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Brief of Defendant, Twp of Tewksbury, in support of motion for transfer to the COAH.

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ROBERT E. RIVELL,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	HUNTERDON COUNTY/
	:	MIDDLESEX COUNTY
vs.	:	MOUNT LAUREL
	:	
TOWNSHIP OF TEWKSBURY,	:	DOCKET NO. L-040993-84PW
a municipal corporation located	:	
in Hunterdon County, New Jersey	:	CIVIL ACTION
	:	
Defendant,	:	

BRIEF OF DEFENDANT, TOWNSHIP OF TEWKSBURY, IN SUPPORT OF MOTION FOR TRANSFER TO THE COUNCIL ON AFFORDABLE HOUSING

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PROCEDURAL HISTORY

On June 19, 1984, Plaintiff, Robert E. Rivell, filed a Complaint in Lieu of Prerogative Writs pursuant to Mt. Laurel II (So. Burlington County NAACP v. Mt. Laurel Twp., 92 N.J. 158 [1983]), against Defendant, Township of Tewksbury. Thereafter, Defendant filed its answer and discovery in the matter commenced. Neither party has as yet filed a trial brief, the case has not yet been tried, and no issues in the case have been adjudicated.

The Fair Housing Act (P.L. 1985, c.222) was signed into law by Governor Kean on July 2, 1985. Pursuant to this Act, the Legislature has provided a means for the resolution of existing and future disputes concerning exclusionary zoning, and has provided a new forum, the Council on Affordable Housing, to determine municipal compliance with the mandate of Mt. Laurel II. The Act provides a mechanism by which existing Mt. Laurel II litigation may be transferred to the administrative body which has been created by the Legislature to handle Mt. Laurel II matters. Defendant requests that this matter be transferred to the Council on Affordable Housing for mediation and review of its housing element and for the determination of any and all issues which are within the jurisdiction of the Council.

LEGAL ARGUMENT

POINT I

THE MOUNT LAUREL II DECISION WAS INTENDED TO PROVIDE AN INTERIM REMEDY UNTIL SUCH TIME AS THE LEGISLATURE ACTED

The power to enact general laws concerning zoning and to control the use of land was granted to the Legislature by the New Jersey Constitution of 1947:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.

Art. 4, §6, ¶2.

The Mt. Laurel II decision recognized the constitutional authority of the Legislature in matters relating to zoning and the use of land and justified the expanded role of the Judiciary in this area only because the Legislature had failed to act:

> [A] brief reminder of the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is best left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interest 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.

So. Burlington County N.A.A.C.P. v. Mt. Laurel Twp., 92 N.J. 158,212 (1983).

On July 2, 1985, Governor Thomas Kean signed The Fair Housing Act into law which provides a comprehensive plan to assure affordable housing in a manner approved by the elected representatives of the citizens of New Jersey. The Fair Housing Act is the Legislature's response to the Mt. Laurel II decision. The Supreme Court recognized that were this to happen, the judicial role "could decrease as a result of [such] legislative and executive action." Id. at 213. The time has now come to implement the Legislature's plan.

The Legislature has established the Council on Affordable Housing "which shall have primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this State." P.L. 1985, c.222, §4(f). Because the Supreme Court and the Legislature are in agreement that implementation of the Mt. Laurel mandate is properly the province of the Legislature, it is only appropriate that this case be transferred to the Council according to the procedures established by the Legislature.

POINT II

THE LEGISLATURE CLEARLY INTENDED THAT THE FAIR HOUSING ACT REPLACE THE INTERIM MEASURES PROVIDED BY MOUNT LAUREL II.

The Fair Housing Act was intended to replace the judicially-created system of upholding the Mt. Laurel obligation, except in the most limited circumstances, as evidenced by the legislative findings and declarations in the preamble to the Act and by the statutory scheme itself. In its findings, the Legislature noted that:

> The State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this Act and not litigation, and 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 added).

P.L. 1985, c.222, §2(g)(3). This language clearly evidences an intent on the part of the Legislature to replace the judicial forum presently deciding Mt. Laurel issues with a new process for the mediation and review of present and future disputes arising under Mt. Laurel I and II.

