ML - Morris County Fair Housing Council v. Boonton Twp. 9/3/85

Brief and Appendix of ~~Bd~~ TS Morris County Fair Housing Council in opposition to the motion of Denville Twp to transfer case to the Affordable Housing Council

p 117

ML 000854 B

ML000854B

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

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

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

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

TABLE OF CONTENTS

STATEMENT OF FACTS

A. The History of the Litigation

Defendant's motion to transfer this matter to the Affordable Housing Council must be evaluated in light of the procedural history and present posture of this litigation. This lawsuit represents a seven-year effort by the plaintiffs to enforce the constitutional rights of low and moderate income persons to realistic housing opportunities in Denville Township. The case has been through protracted pre-trial proceedings; it has been fully tried; orders adjudicating Denville's housing obligation, and its failure to meet that obligation, have been entered; Denville has been ordered to comply; a special advisory master has been appointed; and the master has filed his report.

Specifically, this suit was filed by the Morris County Fair Housing Council, Morris County Branch of the NAACP, and Public Advocate of New Jersey against Denville and 26 other municipalities in Morris County on October 13, 1978. Plaintiffs alleged that each of the defendant municipalities was engaged in unconstitutional exclusionary zoning. Denville answered, denying this claim, offering more than 30 affirmative defenses, and counter-claiming for expenses and attorney fees on the grounds that plaintiffs' commencement of the action was "improper, illegal, arbitrary, [and] capricious." Denville and ten other defendants also challenged the decision to bring the suit in a proceeding before the Appellate Division. This challenge was rejected after briefing and oral argument. Borough of Morris Plains v. Department of the Public Advocate, 169 N.J. Super. 403 (App. Div.), certif. denied, 81 N.J. 411 (1979).

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

Plaintiffs commenced discovery on December 26, 1978, by serving their first set of interrogatories. Judge Muir entered the first of many orders setting timetables for discovery on January 19, 1979. Defendant Denville Township submitted full answers to plaintiffs' first and second sets of interrogatories only after repeated motions and orders to compel discovery. See Order of June 21, 1979; motions of August 24 and September 21, 1979, resulting in order of November 15, 1979; motion of November 1, 1979, resulting in order of December 12, 1979. Plaintiffs deposed Denville's consulting planner and seven other so-called common defense experts whose testimony was offered jointly by Denville and other defendants. Plaintiffs also responded to Denville's interrogatories and provided expert reports by four expert witnesses. Denville and the common defense group conducted 19 days of depositions of these witnesses. Discovery closed on February 25, 1980.

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

In its pre-trial order, the Court sought to simplify the issues by ordering the parties to file detailed proposed findings of fact. On April 30, 1980, plaintiffs filed a 600 page set of findings of fact. Denville filed no findings. On June 17, the Court modified and clarified its order and set a new timetable. On July 24, plaintiffs filed a revised 900 page set of findings of fact. Denville never filed any counter-findings. In September 1980, Judge Muir abandoned the effort to simplify the issues

in this manner and set the case down for trial before Honorable Reginald Stanton for January 5, 1981. On December 1, 1980, Judge Stanton entered a new order establishing trial procedures for a trial to commence on January 5, 1981, and denied Denville's third motion for an indefinite stay. On December 16, as plaintiffs were preparing for trial, the Supreme Court granted a motion for a stay sought by defendants other than Denville.

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

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

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

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

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

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

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

Dr. Kinsey and to the municipal governing body. Plaintiffs also submitted a draft ordinance and comments on Denville's June 13, 1985, draft compliance plan. Mr. Kinsey submitted his report to the Court on August 16, 1985.

On July 2, the Governor signed L. 1985 c. 222, the so-called "Mt. Laurel Bill." On July 8, 1985, Denville moved to terminate the appointment of the special master and transfer the case to the Affordable Housing Council. The Court denied the request to terminate the appointment of the master on July 19, 1985. The remainder of the motion is before the Court in this proceeding.

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

B. Denville's Response to Its Constitutional Obligations

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

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

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

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

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

ARGUMENT

INTRODUCTION

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

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

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

---

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

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

would [not] result in manifest injustice to any party in the litigation."* The application of L. 1985 c. 222, §16 thus involves analysis of two phrases: "manifest injustice" and "party to the litigation."

As will be discussed in detail below, these terms must be construed in light of the Mt. Laurel decisions, Southern Burlington County NAACP v. County NAACP v. Mt. Laurel Township, 67 N.J. 158 (1975) (Mt. Laurel I) and 92 N.J. 155 (1983) (Mt. Laurel II). When analyzed in this context, §16 requires denial of a transfer motion if the transfer of a case to the Affordable Housing Council would significantly perpetuate the types of wrongs condemned by the Supreme Court in the Mt. Laurel decisions, as contributing to the pattern of "widespread noncompliance" with the Constitution. In the present case, transfer would result in 1) further delays in the vindication of the rights of lower income persons caused by the termiantion of judicial proceedings that have nearly been completed and the initiation of new administrative proceedings; 2) greater burdens upon lower income persons in the form of the increased expense and complexity of proceedings to enforce their constitutional rights; 3) the absence, or diminished availability, of effective remedies to enforce compliance; 4) the relegation of low and moderate income persons to exclusive

---

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

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

reliance upon voluntary compliance by the municipal defendant for an extended period of time; and 5) less than full and proper vindication of the constitutional rights of lower income persons. Any of these factors standing alone should bar transfer under the terms of section 16. In combination, they provide overwhelmingly compelling reasons to deny a transfer in this case.

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

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

I.

"PARTY TO THE LITIGATION," AS USED IN L. 1985 c. 222, §16, INCLUDES THE LOWER INCOME PERSONS WHOSE RIGHTS ARE ASSERTED IN THE LITIGATION AND WHO WILL BE BOUND BY ITS OUTCOME

The Court must decide in this matter whether transfer "would result in manifest injustice to any party to the litigation." L. 1985 c. 222, §16. Only by analyzing the phrase "any party to the litigation" can the Court determine what types of "injustice" it must assess. Clearly "any party to the litigation" includes the actual parties. Thus the Court must consider, in the first instance, the extent of possible injury to any organizational plaintiffs and the persons whom they represent, as well as the injury to the builder-plaintiffs. Specifically, in this case, the Court must assess the extent of potential injustice, not merely to builder-plaintiffs (as suggested by the municipal defendant), but also to the low and moderate income persons whose interests are represented by the organizational plaintiffs -- the Morris County Fair Housing Council, the Morris County Branch of the NAACP, and the Public Advocate.

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

The phrase "party to the litigation" in Section 16 must be interpreted in light of the distinctive structure of exclusionary zoning litigation as framed by the Mt. Laurel decisions. All exclusionary zoning litigation is representative litigation brought in the interest of lower income persons. Regardless of who is the nominal plaintiff, the constitutional rights asserted are those of lower income persons. This type of litigation cannot be adjudicated unless the scope of the duty of the municipal defendant to lower income persons is determined. 92 N.J. at 215-16, 256. The final outcome of such a case

must be a remedy fully vindicating the rights of lower income persons. 92 N.J. at 285, 290. This is so even if the interests of the nominal plaintiff, e.g., a builder, are much more limited.

Moreover, regardless of the identity of the nominal plaintiff, all lower income persons are bound by any judgment of compliance entered in such litigation. 92 N.J. at 291-92. Indeed, this Court described the character of this type of litigation in an earlier decision in this matter:

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

In light of the representative character of exclusionary zoning litigation, the term "party to the litigation" in Section 16 must be construed to include the lower income persons whose interests are being asserted in the litigation, as well as the nominal plaintiffs. Any other interpretation would effectively thwart the Mt. Laurel decisions and the statute, for it would result in transfer decisions being made without regard to any potential injustice to the lower income persons whose interests are, in reality, at stake in the proceedings and who will be bound by judgments entered in those proceedings. Thus, in considering

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

II.

