Challange to Builder's remedy & FHA
[based on Mt. Laurel 2 actions]

4/26 argument (circa 1985)

Brief & Appendix on behalf on Intervenor, State of NJ

92 pages

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MORRIS COUNTY FAIR HOUSING COUNCIL, et al.,
Plaintiffs,
v.
BOONTON TOWNSHIP, et al.,
Defendants.

AFFORDABLE LIVING CORPORATION, INC.,
Plaintiff,
v.
MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE,
Defendant.

SIEGLER ASSOCIATES,
Plaintiff,
v.
MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE,
Defendant.

STONEHEDGE ASSOCIATES,
Plaintiff,
v.
TOWNSHIP OF DENVILLE, et al.,
Defendants.

MAURICE SOUSSA and ESTHER H. SOUSSA,
Plaintiffs,
v.
DENVILLE TOWNSHIP, et al.,
Defendants.

ESSEX GLEN, INC.,
Plaintiff,
v.
MAYOR AND COUNCIL OF THE BOROUGH OF ROSELAND, et al.,
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY/ MIDDLESEX COUNTY
DOCKET NO. L-5001-78 P.W.
DOCKET NO. L-042898-84 P.W.
DOCKET NO. L-029176-84 P.W.
DOCKET NO. L-086053-84
DOCKET NO. L-38694-84 P.W.
(CONSOLIDATED MT. LAUREL ACTIONS)

Civil Action

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY/ MIDDLESEX COUNTY
DOCKET NO. L-052513-85
(MT. LAUREL ACTION)

# BRIEF AND APPENDIX ON BEHALF OF INTERVENOR STATE OF NEW JERSEY

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## STATEMENT OF THE CASE

On July 2, 1985, Governor Kean signed The Fair Housing Act, P.L. 1985, c. 222, into law (the "Act"). The Act establishes an administrative mechanism to resolve both pending and future exclusionary zoning disputes in place of litigation. "The expectation is that through these procedures, municipalities operating within State guidelines and with State oversight will be able to define and provide a reasonable opportunity for the implementation of their Mt. Laurel obligations." Governor's Conditional Veto, April 26, 1985, appended hereto.

To effectuate the purposes of the Act, Section 5(a) establishes the Affordable Housing Council, an administrative body with the power to mediate and review exclusionary zoning disputes. Trial courts are granted discretion under the Act to transfer ongoing exclusionary zoning lawsuits to the Council, if the case was filed prior to May 3, 1985. Section 16(a). The legislation envisions that such a transfer will be made unless to do so would result in "manifest injustice to any party to the litigation." In any case filed after May 3, the review and mediation process must be initiated with the Council pursuant to Section 16(b). Defendants in two exclusionary zoning cases now before this court seek implementation of these provisions.

In Morris County Fair Housing Council v. Boonton, (consolidated Denville cases,) a matter filed before May 3, 1985, defendant Denville Township has moved to transfer the matter to the Affordable Housing Council pursuant to Section 16(a). The Public Advocate, on behalf of himself, the Morris County Fair Housing Council, and the Morris County Branch of the NAACP, opposes the

transfer, arguing that a transfer under the particular circumstances of that case would be manifestly unjust. Plaintiff-developers Stonehedge Associates & Siegler Associates similarly oppose the transfer and also attack the constitutionality of the statute. See Stonehedge Brief in Opposition to Motion to Transfer at 15-31 and Siegler Brief in Opposition to Motion to Transfer at 14-34. Plaintiff Affordable Living Corporation "relies on the briefs filed by the other parties" as to the alleged unconstitutionality of the Act and primarily briefs the injustice of a transfer. See Affordable Living Corp. Brief in Opposition to Motion to Transfer at 1.

In Essex Glen v. Roseland, the court is faced with an exclusionary zoning lawsuit initiated after the May 3, 1985 cutoff date. The Act requires that such "new lawsuits" be first presented to the Affordable Housing Council for disposition under Section 16(b); consequently defendant Township of Roseland has moved to dismiss the action before the court. Plaintiff-developer Essex Glen opposes the motion to dismiss, contending that dismissal of the complaint is not mandated by the Act, that the court should retain concurrent jurisdiction, and that the Act violates the State Constitution.

Inasmuch as the constitutionality of the Fair Housing Act has been called into question, the parties have given notice of these actions to the Attorney General who has moved to intervene on behalf of the State to defend the validity of the statute, pursuant to Rule 4:28-4. The State moves to intervene only for the limited purpose of addressing the constitutionality of the statute; whether a particular transfer should occur or would result in "manifest

injustice" is an issue within the court's discretion and best resolved by reference to the specific circumstances of the pending litigation.

The State, however, does differ with certain of the views expressed by the parties as to what constitutes "manifest injustice" - particularly the all encompassing definition urged by the Public Advocate. The Public Advocate's brief seemingly argues that transfer to the Council is inappropriate in any case because of its view that the Constitution of New Jersey tolerates no delay whatsoever in the effectuation of the Mount Laurel obligation. The Public Advocate apparently views any transfer to the Council as involving unreasonable delay because of his view that a "transfer to the Affordable Housing Council will inevitably result in a failure to provide housing opportunities substantially equivalent to the municipality's fair share" Public Advocate Brief in Opposition to Motion to Transfer, at 40. This position strains credulity, proceeding as it does on an adversary's overly pessimistic view of the remedy provided by the Legislature.

Contrary to the Public Advocate's position, an objective reading of the Fair Housing Act yields the conclusion that in all reasonable probability, the Act can and will result in vindication of the Mount Laurel right, notwithstanding its voluntary character. And, while admittedly some delays will attend a transfer because of the time necessarily needed for the Council's organization, adoption of rules and regulations, and guidelines, those delays are reasonably necessary to achieve an effectively and efficiently functioning body, which is necessary to address the problem in all its dimensions. Whether viewed sequentially, or overall, the

durational time frames established by the Legislature are relatively short, given the magnitude of the undertaking. The Public Advocate's position therefore should be rejected by this court.

Beyond that, however, the contours of what constitutes "manifest injustice" are fairly well established and easily applied. Little purpose would be served by rehashing the established definition of "manifest injustice" here. Similarly, it is unnecessary for the State to review at length the factual basis for plaintiffs' allegations that a transfer at this stage would be manifestly unjust.

The State respectfully submits that, after a careful review of each section of the statute challenged by plaintiffs, reading each in conformity with the purpose of the Act and the intention of the Legislature, it will be apparent that the Act properly effectuates the constitutional obligations and rights enunciated by the Supreme Court in Mount Laurel I and II. It is not disputed that the goal of the Act and the constitutional goal are the same. The methods selected by the judiciary and the Legislature to effectuate this goal differ to some degree. This, however, has no bearing on the constitutionality of the Act. The judicial remedies created by the Supreme Court in Mount Laurel II were not of constitutional dimension but, rather, were means of bringing about compliance with the constitutional obligation. In formulating its compliance mechanism, the Court encouraged the Legislature to adopt its own mechanism for enforcing the constitutional goal, one which hopefully would remove the judiciary from the process. That the Legislature's mechanism is different from that provided for by the Court, or perhaps different from one which

plaintiffs may have favored, does not render the Act unconstitutional.

## ARGUMENT

### POINT I

**THE BUILDER'S REMEDY IS NOT CONSTITUTIONALLY REQUIRED; THEREFORE IT IS ENTIRELY WITHIN THE LEGISLATURE'S PURVIEW TO LIMIT THE AVAILABILITY OF THAT REMEDY.**

If there is any common thread among the arguments advanced by plaintiffs in opposition to the Fair Housing Act it is the concern which each has expressed with respect to the viability of the so-called "builder's remedy" under the Act. Plaintiffs argue that several provisions in the Act somehow effect a constitutional deprivation by allegedly limiting the availability of the builder's remedy in proceedings before the courts and the Council. These arguments are apparently grounded on the fiction that the mere filing of an exclusionary zoning contest under Mt. Laurel II "vests" a right in a plaintiff-developer to utilize privately-owned land in a unilateral fashion, without planning controls, with the sanction of the court, and without regard to a municipality's concerns for sound land use planning. A plain reading of the Mount Laurel decisions and the Act, however, suggests that plaintiffs' contentions are of no constitutional merit whatsoever.

In considering the constitutional attacks made by plaintiffs in these cases, it is extremely important to distinguish between the Mount Laurel obligation itself and the mechanism formulated by the Supreme Court, in the absence of legislative action, to implement and enforce the obligation. Over a decade ago, the Supreme Court of this State held that a municipality's land use regulations must provide a realistic opportunity for low and moderate income housing. So. Burl. Cty. N.A.A.C.P. v. Tp. of

Mt. Laurel, 67 N.J. 151 (1975). Insofar as the Mt. Laurel Township zoning ordinance was deemed inconsistent with that requirement, the Court invalidated the ordinance; however, exercising judicial restraint, Mount Laurel I deferred to the Township for reformation of its zoning ordinances stating:

> It is the local function and responsibility in the first instance at least, rather than the court's, to decide on the details of the [amendment of its zoning ordinances] within the guidelines we have laid down. . . . The municipal function is initially to provide the opportunity through appropriate land use regulations and we have spelled out what Mt. Laurel must do in that regard. It is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any such power . . . The municipality should first have full opportunity to itself act without judicial supervision . . . [67 N.J. 191-193 (citations omitted)]

Eight years later, in Mount Laurel II, the Supreme Court reaffirmed the constitutional obligation of a municipality to exercise its governmental zoning powers in furtherance of the general welfare by providing the requisite opportunity for a fair share of the region's need for low and moderate income housing. 92 N.J. 158, 208-109 (1983). Finding that the need for satisfaction of the Mt. Laurel doctrine was greater than ever, the Court clarified various aspects of the doctrine, established procedural guidelines for the management of exclusionary zoning litigation, and expanded the remedies to be implemented by the courts in instances where municipalities fail to comply with their Mt. Laurel obligations.

The Mt. Laurel II Court was acutely aware, however, of the judicial role and acknowledged that it was, indeed, treading on sensitive ground by acting unilaterally, in the absence of an initiative from the Legislature, to enforce the constitutional doctrine. Although the court felt constrained to do so, it repeatedly expressed its preference for legislative action, declaring:

> Nevertheless, a brief reminder of the judicial role in the sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is better left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them. We recognize the social and economic controversy (and its political consequences) that has resulted in relatively little legislative action in this field. We understand the enormous difficulty of achieving a political consensus that might lead to significant legislation enforcing the constitutional mandate better than we can, legislation that might completely remove this Court from those controversies. But enforcement of constitutional rights cannot await a supporting political consensus. So while we have always preferred legislative to judicial action in this field, we shall continue -- until the Legislature acts -- to do our best to uphold the constitutional obligation that underlies the Mt. Laurel doctrine. [92 N.J. at 212-213 (emphasis added)].

The Court noted that, since Mt. Laurel I, there had been some legislative initiative in the field of exclusionary zoning, citing the revision of the Municipal Land Use Law which contemplated zoning with regional consequences in mind, N.J.S.A. 40:55D-28(d), and which relied on the State Development Guide Plan (1980). The Court also relied on that plan in establishing guidelines for a determination of a municipality's Mt. Laurel obligation. 92 N.J. at 213, 223-248. Repeatedly, however the Court again indicated its

readiness to defer further to more substantial legislative and executive actions, but explained that, absent adequate legislative and executive assistance in this field, the Court was obliged to resort to its own devices "even if they are relatively less suitable." 92 N.J. at 213-214.

Because the other branches had not yet acted, the Supreme Court, in Mt. Laurel II endorsed a series of judicial remedies to be imposed by a trial court upon determination that a municipality has not met its Mt. Laurel obligation. Upon such a determination, the Court directed a trial court to order a defendant municipality to revise its zoning ordinance within a prescribed time period. 92 N.J. at 281. In the event that the defendant municipality fails to adequately revise its ordinance within that time frame, the Court further directed that the remedies for noncompliance outlined in its opinion be implemented. 92 N.J. at 278. The trial courts were authorized to issue such orders as might be appropriate under the circumstances of the cases before them, and which might include any one or more of the following:

> (1) that the municipality adopt such resolutions and ordinances, including particular amendments to its zoning ordinance, and other land use regulations as will enable it to meet its Mount Laurel obligations;
>
> (2) that certain types of projects or construction as may be specified by the trial court be delayed within the municipality until its ordinance is satisfactorily revised, or until all or part of its fair share of lower income housing is constructed and/or firm commitments for its construction have been made by responsible developers;
>
> (3) that the zoning ordinance and other land use regulations of the municipality be deemed void in whole or in part so as to relax or eliminate building and use restrictions in

> all or selected portions of the municipality (the court may condition this remedy upon failure of the municipality to adopt resolutions or ordinances mentioned in (1) above); and
>
> (4) that particular applications to construct housing that includes lower income units be approved by the municipality, or any officer, board, agency, authority (independent or otherwise) or division thereof. [92 N.J. at 285-286].

In addition, in instances where the plaintiff is a developer and where a revised ordinance does not meet constitutional requirements, or where no ordinance has been submitted within the time allotted by the trial court, "the court shall determine whether a builder's remedy shall be granted." 92 N.J. at 278. In this regard, the Supreme Court explained that its concern for compliance with Mt. Laurel was the basis for its departure from a prior reluctance to grant builder's remedies expressed in Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 549-552 (1977) and held that, where a developer succeeds in Mount Laurel litigation and has proposed a project which provides a substantial amount of lower income housing, a builder's remedy should be granted unless a municipality establishes that, because of environmental or other substantial planning concerns, the plaintiff's project is clearly contrary to sound land use planning. 92 N.J. 279-280. Thus, while establishing the builder's remedy as one of several measures designed to enhance enforcement of the constitutional mandate espoused in Mount Laurel, the Mount Laurel II Court made it clear that there was no absolute right to that remedy. This is well illustrated by the Court's summary of its ruling concerning the builder's remedy:

> Builder's remedies will be afforded to plaintiffs in Mount Laurel litigation where appropriate, on a case-by-case basis. Where the plaintiff has acted in good faith, attempted to obtain relief without litigation, and thereafter vindicates the constitutional obligation in Mount Laurel-type litigation, ordinarily a builder's remedy will be granted, provided that the proposed project includes an appropriate portion of low and moderate income housing, and provided further that it is located and designed in accordance with sound zoning and planning concepts, including its environmental impact. [92 N.J. at 218 (emphasis added)].

