the minimum of 18 months processing through the Council, which more realistically will take two years or more. We're not looking at delay in a vacuum because, certainly, the Housing Council process must take some time. And at this posture we have to assume that the Legislature chose a reasonable time frame for cases which belong before the Council. But in transfer cases we have to look at delay in relationship to the

status of the case before the Court. Delay equates to postponing the day until the realistic opportunity is afforded and houses are built. In each case we have builders ready to proceed, just as builders have moved promptly to get construction underway in other towns where compliance already has occurred.

In the case of Bernardsville, we have an even more desirable situation being that the municipality itself is ready, by its own admission, to build available housing. Of course, avoidance of delay at all costs is not the goal. However, no one has demonstrated that the Court does not have the expertise, the ability to meet these matters and, at the same time, also meet the special issues that can be involved in these cases.

Both the municipalities before the Court today, and in other matters, have been evaluated on a regional statewide planning basis which has been carefully developed. That's not to say that it is a more thorough, more appropriate basis than others might develop. It is to say that it is comprehensive and, in the Court's view, clear. The methodology also leaves room for adjustments

which are based upon the absence of vacant land, environment constraints, need for preservation of agricultural, historical, recreational or other special categories of land uses, prior land use patterns, prior efforts, and providing housing variety and many other practical and equitable situations which would or could effect the fair share number which would be produced by a literal application of the methodology. The methodology, of course, incorporates the mandate of Mount Laurel II and its instructions with respect to radical transformation. It allows the Court to face, even without the legislation, and to take in effect the impact of the planning impact of whatever the court order may be with respect to fair share minimum.

In short, it appears to me that the methodology before the Court meets the same type of planning criteria on a regional and statewide basis as met by the legislation. I can comfortably conclude in these cases that not only is it manifestly unjust to the plaintiffs to transfer these cases, but there is no significant unjustice, or injustice, to

the municipalities to retain them. The determination of manifest injustice is and will be a balancing process in all cases.

In each case before the Court today, the balance tips dramatically in favor of the denial of these motions. The statutory test is manifest injustice to any party. Defendants have failed to demonstrate the slightest injustice to them; whereas, the injustice to lower income households and the plaintiffs in both cases is, indeed, manifest.

And I would ask counsel for plaintiffs to submit an order in accordance with the opinion.

N L R ~~MR. MASTRO~~: If you don't mind, may I submit the order?

THE COURT: Yes.

R \ R MR. MASTRO: It's my motion.

THE COURT: What remains in the Motzenbecker issue is the vacating of the remedy matter. I will get to that. That does not excuse, as far as I'm concerned, compliance. So there'll be compliance. If the town is thinking about modification of its compliance package, it should proceed.

(Whereupon, the matter concludes.)

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Attorneys for Defendant
Holmdel Township

REAL ESTATE EQUITIES, INC., et al,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
Plaintiffs,	MONMOUTH COUNTY/OCEAN COUNTY MOUNT LAUREL II
v.	Consol. Docket No. L-15209-84 PW
HOLMDEL TOWNSHIP, et al,	Civil Action
Defendants.	ORDER DENYING TRANSFER TO THE COUNCIL ON AFFORDABLE HOUSING

This matter having been opened to the Court by Gagliano, Tucci, Iadanza and Reisner, attorneys for defendant, Holmdel Township,Ronald L. Reisner, Esq. appearing in the presence of Bisgaier & Pancotto, Esqs., attorneys for plaintiff, Real Estate Equities, Inc., Carl S. Bisgaier, Esq. appearing; Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein, Esqs., attorneys for plaintiff, New Brunswick-Hampton, Inc., Douglas K. Wolfson, Esq. appearing; McOmber & McOmber, Esqs., attorneys for plaintiff, Gideon Adler, et al, J. Peter Sokol, Esq. appearing; Lautman, Henderson & Mills, Esqs., attorneys for plaintiff, Township of Hazlet, Scott Jamison, Esq. appearing; and the Court having considered the Motion, Briefs and arguments of counsel; and for good cause shown;

IT IS on this 28 day of October, 1985, ORDERED that the motion of defendant, Holmdel Township, to transfer this case to the Council on Affordable Housing be and the same herey is DENIED.

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

Papers Considered:

_____ Notice of Motion
_____ Movant's Affidavits
_____ Movant's Brief
_____ Answering Affidavits
_____ Answering Brief
_____ Cross Motion
_____ Movant's Reply
_____ Other

Docket No. L-15209-84 PW

Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D. SERPENTELLI
ASSIGNMENT JUDGE

OCEAN COUNTY COURT HOUSE
C.N. 2191
TOMS RIVER, N.J. 08754

10/28/85

October 24, 1985

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RE: Real Estate Equities, Inc. v. Holmdel Township

Gentlemen:

In reviewing my notes of my oral opinion which was placed on the record on Friday, October 11, it appears that I may have omitted a few facts in the chronology of the litigation.