THE TERM "MANIFEST INJUSTICE" IN SECTION 16 MUST BE CONSTRUED TO MEAN THAT A TRANSFER SHOULD BE DENIED WHEN IT RESULTS IN PERPETUATION OF THE CONSTITUTIONAL WRONGS CONDEMNED BY THE SUPREME COURT IN THE MT. LAUREL DECISIONS

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

The term "manifest injustice" is not defined in L. 1985, c. 222, nor is there any helpful legislative history on the meaning of this term. The Court must necessarily look elsewhere for guides to the proper interpretation of this phrase. This task is made more difficult by the fact that this phrase is used in the jurisprudence of New Jersey in varying contexts and with widely divergent meanings. The following uses of the phrase are illustrative:

1) R. 4:17-7 provides that late answers to interrogatories are to be permitted only if "manifest injustice" would otherwise result. The courts have read this language as indicating that leave to make late amendments to interrogatories, while not automatic, is to be granted "liberally." Pressler, Current N.J. Court Rules, Comment R. 4:17-7; See Westphal v. Guarino, 163 N.J. Super. 140 (App. Div. 1978), aff'd mem. on opinion below, 78 N.J. 308 (1978). The potential injustice which the courts evaluate in this context is the possibility that a party will be denied the opportunity to present his case fully and fairly to the trier of fact. In light of this potential injustice, the courts have formulated three criteria to determine whether "manifest injustice" will occur in a particular case: 1) Was there intent by the proponent of the amendment to mislead? 2) Is there any element of surprise? 3) Will the opposing party be unduly prejudiced? Westphal v. Guarino, 163 N.J. Super. at 146.

2) Remittitur will be granted only when the damages awarded by the fact finder would result in "manifest injustice." Baxter v. Fairmount Foods

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

3) R. 3:21-1 permits the withdrawal of a guilty plea at the time of sentencing only to correct a "manifest injustice." This rule has been construed liberally to permit withdrawals of guilty pleas. State v. Taylor, 80 N.J. 353, 365 (1979). The injustice to be evaluated in this context is that the defendant may have been, or may appear to have been, induced improperly to waive his constitutional rights. State v. Taylor, 80 N.J. at 361-62. The courts have carefully formulated the criteria to to be used in this context: withdrawal of a guilty plea is to be permitted when, to one not "approaching defendant's attack on the plea bargain with a set attitude of skepticism," it appears that there is "a significant possibility that the misinformation imparted to the defendant could have directly induced him to enter the pleas." State v. Taylor, 80 N.J. at 365.

4) Where the legislature's intention as to whether or not a statute is to be applied retroactively to pending cases in unclear, the statute will not be applied retroactively where "manifest injustice" would result. Gibbons v. Gibbons, 86 N.J. 515 (1981); Kingman v. Finnerty, 198 N.J. Super. 14

(App. Div. 1985). The injustice to be evaluated in this context is unfairness to parties who might reasonably have relied on the prior law to their prejudice. Gibbons v. Gibbons, 86 N.J. at 523-24. The New Jersey courts have followed such federal decisions as Bradley v. School Board of Richmond, 416 U.S. 696, 716-17 (1974), and Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1964), in formulating three criteria to determine whether this standard is met: (1) the nature and identity of the parties; (2) the nature of the rights at issue; and (3) the nature of the impact of the change in law upon those rights. Bradley v. School Board of Richmond, supra.

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

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

1) "Manifest injustice" is not a term that has a single, consistent meaning throughout New Jersey jurisprudence. Its meaning varies with the context in which it occurs. Sometimes it is used to signify a standard that can be met only in very exceptional cases. In other contexts, it is used to signify a standard that can be met in a great many cases.

2) "Manifest injustice" is always evaluated in terms of the type of injustice that is relevant in the context in which it is used. When it is

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

3) "Manifest injustice," is not a matter for ad hoc determinations. It is a phrase that invites the courts to formulate appropriate standards and, insofar as possible, to adhere consistently to those standards.

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

In the present case, these principles compel several conclusions. First, the Court should construe "manifest injustice" in the context of the Mt. Laurel decisions. The Supreme Court has repeatedly called upon the Legislature to enact legislation "enforcing the constitutional mandate." 92 N.J. at 212. L. 1985, c. 222 is, by its own terms, a response to that request. L. 1985, c. 222, §2(b). The statute recites the central holding of the Mt. Laurel decisions, L. 1985, c. 222 §2(c), and declares the desirability of a "comprehensive planning and implementation response to this constitutional obligation," L. 1985, c. 222, §2(c). Thus, the injury which the Legislature sought to redress by the enactment of L. 1985, c. 222, is the denial of the constitutional rights of lower

income persons as enunciated in the Mt. Laurel decisions.

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

> 3. The Legislature declares that the statutory scheme set forth in this act is in the public interest in that it comprehends a low and moderate income planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court. The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

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

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

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

In the first Mt. Laurel decision, the Supreme Court held that a municipality must plan and provide for sufficient safe and decent housing affordable to low and moderate persons to meet the need of its indigenous poor and its fair share of the present and prospective need of the poor of the region in which the municipality is located. 67 N.J. at 174, 179-81, 197-89. The Court condemned as unconstitutional both the adoption of ordinances that impose "requirements or restrictions which preclude or substantially hinder" provision of low and moderate income housing and the failure to adopt regulations that "make realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing." 67 N.J. at 180-81.

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

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

work." 92 N.J. at 199.* The Court reaffirmed the original Mt. Laurel decision and clarified the procedural and substantive significance of its constitutional mandate. In the course of its opinion, the Court also identified and condemned a number of wrongs that, separately and together, had contributed to the emergence and continuation of the pattern of "widespread noncompliance" with the Constitution. Among the wrongs identified and condemned by the Court were:

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

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

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

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

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

6) Doctrines and procedures that permit cases to be disposed of on the basis of "good faith" or "bona fide" efforts without any determination

---

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

of the magnitude of the municipality's obligation or the degree to which the obligation remained unsatisfied. Without remedies to ensure compliance with the entire constitutional obligation of a municipality, there is "uncertainty and inconsistency" in the constitutional doctrine and a toleration of less than full compliance with the requirements of the Constitution. 92 N.J. at 220-22, 248-53.

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

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

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

response to the Mt. Laurel decisions which has the result of perpetuating these wrongs would have to be declared unconstitutional. Cf. Jackman v. Bodine, 49 N.J. 406 (1967) (striking down inadequate reapportionment plan adopted in response to prior court decree).

Likewise, if the tranfer of any case to the Affordable Housing Council, pursuant to L. 1985 c. 222 §16, would have the effect of perpetuating the very wrongs condemned by the Supreme Court and thus impede the vindication of the rights of lower income persons to realistic housing opportunities in the defendant municipality, transfer must, as a matter of law, be denied. Consequently the term "manifest injustice" as used in Section 16 must, at the very least, mean that a transfer cannot result in the perpetuation of any of the constitutional wrongs condemned by the Supreme Court in Mt. Laurel II as contributing to the pattern of "widespread noncompliance" with the Constitution. Therefore, this Court, in determining whether a transfer will result in "manifest injustice to any party to the litigation," should deny a transfer to the Affordable Housing Council if any of the following would result from the transfer:

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

2. Increased complexity of litigation which significantly impedes vindication of the rights of lower income persons.

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

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

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

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

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

III.