Beyond these expressed criteria, the Mount Laurel II Court provided further safeguards against potential abuses of the builder's remedy by plaintiff-developers. In discussing the numerous perceived difficulties that made the use of the builder's remedy problematic, the Court emphasized that care must be taken to ensure that Mount Laurel is not used "as an unintended bargaining chip" in a builder's negotiations with a municipality and that the courts are not used as enforcers of builders' threats to bring Mount Laurel litigation in the event that municipal approvals for projects lacking provision for lower income housing are not forthcoming. The Court cautioned that its decision to expand builder's remedies was not to be viewed as a "license for unnecessary litigation" when builders are unable for valid reasons to secure variances for their particular parcels, and directed the trial courts to guard against abuses of the Mount Laurel doctrine by plaintiff-developers. 92 N.J. at 280-281. Most importantly, at no point in developing the Mt. Laurel doctrine, has the Court equated the builder's remedy with a "vested right," nor has the Court determined such a remedy to be integral to meeting the constitutional obligation. Rather, the Court has turned with some reluctance to this means of enforc-

ing the constitutional doctrine because of legislative and executive inaction.

Recognizing the need to proceed with caution in this area, and cognizant of the need to afford an opportunity for municipal involvement in the formulation of a builder's remedy to achieve sound planning, the Court directed that trial courts and masters utilize, to the greatest extent possible, "the planning board's expertise and experience so that the proposed project is suitable for the municipality." 92 N.J. at 280. With similar deference to municipal concerns, the Court also authorized trial courts to adjust the timing of builder's remedies "so as to cushion the impact of the developments on municipalities where that impact would otherwise cause a sudden and radical transformation of the municipality." Ibid.

That the builder's remedy and other enforcement measures established by the Supreme Court of New Jersey in Mount Laurel II were meant as interim devices for achieving compliance with the constitutional mandate cannot be doubted. The clear intention of the Court is plainly stated throughout that opinion and is underscored in the Court's concluding remarks:

> As we said at the outset, while we have always preferred legislative to judicial action in this field, we shall continue -- until the Legislature acts -- to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine. . . . [92 N.J. at 352 (emphasis added)].

In response to this judicial acknowledgement of the need for legislative action to fulfill the obligations defined in Mount Laurel II, the Legislature enacted the Fair Housing Act, L. 1985, c. 255 effective July 2, 1985. The Act addresses the rulings of the

Supreme Court of New Jersey in Mount Laurel I and Mount Laurel II. Governor's Conditional Veto, April 26, 1985 thereby complying with the judicial request for a legislative initiative.

The goals established by the Mount Laurel decisions are the underpinnings of the Act. In Mount Laurel II, the Court expressed three purposes for its rulings: (i) to encourage voluntary compliance on the part of municipalities with the constitutional obligation by defining it more clearly; (ii) to simplify litigation in the area of exclusionary zoning; and (iii) to increase substantially the effectiveness of the judicial remedy by providing that in most cases, upon a determination of noncompliance, the trial court would order an immediate revision of the ordinance and require the use of effective affirmative planning and zoning devices. 92 N.J. at 214. It was the Court's aim to accomplish these purposes "while preserving the fundamental legitimate control of municipalities over their own zoning and, indeed, their destiny." Ibid.

Consistent with these judicial goals, the Act establishes a comprehensive planning and implementation response to the constitutional obligation defined in Mount Laurel. Section 2(c). The Act is designed to provide an administrative mechanism to resolve exclusionary zoning disputes in place of protracted and expensive litigation and establishes a voluntary system for municipal compliance with Mount Laurel obligations. Governor's Veto Message, April 26, 1985. The Act also effectuates a legislative preference for the resolution of existing and future disputes involving exclusionary zoning by establishing the Affordable Housing Council as an administrative forum for mediation and review of such disputes in

lieu of litigation. Section 3. As set forth in Point II, infra, consistent with the Mount Laurel goals, the Act's, various sections were designed to keep a municipality on track once it has elected to submit to proceedings for review of its housing element by the Council. In the event of a dispute as to whether a municipality's housing element and zoning ordinance comply with the criteria to be developed by the Council, the Act provides for a mediation and review process intended to obviate the necessity of seeking judicial recourse in such matters. It is also an expressed purpose of the Act to provide various alternatives to the use of the builder's remedy as a method of achieving Fair Share Housing. Section 3.

To facilitate the implementation of the Act and to afford a fair and effective transition between pending exclusionary zoning litigation and proceedings before the Council, the Act provides for, inter alia, the transfer of pending litigation to the Council in certain circumstances, Section 16, and imposes a temporary moratorium on court-awarded builder's remedies. In the latter regard, Section 28 of the Act provides:

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

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* A "builder's remedy" is defined by the Act as:

(Footnote Continued On Following Page)

The moratorium imposed by this Section is of limited duration and will expire, at the latest, on January 1, 1987.*

Notwithstanding the foregoing, plaintiff Stonehedge contends that the moratorium on the award of builder's remedies imposed by Section 28 of the Act is unconstitutional. In support of its claim, plaintiff advances several alternative theories which allegedly verify the unconstitutionality of this provision: that the builder's remedy is "necessary for the enforcement of a constitutional right; that the moratorium "violates the separation of powers clause" of the State Constitution; and that the moratorium contravenes the due process clause of the State Constitution. See Stonehedge Brief at 24-16.**

Before responding to the specific constitutional challenges raised, it is important to emphasize the difficult burden which must be met by a party attempting to challenge the validity of a legislative enactment on constitutional grounds. It is well

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(Footnote Continued From Previous Page)

> a court imposed remedy for a litigant who is an individual or a profit-making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonuses which provide for the economic viability of a residential development by including housing which is not for low and moderate income households. [Section 28].

* See the State's discussion of the time constraints contained in the Act, at Point II, infra.

** Plaintiff Affordable Living Corporation, while not attacking the constitutionality of the statute, similarly claims that the builder's remedy is a vested property right and that to read the Act as divesting a plaintiff of such a "right" offends due process of law. Plaintiff Affordable Living Corporation Brief at 12.

established that there is a strong presumption that a statute passed by the Legislature is constitutional. All doubts are to be resolved in favor of upholding the validity of the statute. New Jersey Association on Correction v. Lan, 80 N.J. 199, 218-219 (1979); In re Loch Arbour, 25 N.J. 258, 264-265 (1957). The Legislature is presumed to have acted in a reasonable manner and on the basis of adequate factual support and any party seeking to overturn a statute bears a heavy burden. Indeed, the presumption of constitutionality can be overcome:

> only by proofs that preclude the possibility that there could have been any set of facts known to the legislative body or which could reasonably be assumed to have been known which would rationally support a conclusion that the enactment is in the public interest. (Hutton Pk. Gardens v. West Orange Town Council, 68 N.J. 543, 565 (1975) (other citations omitted).

Thus the litigant who argues for the invalidity of a statutory provision bears the heavy burden of demonstrating that the presumption of validity should not attach.

Furthermore, plaintiffs cannot successfully challenge the authority of the Legislature, as a general matter, to impose a moratorium. That a legislative body may impose a proper moratorium, even upon all development, is beyond dispute. Most commonly, such restraints are prescribed by municipalities in implementing a zoning scheme. "And, it is well settled that municipalities have power to enact a reasonable moratorium on certain land uses while studying a problem and preparing permanent regulations." Plaza Joint Venture v. Atlantic City, 174 N.J. Super. 231, 237 (App. Div. 1980) (citations omitted.). Here, the Fair Housing Act imposes a temporary moratorium upon the builder's remedy, only one of several

judicial remedies enunciated by the Supreme Court in Mt. Laurel II to be employed by trial courts in considering exclusionary zoning matters. The moratorium applies only to a court imposed version of the builder's remedy. Judicial discretion to order rezoning or to provide for the construction of low and moderate housing is unaffected. Thus, although the moratorium at issue is not as onerous as the wideranging "freezes" on development considered in the caselaw, the moratorium imposed by the Act is plainly constitutional even under the following rigid standards set forth by the courts in those cases.

While the reasonableness of a moratorium depends upon the particular facts of each case, moratoria which have a substantial relationship to the public health, welfare and safety will be upheld. Cappture Realty v. Board of Adjustment of Elmwood Park, 133 N.J. Super. 216, 221 (App. Div. 1975). In Cappture Realty the court upheld a restriction on construction in flood-prone lands, for a specified period of time, until the municipality and county could complete a regional flood control project. The court looked to the extensive planning, the nature of the work, and the fact that the town and county were actively engaged in the project, as reasons supporting the moratorium. Id., at 221. Hence, "[t]he existence of municipal power to enact a reasonable moratorium on certain uses while preparing and studying a new zoning ordinance is

not open to question." New Jersey Shore Builder's v. Twp. of Ocean, 128 N.J. Super. 135, 137 (App. Div. 1974).*

Administrative agency moratoria or "freezes" on development have likewise been sustained. In Toms River Affiliates v. Dept. of Environmental Protection, 140 N.J. Super. 135 (App. Div. 1976), the court upheld the authority of the Commissioner of Environmental Protection, granted under the Coastal Area Facility Review Act (CAFRA), to "freeze" development within a coastal area until it could be evaluated in light of a forthcoming CAFRA plan. The court concluded that:

> With the adoption of a new statute which requires extensive studies and preparation of a comprehensive plan for development of the coastal area involved it is inevitable that implementation will require a considerable period of time. Does this mean that the agency is powerless to prevent the potential frustration of a consistent and comprehensive plan by uncontrolled helter skelter construction in the interim?
>
> Public welfare sought to be advanced by the police power underlying the jurisdiction of the regulatory agency demands the availability of some interim measures to preserve the status quo pending the adoption of a final plan. "Freeze" regulations have thus been approved as reasonable in the analogous area of planning and zoning. Such "stop gap" legislation is a reasonable exercise of power to prevent changes in the character of the area or a community before officialdom has an opportunity to complete a proper study and final plan which will operate on a permanent basis. [Id, at 152-153; citations and footnote omitted].

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* In fact, the Appellate Division has determined that such "freezes" do not even give rise to a claim for a compensable "taking" under condemnation law. See Orleans Builders & Developers v. Byrne, 186 N.J. Super. 432, 448 (App. Div. 1982).

Furthermore, the Appellate Division has upheld a legislative "freeze" on the development of land within the proposed alignment of a state highway for a statutorily prescribed period. Kingston East Realty Co. v. State of New Jersey, 133 N.J. Super 234 (App. Div. 1975). There the court sustained N.J.S.A. 27:7-66 and 67, which provide that notice be given to the Commissioner of Transportation of any proposed development within the alignment for a potential state highway. The statute also enables the Commissioner to temporarily "freeze" any development within the alignment. Ibid. The Court recognized the clear public purpose behind such a freeze:

> . . . The statute not only provides redress for aggrieved property owners, as indicated, but also seeks to avoid the necessity therefor, if possible. As an incident to this purpose, it discourages, for a relatively short period of time, the physical development of improvement of land. Similar measures designed to restrain temporarily the inimical utilization of land, have been recognized under narrow circumstances as reasonable regulations in the exercise of governmental police powers. [Kingston East Realty v. State of New Jersey, supra, at 243-244. (citations omitted)].

Even in the context of the cases at hand, the Supreme Court has focused on the viability of a moratorium. In Mount Laurel II, the Supreme Court specifically authorized judicial postponement of development within a municipality to allow for the orderly implementation of a fair share housing plan. In that vein, the Court empowered trial courts to order:

> that certain types of projects or construction as may be specified by the trial court be delayed within the municipality until its ordinance is satisfactorily revised, or until all or part of its fair share of lower income housing is constructed and/or firm commitments

have been made by responsible developers... [Supra., 92 N.J. at 285].

Thus, the Supreme Court has acknowledged that a moratorium is a useful tool in effecting a Mount Laurel obligation. Consequently, the sole remaining inquiry is whether the particular moratorium imposed by the Legislature under the Fair Housing Act is a proper use of the legislative prerogative.

On judicial review of a moratorium, courts should consider whether the "freeze" is reasonable under the facts of the case and whether the moratorium is rationally related to the legislative end to be achieved. Specifically, two considerations have emerged from the case law and should guide a court in assessing the validity of a moratorium; the court should determine whether the duration of the "freeze" is reasonable, and should weigh the interests of the affected property owners against the public interest in adjusting its land use scheme to meet modern trends.* Schiavone Constructions Co. v. Hackensack Meadowlands Development Commission (HMDC), 98 N.J. 258, 264-265 (1985); Deal Gardens, Inc. v. Board of Trustees of Loch Arbour, 48 N.J. 492 (1967); Monmouth Lumber Co. v. Ocean Tp., 9 N.J. 64 (1952); Meadowlands Regional Develop-

* The State will employ this analysis to demonstrate the constitutionality of Section 28 of the Act. We note, however, that plaintiffs' interests in the case at bar do not rise to the level of an "affected property owner," as set forth in the cases, inasmuch as the Section 28 freeze only temporarily restricts the judicial availability of a single development-related remedy, the builder's remedy, and because, as discussed infra, plaintiffs have no "vested right" to a builder's remedy. Consequently, plaintiffs herein cannot claim the interest asserted by the property owners in the cases cited; and even under the legal consideration afforded a truly aggrieved property owner, plaintiffs cannot make out a legitimate claim that the moratorium at issue is illegal.

ment Agency v. Hackensack Meadowlands Development Commission (HMDC), 119 N.J. Super. 572, 576-577 (App. Div. 1972).

In Schiavone Construction Co., supra, the Supreme Court of New Jersey was presented with a challenge to a moratorium imposed by the HMDC. The Court remanded to the trial court for further proceedings, but reiterated its directive, expressed in Deal Gardens, supra, that in "evaluating land use restriction, courts should consider the reasonableness of the duration of any moratorium on development." Schiavone Construction Co., supra, 98 N.J. at 264. In particular, the Court called for an examination of "the relationship between the purpose of the restrictions and the time required to reach and to implement a final decision as to the ultimate use of the property." Ibid., at 265.