1. That Gideon Adler t/a Palmer Associates filed a complaint on August 31, 1982.
2. That a motion to consolidate the Adler actions with the Real Estate Equities and New Brunswick Hampton was granted on September 14, 1984.
3. That Richard Coppola filed a partial report on December 21, 1984 with respect to certain aspects of the order entered on November 9, 1984.
4. That a hearing was held on April 18, 1985 concerning Mr. Coppola's calculation of the commutershed and his computation of fair share.

To Counsel - Holmdel Township
Mount Laurel

October 17, 1985

To the extent that any of the foregoing matters were omitted, kindly consider the oral opinion of October 11, 1985 supplemented accordingly.

My chambers has been in touch with Mr. Coppola's office concerning receipt of the site suitability study. We are informed that it should be delivered within approximately ten days.

Very truly yours,

Eugene D. Serpentelli

EDS:RDH

Eugene D. Serpentelli, A.J.S.C.

PRETRIAL ORDER

Pretried by Judge SERPENTELLI

on (date) 9/20/84

Reporter. C. WOLGAST

SUPERIOR COURT OCEAN COUNTY LAW DIVISION

DOCKET NO. L-15209-84 P.W.

REAL ESTATE EQUITIES,

CALENDAR NO.

COMPLAINT FILED

PLAINTIFF,

VS.

TOWNSHIP OF HOLMDEL,

DEFENDANT.

The parties to this action, by their attorneys, having appeared before the Court at a pretrial conference on the above date, the following action was taken:

1. Prerogative writs seeking Mount Laurel relief.

2. Adoption of comprehensive zoning ordinance 84-7 on August 27, '84 The adoption of Master Plan of 1980. SDGP classification is both growth and limited growth.

d. Real Estate equities of PQ classified as growth;

e. New Brunswick - Hampton PQ classified as growth;

f. Palmer Assocs. PQ classified as growth;

3-4 See attached.

5. None.

6. Plft Real Estate Equities amends allegation two on page 3 of its complaint to reflect ownership of 109 acres.

7. a. What is twp's fair share; (region, regional need and allocation)

b. Do ordinances of twp comply with Mount Laurel II;

c. Are the plfts intitled to builder's remedy;

d. If the remedy sought exceeds fair share allocation, can a greater fair share be assesed;

e. If the answer to d. is no, how should the fair share be allocated to any plft receiving a remedy;

f. What percentage of low and moderate units must be built by plf;

g. What is the definition of median income for affordability purposes;

h. May the present and/or prospective need be phased for compliance purposes;

i. For the purposes of determining whether plfts are entitled to a builder's remedy, does ordinance in effect at time of trial or the ordinanc in effect at the time of filing of complaint affect that decision; (time of deci rule)

j.

8. None.

9. a. All land use regulations fo the twp;
b. Master Plan of the twp;
c. SDGP, HAR, consensus report of April 2, 1984 and CUPR repor
d. Concept maps of plfts;
e. Expert reports of all parties.

10. a. Harvey Moskowitz - Real Estate Equities; Peter Abeles or Jerffrey Weiner - New Brunswick-Hampton; Carl Himtz - Palmer Assocs.
d. William Fitzgerald, William Queale, Michal Walsh, Edwin Mills, Malcolm Kasler.

11. Briefs on time of decision rule shall be filed at a date to be set by the court.

12. Usual.

13. None.

14. a. Real Estate Equities, Carl S. Bisgaier;
b. New Brunswick-Hampton, Douglas K. Wolfson and Jeffr R. Surenian;
c. Palmer Assocs. - J. Peter Sokol;
d. Twp of Holmdel - Ronald Reisner, S. Thomas Gagliano;

15. Five days for fair share.

16. October 15, 1984.

**17. All expert reports and interrogatories to be exchanged and filed with the court by October 1, 1984.

18. The ordinances in effect prior to Ordinance 84-7 do not comply with Mount Laurel so that the initial phase of the trial shall be limited to fair share allocation;

The second phase fo the trial, at a date to be set by the court, shall relate to the compliance of Ordinance 84-7 and any other ordinances adopted in the 90 day revision period. Twp reserves its right to contend that based upon adoption of Ordinance 84-7, should it be found to be compliant, that the plft is not entitled to a builder's remedy.