TRANSFER OF THE PRESENT CASE TO THE AFFORDABLE HOUSING COUNCIL WOULD RESULT IN MANIFEST INJUSTICE TO LOWER INCOME PERSONS AND MUST, THEREFORE, BE DENIED

Evaluation of the factors set forth in the previous section of this brief demonstrates that transfer of the present case to the Affordable Housing Council (AHC) under L. 1985 c. 222, §16 would result in manifest injustice to the plaintiffs and lower income persons. As plaintiffs will explain, a transfer would perpetuate the wrongs which were condemned by the Supreme Court as contributing to "widespread non-compliance" with the Constitution and would impede the vindication of the constitutional rights of lower income persons. A transfer would also require the plaintiffs to start anew in vindicating their constitutional rights before the Affordable Housing Council after years of proceedings, and considerable judicial and financial resources, have been devoted to obtaining Denville's compliance with its obligations under the Mt. Laurel decisions. We shall discuss each of the requisite factors in turn.

1. Delay - Transfer of a case to the Affordable Housing Council entails commencement of an entirely new proceeding. This proceeding is governed by a timetable contained in L. 1985 c. 222 itself and in the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. This timetable is set out in detail in Appendix I. While the statute is ambiguous or inconsistent in some respects,* a reasonable reading of its provisions indicates that the AHC is

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

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

(Footnote continued from previous page)
before the AHC without any action ever being taken.

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

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

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

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

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

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

Even that date, however, does not mark the beginning of compliance by the municipality with its constitutional obligations. It merely marks the end of one phase of proceedings and the commencement of another phase. The Affordable Housing Council appears to have only the power to determine whether a municipality's proposed housing element and fair share plan are acceptable. L. 1985 c. 222, §14. It apparently has no explicit statutory power to compel a municipality to take any action. Compare L. 1985 c. 222, s. 14 with New Jersey Law Against Discrimination, N.J.S.A. 10:4-5 et seq. and with Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. It is well established that agencies cannot exercise remedial powers not expressly delegated to them by the Legislature. A.A. Mastrangelo v. Commissioner of the Department of Environmental Protection, 90 N.J. 666, 684 (1982); In re Jamesburg High School Closing, 83 N.J. 540, 549 (1980); Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579, 598 (1970). Even if plaintiffs prevail at every step of the administrative process and the Affordable Housing Council determines that the municipality's proposed housing element and fair share plan are unacceptable, plaintiffs might still not be able to secure any

remedy from the AHC. Plaintiffs' only recourse at that point would be to recommence judicial proceedings.*

Thus, for the recalcitrant municipality, transfer of a pending case to the Affordable Housing Council, even if one were now in existence, is an effective means of forestalling any enforcement of the Constitution for at least an additional two years. This period is even greater at the present time in light of the uncertain status of the Council (see note at page 7). This raises serious constitutional issues even where suit was filed just before May 2, 1985. Even in such a case, the effect of a transfer will be to perpetuate by new means the impediments to enforcement of the Constitution created by "long delays" and "interminable" proceedings -- the very evils which the Supreme Court condemned and sought to bring to an end in the second Mt. Laurel decision. 92 N.J. 200, 214, 290-91, 341. Compliance with the the Constitution, already ten years overdue, will be set back at least two years longer. Low and moderate income persons will continue to be denied realistic opportunities for affordable housing during this protracted period.

Moreover, the effect of this delay is not merely to forestall compliance with the Constitution for two years. In many municipalities the delay is likely

---

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

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

to have a long-term impact on the ability of lower income persons to ever vindicate their right to realistic housing opportunities. While parties seeking low and moderate income housing are toiling through the administrative process, other development can proceed unchecked in the defendant municipality. In a municipality such as Denville, which claims a scarcity of vacant land and limited infrastructure capacity (Db 15), intervening development not including low and moderate income housing is likely to consume these scarce resources and could permanently thwart vindication of the rights of lower income persons. In addition, as set forth in the affidavit of Alan Mallach, annexed as Appendix J, there are currently exceptionally favorable economic circumstances for the development of low and moderate income housing: interest rates are comparably low; demand for the market rate units, which are necessary to support the inclusionary development of low and moderate income housing, is high; and the housing industry is at a cyclical peak. These conditions are unlikely to continue indefinitely.

In the present case, the effect upon the rights of lower income persons is even greater than in the hypothetical pre-May 2, 1985, case described above. As set forth in detail in the Statement of Facts, this case was filed in 1978 and has diligently been pursued by plaintiffs since then. The case has been fully tried; the Court has determined municipal liability; it has issued a remedial order requiring the municipality to submit a plan for compliance within 90 days; it has appointed a special master; and the master has filed his report. Transferring this case will nullify seven years of litigation by plaintiffs to secure compliance by Denville Township with the Constitution and will force the plaintiffs to begin again the lengthy process of obtaining affordable housing in Denville. Two years from now, plaintiffs will be no closer to securing compliance with the Constitution than they are today. At that point, the litigation will have proceeded for nine years without a definitive result. In

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

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

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

2. Expense and complexity - As noted above, transfer of a case to the Affordable Housing Council entails the commencement of a new proceeding of at least two years in duration. This proceeding will involve mediation, contested administrative hearings, and administrative review revolving around the following issues:

> a. The municipality's fair share plan is consistent with the rules and criteria adopted by the council and not inconsistent with achievement of the low and moderate income housing needs of the region as adjusted pursuant to the council's criteria and guidelines adopted pursuant to subsection c. of section 7 of the act, and
>
> b. The combination of the elimination of unnecessary housing cost generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible after allowing for the implementation of any regional contribution agreement approved by the council. L. 1985 c 222, §14.

The first of these issues concerns the magnitude of the municipality's fair share housing obligation under the New Jersey Constitution. In any case, such as the present one, in which a judicial determination of liability has been made, proceedings before the Affordable Housing Council

will necessarily involve relitigation of the very factual and legal issues already resolved once by the courts. In the present case, these issues were the subject of extensive pretrial discovery and a two-and-a-half week trial.

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

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

In Mt. Laurel II the Supreme Court condemned procedures and doctrines which create a situation in which "the length and complexity of trial is often

outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs afford to sue." 92 N.J. at 200; see also 92 N.J. at 214, 252-54. Transfer of this case, after substantial judicial resources have been expended and the nature of Denville's affordable housing obligation is nearly resolved, would perpetuate the same expense and complexity for parties seeking to obtain affordable housing for low and moderate income individuals.

3. Availabilty of effective remedies - As noted above, the AHC appears to have only the power to approve, approve with conditions, or disapprove a proposed municipal housing element and fair share housing ordinance. L. 1985 c. 222, §14. The effect of disapproval of a municipality's proposed housing element and fair share housing ordinance is that the municipality is in the same posture in any subsequent litigation that it would be in if it had never submitted a housing element to the Council, i.e., it would not be able to offer substantive certification by the AHC as a defense. L. 1985 c. 222, §§17, 18. However, the Affordable Housing Council's power, if any, to compel a municipality to take any action to comply with the Constitution has not yet been clarified.

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

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

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

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

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

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

In Mt. Laurel II, the Supreme Court concluded, based on eight years of "widespread non-compliance with the constitutional mandate," that "a strong judicial hand" is essential to achieve compliance. 92 N.J. at 199. It forcefully stated that judicial reticence to grant the full range of remedies necessary to ensure municipal compliance was no longer justifiable:

> What we said in Mount Laurel in reference to remedy eight years ago was that such remedies were "not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion . . . . " 67 N.J. at 192. That view is no longer "advanced," at least not in this state. It is eight years old. Our warning to Mount Laurel -- and to all other municipalities -- that if they do "not perform as we expect, further judicial action may be sought . . . ." id. at 192, will seem hollow indeed if the best we can do to satisfy the constitutional obligation is to issue orders, judgments and injunctions that assure never-ending litigation, but fail to assure constitutional vindication. 92 N.J. at 289-90.