This focus was consistent with that employed by the Appellate Division in Meadowlands Regional Development Commission, supra. There the court also evaluated a challenge to "freeze" regulations promulgated by the HMDC which restricted development in the Meadowlands for two years while the HMDC was preparing a master plan. The court relied upon the "duration of time" test, but also looked to the nature of the task faced by the HMDC and the administrative scheme for development conceived by the Legislature. The court recognized the interest of individual property owners, and considered how they would be affected by the "freeze," but also acknowledged the existence of a substantial community interest in effective and proper land use. 119 N.J. Super. at 576-577. Upon such a review, and in view of the statutory mandate, the court determined that the HMDC was entitled to a reasonable period of

time to study and implement a comprehensive land use plan, and that a two-year moratorium on development was appropriate:

> The scheme envisioned by the Legislature for development of the Meadowlands area is a unique one. It contemplated an imaginative and innovative approach to the solution of numerous and difficult problems. The Commission to which that task has been assigned is entitled to reasonable time to study them and to devise methods to resolve them. The nature of the Meadowlands area, the vast potential it has in the public interest, the dangers of a too rapid decision and the consequences of a hastily and improperly drawn final plan underscore the necessity for a very careful study of the entire environmental impact of the final plan and possible alternatives thereto. We conclude that the two-year period provided in the original interim zoning regulations and the additional two-month extension thereof are not unreasonable under the circumstances shown by this record. [Id. at 577].

Hence, the court paid deference to the legislative plan for development of the Meadowlands, and in consideration of the complicated and involved issues attendant thereto, approved a temporary moratorium on all development in the interest of comprehensive and intelligent planning.

Therefore, beyond the plain fact that plaintiffs have no constitutional right to a particular remedy, it is evident that under the foregoing standards, the "freeze" contained in Section 28 of the Fair Housing Act passes constitutional muster. It is a limited moratorium confined both in scope and duration operating only to limit the award of a particular type of judicial remedy. The legislative curtailment of the builder's remedy does not restrict development per se and does not restrain the construction of projects comprised entirely of low and moderate income housing. Rather, it is directed only towards profit-making litigants who

have, since Mt. Laurel II, sought judicial license to construct housing projects which are primarily not for low and moderate income households.

The "freeze" is clearly related to a rational legislative purpose: the orderly implementation of an administrative mechanism to enable municipalities to meet their constitutional obligation under the Mt. Laurel cases. Consistent with the express legislative preference for an administrative response to the dilemma posed by Mt. Laurel, Section 3, and the New Jersey Supreme Court's own desire to defer to a legislative initiative, 92 N.J. at 213, the Fair Housing Act provides an alternative mechanism for resolution of Mount Laurel II obligations and disputes pertaining thereto, and establishes a time frame within which to make that mechanism workable. Similar to the moratorium imposed by the HMDC and upheld in Meadowlands Regional Development Agency, supra, the freeze at issue herein was provided by the Legislature to enable the administrative process to address a complicated issue in a comprehensive and orderly manner.

Plaintiff Stonehedge also erroneously asserts that the builder's remedy is necessary for enforcement of the constitutional right and is an essential part of that right. In so contending, plaintiff Stonehedge has ignored the plain language of Mount Laurel II. A reading of that decision clearly demonstrates that the Court intended to provide a variety of judicial remedies in the interest of affording the trial courts wide latitude to ensure compliance with a municipality's constitutional obligation. It is the fulfillment of that obligation, and not the imposition of any particular remedy, which is mandated by Mount Laurel II. The

Court's very specific directive regarding the imposition of builder's remedies confirms that the award of a builder's remedy is not in itself an absolute right, but is, rather, one of several methods which a court may in its discretion utilize to achieve compliance with the constitutional obligation.* Therefore, under Mt. Laurel II, a trial court may consider whether a builder's remedy is appropriate in a particular case; however, that decision in no way supports a conclusion that the award of a builder's remedy is mandated in all cases.

Only in appropriate circumstances, and only upon a determination (i) that a proposed project includes an appropriate portion of low and moderate income housing, and (ii) that the project is located and designed in accordance with sound zoning and planning concepts, including its environmental impact, is an award of a builder's remedy authorized under Mount Laurel II. 92 N.J. 218, 279-280. Not by any stretch of the imagination can Mount Laurel II be read to bestow on a builder-plaintiff a "vested right" to a builder's remedy. In point of fact, the very case cited by plaintiff Stonehedge demonstrates conclusively that its arguments in this regard must fail. In Morin v. Becker, 6 N.J. 457 (1951), the Supreme Court of New Jersey stated that:

> the right to a particular remedy is not a vested right. This is the general rule; and the exceptions are of those peculiar cases in which the remedy is part of the right itself. As a general rule, every state has complete control over the remedies which it offers to

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* In fact, the Supreme Court in Mt. Laurel II refused to impose a builder's remedy in two of the cases before it, noting that a builder's remedy was not appropriate in the circumstances presented therein. 92 N.J. 315-316, 321.

> suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right already in existence. And it may abolish old remedies and substitute new... [6 N.J. at 470-471, citing Wasner v. Atkinson, 43 N.J.L. 571, 574-575 (Sup. Ct. 1881) (other citations omitted)]

In light of this rule, and in view of the fact that the builder's remedy is not a right but is only one of several remedies available under Mount Laurel II, it is clear that the temporary moratorium on the judicial imposition of builder's remedies contained in Section 28 of the Act presents no constitutional infirmity.

Plaintiff Affordable Living Corporation has exhibited a similar misunderstanding of the distinction between a right and a remedy in complaining that the Fair Housing Act "divests" it of a vested right to builder's remedy, contrary to due process of law. Brief of plaintiff Affordable Living Corporation at 12. Here again, the very cases upon which plaintiff relies fail to support this overbroad proposition. In fact, the New Jersey Supreme Court has consistently held that a statute may even impair private property rights when protection of the public interest so clearly predominates over that impairment. See e.g., Rothman v. Rothman, 65 N.J. 219, 225 (1974). Moreover, even where a vested right was deemed to exist, the Court has expressly held that "[a] statute that gives retrospective effect to essentially remedial changes does not unconstitutionally interfere with vested rights." State Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 499 (1983). Here plaintiffs cannot legitimately assert that their proprietary interest in a particular remedy rises to the level of a constitutional right. The Supreme Court has acknowl-

edged that the public interest in zoning for the general welfare might be achieved through a variety of remedial measures. It is the municipality's obligation to zone consistent with Mt. Laurel II and not the Court's suggested methods for complying with that obligation which affords constitutional dimension to these cases. Therefore, it was entirely within the Legislature's prerogative to provide alternative remedies retrospectively in the interest of achieving municipal compliance with Mount Laurel II.

Just as spurious is the claim by plaintiff Stonehedge that Section 28 is violative of the due process mandate of the New Jersey Constitution, Article I, paragraph 1. As Stonehedge notes, a due process analysis calls for a determination of whether the stated legislative purpose and means employed are constitutionally permissible. The legislation in question must bear a rational relationship to a constitutionally permissible objective. U.S.A. Chamber of Commerce v. State, 89 N.J. 131, 155 (1982), citing Fergeson v. Skrupa, 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed.2d 93, 98 (1963).

The State may, in the exercise of its police power, take such action as is appropriate in its judgment to promote and protect the public health, safety and welfare. In Mount Laurel II, the Supreme Court of New Jersey recognized that the exercise of the police power to regulate the use of land for the benefit of the general welfare was particularly suited to legislative action. See e.g., 92 N.J. at 212-213. The Act meets the need which the Court perceived for such legislative action. It provides a comprehensive planning and implementation mechanism for satisfaction of the constitutional obligation enunciated in Mount Laurel II. The Act

is designed to effectuate the State's declared preference for the resolution of existing and future disputes via an administrative mediation and review process and to encourage voluntary compliance with Mount Laurel objectives. Governor's Veto Message, September 26, 1985.

By imposing a temporary moratorium on the award of a builder's remedy in Section 28, the Legislature attempted to provide time for the administrative system to work. As in those cases regarding the imposition of a moratorium on development generally, to allow for comprehensive planning, the Legislature here sought to afford municipalities an adequate opportunity to undertake such action as may be necessary to achieve voluntary compliance with their constitutional obligations during the Council's organizational period. The validity of such temporary measures by the Legislature is underscored by the determination of the Supreme Court of New Jersey in Mount Laurel II that it was within the power of the trial courts to adjust the timing of builder's remedies so as to cushion the impact of such developments on municipalities where that impact would otherwise cause a sudden radical transformation of those municipalities. 92 N.J. at 280, 285. Thus, no due process considerations are impinged by the legislative determination to provide for a temporary moratorium.

Plaintiff Stonehedge further contends that the moratorium set forth in Section 28 of the Act violates the separation of powers clause of the New Jersey Constitution, Article III, paragraph 1. Plaintiff claims that the provision is "an attempt to override the Supreme's Court's constitutional power to make rules governing the administration, practice and procedure in all

courts." New Jersey Constitution, Article VI, Section II, paragraph 3. See Brief and Appendix of plaintiff Stonehedge Associates at 25. The constitutional mandate cited by plaintiff for this proposition, however, has been deemed to vest the exclusive authority for establishing laws of pleading and practice in the Supreme Court. This rule-making power must be distinguished from the courts' authority to make substantive law, which defines our rights and duties, through decision-making in specific cases coming before them. See generally Winberry v. Salisbury, 5 N.J. 240, 248 (1950). In advancing this alleged constitutional argument, plaintiff Stonehedge has failed to recognize this distinction. The Court's identification of possible judicial remedies, including the builder's remedy, for non-compliance with the constitutional obligation defined in Mount Laurel II was clearly of a substantive nature. Therefore, the Legislature cannot be said to have intruded on an area of law-making which was exclusively reserved to the courts in providing alternatives to those judicial remedies in the Act.

Moreover, the Supreme Court's repeated acknowledgement that enforcement of the constitutional obligation defined in Mount Laurel was an area in which the Court was awaiting legislative action clearly demonstrates that such an argument is untenable. Instructive in this regard is the decision of the Superior Court of New Jersey, Appellate Division in Stroinski v. Office of Public Defender, 134 N.J. Super. 21 (App. Div. 1975), where the court considered whether a section of the New Jersey Public Defender Act, N.J.S.A. 2A:158A-17, violated the constitutional provisions cited herein by plaintiff Stonehedge. In that case the plaintiff con-

tended that the provision at issue constituted an invalid encroachment by the Legislature upon the rule-making authority of the New Jersey Supreme Court. The court rejected the plaintiff's assertions, noting that the Public Defender Act was the Legislature's response to decisions of the United States Supreme Court and the New Jersey Supreme Court implementing the constitutional guarantee to an indigent defendant in a criminal case of the right to counsel. 134 N.J. Super. 29. Relying on language in decisions which predated that Act and in which the courts had afforded opportunities for legislative initiative, the court determined that the statute at issue did not offend the rule-making authority of the Supreme Court, 134 N.J. Super. at 30, stating:

> Thus, the matter of providing counsel for indigent defendants in criminal cases, including the allocation and method of payment of costs thereof, was expressly left by the Supreme Court to the Legislature. Under these circumstances it cannot be said that the subsequent enactment by the Legislature of the Public Defender Act in response to the Court's invitation constitutes an invalid encroachment of the Court's rule-making power. ... [Ibid.]

Similarly, in the present situation, it cannot be said that the Legislature's promulgation of the Act in any way contravenes the separation of powers clause of the New Jersey Constitution. Rather, the Act is the legislative initiative which was repeatedly invited by the Supreme Court of New Jersey in Mount Laurel II.

Lastly, plaintiffs unanimously complain that the Act precludes the award of a builder's remedy by the Council and, for this reason, again maintain that the Act is constitutionally infirm. See Brief of plaintiff Affordable Living Corporation at 11-12; Brief of plaintiff Stonehedge Associates at 26-27; Brief of plaintiff Siegler Associates at 30-34; Brief of plaintiff Public

Advocate at 35-36. Once again, such arguments are premised on an illusory right to a builder's remedy. Moreover, plaintiffs offer no support for their proposition that the Council may not award a builder's remedy as a condition for granting substantive certification, and, in fact, no such prohibition exists. Implicit in the Act is the expectation that in approving a municipal housing element, the Council may require that techniques be implemented which will have an effect comparable to that achieved by a builder's remedy, but accomplished within the context of regional planning and not simply as a reward for a successful litigant. In this regard, Section 3 provides, in relevant part:

> 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 their 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. [Emphasis supplied].

As is plain from an objective reading of this Section, the Act states a preference for an administrative solution and seeks to provide alternatives to the builder's remedy, but does not exclude that remedy. Surely, if it was the Legislature's intent to limit the conditions which the Council might impose, and particularly to absolutely prohibit the imposition of certain conditions, the Act would so provide.

Furthermore, as plaintiffs acknowledge, the Act specifically requires municipalities to include in their housing element:

> A consideration of the lands that are most appropriate for construction of low and moderate income housing and of the existing structures most appropriate for conversion to, or rehabilitation for, low and moderate income

> housing, including a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing. [Section 10(f) (emphasis added)].

Thus, contrary to plaintiffs' contentions, the Act specifically envisions that the interests of builders be considered both by the municipality in developing a housing element, and thereafter by the Council in reviewing that element.

Plaintiffs' common failure to make reference to Section 14(b) of the Act is most telling. That Section empowers the Council to condition its grant of certification of a housing element "upon changes in the element or ordinances." Under that provision, the Council may require that a municipality rezone and may impose conditions which "make the achievement of a municipality's fair share of low and moderate income housing realistically possible." No limitations are imposed with respect to the Council's discretion to insist upon such conditions as it may deem appropriate to achieve the goals of the Act. Nor have plaintiffs provided any sound reason for determining that such a limitation is implicit in the Act.

The Legislature has expressed a preference for alternatives to the builder's remedy in the Act. That preference is underscored by the "freeze" on the judicial imposition of such remedies during the Act's implementation period and has culminated in the establishment of the Council which has the discretion to impose conditions embracing a wide variety of remedies. Plaintiffs offer no basis for concluding that the moratorium imposed by Section 28 is either unreasonable in duration or unrelated to a legitimate public purpose. Nor can plaintiffs demonstrate that Mount

Laurel obligations will not be satisfied under the Act. Instead, plaintiffs simply bemoan the legislative determination to temporarily excise a judicial remedy which has worked to the profitable advantage of private litigants.

## POINT II

THE FAIR HOUSING ACT IS A COMPREHENSIVE PLANNING AND IMPLEMENTATION RESPONSE ON THE PART OF THE LEGISLATURE TO THE MOUNT LAUREL CASES AND IS DESIGNED TO PROVIDE AN ADMINISTRATIVE MECHANISM FOR RESOLVING EXCLUSIONARY ZONING DISPUTES AND TO MEET THE MOUNT LAUREL OBLIGATION. THE ACT IS CLEARLY CONSTITUTIONAL AND SHOULD BE UPHELD.