Pursuant to this intention, the Act contains express provisions for transferring ongoing litigation to the jurisdiction of the Council on Affordable Housing. P.L. 1985, c.222, §16(a). The instant case, one in which no issues have yet been adjudicated, should therefore be transferred in

accordance with the Legislature's directives. Although the judicial role in these cases has not been eliminated, the judiciary no longer has primary jurisdiction over Mt. Laurel claims. The proper forum for resolution of the present case is now the Council on Affordable Housing, and the Defendant requests that its case be so transferred.

POINT III

TRANSFER TO THE COUNCIL ON AFFORDABLE HOUSING IS APPROPRIATE IN THE INSTANT CASE

SUBPOINT A: Transfer to the Council on Affordable Housing is mandatory unless it is clearly shown that there will result a manifest injustice to a party.

The Fair Housing Act provides that "For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, any party to the litigation may file a motion with the court to seek a transfer of the case to the Council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation." P.L. 1985, c.222, §16(a). The motion for transfer to the Council on Affordable Housing must be granted unless such transfer would result in a manifest injustice to any party. The standard the court is to apply here is that enunciated by R. 4:69-5. This Rule specifically provides that an action in lieu of a Prerogative Writ is not maintainable so long as an avenue of administrative review exists. The Rule acknowledges the sound and firmly established policy of judicial deference to administrative bodies having jurisdiction over a matter and having expertise in the field. This and other rules thus require the exhaustion of administrative remedies unless the interests of justice manifestly require otherwise.

In Central R.R. Co. v. Neeld, 26 N.J. 172 (1958), cert. den. 357 U.S. 928 (1958), the New Jersey Supreme Court ruled that R.R. 4:88-14 (the source rule of R. 4:69-5) must be applied to dismiss an action pending in the courts "unless there is a manifest showing that the interests of justice require otherwise." At 181. In enacting the Fair Housing Act, the Legislature envisioned that, even as to pending cases, the Council on Affordable Housing was the most appropriate primary forum. Only where the transfer would result in manifest injustice to one party might the transfer be denied.

The requirement of administrative exhaustion set forth in R. 4:69-5, and in the Fair Housing Act's provision regarding transfer, serves several purposes.

> [T]he rule ensures that claims will be heard, as a preliminary matter, by the body having expertise in the area. This is particularly important where the ultimate decision rests upon factual determination lying within the expertise of the agency or where agency interpretations of relevant statutes or regulations are desirable.

Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 386 (1979). Even the presence of constitutional implications in the issues presented does not suffice to abrogate the exhaustion requirement. Id. at 387.

The New Jersey courts are familiar with situations where, after exercising jurisdiction over a matter, they must, pursuant to the doctrine of primary jurisdiction, refer factual issues to an administrative body for its review. See Boss v. Rockland Electric Co., 95 N.J. 33 (1983). In Boss, property owners

sought to enjoin an electric utility's proposed selective tree removal program on an easement. Although the trial court had carefully considered the Bureau of Public Utilities regulations affecting right-of-way maintenance, had made factual findings, and had even walked the terrain over which the easement extended, our Supreme Court determined that the necessary factual findings should have been made by the Bureau of Public Utilities and remanded the case to the trial court for referral of the factual issues to that agency.

There has been no resolution of any factual issues in the case sub judice. The argument in favor of transfer to the Council on Affordable Housing is far more compelling here than in Boss where, even though the trial court had already made the factual findings, the Supreme Court remanded the matter for referral to the administrative agency with primary jurisdiction. In the present case, there would be no duplication of fact finding effort at all since the Court has not yet made any factual findings. The instant motion for transfer to the Council on Affordable Housing must be granted unless it is clearly shown the transfer would result in a manifest injustice to any party. Defendant, Township of Tewksbury, submits that no manifest injustice would result from the transfer and that compelling reasons in favor of the transfer exist.

SUBPOINT B: Compelling reasons exist why Defendant's request for transfer to the Council should be granted.

There are compelling reasons why the Defendant should be permitted to have this case transferred to, and to obtain a substantive certification from, the Council on Affordable Housing.