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

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

4. Requiring plaintiffs to rely on voluntary compliance - As noted above, L. 1985 c. 222 is not a statute that mandates or compels municipal compliance with the Constitution. It is a statute which establishes a scheme for official recognition of voluntary compliance by municipalities. Submission of a housing

element and fair share housing ordinance to the Affordable Housing Council is a wholly voluntary act by any municipality. Participation in the AHC's mediation and review process is also voluntary. Once the Affordable Housing Council makes its determination, the municipality is free to adopt implementating ordinances or not, as it chooses.*

Transferring a case to the Affordable Housing Council thus obliges lower income persons to rely on the willingness of the defendant municipality to undertake voluntary compliance with its constitutional obligations. In the Mt. Laurel II decision, however, the Supreme Court held that mere reliance on voluntary compliance by municipalities was neither justifiable nor constitutional. 92 N.J. at 199, 220-21, 341. Compliance with the Constitution, the Court declared, can no longer merely be "a matter between [municipalities] and their conscience." 92 N.J. at 341.

Obliging lower income persons to rely on the voluntary compliance by a defendant municipality is particularly inappropriate where that municipality cannot show a history of good faith efforts to comply. In the present case, Denville has a continuous record of lack of good faith efforts to comply with the requirements of the Constitution. As set forth in the Statement of Facts, between 1975 and 1983, the municipality took no steps to reduce barriers to the provision of low and moderate income housing. It made no changes in its zoning ordinances to eliminate cost-increasing provisions. It initiated no affirmative steps to create housing affordable to low and moderate income households. Since 1983, the municipality has not amended its ordinance or taken any steps to create realistic opportunities for housing affordable to lower income persons. Indeed, this Court had to strike down the munici-

---

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

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

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

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

In sum, there is nothing in Denville's past actions to suggest that another two years of voluntary compliance by Denville will bring lower income persons

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

5. Absence of Site-Specific Remedies for Builders*. As noted above, the Affordable Housing Council appears not to have the power to award any remedies to a successful plaintiff and, in particular, the Council apparently lacks the power to grant site-specific remedies to a successful builder-plaintiff. L. 1985 c. 222, §14. Moreover, the statute does not appear to even authorize the Affordable Housing Council to condition its approval of a municipality's housing element and fair share ordinance upon the plan being amended to rezone the builder-plaintiff's site. While a municipal housing element must "include consideration of lands of developers who have expressed a commitment to provide low and moderate income housing," L. 1985 c. 222, §10(f), there is no statutory requirement that it provide for rezoning of the site of any builder-plaintiff, even if that site is otherwise suitable for the development of low and moderate income housing.

As a result, a builder may "successfully" litigate a case before the Affordable Housing Council, which results in the municipality submitting and implementing a housing element and fair share housing ordinance that satisfies the criteria and guidelines of the Council, and still not achieve any economic benefit himself. Substantive certification of compliance awarded in such a

---

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

case, as in other cases, would carry a strong presumption of validity in the courts. L. 1985, c. 222, §17(a). It would, therefore, also be very difficult for the builder to secure any subsequent judicial remedy.

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

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

Second, the absence of a builder's remedy has larger systemic impacts on lower income persons. As noted above, L. 1985, c. 222 does not mandate or compel compliance by municipalities with the New Jersey Constitution. Rather, it creates a mechanism for official recognition of voluntary compliance. The only inducement for a municipality to avail itself of this voluntary mechanism (other than the illicit inducement of securing an additional two years in which to continue not to comply) is the opportunity to interpose the substantive certification awarded by the Affordable Housing Council as a defense in

exclusionary zoning litigation. L. 1985, c. 222, §17(a). If there is no incentive for builders to bring such litigation, then the inducement for municipalities to voluntarily seek substantive certification also disappears. The statute, which appears in theory to be a means of fostering municipal compliance with the Constitution, will, in reality, operate to eliminate all the existing pressures for municipal compliance. Transfer of pending cases accelerates this process and severely thwarts the vindication of Mt. Laurel's constitutional mandate.

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

In Mt. Laurel II, the Supreme Court reaffirmed that:

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

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

First, section 7(c)(1) of the statute requires that the Affordable Housing Council adopt criteria and guidelines for the determination of municipal fair share. The Affordable Housing Council, however, is required to use a formula that arbitrarily subtracts from municipal fair share the number of existing adequate housing units occupied by lower income

---

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

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

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

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

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

---

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

share ordinance upon any requirement that "a municipality raise or expend municipal revenues in order to provide low and moderate income housing." Although the meaning of this section is not perfectly clear, it would appear to prohibit the Affordable Housing Council from conditioning approval of a proposed housing element upon the municipality amending its plan to accommodate subsidized rental housing financed by federal subsidies or by the New Jersey Housing and Mortgage Finance Agency, since rental housing subsidized from either source is available only if the municipality grants tax abatements. N.J.S.A. 55:14J-8(f); see generally Mt. Laurel II, 92 N.J. at 264-65. This is inconsistent with the clear mandate of the Supreme Court that accommodation of subsidized housing is one of the repertoire of affirmative measures which municipalities must utilize, 92 N.J. at 262-65.

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

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

Ultimately, Section 7(d) makes it impossible for municipalities to satisfy their full fair share of the region's present and prospective housing need. If the Affordable Housing Council cannot demand that municipalities either expend their own funds or accept housing funds from other agencies, the only effective means of compliance which it can demand is inclusionary zoning. See 92 N.J. at 267-70. Inclusionary zoning works. Experience

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

As a result of these three provisions, it is reasonably foreseeable that transfer to the Affordable Housing Council will inevitably result in a failure to provide housing opportunities substantially equivalent to the municipality's constitutional fair share.

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

---

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

CONCLUSION

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

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

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

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

ALFRED A. SLOCUM
ACTING PUBLIC ADVOCATE OF
THE STATE OF NEW JERSEY

By: 
STEPHEN EISDORFER
ASSISTANT DEPUTY PUBLIC ADVOCATE

Dated: September 3, 1985

APPENDIX

MUNICIPALITY: DENVILLE

LEAST COST PROVISIONS

(1) small lot single family detached houses

Provisions of R-4 zone are within least cost parameters. No vacant land (with exception of isolated lots) exists in this zone.

(2) two family houses

Provisions of R-4 zone are within least cost parameters. see above.

(3) townhouses

not permitted

(4) garden apartments

Permitted in A-1 zone under standards that are not least cost.
(see attachment note 1)

(5) midrise or highrise apartments

Senior citizen housing of 4 stories or 40' height permitted as conditional use (see attachment note 2).

(6) mobile homes

mobile homes prohibited in all zones (19-5.712)

(7) planned unit or planned residential developments

not permitted.