### A. THE METHOD OF ACHIEVING THE MOUNT LAUREL OBLIGATION SET FORTH IN MOUNT LAUREL II IS NOT CONSTITUTIONALLY REQUIRED.

Plaintiffs here cannot seriously contend that the Legislature, in enacting the Fair Housing Act, has abrogated the constitutional requirement of Mount Laurel. However, plaintiffs argue that the Act is somehow unconstitutional because the Legislature has enacted a statutory scheme to effectuate the doctrine which is different from the compliance mechanism created by the Supreme Court in Mount Laurel II. However, as discussed in Point I, that the Mount Laurel II compliance mechanism is not constitutionally required is readily apparent. While this mechanism was utilized by the Court, in the absence of legislative action, in effectuating the constitutional obligation, 92 N.J. at 212, one judicial mechanism itself is simply that - a means of achieving the constitutional requirement and not the requirement itself. Nowhere is this more clear than in the Court's discussion of its rationale for redefining the type of municipality which would have a Mount Laurel obligation from that of a "developing municipality" to that of a municipality in a designated "growth area" specified in the State Development Guide Plan. 92 N.J. at 223-238. In making this revision, the Court stated:

> The point here is that we see every reason to modify what is generally regarded as one of the doctrines of Mount Laurel I, namely, that the Mount Laurel obligation applies only in developing municipalities, and no reason, either in the constitutional doctrine or in the Mount Laurel case itself, not to do so.
>
> That we are not inhibited by the Constitution from making this change is apparent when one analyzes the constitutional obligation itself. Mount Laurel I held that in the exercise of the zoning power a municipality could not constitutionally limit to its own citizens those whose housing needs it would consider, but was required to consider the housing needs of all of the citizens of the region of which that municipality was a part. Put differently, the zoning power that the State exercised through its municipalities would have constitutional validity only if regional housing needs were addressed by the actions of the municipalities in the aggregate. The method selected by this Court in Mount Laurel I for achieving that constitutionally mandated goal was to impose the obligation on those municipalities that were "developing." Clearly, however, the method adopted was simply a judicial remedy to redress a constitutional injury. Achievement of the constitutional goal, rather than the method of relief selected to achieve it, was the constitutional requirement. [92 N.J. at 236-237.]

The remedies formulated by the Supreme Court in Mount Laurel II are judicial remedies that the Court believed would, in the absence of legislative action, achieve the constitutional goal. 92 N.J. at 237. To reiterate, "[a]chievement of the constitutional goal, rather than the method of relief selected to achieve it, was [and is] the constitutional requirement." Ibid. The judicial compliance mechanism, therefore, is not constitutionally required and the Legislature, by enacting legislative methods to achieve the constitutional goal, has neither violated the Constitution nor abrogated the constitutional doctrine of the Mount Laurel cases.

The fact that the legislative scheme for enforcing the Mount Laurel obligation is different from that devised by the Supreme Court in no wise renders the Act "unconstitutional." How the Mount Laurel obligation should be effectuated, as evidenced by the Supreme Court's decisions and the decisions of the Mount Laurel judges following the Supreme Court's Mount Laurel II decision, is plainly a subject upon which "reasonable men might differ." New Jersey Sports & Exposition Auth v. McCrane, 61 N.J. 1, 8 (1972), app. dism. 409 U.S. 943, 93 S.Ct. 270, 34 L.Ed.2d 215 (1972); New Jersey Association on Correction v. Lan, 80 N.J. 199, 200 (1979). Because of this, deference must be granted to the choices made by the Legislature as to how best to achieve the constitutional goal. As the Supreme Court stated in New Jersey Sports & Exposition Auth. v. McCrane:

> One of the most delicate tasks a court has to perform is to adjudicate the constitutionality of a statute. In our tripartite form of government that high prerogative has always been exercised with extreme restraint, and with a deep awareness that the challenged enactment represents the considered action of a body composed of popularly elected representatives. As a result, judicial decisions from the time of Chief Justice Marshall reveal an unswerving acceptance of the principle that every possible presumption favors the validity of an act of the Legislature. As we noted in Roe v. Kervick, 42 N.J. 191, 229 (1964), all the relevant New Jersey cases display faithful judicial deference to the will of the lawmakers whenever reasonable men might differ as to whether the means devised by the Legislature to serve a public purpose conform to the Constitution. And these cases project into the forefront of any judicial study of an attack upon a duly enacted statute both the strong presumption of validity and our solemn duty to resolve reasonably conflicting doubts in favor of conformity to our organic charter. [New Jersey Sports & Exposition Auth. v. McCrane, supra, 61 N.J. at 8.]

As will be discussed more fully in the remainder of this point heading, the Legislature has enacted the Fair Housing Act to create an administrative mechanism for addressing the constitutional goal. The Act provides a vehicle for consensual compliance with Mount Laurel, will avoid trials, and will result in the construction of housing for lower and moderate income persons rather than interminable litigation. Section 3. It is respectfully submitted that the court should defer to the choices made by the Legislature as to how the constitutional obligation should be met, and should, therefore, uphold the validity of the Fair Housing Act.

B. A SECTION-BY-SECTION ANALYSIS OF THE ACT.

In the remaining sections of this point heading, the State will set forth a detailed section-by-section analysis of the Act. This analysis is intended to provide assistance to the court in interpreting the Act and will also discuss the specific arguments made by plaintiffs regarding each challenged statutory provision.*

1. THE COUNCIL ON AFFORDABLE HOUSING; SECTIONS 5 AND 6.

As discussed above, the Fair Housing Act is designed to provide an administrative mechanism to resolve exclusionary zoning disputes in place of the judicial mechanism formulated by the Supreme Court in Mount Laurel II. Through this administrative mechanism, municipalities operating within state guidelines and with State oversight will be able to define and provide a reasona-

* The builder's remedy moratorium, Section 28, is addressed in Point I of this brief.

ble opportunity for the implementation of their Mount Laurel obligations. Sections 2(b), 3; see also Governor's Conditional Veto, April 26, 1985, at 1. To effectuate the constitutional goal, the Act establishes a voluntary system through which municipalities can submit plans for providing their fair share of low and moderate income housing to a State Council on Affordable Housing (Council) which, upon the petition of the municipality, would certify the plan if it satisfies the Council's requirements. Substantive certification would shift the burden of proof to the complaining party to show that the plan does not provide a realistic opportunity for the provision of the municipality's fair share. Governor's Conditional Veto, April 26, 1985, at 1.

Under the legislative compliance mechanism, the Council "shall have primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this State." Section 4(a). The Council, which has been established in, but not of, the Department of Community Affairs, consists of nine members appointed by the Governor* with the advice and consent of the Senate: four local officials (one of whom must be from an urban area and no more than one representing county interests); two representatives of households in need of low and moderate income housing (one of whom must be a builder of low and moderate income housing and one of whom shall be the executive director of the New Jersey Housing and Mortgage Finance Agency), and three persons representing the public interest. Section 5(a).

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* As of the present date, the Governor has nominated nine individuals to serve on the Council.

Section 5(d) states that the Governor shall "nominate" the members within 30 days of the Act's effective date, July 2, 1985. Plaintiffs complain that the members nominated by the Governor have not yet been confirmed by the Senate and, therefore, there is no Council in existence at this time which could receive resolutions of participation submitted by municipalities under Section 9. However, such resolutions may be filed with either the Department of Community Affairs or the New Jersey Housing and Mortgage Financing Agency until such time as the Council's membership is confirmed. The possibility of a delay in the appointing process was clearly anticipated in the Act. Both the Governor and the Legislature were concerned that, because of the time necessary for the Governor to make the nominations which the Senate would then have to confirm, the Council's time to perform its functions would be significantly eroded by the appointment process. See, e.g., Sections 7, 8; Governor's Conditional Veto, April 26, 1985, at 6-7. Thus, the time frames for action by the Council and the participating municipalities were set up to run from either the date the Council members are all confirmed or from January 1, 1986.* Therefore, no untoward delay in the process will occur due to the fact that Council members have not yet been confirmed since firm dates have been established by which time the Council and

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* For example, Section 7(a) requires the Council to determine housing regions of the State within seven months of the date of confirmation of the last member initially appointed to the Council or seven months from January 1, 1986, whichever is the earlier date. See Governor's Conditional Veto, April 26, 1975, at 6-7.

municipalities must act.*

Under Section 6(a) of the act, the Council may establish a plan of organization and may incur expenses within the limits of funds available to it.** The Council may also contract for the services of other professional, technical and operations personnel and consultants as may be necessary to assist it in the performance of its duties. Section 6(b). These organizational powers go a far way toward answering plaintiffs' arguments that the Council will be "too inexperienced" to deal with Mount Laurel issues, in comparison with the three Mount Laurel judges, who have dealt with such cases at least since January 20, 1983. Besides the fact that this argument is certainly not of a constitutional dimension, the argument ignores the fact that the Council will be comprised of individuals representing the very interests that are involved in Mount Laurel litigation, i.e., those of municipalities, builders, households in need of low and moderate income housing, and the public at large. Moreover, Section 6(b) permits the Council to quickly add to its expertise by contracting for professional and consulting services to assist it in meeting its obligations under the Act. In any case, the Council will not be operating in a void. Under Section 7(e), the Council must give appropriate weight to pertinent

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* Plaintiffs also complain that the Act provides no provision for what will occur, for example, if no members are confirmed to sit on the Council or if the Council does not perform its initial duties in a timely fashion. This argument is premature at this time. The court must presume that the Governor, the Senate and the Council will meet the statutory obligations imposed upon them in a reasonable fashion.

** The Council will receive a $1 million appropriation from the State's General Fund. Section 33.

research studies, government reports, decisions of other branches of government (which would include the written decisions rendered by the Mount Laurel judges after January 20, 1983), implementation of the State Development and Redevelopment Plan and public comment. These resources should enable the Council to fulfill its duties in a timely fashion as required by the Act. Clearly, plaintiffs' argument that the Council is "too inexperienced" to carry out its functions is without merit and should be rejected.

## 2. THE ROLE OF THE COUNCIL; SECTIONS 7 AND 8.

### a. THE COUNCIL'S PROCEDURAL REGULATIONS.

Pursuant to Section 8 of the Act, the Council must propose procedural rules within four months of the date the last member is confirmed or four months from January 1, 1986, whichever is the earlier date. These rules will become effective after they are made available for public comment in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. In arguing that the administrative process through which their cases will now pass is "uncertain" due to Legislature's failure to set forth detailed procedural rules for the Council's operations, plaintiffs have clearly overlooked Section 8 and, therefore, any questions regarding how the Council will administer the Act are clearly premature at this point.

### b. DETERMINATIONS TO BE MADE BY THE COUNCIL.

#### i. HOUSING REGIONS

Section 7 of the Act is the statutory provision which requires the Council to determine to which regions of the State the Mount Laurel obligation will apply, the need for low and moderate

income housing in these regions and throughout the State, and the municipalities' fair share of such housing. Section 7(a) requires the Council to determine housing regions of the State within seven months of the date the last Council member is confirmed or within seven months from January 1, 1986, whichever is earlier. "Housing region" is defined in Section 4(b) of the Act and means:

> ...a geographic area of no less than two nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas as last defined by the United States Census Bureau prior to the effective date of this act.

Plaintiffs complain that the "two to four" county limitation of Section 4(b) is "too restrictive." They contend that a housing region must be much larger to fairly reflect the needs of the housing market area of which the municipality forms a part. Thus, they assert that "[t]he arbitrary restriction of region to two or four counties will result in many improper fair share decisions by the Council." (See, Stonehedge Associates' Motion Brief, at 18). This contention is not ripe for disposition at this time since the State's housing regions have not yet been determined by the Council. Until this is accomplished, plaintiff's argument is merely speculative and should be rejected. Moreover, the argument clearly does not raise a constitutional question. In Mount Laurel II, the Supreme Court nowhere stated that a housing region, as a constitutional requirement, must be of a certain fixed size and make-up. Rather, the Court left this determination to the Mount Laurel judges and "the experts," envisioning that, over a

period of time, "a regional pattern for the entire state will be established...." 92 N.J. at 254, 256.

Here, the Legislature has chosen the Council to make this determination based upon the county standards set out in Section 4(b). Under the statewide plan established by the Legislature, which is based upon regional, rather than on single municipality-by-single municipality, considerations, the use of counties to define regional need is certainly not arbitrary. Clearly, the Court did not preclude the use of counties to determine regional need (92 N.J. at 349-350) and it just as clearly encouraged the Legislature to develop a statewide land use plan. 92 N.J. at 236.* It must be presumed that the Council will establish the "two to four" county regions in a manner consistent with achieving the constitutional goal. Therefore, plaintiffs' argument should be rejected.

Plaintiffs also contend that the housing region definition set forth in Section 4(b) is defective because it requires that the counties within a region "exhibit significant social economic and income similarities" which, they assert, will tend to preserve "exclusionary patterns." Again, however, this argument is not ripe for consideration since the Council has not yet determined

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* In this regard, it should be noted that, while the Supreme Court did not reject the use of a single county as a means of determining regional need, it did express reluctance in sanctioning the use of only one county for this purpose. 92 N.J. at 349. The Legislature, consistent with Mount Laurel II, has determined that housing regions must be made up of two to four counties. Indeed, the "two to four" county configuration chosen by the Legislature appears to have been taken from the Report filed by the Center for Urban Policy Research of Rutgers University.

housing regions. Moreover, the Legislature's determination is clearly a matter of choice as to how best to effectuate the Mount Laurel doctrine within the context of a statewide plan for development. 92 N.J. at 224-225. Thus, plaintiffs' contention should be rejected.

ii. OTHER DETERMINATIONS.

At the same time that it determines the housing regions of the State, the Council must also estimate the present and prospective need for low and moderate income housing at the State and regional level, and provide population and household projections for the State and housing regions. Sections 7(b), 7(d). These requirements are not specifically challenged by plaintiffs in these cases.

iii. THE COUNCIL'S CRITERIA AND GUIDELINES.

a. THE FAIR SHARE CREDIT.

Section 7(c)(1) of the Act requires the Council to adopt criteria and guidelines for a municipal determination of its present and prospective fair share of the housing need in a given region. Plaintiffs challenge this provision because they assert that it permits a municipality's fair share to be determined after "crediting on a one to one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households." Section 7(c)(1). Plaintiffs allege that this credit is impermissible since units constructed prior to the 1980 census

are already accounted for in the need projections and, therefore, will be counted twice.