** All depositions to be completed October 10, 1984.

Real Estate Equities, Inc.
v. Tp. of Holmdel

ATTACHMENT

3. and 4. FACTUAL AND LEGAL CONTENTIONS: Plaintiff is the owner of approximately 109 acres of land in the defendant Holmdel Township. Plaintiff wishes to develop these lands for residential uses and to provide a substantial percentage of units for low and moderate income persons. The defendant's land use plan and zoning ordinance splits plaintiff's lands into two zones which provide for commercial use (50 acres) and residential use (50 acres). Plaintiff unsuccessfully sought a zoning change to permit its development and filed this litigation seeking Mt. Laurel II compliance and a builder's remedy. Thereafter, two additional lawsuits were filed which were consolidated due to the similarity of factual and legal issues. Defendant's land use plan and zoning ordinance as otherwise approved do not provide for defendant's provision of a realistic opportunity for the construction of its fair share of its region's low and moderate income housing needs. Defendant has zoned an insufficient amount of land for higher density uses and subject to a zoning scheme which will not produce sufficient low and moderate income housing. The zoning ordinance in effect when the complaint was filed was totally inimical to Mt. Laurel II. An ordinance purportedly adopted in August, 1984, is now under review by plaintiff's expert. With regard to the aforementioned claims, plaintiff seeks declaratory and injunctive relief, invalidating the land use plan and land use ordinances of the defendant, appointing a master to facilitate the adoption of appropriate land use ordinances and providing plaintiff with a builder's remedy, in accordance with its plans to build a residential development of 1836 units - a substantial percentage of which will be affordable to lower income households.

3:A

NEW BRUNSWICK-HAMPTON, INC.

ATTACHMENT

3. and 4. FACTUAL AND LEGAL CONTENTIONS: Plaintiff, New Brunswick-Hampton, Inc., is the contract purchaser by assignment of two (2) parcels of land in the defendant Holmdel Township; one parcel of approximately 107 acres and a second parcel of approximately 87 acres. Plaintiff wishes to develop these lands for residential uses and to provide a substantial percentage of units for low and moderate income persons. Both of plaintiff's parcels are within the R-40A residential and agricultural district which permits single family detached dwellings on minimum lots of 43,000 square feet. Both parcels are within the SDGP growth area and are well suited for the high density residential development which renders feasible construction of units affordable to low and moderate income households. Plaintiff seeks to build 428 single family homes at a density of approximately 4 units per acre on the 107 acre tract and 1,218 apartment units at a density of 14 units per acre on the 107 acre tract. Defendant's land use plan and zoning ordinance as approved do not provide for defendant's provision of a realistic opportunity for the construction of its fair share of its region's low and moderate income housing needs. Defendant has zoned an insufficient amount of land for higher density uses and subject to a zoning scheme which will not produce sufficient low and moderate income housing. The zoning ordinance in effect when the complaint was filed was totally inimical to Mt. Laurel II. An ordinance purportedly adopted in August, 1984, is now under review by plaintiff's expert. With regard to the aforementioned claims, plaintiff seeks declaratory and injunctive relief, invalidating the land use plan and land use ordinances of the defendant, appointing a master to facilitate the adoption of appropriate land use ordinances and providing plaintiff with a builder's remedy, in accordance with its plans to build a residential development of 1,646 units, of which 329 will be affordable to low and moderate income households.

GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN
COUNSELLORS AT LAW

Palmer Ass

3B

ATTACHMENT

3 and 4.
FACTUAL AND LEGAL CONTENTIONS:

Plaintiff is the owner of a parcel of land located in Holmdel Township, designated as Block 52, Lot 19 on a Tax Map of Holmdel Township and consisting of approximately 26 acres of land, hereinafter referred to as "Palmer Square." Plaintiff desires to develop the Palmer Square acreage to provide for low and moderate income housing units. The defendant's original land use plan and zoning ordinance effectively prohibits the development of Palmer Square in order to provide for units for low and moderate income persons. The litigation instituted by the plaintiff, now consolidated with other suits against the Township of Holmdel, seeks permission to develop its property in accordance with Mount Laurel II and Mount Laurel I. The original land use plan and zoning ordinance of the Township of Holmdel does not provide a realistic opportunity for the construction of its fair share of the region's low and moderate income housing needs. The zoning ordinance is exclusionary and is in direct opposition to the existing Mount Laurel precedent. The ordinances adopted in August of 1984 are similarly exclusionary. Plaintiff seeks declaratory and injunctive relief invalidating the use plan and land use ordinances of the defendant, the original and recently adopted plans and ordinances. Plaintiff also seeks the appointment of a master to facilitate the adoption of appropriate land use ordinances and to provide a builder's remedy to the plaintiff in accordance with its plans to develop Palmer Square.