MUNICIPALITY: DENVILLE

ZONE	PERMITTED USES	LOT SIZE or DENSITY	FRONTAGE or WIDTH		UNIT SIZE/BEDROOM RESTRICTIONS
C	SF	81,000 ft^2 within 360' of street line	80'	225'	see note 1
R-C	SF	40,250 ft^2 (in 230')	70'	135'	1200 ft^2 (min. 800 ft^2 on 1st floor)
R-1	SF	40,250 ft^2 (in 230')	70'	135'	1200 ft^2 (800 ft^2)
R-2	SF	15,000 ft (in 150')	50'	$(100')^2$	1000 ft^2 (700 ft^2)
R-2A	SF	11,200 ft^2 (in 140')	50'	$(80')^2$	1000 ft^2 (700 ft^2)
R-3	SF	7,500 ft^2 (in 125')	50	$(60')^2$	870 ft^2 (600 ft^2)
R-4	SF	5,000 ft^2 (in 100')	50'	50'	768 ft^2 (600 ft^2)
	2 family	10,000 ft^2 (in 100')	100'	100'	700 ft^2 per dwelling unit
A-1	Garden Apartments	4 acres (in 695')	250'	NA	1 BR 700 ft^2 2 BR 900 ft^2

NOTE: 'senior citizen housing' provided as conditional use (see attachment)

NOTES: (1) information on page 5.41 of ordinance. page not provided public advocate in copy of ordinance
(2) figures in parentheses are not specified in ordinance, but are mandated by virtue of combination lot size/lot depth within which lot size measured provisions; e.g., 15,000 ÷ 150 = 100'
(3) 2 parking spaces per DU required in C, R-C, and R-1 through R-2A. 1 parking space per DU required in R-3 and R-4.
(4) R-1 single family development permitted in POS (public-open space) zone
(5) R-4 one and two family development permitted in OB-1 (office-business) zone

DENVILLE TOWNSHIP

(1) Garden Apartments

Garden apartments are permitted in the A-1 zone subject to the following standards:

a. minimum tract size 4 acres (measured within 695' from street line) and frontage of 250'
b. maximum density of 10 DU/acre
c. maximum height of 2 stories
d. at least 85% of units must be 1 bedroom, and balance two bedroom. No three bedroom or larger units permitted.
e. minimum floor area requirements are

1 BR	700 ft^2
2 BR	900 ft^2

f. two parking spaces per unit
g. buildings must have brick/stone exterior

(2) Senior Citizen Housing

Senior citizen housing, utilizing available state and Federal programs, to meet "the needs of senior citizens of the Township" are permitted as a conditional use. Since no zones are specified*, it would appear that the conditional use is permitted in all zones of the Township. Standards are as follows:

a. minim tract size 5 acres with 400' frontage
b. 100' setback of buildings from all property lines
c. 30 DU/acre maximum density
d. maximum of 4 stories but no more than 40' high
e. at least 50% of units are to be 1 bedroom, and balance (exception for superintendant) to be efficiency apartments
f. .625 parking spaces per DU
g. meet standards of HUD Minimum Property Standards

It should also be noted that the Planning Board is given extremely broad discretion in reviewing and approving/denying as well as setting conditions for developments under this section (see Section 19-5.1005 (x), (y), and (z))

(3) MAPPING

The R-4 zones in the Township are located around Indian Lake, and between I-80 and the Rockaway River in the center of the Township. The latter area is largely located in the flood hazard zone. All of these areas, as well as the small OB-1 area adjacent to the latter, are for practical purposes completely developed.

There are three small tracts zoned A-1. One a short distance from E. Main Street, and the other two along (and largely in the flood plain of) the Rockaway River. We believe all are developed.

wnship of Denville
Vacant Land Development Potential
October 1979

MD-3 SL
1-17-84
M.M.

	Available Vacant Land (Acres)	Excessive Slopes 25% and Over	Composite Limitations(1)	Flood Hazard Areas	Suitable For Development
C	149.06	28.41	128.17	2.30	13.83
R-C	310.32	35.53	83.00	54.99	179.51
R-1	751.55	149.06	307.48	34.33	368.91
R-2	121.11	17.04	36.62	10.05	66.76
R-2A	40.00	4.75	20.66	-	15.21
R-3	45.92	3.09	17.04	14.58	16.93
R-4	12.62	1.72	7.63	3.16	2.93
A-1	-	-	-	-	-
POS	-	-	-	-	-
B-1	.86	-	.28	.69	-
B-2	17.79	-	10.10	6.89	4.31
B-2A	3.84	-	1.89	-	2.01
B-3	.86	-	.22	.57	-
OB-1	2.12	-	-	-	1.84
OB-2	-	-	-	-	-
OB-3	-	-	-	-	-
OB-4	61.24	3.96	40.23	-	14.92
I-1	5.56	-	3.55	-	.80
I-2	287.17	14.98	176.27	60.56	98.79
TOTAL	1,810.02	258.54	833.14	188.12	786.75(2)

(1) Composite Limitations
Depth to Bedrock = 0-6 feet
Depth to Water = 0-5 feet
Soil Permeability = Unacceptable

(2) This represents 9.58 percent of the total Township area.

APPENDIX B

JOSEPH H. RODRIGUEZ, ESQUIRE
PUBLIC ADVOCATE OF NEW JERSEY
Attorney for Plaintiffs
BY: Stephen Eisdorfer
Assistant Deputy Public Advocate
Division of Public Interest Advocacy
Department of the Public Advocate
Richard J. Hughes Justice Complex
CN-850
Trenton, New Jersey 08625
(609) 292-1692

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

MORRIS COUNTY FAIR HOUSING COUNCIL, et al.,	Civil Action
Plaintiffs,	PLAINTIFFS' THIRD SET OF INTERROGATORIES TO DENVILLE TOWNSHIP
vs.	
BOONTON TOWNSHIP, et al.,	
Defendants.	

Plaintiffs hereby request that defendant answer the following questions in writing under oath in accordance with the rules of court.

Instructions

These interrogatories shall be answered under oath by an officer or agent of defendant who shall furnish all information available to defendant or its agents, employees, or attorneys.

The person answering the interrogatories shall designate which of such information is not within his or her personal knowledge and as to

10. State how much vacant land in the municipality is not subject to any of the physical conditions described in question 9.

See attached table.

12. If defendant claims that the boundaries of limited growth areas, conservation areas, agricultural areas, or growth areas delineated in the State Development Guide Plan are incorrect as to defendants,

(a) State where defendant claims the boundaries should be drawn (this question may be answered by drawing the current boundaries and the claimed boundaries on a map of the municipality).

(b) Describe each change and state with specificity the facts which justifies this change.

13. State which, if any of the following measures defendant has taken to foster realistic housing opportunities for low and moderate income households:

(a) Steps to facilitate construction of publicly subsidized housing, including, but not limited to, adoption of a "resolution of need," execution of an agreement to accept payment in lieu of taxes, or approval of site plan for a subsidized housing project.

We have through our committee indicated 2 sites available for low cost housing and subsidized housing, trying to work under 208 and 236 programs, but no funds available. We have survey of senior citizens needs.

(b) Steps to facilitate construction of public housing including, but not limited to, establishment of a local public housing authority, participation in a regional housing authority, approval of a site plan for public housing development, execution of a "cooperation agreement."

Member of the Morris County Housing Authority and have a signed agreement with them.

(c) Incentive zoning for construction of housing affordable to low or moderate households as described at 92 N.J. 266-67.

Township has agreed in principle to give tax abatement on the land, if proper funding can be had to build a housing project.

(d) Mandatory set-asides requiring reservation of a proportion of units in large developments for low and moderate income households as described at 92 N.J. 267-70.

Same as above. Possible sites set aside for low-income and senior housing.

(e) Zoning for mobile homes or mobile home parks.

14. For each of the measures described in question 13,

(a) State when the measure was begun, how long it continued in effect, and when it terminated.

(b) If the measure was initiated, implemented or terminated by ordinance, resolution or other formal action of the municipal governing body or any other municipal agency,

1) State what agency adopted the ordinance or resolution or took the formal action.

See answer to interrogatory No. 13

2) State the date and number of the ordinance or resolution or other formal action.