Once again, this argument is not ripe for consideration at this time. Moreover, the 1980 census is not even mentioned in the Act. The Council will determine regional need for each of the housing regions pursuant to Section 7(b). Under Section 7(c)(1), the municipality must then determine its present and prospective fair share of the region's need for low and moderate income housing. In making this determination, the municipality must be able to count in its inventory of existing housing those units of low and moderate income housing which are currently available to meet this need. To achieve this goal, Section 10 of the Act requires the municipality to conduct an inventory of its housing stock by age, condition and occupancy characteristics and enables the municipality to inspect "all necessary property tax assessment records" to ensure that an accurate count is made. Thus, the credit referred to in Section 7(c)(1) is merely a recognition by the Legislature of the need to make an accurate count of current low and moderate income housing units already existing in a municipality so that the municipality will be correctly allocated only its fair share of any <u>additional</u> housing that may be needed in the region. Plaintiffs' fear that the credit will act to reduce the municipality's obligation is, therefore, without merit and should be rejected.

b. <u>CRITERIA FOR MUNICIPAL ADJUSTMENT OF FAIR SHARE.</u>

Section 7(c)(2) of the Act requires the Council to adopt criteria and guidelines, within the time frame set forth in Section

7, for municipal adjustment of fair share based upon a consideration of the factors set forth in Sections 7(c)(2)(a) through (2)(g). Plaintiffs challenge this provision, arguing that making adjustments based upon these considerations could dilute the constitutional requirement and make it impossible to achieve. Specifically, plaintiffs challenge Section 7(c)(2)(a) (requiring adjustment for the preservation of historically or important architecture or environmentally sensitive lands); Section 7(c)(2)(b) (requiring adjustment when the established pattern of development in the community will be drastically altered); Sections 7(c)(2)(c) and (d) (requiring adjustment for the provision of adequate land for recreational, conservation and farmland preservation purposes and for adequate open space), and Section 7(c)(2)(f) (requiring adjustment when adequate public facilities and infrastructure capacities are not available). Plaintiffs contend that allowing such adjustments may create means for municipalities to avoid, rather than to meet, their Mount Laurel obligations.

Again, this argument is speculative and not ripe for judicial consideration. At this time, the criteria and guidelines for adjustment have not been established by the Council and no adjustments have been made. Moreover, the adjustment of a municipality's fair share, based upon the factors set forth in Section 7(c)(2), are not inconsistent with Mount Laurel II, where the Supreme Court stated:

> We reassure all concerned that Mount Laurel is not designed to sweep away all land use restrictions or leave our open spaces and natural resources prey to speculators. Municipalities consisting largely of conservation, agricultural, or environmentally sensitive areas will not be required to grow because of

> Mount Laurel. No forests or small towns need be paved over and covered with high-rise apartments as a result of today's decision.
>
> As for those municipalities that may have to make adjustments in their lifestyles to provide for their fair share of low and moderate income housing, they should remember that they are not being required to provide more than their fair share. No one community need be concerned that it will be radically transformed by a deluge of low and moderate income developments. Nor should any community conclude that its residents will move to other suburbs as a result of this decision, for those "other suburbs" may very well be required to do their part to provide the same housing. Finally, once a community has satisfied its fair share obligation, the Mount Laurel doctrine will not restrict other measures, including large-lot and open area zoning, that would maintain its beauty and communal character. [92 N.J. at 219-220.]

The adjustments set forth in Section 7(c)(2), to be made in making these fair share determinations are not inconsistent with the reassurances of the Court. As under the judicial mechanism, conservation, agricultural and environmentally sensitive areas will be preserved as will town parks and recreational areas. The adjustment to be made when developmental patterns of a community will be "drastically altered" (Section 7(c)(2)(b)) will ensure that a municipality will not have to be "radically transformed" to meet its Mount Laurel obligation. 92 N.J. at 219, 259-260. All of these adjustments are also consistent with the comprehensive statewide development plan envisioned by the Act and, therefore, should be upheld. See Section 7(c)(2)(e); Governor's Conditional Veto, April 26, 1985, at 4-5.

c. LIMITATIONS ON A MUNICIPALITY'S FAIR SHARE.

Plaintiffs also challenge Section 7(e) of the Act, which permits the Council, in its discretion, to place a limit, based upon criteria to be developed, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing. Plaintiffs assert that this provision might enable the Council to permit municipalities to avoid their Mount Laurel obligation. However, this argument is clearly speculative. The provision is entirely discretionary and may never be utilized by the Council. Moreover, the criteria to be adopted by the Council may allay plaintiffs' fears that this portion of the Act will somehow dilute a municipality's Mount Laurel obligation. Finally, this section appears to represent nothing more than the Legislature's recognition that a municipality is only required to meet its fair share of the regional need, not more. This principle is entirely consistent with the Supreme Court's view. 92 N.J. at 219-220, 259-260. Therefore, plaintiffs' contentions on this point should be rejected.

3. THE ROLE OF THE MUNICIPALITY; SECTIONS 9 TO 12; 22, 23 TO 25, AND 27.

a. THE RESOLUTION OF PARTICIPATION.

Sections 9 through 12 and Sections 22, 23, 24, 25 and 27 of the Act set forth the actions which a municipality must take if it chooses to comply with, and obtain the benefits and protections of, the Fair Housing Act. Under Section 9(a), a municipality, which elects to come under the Act, must file a resolution of participation to notify the Council of its intent to later submit a

fair share housing plan. A resolution of participation is "a resolution adopted by a municipality in which the municipality chooses to prepare a fair share plan and housing element in accordance with [the Act]." Section 4(e). Within five months after the Council's adoption of its criteria and guidelines (under Section 7), the municipality must prepare and file a housing element and any fair share ordinance, properly introduced and implementing the housing element, with the Council.

Under Section 9(b), if a municipality does not file the resolution of participation within the initial four month period, it may still do so at any time thereafter. However, to encourage municipalities to voluntarily come under the administrative procedures established by the Act as quickly as possible, Section 9(b) provides that "there shall be no exhaustion of administrative remedy requirements pursuant to section 16 of [the Act] unless the municipality also files its fair share plan and housing element with the [Council] prior to the institution of the litigation." Thus, the Act provides municipalities with a strong incentive to bring themselves within the administrative mechanism at an early date in order to take advantage of the presumptions and benefits offered thereunder.

b. THE MUNICIPALITY'S HOUSING ELEMENT.

Pursuant to Section 10 of the Act, a municipality's housing element "shall be designed to achieve the goal of access to affordable housing needs, with particular attention to low and moderate income housing...." Thus, the ultimate standard, against which a municipality's housing element and land use ordinances will

be measured, is identical to the constitutional obligation established by the Supreme Court in Mount Laurel. At a minimum, the housing element must consider, for example, the municipality's current inventory of housing stock, Section 10(a); the municipality's demographic characteristics, Section 10(c); the existing and probable future employment characteristics of the municipality, Section 10(d), and the land most appropriate for the construction of low and moderate income housing, Section 10(f).

c. COMPLIANCE TECHNIQUES.

Section 11(a) of the Act sets forth the various techniques which a municipality must consider in order to enable it to provide a realistic opportunity for the provision of its fair share. The municipality must also demonstrate that its land use ordinances have been revised to incorporate provisions for low and moderate income housing. The techniques which a municipality must consider, in addition to other techniques published by the Council or proposed by the municipality subject to Council approval, include: rezoning for densities; "overzoning;" the use of disposition covenants; infrastructure expansion; donations of municipally owned lands; tax abatements, subsidies, and the use of municipal funds. Sections 11(a)(1) through (8). All of these compliance techniques were discussed and sanctioned by the Supreme Court in Mount Laurel II, 92 N.J. at 261-274, and evidence the Legislature's equal commitment to the use of affirmative measures to remove restrictive barriers to low and moderate income housing in order to provide the realistic opportunity for such housing required by the Constitution. 92 N.J. at 260-262.

i. RELATED STATUTORY PROVISIONS.

In related statutory provisions, the Legislature has taken further steps to assist municipalities in meeting their Mount Laurel obligations. Under Section 24, the New Jersey Mortgage and Housing Finance Agency ("the Agency"), Section 4(i), must establish procedures for entering into, and must enter into, contractual agreements with willing municipalities or developers of inclusionary developments whereby the Agency will administer resale controls and rent controls in municipalities where no appropriate agency exists. This section is entirely consistent with the Supreme Court's discussion of the importance of resale and rent controls in Mount Laurel II, 92 N.J. at 269-270, and will help to ensure that low and moderate income housing remains available for a reasonable period of time. See also Sections 11(a)(3); 12(e); 20(e); 21(f).

Under Section 25, a municipality is also authorized to purchase, lease or acquire by gift, real property which it determines necessary or useful for the construction or rehabilitation of low and moderate income housing or conversion to low and moderate income housing. This grant of authority enables the municipality to meet its fair share itself if it chooses to do so.

Section 11(d) of the Act provides that a municipality is not required to raise or expend municipal revenues in order to provide low and moderate income housing. The Public Advocate has argued, by distorting Section 11(d) beyond what the Legislature had intended, that this provision would enable a municipality to refuse to grant tax abatements to a developer since such tax abatements

could be construed as the "expending of municipal revenues." See Public Advocate's Motion Brief, at 38-40. This overbroad "construction" is clearly contrary to the plain language of Section 11. Sections 11(a)(4), (a)(5), (a)(6), (a)(7), and (a)(8) specifically require the municipality to consider plans for infrastructure expansion, donations or use of municipally-owned land, tax abatements, state or federal subsidies, and the utilization of municipally generated funds. In formulating its housing element, the municipality is not required to implement any one particular method of providing its fair share of the regional need. However, the "package" of compliance methods it selects must provide a realistic opportunity for the construction of low and moderate income housing. Section 11. Contrary to the Public Advocate's argument, the Council would be able to condition certification of a municipality's housing element upon the requirement that it utilize one, or more, of the affirmative measures set forth in Section 11, (including those which may impose a financial obligation on a municipality), in meeting its constitutional obligation. Mount Laurel II, 92 N.J. at 265. However, no Court has ever required a municipality to directly finance or actually construct low and moderate income housing units. This is all that Section 11(d), (which states that a municipality is not required "to raise or expend municipal revenues in order to provide low and moderate housing" (emphasis added)), is meant to reflect. Thus, Section 11(d) should be interpreted consistently with the other provisions of the Act and with Mount Laurel II to mean that the municipality need not directly finance the actual construction of the low and moderate income units. See Schierstead v. Brigantine, 29 N.J. 220, 230 (1959)

(statutes are to be read sensibly and the controlling legislative intent is to be presumed as consonant to reason and good discretion). Therefore, the Public Advocate's argument on this point should be rejected.*

d. "PHASING-IN" OF THE FAIR SHARE OBLIGATION.

Section 11(b) of the Act provides that a municipality may provide for a phasing schedule for the achievement of its fair share of low and moderate income housing. Section 23 sets forth the factors which must be considered before a phase-in of the fair share requirement is approved and provides guidelines for the time periods during which the fair share obligation must be met. Plaintiffs do not directly attack these provisions and this legislative compliance mechanism is clearly consistent with the judicial enforcement scheme created in Mount Laurel II. There, the Supreme Court expressly stated that a municipality may not always be required to fulfill its complete fair share obligation immediately but instead, under appropriate circumstances, a phase-in of such housing, over a period of years, would be permissible. 92 N.J. at 218-219. The criteria and guidelines set forth in Section 23 are clearly in keeping with the Supreme Court's hope that "phase-ins" would be carefully controlled. 92 N.J. at 219.

e. REGIONAL CONTRIBUTION AGREEMENTS.

Section 11(c) of the Act enables the municipality to propose that a portion of its fair share be met through a regional

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* It should be noted that, under Section 27, amounts expended by a municipality in preparing and implementing a housing element and

(Footnote Continued On Following Page)

contribution agreement. Section 12 sets forth the standards which must be met before such an agreement may be approved. Under this compliance method, a municipality may propose the transfer of up to 50% of its fair share to another municipality within its housing region by means of a contractual agreement into which the two municipalities voluntarily enter. Section 12(a). The agreement must specify how the receiving municipality will provide the housing and the amount of contributions to be made by the sending municipality. Regional planning agreements may only be approved by the Council, Section 12(c), or by a court (in matters in litigation as described in Section 12(b)), if the agreement provides a realistic opportunity for the provision of low and moderate income housing within the housing region and within convenient access to employment opportunities in accordance with sound comprehensive planning. The Council will receive the input of the county planning board of the receiving municipality in its review of proposed regional contribution agreements and will, if there is no county planning board, examine the master plan and zoning ordinances of both municipalities, the master plan of the county involved and the State development and redevelopment plan before rendering its decision. Section 12(c).

The Council will also closely monitor the contribution schedule and the Director of the Division of Local Government

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(Footnote Continued From Previous Page)

fair share plan are mandated expenditures that are exempt from the limitations on final appropriations imposed by N.J.S.A. 40A:4-45.1 et seq.

Services will ensure that the sending municipality sets aside adequate funds in its annual budgets to meet its schedule of contributions. Section 12(d). In addition, the Council will establish "a reasonable minimum number of units, not to exceed 100," which a receiving municipality may accept, Section 12(e), as well as guidelines for the duration and amount of contributions in regional contribution agreements. Section 12(f). Finally, under Section 12(g), the Council will require the receiving municipality to file annual reports setting forth its progress in implementing the project and may take such actions as may be necessary to enforce the agreement to ensure a timely implementation of the project.*

Plaintiffs allege that these provisions are unconstitutional because they would enable a municipality to transfer a portion of its fair share to another municipality. Plaintiffs are apparently concerned that such an agreement would permit the sending municipality to avoid meeting its full Mount Laurel obligation. (See Siegler Associates' Motion Brief, at 29-30). This argument should be rejected. As discussed previously, the mechanism which the Supreme Court formulated Mount Laurel II to effectuate the constitutional goal is not in itself of constitutional stature. In Mount Laurel II, the Supreme Court stated that fair share should be

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* Under Section 17(b), a presumption of validity will attach to any regional contribution agreement approved by the Council. This presumption can only be rebutted by clear and convincing evidence demonstrating that the approved agreement does not provide for a realistic opportunity for the provision of low and moderate income housing within the housing region. In addition, under Section 11(c), a municipality's housing element must demonstrate the manner in which that portion of its fair share, which it proposes to meet under a regional contribution agreement, will be met if an agreement is not consummated or approved by the Council.

determined for "growth areas." 92 N.J. at 236-237. The Legislature has adopted a different approach, not focusing on growth areas but rather on regional need, as part of a comprehensive state system of land use planning. In doing so, the Legislature expressly found that transfer agreements should be permitted to maximize the number of low and moderate income units by rehabilitating existing, but substandard, housing in the State. Section 2(f). The rehabilitation of such housing is a major goal of the legislative scheme, as is the need to provide housing throughout the State for the free mobility of citizens. Section 2(g). To ensure that regional contribution agreements help to ameliorate the housing problem, the Legislature has also established strict guidelines for the approval of transfer agreements, Section 12, and such transfers will not be approved unless they occur on the basis of sound comprehensive planning considerations, an adequate housing financing plan, and access of low and moderate income households to employment opportunities. Section 2(f). As discussed above, the questions of how a municipality should comply with its fair share obligation, and where such housing should be constructed, are clearly questions upon which "reasonable men might differ." New Jersey Sports & Exposition Authority v. McCrane, supra, 61 N.J. at 8. The Legislature's decision to answer these questions on a regional basis, rather than on strict "growth area" by "growth area" basis, is clearly reasonable and not subject to successful attack on constitutional grounds.