The Council has been set up to provide a long term solution to the concerns expressed in Mt. Laurel II. Defendant should be be permitted to prepare its housing element and submit its fair share housing ordinance implementing its housing element in accordance with the criteria and guidelines promulgated by the Council pursuant to Sec. 7(c) of the Act. Transfer to the Council would ensure that the Defendant would have the benefit of those criteria and guidelines.

The Council is also empowered to determine the housing regions of the State. Defendant should have its fair share of regional need determined by reference to the regions established by the Council. The establishment of housing regions and the determination of present and prospective need for low and moderate income housing at the State and regional level is in the best interests of not only Defendant but of all residents and municipalities in this State. Only in this way can the public interest be served without the evils attendant upon

unplanned growth. See Mt. Laurel II at 236. Allowing the present litigation to proceed to trial deprives Defendant and the public of the benefits of planned growth and consistent determination of fair share obligation, and of measures to implement that obligation, in accordance with State and regional needs as determined by the Council on Affordable Housing. These sound policy reasons favor transfer.

Furthermore, transfer to the Council could have substantial economic benefits for the parties. First, the Act empowers the Council to employ such personnel as it deems necessary and to contract for the services of other professional, technical and operational personnel and consultants as may be necessary. §6(c). The Legislature has provided funds for this purpose. The judicial budget does not provide for the payment of planners and other expert witnesses and, if transfer is not permitted, these expenses would have to be borne all by the parties. If the parties are permitted to utilize the expertise of the Council, in lieu of testimony before the Court, substantial savings could be realized.

Additionally, the Act and its companion legislation has provided various funding mechanisms whereby Defendant could receive financial help toward meeting its Mt. Laurel obligations. Transfer to the Council and obtaining a substantive certification under the Act will permit Defendant to develop and implement a comprehensive plan to provide for its entire Mt. Laurel need, using funding mechanisms provided pursuant to the Fair Housing Act, and without density bonuses

and the resultant increase in building of market units in a community without water and sewer systems.

The Act also provides a mechanism for regional tranfer of a municipality's fair share to another municipality within its housing region. Defendant, Township of Tewksbury, which lacks sufficient infrastructure to support growth in sufficient density to provide large amounts of low and moderate income housing through means of density bonuses, should be permitted to pursue a regional transfer. However, although the Act provides a mechanism by which a Defendant in an exclusionary zoning suit may petition to the court for approval of a transfer plan, §12(b), the Act requires the Council to review the plan not the Court. Defendant would be required to forego this newly created avenue of compliance if the Court precluded Defendant from the transfer and proceeded now to adjudicate the many issues of the case.

Transfer to the Council would ensure that parties to this litigation and the public at large would be given the benefit of the comprehensive planning, and funding mechanisms, which the Council will be able to provide to municipalities receiving Council approval for their plans. Defendant, in addition to resolving the issues in this case, must plan wisely for the future. The Council on Affordable Housing as envisioned and structured by the Fair Housing Act provides the most suitable forum for resolving the present litigation in the public good.

SUBPOINT C: The transfer would not result in manifest injustice to Plaintiff

The Legislature intended to have pending Mt. Laurel cases, as argued below, tranferred to the Council, unless the trial court found that the transfer would result in "a manifest injustice" to any party to the litigation. The policy considerations on which this legislative provision are based are enunciated in Brunetti v. Borough of New Milford, 68 N.J. 576 (1975):

> This Court has recognized that the exhaustion of remedies requirement is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts. Ward v. Keenan, supra, 3 N.J. at 302. Therefore, while it is neither a jurisdictional nor an absolute requirement, there is nonetheless a strong presumption favoring the requirement of exhaustion of remedies.

68 N.J. 576, 588.

This policy of exhaustion of administrative remedies "will be adhered to except when the question is solely one of law raising an important question of statutory construction." N.J. Optometric Assoc. v. Hillman-Kohan, 160 N.J. Super. 81, 88 (App. Div. 1978).

The exceptions to this policy are most limited. The exhaustion will not be required only where:

> ...administrative review would be futile, where there is a need for a prompt decision in the

> public interest, where the issues do not involve administrative expertise or discretion and only a question of law is involved and where irreparable harm will otherwise result from denial of immediate judicial relief.