See answer to interrogatory No. 13

3) Attach a copy of all ordinances or resolutions or other documents memorializing the formal action.

None

(c) Describe with specificity all housing constructed as a result of the measure, including for each such housing development,

1) The name and address of the developer.

None

2) The location of the units.

None

3) The number of dwelling units developed.

None

4) The characteristics of units constructed by bedroom number and housing type (e.g., 1-bedroom garden apartments, 2-bedroom mobile homes).

None

5) The date the units were put on the market for rental or sale.

N/A

6) The price or rents by number of bedrooms and housing type (e.g., 1-bedroom garden apartment - $220/mo.; 2-bedroom mobile home - $27,000) as of the date the units were initially marketed.

N/A

7) The current prices or rents of the units by number of bedrooms and housing type.

N/A

8) Current vacancy rate.

N/A

(d) Attach copies of all reports, studies, surveys, memoranda or other documents pertaining to the initiation, implementation, or termination of such measure.

15. If defendant or any municipal agency considered but did not implement one or more of the measures described in question 13, at any time between 1975 and the present, for each such measure,

(a) Describe with specificity the measure considered.

See answer to interrogatory No. 13.

(b) State the date or dates on which it was considered.

Unknown.

(c) Describe with specificity the reasons for deciding not to implement the measure.

See answer to interrogatory No. 13.

(d) Attach copies of all reports, studies, surveys, letters, memoranda, minutes, resolutions, or other documents pertaining in whole or in part to the measure, its consideration, or the decision not to implement it.

16. If defendant claims it has adopted measures that create realistic opportunities for housing affordable to low or moderate income households other than those described in question 13, list each such measure.

None adopted at this time.

17. For each measure listed in response to paragraph 16, answer questions 14(a) to 14(d).

N/A

18. List all developments or proposed developments within defendant municipality of more than 10 residential units or more than 5,000 square feet of commercial or industrial floor area construction for which a zoning variance was granted, amendment to the zoning ordinance was allowed, subdivision approval was granted, site plan was approved, building permit was granted, or certificate of occupancy was issued between 1977 and the present.

See item 6.

19. For each development listed in response to question 18,

See item 6 for answers 19a thru f.

DENVILLE TOWNSHIP
MOUNT LAUREL II COMPLIANCE PROGRAM DATE: 6-12-85

II. FAIR SHARE COMPLIANCE

A. INTRODUCTION

Denville Township already has a significant stock of low and moderate income housing. As shown by the 1980 census, Denville has over 400 units of housing affordable to low and moderate income people. Twenty-six percent of the Township's households are low and moderate income households as defined in the Mount Laurel II decision.

The Township acknowledges that homes for low and moderate income people should continue to be made available in Denville. Denville believes that this can best be accomplished by a coherent and coordinated program designed, controlled and implemented by the Township itself. The social, environmental and economic health of the community must be carefully preserved if Denville is to continue to provide affordable low and moderate income homes.

The helter-skelter, immediate force-fit approach must be avoided, because Denville Township cannot survive the introduction of a large number of new residents without adequate environmental review and prior development of adequate infrastructure. In the interest of orderly progress and preservation of community character, Denville's fair share should be provided at a pace consistent with the overall development of the community.

B. COMPLIANCE PROGRAMS

Denville Township will provide its fair share of affordable housing through five principal mechanisms:

1. Rehabilitation of existing substandard housing with assistance from the Morris County Department of Community Development.

2. Conversion of existing structures to create affordable rental units within them.

3. Construction of publicly subsidized affordable senior citizen housing.

4. High density development of approximately 60 acres of land appropriate for such development to provide additional affordable housing.

5. Creation of an overlay zone requiring that all developers provide affordable low and moderate income housing within their developments.

1. Rehabilitation

Denville has already received a one for one compliance credit for 41 housing units rehabilitated by the Morris County Department of Community Development as of July 1984. Department director Grace Brewster reports that twelve Denville households were assisted or found eligible for assistance between August 1984 and May 1985. Ms. Brewster anticipates completing 50 to 60 additional cases in the next five years, making a total of 62 to 72 units beyond the 41 for which Denville has already received credit. Thus, the Township can be expected to satisfy at least 62 units of its fair share obligation by continuing to encourage and support housing rehabilitation.

2. Accessory Conversion

In the spring of 1984 the Township proposed and was prepared to adopt an ordinance providing for and encouraging accessory conversions. A full year has been lost because this approach to implementing fair share was not agreed to at that time. Now, more than a year later, Denville Township again proposes to adopt an accessory conversion ordinance allowing homeowners to create apartments within or, where appropriate, as additions to their homes.

Accessory apartments in Denville must meet the following criteria:

1. The unit must be rented to a low or moderate income household.

2. The rent, including utilities, must be no more than 30% of the income of a low or moderate income household.

3. The owner must agree to comply with the New Jersey Law Against Discrimination, NJSA 10:4-1 et seq.

4. The unit must be subject to controls administered by the Denville Affordable Housing Board to ensure that it is rented by and affordable to lower income households for a reasonable period of time.

Based upon citizen response, the Township believes that accessory conversion will be a very active program. For the purpose of estimating the number of potential conversions, it should be noted that Denville contains about 4,500 single-family detached housing units, of which about 3,200 have three or more bedrooms. Conversion of as little as 3% of the 3,200 larger homes would provide about 100 Mount Laurel units, while a more realistic 5% conversion rate would provide 160 Mount Laurel units.

3. Senior Citizen Housing

With a large and rapidly increasing older population, Denville is particularly concerned about providing additional housing for senior citizens. Denville proposes to build (150) units of publicly subsidized senior citizen housing. This housing will be administered by the Denville Affordable Housing Board. Units will be rented or sold to senior citizens of low and moderate income. Sites should be selected for their proximity to existing adequate infrastructure, public transportation and community services. Possible sites include a 21 acre tract between the end of Luger Road and the Parsippany Troy Hills border and the 19 acres owned by the township on Vanderhoof Avenue.

4. High Density Development

To implement the immediate development of low and moderate income housing, Denville will rezone a limited area of the Township for well-planned high density development. This zone will provide for an initial maximum of (60) acres with densities between 7 and 10 units per acre depending on environmental and infrastructural constraints and community resources. In areas judged by the Township Planning Board to have only minor constraints, densities of 7 units per acre will be sought. In areas with significant constraints densities of up to 10 units per acre of suitable land will be allowed depending on the developer's efforts to minimize impacts to the environment and to contribute to infrastructural improvements. In all cases, site selection and development criteria must be compatibility with existing uses, adequacy of existing infrastructure, environmental constraints and access to public transportation and community services.

If the Planning Board determines that high density development should be allowed such development must provide a significant proportion of the Township's fair share of low and moderate income housing. Denville Township has determined that a 30% set-aside of low and moderate income housing should be mandatory in such high density developments.

It is anticipated that the Nuzzo and Stonehedge tracts may be suitable for a high density approach. Development of these tracts at 7 units per acre with a 30% set-aside could provide approximately 122 units of low and moderate income housing.

5. General Mandatory Set-Aside

To provide additional affordable housing as the Township develops, Denville will prepare an overlay zone requiring that at least 30% of all newly constructed housing units within a subdivision of five or more building lots be affordable to and reserved for persons of low and moderate income. Construction of low and moderate income units will generally be allowed at a

density four times the zoned density. Because small subdivisions will not contain enough market rate units to subsidize development of low and moderate income housing on the site, subdivisions of less than five building lots will have the alternative of paying a fee to the Denville Affordable Housing Board. The Township will specify the structure of this fee after further economic analysis. The Affordable Housing Board will use the proceeds to supplement other sources of financing for the senior citizen housing and accessory conversions discussed in sections 2 and 3 above.