Moreover, the Supreme Court expressly envisioned that such transfer agreements, if carefully constructed and monitored, would become possible if changes in the zoning laws were made by

the Legislature. Thus, in Mount Laurel I, in discussing a "developing municipality's" obligation to meet its fair share of the present and prospective regional need for low and moderate income housing, the Court stated:

> Frequently it might be sounder to have more of such housing, like some specialized land uses, in one municipality in a region than in another, because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason. But, under present New Jersey legislation, zoning must be on an individual municipal basis, rather than regionally. So long as that situation persists under the present tax structure, or in the absence of some kind of binding agreement among all the municipalities of a region, we feel that every municipality therein must bear its fair share of the regional burden. [67 N.J. at 189; footnote omitted.]

Here, the Act specifically permits, for the first time, the "kind of binding agreements" between municipalities in a region which the Court in Mount Laurel I stated might be "sounder," in terms of comprehensive State and regional planning, than requiring each separate municipality to become a "microcosm" of housing need throughout the State. While not a tax, the contributions to be made by the sending municipality to the receiving municipality clearly constitute the means (lacking at the time of Mount Laurel I) necessary to make such regional planning a viable, and permissible, alternative to the judicial compliance scheme.

Not only is Section 12 consistent with the Supreme Court's analysis in Mount Laurel I, it is consistent with the Court's statements concerning this subject in Mount Laurel II, where the Court found that "zoning in accordance with regional planning is not only permissible, it is mandated . . . " 92 N.J.

at 238; (emphasis added). In response to plaintiffs' argument that the transfer agreement provision is unconstitutional, the State points to the Court's statement in Mount Laurel II, that "[t]he Constitution of the State of New Jersey does not require bad planning . . . There is nothing in our Constitution that says we cannot satisfy our constitutional obligation to provide lower income housing and, at the same time, plan the future of the state intelligently." 92 N.J. at 238. In enacting Sections 11(c) and 12, the Legislature has met the challenge, posed to it by the Supreme Court, of developing a comprehensive, statewide planning scheme. Its decision, to allocate fair share on a regional basis among the several municipalities, under closely-controlled circumstances, is based upon sound planning principles as recognized by the Supreme Court; acknowledges and attempts to meet the need to rehabilitate substandard housing in the State; and, at the same time, clearly adheres to and fulfills the constitutional goal of ensuring a realistic opportunity for the provision of low and moderate income housing in the housing regions. Plaintiffs' argument on this point, therefore, should be rejected.

f. REPOSE FOR MUNICIPALITIES UNDER SECTION 22.

In its brief opposing transfer to the Council, Stonehedge Associates alleges that Section 22 violates Mount Laurel II because it gives "absolute sanctity" to all settlements previously reached in exclusionary zoning litigation. Stonehedge brief at 23. Section 22 provides that:

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

> six year period following the effective date of this act.*

The argument does not specify whether the section is constitutionally infirm or whether it simply violates a non-constitutional aspect of the Supreme Court's holding. In fact, this section violates neither the constitution nor the decision when properly read to implement the legislative objective of assuring a "sound comprehensive planning and implementation response" to the recognized need to maximize the amount of low and moderate income housing provided in the State. Section 2(d).

The Supreme Court recognized in Mount Laurel II that municipalities which had completed the burdensome process of litigating an exclusionary zoning case and provided a realistic opportunity for a fair share of needed housing would need a sense of finality and relief from the threat of further such litigation. It also recognized that the ordinary rules of res judicata could not provide that relief because neither the precise issues nor the parties remained the same. Accordingly, the Court modified the doctrine of res judicata and fashioned a six year period of repose within which a municipality that had received a "judicial determination of compliance" could proceed with its normal planning process free from the threat of litigation. Mount Laurel II at

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* §22 is completed by the following provision:

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

291-292. That six year period mirrored the time provided in the Municipal Land Use Law after which a municipality must reexamine and amend its land use regulations. Id. at 291.

Section 22 of the Act protects that period of repose granted to municipalities by the Court. There is no indication that the Legislature intended to extend the repose beyond that contemplated by the Supreme Court. Section 22 must therefore be read to attach six years of repose to only those settlements which have been adjudged in compliance with the constitutional rights and obligations identified in Mount Laurel I. The Legislature itself declared that

> the statutory scheme set forth in this Act is in the public interest in that it comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court. [L. 1985, c. 222, §3.]

A provision in the statute that provided any settlement of an exclusionary zoning case, even one which did not provide low and moderate income housing, with six years of repose certainly would not be in the public interest as declared by the Legislature. The constitutional obligations of a municipality would not be satisfied by a settlement which did not include a reasonable estimate of the municipality's fair share and a realistic possibility that the obligation would be met. The Legislature would not have intended to give six years of repose to a municipality which had entered into a non-compliant settlement.

When construing a statute, it should not be "the words of the law, but the internal sense of it that makes the law."

Caputo v. The Best Foods, 17 N.J. 259, 264 (1955) quoting Eyston v. Studd, 2 Plowd. 459; Eng. Repr. 695 (1574). It would defy common sense to read Section 22 to afford repose to any settlement which had not been found by a court to be in compliance with the municipality's obligation. "Where a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter." N.J. Builders, Owners and Managers Assoc. v. Blair, 60 N.J. 330, 338 (1972). "The intention emerges from the spirit and policy of the statute rather than the literal sense of particular terms." Caputo v. The Best Foods, supra, at 264. The intention of the Legislature was clearly to protect the repose contemplated in Mount Laurel II.

Stonehedge raises the additional point that the Act provides absolute repose for municipalities which have settled cases while Mount Laurel II would permit additional litigation in the event of "substantial transformation of the municipality." Stonehedge brief at 23. The statute clearly provides absolute repose. The Supreme Court's position is not so clear. Even though the Court provided that compliance judgments would have res judicata effect for six years "despite changed circumstances," 92 N.J. at 291, it added in a latter footnote that "(a) substantial transformation of the municipality, however, may trigger a valid Mount Laurel claim before the six years have expired." 92 N.J. at 292, n.44. The threshold between "changed circumstances" and "substantial transformation" was not identified. Nevertheless, this conflict in the decision has been resolved by the Legislature. The six years of repose has become absolute. There is no constitution requirement that only a conditional repose attach. More-

over, it must be remembered that this argument is premature. No party in this action has sought repose pursuant to Section 22 of the Act.

4. COUNCIL REVIEW OF THE HOUSING ELEMENT; SECTIONS 13, 14, 15, 16, 17, 18 AND 19.

a. COUNCIL REVIEW WHEN NO OBJECTION IS FILED TO CERTIFICATION.

Section 13 of the Act permits a municipality which has filed a housing element with the Council to petition the Council for a substantive certification of its element and ordinances. Within 45 days of the publication of the notice of the municipality's petition, the Council must review the petition and issue a substantive certification if it finds (1) that the municipality's plan is consistent with its criteria "and not inconsistent with achievement of the low and moderate income housing needs of the region as adjusted" under Section 7; and (2) that "the combination of the elimination of unnecessary housing cost generating features from the municipality's 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." Sections 14(a) and (b).

In conducting its review, the Council may meet with the municipality. Section 14. If the Council determines that the element does not meet the requirements of Section 14(a) and (b), it may deny the petition or condition its certification upon timely changes in the element or ordinances. Section 14. The municipality is given 60 days after such denial or conditional approval to

refile its petition with changes satisfactory to the Council. If this is accomplished, the Council will issue a substantive certification to the municipality. Section 14. If the municipality fails to meet these conditions, its petition for substantive certification will be deemed to be denied. Once substantive certification is granted, the municipality must adopt its fair share housing ordinance as approved by the Council within 45 days. Section 14. Again, the failure of the municipality to adopt the approved fair share housing ordinance within this time period will constitute a denial of the municipality's petition.

The Act provides strong incentives to encourage voluntary compliance by municipalities. A substantive certification is extremely important to the municipality because if an exclusionary zoning case is filed against the certified municipality, a presumption of validity will attach to the certified housing element and ordinance implementing the housing element which can only be rebutted by clear and convincing evidence that the element and ordinance do not provide a realistic opportunity for the provision of the municipality's fair share. Section 17(a). Moreover, the Council will be a party to any such legal action and will present its reasons for granting substantive certification, which would obviously be entitled to great weight in the court's consideration of the element. Section 17(c). Furthermore, the receipt of substantive certification is a prerequisite for any municipality applying for loans or grants from the Neighborhood Preservation Program, Section 20(a), and other affordable housing programs

established by the New Jersey Mortgage and Housing Finance Agency. Section 21(a).*

b. COUNCIL REVIEW WHEN AN OBJECTION IS FILED TO CERTIFICATION; THE MEDIATION AND REVIEW PROCESS.

The foregoing discussion covered the situation where no interested party objects to the issuance of a substantive certification to the municipality. Once public notice of a petition for substantive certification is filed, however, interested parties would have a 45 day period in which to object to the issuance of a certificate to the municipality. Section 14. If such an objection is filed, the Council must engage in the mediation and review process set forth in the Act. Section 15(a)(1). This process is specifically designed to provide a means of resolving any such disputes through an administrative review process, rather than through litigation, the latter approach clearly being disfavored by both the Legislature, Sections 2(b) and 3, and the Supreme Court. Mount Laurel II, 92 N.J. 199-200. As under the judicial process, the administrative review process will proceed expeditiously and will conclude all questions involved in one proceeding, with a single appeal. 92 N.J. at 290.

In cases where an objection is filed to the municipality's petition for substantive certification as permitted under

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* However, Section 20(c) and Section 21(b) permit the Neighborhood Preservation Program and the New Jersey Mortgage and Housing Finance Agency, respectively, to provide financial assistance to affordable housing programs located in municipalities which have not received substantive certification during the first 12 months from the effective date of the Act and for any additional period the Council may approve.

Section 14, the Council must first meet with the municipality and the objectors and attempt to mediate a resolution of the dispute. Section 15(b). If the mediation is successful, the Council must issue a substantive certification to the municipality provided it finds that the municipality's housing element meets the criteria set forth in Section 14 of the Act. Section 15(b).

If mediation efforts are unsuccessful, the review process will begin and the matter must be transferred to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. Section 15(c). The OAL must expedite its normal hearing process as much as practicable and must assign an administrative law judge to the matter, who must promptly schedule, conduct and conclude an evidentiary hearing. Section 15(c). The administrative law judge must limit the time allotted for briefs, make proposed findings of fact, conclusions of law and promptly prepare an initial decision resolving the dispute. Ibid. Within 90 days of transmittal of the matter to the OAL, the initial decision, the transcript of the evidentiary hearing and copies of all exhibits introduced in evidence before the OAL must be filed with the Council. Section 15(c). The Council will then review the administrative record and issue a final decision determining whether a substantive certification should be issued to the municipality. Appeals may be taken from the Council's final decision to the Appellate Division of the Superior Court. Governor's Conditional Veto, April 26, 1985, at 7.

c. CHALLENGES TO A MUNICIPALITY'S LAND USE ORDINANCE FILED IN THE SUPERIOR COURT; COUNCIL REVIEW UNDER SECTION 16.

Section 16 of the Act sets forth the procedures which will be followed for cases in which a party has challenged the municipality's land use ordinances by instituting legal action in the Superior Court. For those exclusionary zoning cases initiated more than 60 days before the Act's effective date, Section 16(a) provides that 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 to not to transfer the case, the Court must consider whether the transfer would result in "a manifest injustice to any party to the litigation." Section 16(a). In applying this standard, a court should take notice of, and defer to, the fact that the Legislature, in Section 3 of the Act, has declared "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 [the Act] and not litigation . . . ." Thus, in keeping with the clear legislative intent, a court should transfer a Section 16(a) case to the Council unless it finds that such a transfer would result in a manifest injustice to any party in the litigation. Reading Section 16(a) to permit a court the discretion not to transfer a case even if it finds that no manifest injustice would result to any party, as several of the plaintiffs have attempted to do, would not comport with the clearly expressed will of the Legislature that, barring a finding of manifest injustice, the matter should be transferred to the Council. See AMN, Inc. v. So. Bruns. Tp. Rent Level Bd., 93 N.J. 518, 525 (1983) (A court's duty

in construing a statute is to determine the intent of the Legislature and implement it).

In a Section 16(a) case, 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 from the promulgation of the Council's guidelines and criteria pursuant to Section 7 of the Act, whichever occurs later, jurisdiction over the dispute shall revert to the court. Although Section 16(a) does not expressly state what will occur once the case is transferred to the Council, in view of the Act's purpose of providing an administrative mechanism for resolving fair share disputes, the request to transfer clearly should be interpreted as requiring that the municipality making the request is deemed to seek substantive certification of its housing element. Otherwise, there would be no reason for the transfer. See In re Loch Arbour, 25 N.J. 258, 262-263 (1957) (It is recognized as a fundamental principle of construction that a statute often speaks as plainly by inference as by express words. Matters which are clearly implied are considered an integral part of the enactment itself). Thus, the request for transfer should be interpreted to also constitute a petition for substantive certification filed as of the date the housing element is filed with the Council under the time limitations set forth in Section 16(a). The other parties to the litigation may then review the housing element. If no objection is filed within the 45-day period provided by Section 14(a), the element will be reviewed by the Council under Section 14 and a substantive certification will be issued if the criteria set forth in that provision are met. If an objection is filed, the mediation and review process of Section 15 of the Act

will be automatically invoked and the dispute will be resolved through the mediation and review process described earlier.