FACTUAL AND LEGAL CONTENTIONS
AND LEGAL ISSUES OF
DEFENDANT HOLMDEL TOWNSHIP

4(a). Ordinance 84-7 satisfies the defendant's obligation and provides a realistic opportunity for building its fair share of low and moderate income housing.

(b). The number of units which should constitute the defendant's fair share are set forth in the expert's reports and outline both prospective needs and the present indigenous need for 1980-1990.

(c). The defendant's determined "fair" share should include thorough consideration of the Township's water and sewer capacities.

(d). Plaintiff has not presented defendant with specific particulars of its plans for constructing and financing the proposed low and moderate income housing.

(e). Any construction of proposed multi-unit high density housing should be achieved in stages to prevent excessive, rapid population increases and to render feasible the provision of necessary infrastructure.

(f). The legal issue to be tried is whether the introduction and passage of an ordinance after the filing of plaintiff's complaints can be utilized by the Court to determine the issue of compliance.

(g). The issues relating to builders remedy are reserved pursuant to the Order of the Court of August 23, 1984.

7. LEGAL ISSUES AND EVIDENCE PROBLEMS:

Determination of fair share for Township Defendant: Determination of regional present and prospective need and compliance of Ordinance 84-7 with the Mount Laurel II decision.

NJ Senate
NJ Senate

Accordingly, I return Senate Bill No. 1356 (OCR) and recommend that it be amended as follows:

* * * * * * * *

Respectfully,

Thomas H. Kean
GOVERNOR

FAIR HOUSING ACT

CHAPTER 222

SENATE NOS. 2046 and 2334

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.
Matter printed in italics *thus* is new matter.
Matter enclosed in asterisks or stars has been adopted as follows:
***—Assembly committee amendments adopted February 28, 1985.**
****—Senate amendments adopted in accordance with Governor's recommendations May 13, 1985.**

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

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

1.[21] This act shall be known and may be cited as the "Fair Housing Act."

2.[22] The Legislature finds that:

a. The New Jersey Supreme Court, through its rulings in *South Burlington County NAACP v. Mount Laurel*, 67 N.J. 151 (1975) and *South Burlington County NAACP v. Mount Laurel*, 92 N.J. 158 (1983), has determined that every municipality in a growth area has a constitutional obligation to provide ***through its land use regulations*** a realistic opportunity for a fair share of its

21. N.J.S.A. 52:27D-301.
22. N.J.S.A. 52:27D-302.

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successful, the council shall conduct a review process as set forth in subsection c. to determine whether or not the municipality is entitled to substantive certification.]** **The Office of Administrative Law shall expedite its hearing process as much as practicable by promptly assigning an administrative law judge to the matter; promptly scheduling an evidentiary hearing; expeditiously conducting and concluding the evidentiary hearing; limiting the time alloted for briefs, proposed findings of fact, conclusions of law, forms of order or other disposition, or other supplemental material; and the prompt preparation of the initial decision. A written transcript of all oral testimony and copies of all exhibits introduced into evidence shall be submitted to the council by the Office of Administrative Law simultaneously with a copy of the inital decision. The evidentiary hearing hall be concluded and the initial decision issued no later than 90 days after the transmittal of the matter as a contested case to the Office of Administrative Law by the council, unless the time is extended by the Director of Administrative Law for good cause shown.**

16.[36] For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, *[no exhaustion of the review and mediation procedures established in sections 14 and 15 of this act shall be required unless the court determines that a transfer of the case to the council is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing]* *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 *[four]* *five* months from the date of transfer, or promulgation of criteria and guidelines by

36. N.J.S.A. 52:27D-316.

52a

the council pursuant to section 7 of this act, whichever occurs later, jurisdiction shall revert to the court.

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

17.[37] a. In any exclusionary zoning case filed against a municipality which has a substantive certification and in which there is a requirement to exhaust the review and mediation process pursuant to section 16 of this act, there shall be a presumption of validity attaching to the housing element and ordinances implementing the housing element. To rebut the presumption of validity, the complainant shall have the burden of proof to demonstrate ***by clear and convincing evidence*** that the housing element and ordinances implementing the housing element do not provide a realistic opportunity for the provision of the municipality's fair share of low and moderate income housing after allowing for the implementation of any regional contribution agreement approved by the council.

b. There shall be a presumption of validity attaching to any regional contribution agreement approved by the council. To rebut the presumption of validity, the complainant shall have the burden of proof to demonstrate ***by clear and convincing evidence*** that the agreement does not provide for a realistic opportunity for the provision of low and moderate income housing within the housing region.

37. N.J.S.A. 52:27D-317.

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c. The council shall l
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38. N.J.S.A. 52:27D-318.
39. N.J.S.A. 52:27D-319.