Under this plan, development of all residentially zoned vacant land in the Township would provide about 386 units of Mount Laurel housing.

C. SELECTION OF BUYERS AND RENTERS

All low and moderate income housing units produced under the programs outlined above will be sold or rented to persons of low and moderate income.

The Denville Affordable Housing Board will select buyers and renters from among the income eligible applicants in accordance with the following priority list:

1. Residents of Denville who have lived in the Township for at least one year and who are living in shared or deficient housing.

2. Employees of Denville Township, Denville Township School District, or other public agencies or educational facilities located within the Township who are living in shared or deficient housing.

3. Other persons employed in Denville who are living in shared or deficient housing.

4. Residents of Denville Township not included in (1), (2), or (3) above.

5. Persons employed in Denville Township and living more than 20 miles from their place of work in the Township or living in any urban aid municipality within the Township's Mount Laurel II prospective housing need region.

6. Persons employed within ten miles of the municipal boundary of Denville Township and living in shared or deficient housing.

7. All other persons living in shared or deficient housing within Denville Township's prospective need region, with preference given to those living in designated urban aid municipalities.

8. All others.

In all categories, preference will be given to former residents of Denville over persons who have never lived in the Township.

(302/2)

APPENDIX G

State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
CN 850
TRENTON, NEW JERSEY 08625

AMY PIRO,
ACTING PUBLIC ADVOCATE

RICHARD E. SHAPIRO
DIRECTOR
TEL: 609-292-1693

June 20, 1985

David Kinsey
252 Varsity Road
Princeton, New Jersey

Re: Morris County Fair Housing Council v. Boonton Township - Docket No. L-6001-78
P. W. (Denville Township)

Dear Mr. Kinsey:

Plaintiffs, Morris County Fair Housing Council, et al., have reviewed the attached proposed compliance plan submitted by Denville Township on June 14, 1985, in the above entitled matter.

The plan unfortunately does not correspond in specificity to the "revised ordinance" called for by the Supreme Court, Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158, 284 (1983), or even the detailed written plan promised by the municipality. It contains major gaps and is sketchy or unclear in a number of major areas. As a result, analysis of some aspects of the plan is difficult or impossible at this time. We can, however, offer some preliminary comments.

In general, any plan for compliance must be evaluated in terms of the standards enunciated by the Supreme Court: does it create a "realistic opportunity" for creation of sufficient safe, decent housing affordable to low and moderate households to satisfy the municipality's indigenous housing need and its fair share of the regional housing need. 92 N.J. 214-15. The opportunity must not be merely hypothetical or theoretical. It must be "realistic", i.e. designed and actually result in provision of housing. 92 N.J. at 260-61. In the context of a remedial proceeding such as this, the result must be that "the opportunity for low and moderate income housing found in the new ordinance [is] as realistic as judicial remedies can make it." 92 N.J. at 214. It is in this context that we offer the following comments on the various components of the Denville plan.

1. Rehabilitation of Existing Units (II-2)

Denville seeks credit for anticipated rehabilitation by Morris County using Community Development Block Grant funds of 62-72 substandard units occupied by lower income households between July 1984 and 1990. As noted in our letter of May 8, 1985, plaintiffs support the concept of rehabilitation of existing substandard housing, provided the program is in fact designed to provide realistic housing opportunities for lower income households.

The Denville proposal, however, has two serious deficiencies. First, it is inconsistent with the determination by Judge Skillman as to the number of substandard lower income units in Denville. At Denville's urging, Judge Skillman deviated from the so-called consensus methodology to find that Denville has only 92 substandard and overcrowded units occupied by lower income households. Of these, 53.8 percent, a total of 46, are physically substandard. Denville received credit for rehabilitation of 41 of these units in the Court's order of January 31, 1985. Thus, any credit for rehabilitation of substandard units must be limited to no more than 5 units.

While there may well be more physically substandard lower income units in Denville-a matter as to which Denville has submitted no data - any additional such units would have to be added to Denville's constitutional housing obligation. Rehabilitation of such units, although highly desirable, cannot logically result in a net credit against Denville's housing obligation.

Second, exclusive reliance on county expenditure of federal Community Development Block Grant funds does not create "realistic" housing opportunities. Morris County is not legally or contractually bound to fund this program. There are many demands on these scarce funds and there is no assurance that the County will not direct them to some other worthy project next year or at any time between now and 1990. Moreover, this year, as in every year since 1980, President Reagan has sought to reduce or eliminate funding for the federal Community Development Block Grant program. See 12 Housing and Development Reporter 829 (March 25, 1985). There is no assurance that this program will survive even one more fiscal year.

In light of this uncertainty, the municipality cannot properly rely on the Morris County housing rehabilitation program in the absence of a fully developed municipal backup plan that

would satisfy the standards described in our letter of May 8, 1985, and would go into effect whenever the county program drops, for whatever reason, below the anticipated rate of rehabilitation.

For these reasons, Denville's rehabilitation plan does not create realistic housing opportunity for 62-72 lower income households as claimed.

2. Accessory Conversions (II-2)

Denville proposes to adopt a permissive accessory conversion ordinance which, it claims, will create realistic housing opportunities for 100 to 160 low income households. The municipality also proposes to impose affordability standards to ensure that newly created accessory units will in fact be affordable to, and occupied by, lower income households.

The municipality, however, offers no evidence to suggest that its housing stock lends itself to accessory conversions. Nor does it offer any evidence to suggest that any significant number of homeowners desire to construct accessory units under the standards proposed by the municipality. Indeed, in presenting this plan on June 14, 1985, counsel for the municipality acknowledged that the "citizen response" cited in the report, consisted of persons expressing support for the concept of conversions rather persons expressing a desire personally to construct apartments for lower income families in their homes.

There is no evidence at this point to support the claim that permissive accessory conversions will create any significant stock of housing affordable to lower income households. After reviewing extensive testimony, Judge Smith rejected municipal claims that accessory conversions would create more than a negligible quantity of lower income housing in the Mahwah litigation.

As noted in my letter of May 8, 1985, it may well be that the municipality could create a subsidy or grant program that would make development of low income accessory units sufficiently attractive to make accessory conversions a "realistic" source of lower income housing. In the absence of such subsidies, Denville's proposal cannot be considered to create "realistic" housing opportunities.

3. Senior Citizen Housing (II-3)

Denville proposes to construct 150 units of subsidized lower income housing. This proposal is unimpeachable in concept. In its present form, however, it is entirely speculative and unrealistic.

First, Denville identifies no source of subsidy funds. It suggests no existing state or federal program which is likely to provide funds and does not propose a municipal appropriation or issuance of municipal bonds.

In addition, the so-called Luger Road site is relatively inaccessible and located in an area of heavy industry. There are serious questions as to its feasibility and suitability as a senior citizen housing site.

For these reasons, the senior citizen housing proposal is, at best, theoretical and not "realistic" as required by the Supreme Court.

4. Rezoning for "High Density" Development (II-4)

Denville proposes to rezone two sites, known for purposes of this litigation as the Nuzzo and Stonehedge sites, totaling 60 acres, for residential development at densities of 7 to 10 units per acre with mandatory setasides of 30 percent lower income units. Owners of both sites have indicated a willingness to construct at densities of 10-15 units per acre with 20 percent lower income setasides,but have asserted that development on the terms proposed by the municipality is not economically feasible.