Section 16(b) of the Act covers situations where a party has instituted litigation less than 60 days before the effective date of the Act or after the effective date of the Act. For these cases, the person instituting the litigation must file a notice to request review and mediation with the Council pursuant to Sections 14 and 15 of the Act. If the municipality adopts a resolution of participation within four months of the Act's effective date (under Section 9(a)), or has filed a resolution of participation and a housing element and fair share plan prior to the institution of litigation (under Section 9(b) for municipality's which do not file a resolution of participation within the first four months of the Act), the review and mediation process set forth in Section 14 and 15 of the Act must be exhausted before the party would be entitled to a trial on his complaint. Section 16(b).

Section 16(b) presents statutory interpretation problems which should be resolved by reference to the legislative intent underlying the provision. While Section 16(b) requires the plaintiff to file a notice to request review and mediation with the Council, it does not expressly require the defendant (municipality) to file even a resolution of participation. If the municipality does not file a housing element and fair share plan and a petition for substantive certification of its housing element, there would be nothing for the Council to review and mediate. Therefore, to be consistent with the interpretation of Section 16(a) set forth above, and for the same reasons, Section 16(b) should be interpreted as requiring that the municipality file a housing element

and fair share plan and a petition for substantive certification. In re Loch Arbour, supra; see also Juzek v. Hackensack Water Co., 48 N.J. 302, 315 (1966). If the municipality fails to file a housing element within the required time periods (See Sections 9(a) and 9(b)), the obligation to exhaust administrative remedies should automatically expire. See Section 18. Also, as in the case of a Section 16(a) matter, the filing of the housing element should be interpreted to constitute a petition for substantive certification as of the date the housing element is filed with the Council. The Council, if an objection to certification is filed, would then begin its mediation and review process as described earlier.

Section 16(b) also does not specify how such a case should be treated by the trial court while administrative remedies are being exhausted under the Act. It would appear that the trial court would have two options: (1) to dismiss the case or (2) to transfer the case to the Council while retaining jurisdiction. See, e.g. Sections 18 and 19. Here, it is respectfully submitted that the court would have the discretion to invoke either option. R. 4:69-5. However, in keeping with the legislative intent underlying the Act and, in view of the express language of Section 16(b) which states that "the person shall exhaust the review and mediation process of the [Council] before being entitled to a trial on his complaint" (emphasis added), the court should not permit the case to proceed on a "dual track," i.e. proceed both in the court and before the Council. Because the clear purpose of the Act is to reduce the judicial role in favor of the resolution of exclusionary zoning cases through the Council's administrative procedures, the

court should await the conclusion of proceedings before the Council prior to proceeding further with the trial court litigation.

Contrary to the arguments of several of the plaintiffs, this interpretation does not infringe upon the prerogative writ jurisdiction of the court. See R. 4:69-5; Fischer v. Twp. of Bedminster, 5 N.J. 534 (1950). Such an argument might be available (although the outcome is by no means clear) if Section 16(b) were interpreted to absolutely require exhaustion of administrative remedies in all cases, thereby completely depriving the trial court of its jurisdiction. Fischer, supra, 5 N.J. at 541. However, the issue need not be addressed here, since Section 16(b) is more appropriately read as the expression of the Legislature's intent to provide an administrative procedure for the resolution of the dispute and its strong preference that such procedure should be exhausted before recourse is had to the courts. This interpretation is fully consonant with the principle of primary jurisdiction. Patrolman's Benev. Ass'n v. Montclair, 70 N.J. 130, 135 (1976); Woodside Homes, Inc. v. Morristown, 26 N.J. 529, 540-541 (1958).

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administra-

tive body for its view. [United States v. Western Pacific R.R. Co., 352 U.S. 59, 63-64, 77 S.Ct. 161, 164-65, 1 L.Ed.2d 126, 132 (1956), cited in Woodside Homes, Inc., supra, 26 N.J. at 541.]

Under the Act, the Council has been granted the "primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations of this State." Section 4(a). Therefore, under the doctrine of primary jurisdiction, the court should transfer a Section 16(b) case to the Council, or dismiss the case outright, to permit the Council to resolve the matter through its administrative procedures. This should be the general rule especially where, as should be the situation in Section 16(b) cases, the Council's administrative procedures will be invoked at the earliest stages of the dispute. See Boss v. Rockland Elec. Co. 95 N.J. 33, 40 (1983). A contrary construction of the Act, permitting both the court and the Council to concurrently resolve the dispute, could lead to inconsistent results and would frustrate the principal purpose of the Act. Cf. Bd. of Ed. Plainfield v. Plainfield Ed. Ass'n., 144 N.J. Super. 521, 525 (App. Div. 1977). Therefore, the court should defer its consideration of the matter until administrative remedies before the Council have been exhausted. Plainly, few cases in this category will present demonstrable "manifest injustice" justifying disregard of the administrative process. R. 4:69-5.

Plaintiffs also argue that the Supreme Court indicated in Mount Laurel II that the exhaustion of administrative remedies is not required in exclusionary zoning litigation and, therefore, parties should never be required to exhaust the Council's mediation

and review process before proceeding with their suits. In Mount Laurel II, the Supreme Court stated:

> We comment here on the defendants' claim that plaintiffs should have exhausted administrative remedies before bringing this suit. There is no such requirement in Mount Laurel litigation. If a party is alleging that a municipality has not met its Mount Laurel obligation a constitutional issue is presented that local administrative bodies have no authority to decide. Thus, it is certainly appropriate for a party claiming a Mount Laurel violation to bring its claim directly to court. [92 N.J. at 342, n. 73; citations omitted.]

Plaintiffs have clearly misread this section of Mount Laurel II. In this quotation, the Court was referring to local administrative bodies which clearly have never had, nor do they now have, jurisdiction to resolve constitutional disputes. Here, however, the Legislature has established a state administrative agency whose primary purpose is to provide for compliance with the Constitution. The fact that constitutional issues may be involved, therefore, is part and parcel of the new administrative mechanism and would not excuse the requirement placed upon the parties that they exhaust administrative remedies available before the Council prior to continuing their legal actions in a court. See Brunetti v. Borough of New Milford, 68 N.J. 576, 590 (1975); Woodside Home, Inc. v. Morristown, supra.

Plaintiffs have also challenged the mediation and review process on the ground that they believe it will cause unreasonable delays in the resolution of their law suits and possibly delay the construction of lower and moderate income housing. However, it must be pointed out that the Legislature took several affirmative steps to prevent municipalities or other parties from utilizing the

Council's mediation and review processes as a means for delay. Thus, consistent with the interpretation of Section 16 set out above, Section 18 of the Act provides that if a municipality which has adopted a resolution of participation pursuant to Section 9, fails to meet the deadline for submitting its housing element to the Council prior to the institution of exclusionary zoning litigation, the obligation to exhaust administrative remedies contained in Section 16(b) automatically expires. The obligation will also expire if the Council rejects the municipality's request for certification or conditions its certification upon changes which are not made within the time periods established by the Act and the Council. Section 18; see also Section 14. Furthermore, Section 19 provides that if the review and mediation process is not completed by the Council within six months of receipt of a request by a party who has instituted litigation, the party may file a motion with a court of competent jurisdiction to be relieved of the duty to exhaust administrative remedies.

Before leaving this point, it should be noted that the last sentence of Section 19 needs to be clarified. The last sentence of Section 19 provides that "[in] the case of review and mediation requests filed within nine months after this act takes effect, the six-month completion date shall not begin to run until nine months after this act takes effect." Thus, under Section 19(b), a party who has filed a mediation and review request could file a motion to be relieved of the duty to exhaust administrative remedies on October 2, 1986 (15 months after the Act's effective date). This sentence in Section 19 is inconsistent with the fact that, under Section 9(a), a municipality is not required to file

its housing element until five months after the Council's adoption of its criteria and guidelines and, pursuant to Sections 9(a) and 7, this date may fall as late as January 1, 1987. Therefore, the last sentence of Section 19, if applied literally, would defeat the purpose of the Act that a participating municipality's housing element should be considered through the Council's mediation and review process because the exhaustion of administrative remedies could be excused prior to the municipality even filing a housing element. The last sentence of Section 19, if it is to remain in the Act at all, should be interpreted to apply only in the event that the Council quickly adopts its criteria and guidelines and a municipality promptly files its housing element before April 2, 1986, six months prior to October 2, 1986. This would ensure that the Council would be given the full six-month period to complete its mediation and review prior to the October 2, 1986 expiration date set by the last sentence of Section 19. However, recognizing that the Council may not realistically be able to adopt its criteria and guidelines so promptly, it is respectfully submitted that, in keeping with the established statutory interpretive techniques which permit the deletion and disregard of language in a statute when justifiable to fulfill the legislative intent (see County of Monmouth v. Wissell, 68 N.J. 35, 43 (1975)), the last sentence of Section 19 should not be applied. See Section 32.

5. LOAN AND GRANT PROGRAMS; SECTIONS 20, 21 AND 33.

Plaintiffs do not challenge the portions of the Act which establish loan and grant programs, to be administered by the State, of which municipalities may take advantage if they choose to comply

with the Act. To promote administrative and economic efficiency, existing State agencies will establish programs to assist the municipalities to provide housing for low and moderate income households. Under Section 21 of the Act, the New Jersey Housing and Mortgage Finance Agency will set up a Mount Laurel housing program to help finance Mount Laurel housing projects. The Agency's programs will include assistance for home purchases and improvement through interest rate, down payment and closing cost assistance as well as capital buy downs; rental programs including loans or grants for projects with low and moderate income units; moderate rehabilitation of existing rental housing; congregate care and retirement facilities; and conversions, infrastructure assistance, and grants and loans to municipalities, housing sponsors and community organizations for innovative affordable housing programs. The Agency's program will be funded with a set aside of 25% of the Agency bond revenues, which is estimated to be $100 million, and a legislative appropriation of $15 million. Section 33.

Under Section 33 of the Act, $10 million has been appropriated to the Neighborhood Preservation Program. Governor's Conditional Veto, April 26, 1985, at 3-4. These funds will be used for rehabilitation, accessory conversions and conversions, acquisition and demolition costs, new construction, costs for technical and professional services associated with a project, assistance to qualified housings sponsors, infrastructure and other housing costs. Section 20.

These sections of the Act demonstrate, through the appropriation of new funds and through the refocusing of funds and programs previously in existence, that the Legislature is firmly

committed to the Mount Laurel goal. The programs established clearly will assist municipalities in providing a realistic opportunity for a fair share of their region's present and prospective needs for housing for low and moderate income families.

6. LEGISLATIVE REPORTING REQUIREMENTS; SECTION 26.

To further ensure that the constitutional goal is achieved, both the Council and the Agency must each report to the Governor and the Legislature annually on the effects of the Act in promoting the provision of low and moderate income housing in the several housing regions of the State. Section 26. The reports may also include recommendations for any revisions or changes in the Act which are believed to be necessary to more nearly effectuate this end. Ibid. Within 36 months of the Act's effective date, the Council must report to the Governor and the Legislature concerning any further actions necessary to be taken at the State, regional, county and municipal levels to provide for the implementation and administration of the Act on a regional basis, including any revisions or changes in the law necessary to accomplish that goal. Ibid. These requirements will help to ensure that the Council's criteria and processes do not remain static in the face of changes in the statewide planning process. Cf. Mount Laurel II, 92 N.J. at 241-243. The planning process must remain a continuing one so that the constitutional obligation is not frustrated by changed circumstances. Ibid. Section 26, therefore, will enable the Legislature to carefully monitor the Council's administrative process and to make changes in the Act when experience shows that such changes are necessary to effectuate the constitutional goal.

7. SEVERABILITY; SECTION 32.

Plaintiff Stonehedge Associates argues that, because the Fair Housing Act is designed to provide a "comprehensive planning and implementation response" to Mount Laurel II, if any of the Act's provisions are found to be unconstitutional, the entire Act must fall. See Stonehedge Associates' Brief, at 29-30. However, in making this contention, Stonehedge Associates has all but ignored the fact that the Act contains an express severability clause. Section 32 of the Act provides:

> If any part of this act shall be held invalid, the holding shall not affect the validity of remaining parts of this act. If a part of this act is held invalid in one or more of its applications, the act shall remain in effect in all valid applications that are severable from the invalid application.

The language of Section 32 is unambiguous and gives rise to a strong presumption that the Legislature did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether any particular provision of the Act was invalid. See, Inganamort v. Borough of Fort Lee, 72 N.J. 412, 422 (1977) (inclusion of a severability clause in a municipal ordinance creates a presumption that each section of the ordinance is severable); Brunetti v. Borough of New Milford, 68 N.J. 576, 600, n. 23 (1975) (the fact that an ordinance contains a severability or saving clause evinces an intent on the part of the municipality to make each provision of the ordinance severable); see also INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 2774, 77 L.Ed.2d 317, 332 (1983) (further inquiry of legislative intent concerning severability need not be undertaken where a severability clause is present in the statute). As set forth above, the Legislature has expressly

stated in Section 32 that if any part of the Act shall be held invalid, the remainder of the Act shall not be affected thereby. The Legislature's intent that the Act would survive a finding that one of its provisions was unconstitutional is further demonstrated by the fact that Section 32 specifically provides that if any application of the Act is found invalid, the Act shall remain in effect in all of its valid applications. Thus, even if in a particular factual situation, a court found that a provision of the Act would be unconstitutional if applied to a particular person or entity, the Legislature clearly intended that the provision should remain in effect as applied to other persons or circumstances.

Clearly, therefore, Stonehedge Associates' contention on this point should be rejected. By including Section 32 in the Act, the Legislature could not have more plainly authorized the presumption that each section of the Act is severable. Inganamort, supra; see also Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212, 231-232 (1985); Affiliated Distillers Brand Corp. v. Sills, 56 N.J. 251, 265 (1970). Stonehedge Associates has completely failed to demonstrate a contrary legislative intent and, therefore, it has failed to meet its heavy burden of overcoming this strong presumption. Moreover, as discussed in other sections of this brief, the Act is clearly constitutional and, therefore, Stonehedge Associates' contention need not even be considered.