Brunetti, supra at 589.

This is certainly not a case where administrative review will be futile; the Council has been established specifically to provide the expertise necessary in an area which our Supreme Court said solely needed a legislative and administrative response rather than a judicial one.

While the provision of low and moderate income housing does involve the public interest, this is true throughout the State. The obligation of Mt. Laurel is state-wide, applying in communities where no litigation is yet pending as well as in those where it is. If the Court were to entertain the notion that this generalized type of public interest justified not transferring a case, then no case would be transferred to the Council and the whole legislative response to the problem would be frustrated.

The issues involved in the instant case do not involve substantial questions of law but rather questions of fact.

Lastly, there is no irreparable harm to Plaintiff which would otherwise result from the denial of immediate judicial relief. It could hardly be expected, even if the Court retained this case, that there would result any immediate judicial relief to Plaintiff. A trial would necessarily be lengthy, and even if Plaintiff prevailed, would be followed by extensive and lengthy

proceedings after the initial trial.

The Fair Housing Act imposes reasonable time limits for establishing the Council. Also, the Act provides funds for the hiring of a full-time staff. The manpower of the agency when formed should surpass the limited resources of the judiciary. The information which must be submitted to the Council, such as the municipality's housing element and the any objections thereto and supporting reports and materials of Plaintiff, would be the same as each party is presently preparing to supply to this court at trial. No additional expense will be incurred, and the cost of mediation and review may be expected to be less than the cost of a protracted trial in the Superior Court, with the possibility for further expense, even if the Plaintiff should prevail, for a Master and the time involved resolving the litigation even after an initial trial. The Legislature has further provided for an expedited procedure before the Office of Administrative Law if mediation and review fail. Fair Housing Act §15(c).

Furthermore, in the present case, Plaintiff's property is not located within the growth zone as shown by the State Development Guide Plan and Defendant had passed a Mt. Laurel ordinance before the suit was commenced. Plaintiff's entitlement to a builder's remedy is speculative. Moreover, the Legislature has stayed builder's remedies pursuant to §28 of The Fair Housing Act until after a municipality in a pending Mt. Laurel case has an opportunity to file its housing element with the Council as set forth in §9(a) of the Act. Therefore, the

remedy Plaintiff seeks in the instant case is presently unavailable to him. Plaintiff will suffer no irreparable harm if this matter is transferred to the Council on Affordable Housing.

None of the reasons justifying bypassing administrative review exist in the present situation. Administrative review would clearly not be futile since the Council on Affordable Housing will be available to provide an effective and completely adequate means for implementing the constitutional obligation to provide housing for low and moderate income families. Administrative review would not be futile but, on the contrary, extremely beneficial.

The Council has clearly been empowered to set criteria and guidelines regarding fair share, regional need and regional contributions. See e.g. Sec. 7(c). Furthermore, the Council must review all the evidence submitted by a municipality, including its housing element, and evidence submitted in objection thereto, and then determine whether or not to grant substantive certification. The Council has been established to make factual findings and in the present case, the necessity for factual determination is great. "When agency fact-finding is crucial to the resolution of a dispute, the judicial process [should be] suspended pending referral of such issues to the administrative body for its review." U.S. v. Western Pac. R. Co., 352 U.S. 59, 63-64 (1956); Boss, 95 N.J. 33.

There are no reasons herein to justify bypassing the review and mediation procedures afforded by the Council on

Affordable Housing. Transfer is in the public interest as set forth in the Legislative findings to the Fair Housing Act §3. The Plaintiff's involvement in this case is required to be for the benefit of low and moderate income citizens; the purpose of Mt. Laurel litigation is not to provide a windfall to a developer, but to provide low and moderate income housing. Transfer to the Council will ensure that such housing is built according to sound planning considerations. The interests of justice require transfer of the instant case. Defendant's motion for transfer to the Council on Affordable Housing should be granted.

CONCLUSION

For the foregoing reasons, Defendant, Township of Tewksbury, requests that its Motion for Transfer to the Council on Affordable Housing be granted.

Respectfully submitted,

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Township of Tewksbury

By _____
RICHARD DIETERLY