## CONCLUSION

In summary, plaintiffs' constitutional attacks on the Fair Housing Act must fail. Like the judicial process established by the Supreme Court in Mount Laurel II, the Act's administrative mechanism is designed to effectuate the constitutional obligation that a municipality's zoning regulations provide a realistic opportunity for its fair share of the region's need for low and moderate income housing. This constitutional goal has not been abrogated or diluted in any way by the Act. That the Legislature has established an administrative, rather than a judicial, mechanism to achieve this goal does not violate nor even implicate the Constitution. The judicial scheme for achieving compliance established by the Supreme Court in Mount Laurel II is not constitutionally compelled and was implemented only because such a system was necessary in the absence of legislative action, which the Court repeatedly stated would be more appropriate. The Legislature responded to this challenge by enacting the Fair Housing Act. The Act will ensure that the constitutional obligation is met through the comprehensive, statewide land use planning mechanism set forth therein.

In addition, even when plaintiffs' specific contentions are examined, they are clearly without merit. Most of the arguments can not be resolved at this point because the issues attempted to be raised are not ripe for judicial review. Moreover, plaintiffs cannot, in their pursuit of a builder's remedy, claim a constitutional entitlement thereto. Accordingly, as has been demonstrated above, the administrative mechanism established by the Legislature is consistent with the Mount Laurel II decision and should be sustained in each and every respect.

For all of the foregoing reasons, the State respectfully urges the court to reject plaintiffs' constitutional challenge to the Act.

Respectfully submitted,

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APPENDIX

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

April 26, 1985

SENATE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 2046 AND SENATE BILL NO. 2334

To the Senate:

Pursuant to Article V, Section I, paragraph 14 of the Constitution, I herewith return Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334 with my recommendations for reconsideration.

This bill sets forth a "Fair Housing Act" which addresses the New Jersey Supreme Court 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). It is designed to provide an administrative mechanism to resolve exclusionary zoning disputes in place of protracted and expensive litigation. The expectation is that through these procedures, municipalities operating within State guidelines and with State oversight will be able to define and provide a reasonable opportunity for the implementation of their Mt. Laurel obligations.

To accomplish this the bill establishes a voluntary system through which municipalities can submit plans for providing their fair share of low and moderate income housing to a State Council on Affordable Housing which would certify the plan. This certification would give the plan a presumption of validity in court. The presumption would shift the burden of proof to the complaining party to show that the plan does not provide a realistic opportunity for the provision of the fair share before a builder's remedy could be instituted.

In addition, the bill would permit regional contribution agreements whereby a municipality could transfer up to one-third of its fair share to another municipality within the same region. The bill also provides for a phasing schedule giving municipalities a time period, in some cases more than 20 years, to provide for their fair share.

The bill establishes a Fair Housing Trust Fund to provide financial assistance for low and moderate income housing. The Fund would be financed with a $25 million appropriation from the General Fund and with realty transfer tax revenues. This bill is tied to Assembly Bill No. 3117 which would increase the realty transfer tax revenues and places the State's portion of the realty transfer tax revenues in the Fair Housing Trust Fund account. The two bills are linked together through an effective date provision in Senate Bill No. 2046

which provides that Senate Bill No. 2046 will remain inoperative until Assembly Bill No. 3117 is enacted.

The bill also places a 12-month moratorium on the implementation of judgments imposing a builder's remedy. The Attorney General is required to seek a determination of the constitutionality of this provision in a declaratory judgment action to be filed within 30 days from the effective date of the act. If the action is not brought within that time frame, the moratorium expires. In addition, the bill contains a severability clause providing that if one portion of the act is found invalid, the remaining severable portions shall remain in effect.

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. While I am in accord with the basic approach set forth in this bill, I am compelled to return it for necessary amendments.

It is essential that the temporary moratorium on the builder's remedy be constitutionally sustainable in order to enable municipalities to take advantage of the procedures in this bill. The builder's remedy is disruptive to development and planning in a municipality. A moratorium for the planning period in this bill is needed. Unfortunately, the moratorium proposed by this bill would affect court judgments which have already been entered. This may represent an unconstitutional intrusion into the Judiciary's powers. I question whether the Legislature can, in effect, undo a court judgment in this way. Accordingly, I am recommending an amendment to make this moratorium prospective only by directing the courts not to impose a builder's remedy during the moratorium period in any case in which a final judgment providing for a builder's remedy has not been entered. I recommend that the moratorium commence on the effective date of this act and expire at the end of the time period in which municipalities have to file their housing element pursuant to section 9.a., a period of 12 months from the date the Council is confirmed.

I am also deleting the provision requiring the Attorney General to seek a declaratory judgment on the constitutionality of the moratorium. This provision suggests that the Legislature has some question about the constitutionality of

this provision. The change I have suggested should remove that uncertainty. In addition, a provision such as this is peculiar, since the Legislature should not be enacting laws which it believes might be unconstitutional.

In place of the Fair Housing Trust Fund and its $25 million appropriation from this bill, I propose at this time to work with existing programs, namely the New Jersey Housing and Mortgage Finance agency and the Neighborhood Preservation Program in the Department of Community Affairs. Until the Council is in operation and municipalities start receiving substantive certification and entering into regional contribution agreements, it is difficult to evaluate new funding programs. Accordingly, rather than set up a new housing funding mechanism, I believe it would be more administratively and economically efficient to work with existing State programs to provide housing for low and moderate income households. I propose to fund this Mt. Laurel housing program with $100 million of bond funds, and a total of $25 million from the General Fund.

The New Jersey Housing and Mortgage Finance Agency will set up a Mt. Laurel housing program to help finance Mt. Laurel housing projects. The Agency's programs will include assistance for home purchases and improvement through interest rate, down payment and closing cost assistance as well as capital buy downs; rental programs including loans or grants for projects with low and moderate income units; moderate rehabilitation of existing rental housing; congregate care and retirement facilities; conversions, infrastructure assistance, and grants and loans to municipalities, housing sponsors and community organizations for innovative affordable housing programs.

The Agency's program will be funded with a set aside of 25% of the Agency bond revenues; the set aside is estimated to be $100 million per year. I am also recommending a State appropriation of $15 million to the New Jersey Housing and Mortgage Finance Agency for its Mt. Laurel housing program.

The Neighborhood Preservation Program would be appropriated in total approximately $10 million to assist municipalities in Mt. Laurel housing programs. I propose to dedicate the increase in the Realty Transfer Tax proposed by the companion bill, A-3117, to the Neighborhood Preservation Program. An outright appropriation of $2 million from the General Fund is intended to bring the total to $10 million.

These funds would be used in neighborhood preservation areas for such things as rehabilitation, accessory conversions and conversions, acquisition and demolition costs, new construction, costs for technical and professional services associated with a project, assistance to qualified housing sponsors, infrastructure and other housing costs.

In addition, assistance would be limited to housing in municipalities with substantive certification of their housing elements or housing subject to a regional contribution agreement. However, in order that programs can get underway immediately, an interim provision is inserted to enable the funds to be used for Mt. Laurel housing before these determinations are made for a 12-month period following the effective date with the Council having the power to extend this time frame.

The amendments I have proposed for funding low and moderate income housing far exceeds the amounts appropriated in the original bill while utilizing existing State programs and agencies.

One key element in determining a municipality's "fair share" of low and moderate income housing is the estimate of "prospective need" in the region and municipality. This bill requires the Council to estimate the prospective need for the State and regions and to adopt criteria and guidelines for municipal determination of prospective need. When preparing its housing element, a municipality must determine its fair share of prospective and present need. Its housing element must provide a realistic opportunity for the provision of this fair share. Despite its importance, nowhere in the bill is a definition of "prospective need" provided. Accordingly, I am inserting such a definition which is designed to help assure that the prospective need numbers are realistic and not based on theoretical or speculative formulas.

The bill currently permits a municipality's fair share figure to be adjusted based upon "available vacant and developable land, infrastructure considerations or environmental or historic preservation factors." I would like to strengthen this language to assure that adjustments are provided in order to preserve historically or important architecture and sites or environmentally sensitive lands and to assure that there is adequate land for recreational, conservation, or agricultural and farmland preservation purposes and

open space. In addition, adjustments should be provided where there is inadequate infrastructure capacity and where the established pattern of development in the community would be drastically altered, or the pattern of development is contrary to the planning designations in the State Development and Redevelopment Plan prepared pursuant to P.L. c. (now pending before the Legislature as S-1464 of 1984).

As an additional check on excessive fair share numbers which would radically change the character of a community, I propose to authorize the council, in its discretion, to place a limit on a municipality's fair share. The limit would be based on a percentage of the municipality's housing units and any other relevant criteria, such as employment opportunities, selected by the council.

Another key element in determining a municipality's "fair share" of low and moderate income housing is an estimate of the condition of existing housing stock to determine the amount of substandard housing throughout the State. In order to achieve an accurate determination of the present and prospective housing needs of all the regions in the State, a thorough housing inventory should be performed by every municipality in the State. To require housing elements which include accurate housing inventories from only municipalities in growth areas, is to obtain only a limited picture of New Jersey's true housing needs. I am therefore recommending an amendment to the Municipal Land Use Law to require municipalities to prepare a thorough and accurate housing inventory as part of the housing element in their master plan.

The current Municipal Land Use Law requires municipalities to prepare master plans which may contain a housing element. I am recommending that the Municipal Land Use Law be amended to incorporate the housing element prepared under this statute. In this way, the housing element under the Municipal Land Use Law will be identical to the housing element prepared pursuant to this act. In addition, the Municipal Land Use Law requires that a municipality have a land use element in its master plan in order to have a valid zoning ordinance. I am adding to this requirement that the municipality have a housing element. In this way, every municipality in order to have a valid zoning ordinance would have to put together a housing element as defined in this act.

To assist municipalities in obtaining numbers that are realistic, I also suggest that language be inserted in the bill to enable the municipality when conducting its housing inventory to have access on a confidential basis to the local assessor's records. I am advised that statutory authorization is needed for this.

I am also recommending that certain language changes be made in the findings section of the bill. We should state that rehabilitation of existing housing stock in the urban centers must be encouraged. I also believe we should note that the Mt. Laurel obligation is limited to changes in land use regulations and clarify that municipalities need not expend their resources for Mt. Laurel housing.

The membership on the Council on Affordable Housing consists of four local officials (one of whom must be from an urban area and no more than one representing county interests), three representatives of households in need of low and moderate income housing (one of whom shall be a builder of low and moderate income housing) and two representing the public interest.

In order to have adequate representation of the public interest, I recommend that three members represent the public interest and two the needs of low and moderate income households. I also suggest that the executive director of the New Jersey Housing and Mortgage Finance Agency hold one of the positions in the latter category, due to the expertise of that Agency in low and moderate income housing finances and the numerous responsibilities the Agency is given in this bill.

The Council is required to adopt rules and regulations within four months from the bill's effective date. In addition, within seven months from the bill's effective date, the Council must: (a) determine the State's housing regions, (b) establish the present and prospective need estimates for the State and the regions, (c) adopt guidelines and criteria for municipal fair share determinations, adjustments to fair share and phasing, and (d) provide population and household projections. However, the Council cannot begin its work until its membership is confirmed. Since I am given 30 days to make the nominations and the Senate must thereafter confirm the nominations, the Council's time to perform these functions will be significantly eroded by the appointment

process. Accordingly, I am proposing amendments to provide that these time periods run from the date the Council members are confirmed or January 1, 1986, whichever is earlier.

With respect to pending litigation, the bill permits a party in current litigation to request the court to transfer the case to the Council on Affordable Housing for mediation procedures. When reviewing such a request, the courts must consider whether or not the transfer would result in a manifest injustice to one of the litigants.

The bill as currently drafted creates a novel mediation and review process and specifically provides that the review process should not be considered a contested case under the Administrative Procedure Act, subject to the procedures of that act and a hearing by an administrative law judge. If mediation and review by the housing council is unsuccessful, the matter will be heard in the trial court of the Superior Court.

I recommend, in place of the special procedures set forth in this bill, the regular administrative law procedure. Under this approach, if the mediation by the council is unsuccessful, the dispute will be transferred to the Office of Administrative Law as a contested case for a hearing pursuant to its rules. The ultimate decision will be made by the council and appeals will be taken from the council's decision to the Appellate Division of the Superior Court.

If a municipality receives substantive certification, its housing elements and ordinances are presumed valid. I am concerned that after going through the administrative process in this bill and receiving substantive certification, a municipality still may not have sufficient protection from a builder's remedy. I am therefore recommending that the presumption of validity be buttressed by an amendment providing that it may only be rebutted with "clear and convincing" evidence.

Senate Bill No. 2334 originally provided that a municipality could transfer up to one-half of its fair share to another municipality. In order to provide municipalities with more flexibility in their preparation of regional contribution agreements, I recommend that the one-third figure be returned to the original one-half number previously recommended by Senator Lynch, the sponsor of Senate Bill No. 2334.

In addition, I recommend that a municipality which has reached a settlement in Mt. Laurel litigation be granted a period of repose from further litigation and be deemed to have a substantively certified housing element. This period of repose will run six years from the bill's effective date.

I recommend the deletion of the provision in this bill which allows a municipality to employ condemnation powers to acquire property for the construction and rehabilitation of low and moderate income housing. I question the authorization of such a drastic power without some evidence of its necessity in resolving our State's housing needs.

The Senate Committee Substitute as originally drafted required the Council to report to the Governor and the Legislature in the implementation of this act within two years from its effective date. The Assembly amendments place this reporting requirement upon the New Jersey Housing and Mortgage Finance Agency rather than the Council. I recommend having both the Council and Agency report to the Governor and Legislature on an annual basis.

Accordingly, I herewith return Senate Committee Substitute for Senate Bill No. 2046 and Senate Bill No. 2334 and recommend that it be amended as follows:

Page 1, Title, Line 1: After "housing," omit "and"; after "appropriation" insert "and amending the Municipal Land Use Law, P.L. 1975, c. 291 (C. 40:55D-1 et seq.)"

Page 1, Section 2, Line 6: After "provide" insert "through its land use regulations"

Page 2, Section 2, after Line 43: Insert new subsections as follows:

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

h. The Supreme Court of New Jersey in its Mount Laurel decision demands that municipal land use regulations affirmatively afford a reasonable opportunity for a variety and choice of housing including low and moderate cost housing, to meet the needs of people desiring to live there. While provision for the actual construction of that housing by municipalities is not required, they are encouraged but not mandated to expend their own resources to help provide low and moderate income housing."

Page 3, Section 4, After Line 43: Insert new subsection as follows:

"j. 'Prospective Need' means a projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality, as the case may be, as a result of actual determination of public and private entities. In determining prospective need consideration shall be given to approvals of development application, real property transfers and economic projections prepared by the State Planning Commission established by P.L. c. (now pending before the Legislature as S-1464 of 1984)."