As the Supreme Court noted, a purported lower income housing opportunity is not realistic if the rezoning does not create an economic incentive (i.e. the likelihood of securing a favorable economic return) for the property owner to construct that housing. Experience in northern New Jersey now suggests that rezoning for a 20 percent lower income setaside at densities of 10-15 units per acre provides such an incentive. While there may be special market circumstances in particular communities or exceptional characteristics of particular sites that would support a slightly higher setaside or slightly lower densities, Denville has offered no demonstration of such special market circumstances or exceptional site characteristics. In presenting the plan, counsel indicated that Denville had no such information. It should be noted that Judge Skillman declined to approve a 25 setaside in Mcntville Township as part of a negotiated settlement.

In the absence of any such extraordinary showing, this rezoning cannot be deemed a realistic means of providing lower income units.

5. General Mandatory Setaside (II-4)

Denville proposes imposition of a requirement in all residential zones that all residential development be subject to a 30 percent lower income setaside. In developments of less than five units, the municipal plan suggests this setaside could be satisfied by the property owner paying an unspecified sum to a municipal entity. Lower income units could be constructed at a density four times greater than the prevailing density in the zone. Denville seeks credit for 386 lower income units under this proposal. This figure, according to counsel, is based on full buildout of all existing residential zones.

For purpose of this analysis, we assume that this zoning is not barred by the Municipal Land Use Law or other statutory or constitutional requirements.

This proposal has several critical defects. First, the proposed rezoning does not contemplate removing any existing cost-increasing features. To the contrary, it preserves all existing densities and design requirements for the conventional units. Even as to lower income units, the proposal does not remove any cost-increasing features except for the limited increase in density. For example, 18 percent of all vacant land* zoned for residential uses in Denville is in the C zone, which permits construction only of single family detached housing of at least 1,500 square feet in floor area on lots of 81,000 square feet (approximately 2 acres). Under Denville's proposal, lower income units would have to be built in this zone as single-family detached houses with at least 1,500 square feet of floor space on lots of at least half an acre.

Similarly, approximately 58 percent of the vacant land zoned for residential purposes is located in the R-C and R-1 zones which permit construction only of single family detached houses with at least 1,200 square feet of floor area on lots of 40,250 square feet (approximately one acre) or more. In this zone, lower income units would have to be built as single family detached

---

* Land in tracts of eight acres or more. Montney, Denville Township Revised Vacant Land Analysis, (May 1984).

houses with 1,200 square feet of floor area on lots of a quarter acre or more. These densitites and design requirements are very similar to those struck down ten years ago by the Supreme Court in Mt. Laurel I, 67 N.J. 155, 183 (1975).

Second, Denville's proposal does not create economic incentives for production of lower income housing. The density increase is limited to lower income units. It does not provide any increased income to offset the losses in the lower income units, much less profit to encourage development of such units. Indeed, the proposal has the contrary effect. On a hypothetical 100 acre tract currently zoned at one unit to the acre as in Denville's R-1 and R-C zones, a developer would be able to construct 129 units, of which at least 39 would be required to be lower income and 90 could be conventional units. The proposal thus increases the developer's costs by requiring him to construct 29 lower income units at a maximum density of four units per acre and to market them at a loss while simultaneously reducing his income by reducing by ten the permitted number of conventional units.

Denville offers no analysis to show what the effect of this rezoning would be on the incentive for property owners to build. It can hardly be doubted, however, that, even if property owners can derive an economic return under this ordinance (a question which we cannot answer at this point), their incentive to construct housing is very dramatically reduced. Indeed, this proposal would appear to function more as a device to discourage residential development than a device to foster development of lower income housing.

Third, as noted above, the claim that this proposal will produce 386 units, ispremised on full buildout of all vacant land zoned for residential uses in Denville. In none of Denville's planning documents has it been suggested that this is likely within the next six years. To the contrary, this proposal virtually guarantees that construction of these units will stretch out over a very long period of time.

Finally, while the proposal suggests that this general mandatory setaside will also generate funds from developments of five acres or less, none of the details of this aspect of the proposal have been spelled out. It is therefore impossible to evaluate this aspect of the proposal at this time.

6. Selection of Buyers and Renters (II-5)

Denville proposed an elaborate array of selection criteria for prospective buyers and renters. These critieria would create an unlimited and unconditional legally mandated preference for present residents and employees of Denville, former residents of Denville, and persons living in the immediate vicinity of Denville.

These criteria are inconsistent with the municipality's duty to meet its fair share of the regional housing need as well as the needs of its indigenous poor. In addition, they have a disparate impact on racial minorities. The population of New Jersey is 13 percent black. The population of northeastern New Jersey is 14 percent black. The population of Denville, by contrast, is 0.34 percent black. In the past, its black population has been even lower (0.13 percent in 1960 and 0.27 percent in 1970). Morris County, which would encompass most of the 20 mile radius in Denville's fifth rank of preference, has a population which is only 2.5 percent black. These criteria would thus appear to represent a prima facie violation of the Title VIII of the Civil Rights Act of 1964, as amended. See Metropolitan Development Corporation v. Village of Arglington Heights, 558 F.2d 1283 (7th Cir. 1977) cert. denied, 434 U.S. 1025 (1978).

Several matters are conspicuous by their absence from Denville's plan.

a) Overzoning - Denville seeks credit for 122 units of lower income housing on two sites to be rezoned for lower income housing. It cannot and does not assert that the owners of these properties are ready, willing, and able to build under the terms of its proposed rezoning. Even if its proposed rezoning were otherwise unimpeachable, overzoning would be virtually mandatory under these circumstances to ensure that realistic housing opportunities are in fact created.

b) Affordability - The plan is generally silent on measures to ensure affordability. In particular, it does not specify what proportion of all units created by the plan would be affordable to low income households.

In sum, none of the components of the proposed plan appear to create realistic opportunities for provision of

significant quantities of safe, decent housing affordable to lower income households. The only aspect of the plan that appears both workable and nonspeculative is the 12 units of substandard housing which Morris County has agreed to rehabilitate.

Plaintiffs recommend therefore that you report to the Court that Denville has not proposed a realistic plan for compliance and that you proceed to formulate such a plan. In our letter of May 8, 1985, we outlined what we believe to be a reasonable and realistic plan for compliance. We are prepared to amplify and elaborate on that plan to ensure a workable and realistic program for compliance by Denville with its constitutional obligations.

Very truly yours,

Stephen Eisdorfer

Stephen Eisdorfer
Assistant Deputy Public Advocate

SE:cc
Enclosure
cc: All Counsel
Hon. Stephen Skillman, J.S.C.

APPENDIX H

DAVID N. KINSEY ASSOCIATES
PLANNING, COASTAL MANAGEMENT, AND THE ENVIRONMENT

252 Varsity Avenue Princeton, New Jersey 08540 (609) 734-4919

Master's Report:

The Compliance of Denville Township, Morris County, New Jersey with Mount Laurel II

August 1985

Prepared for:

Honorable Stephen Skillman, J.S.C.
Superior Court of New Jersey
Middlesex County Court House
New Brunswick, New Jersey 08903-0964

Prepared by

David N. Kinsey, Ph.D., AICP
New Jersey Professional Planner License No. 3047

SUMMARY

1. Denville Township has a fair share housing obligation of 883 units through 1990 under Mount Laurel II, as determined by Judge Skillman on January 14, 1985, and March 14, 1985.

2. As court-appointed master appointed on March 5, 1985, I have attempted to assist the officials of Denville Township in developing zoning to provide a realistic opportunity for the construction of this low and moderate income housing.

3. This report evaluates and finds the Township's submitted Mount Laurel II compliance program to be unacceptable.

4. I recommend revisions to the Township's Land Use Ordinance to achieve compliance, including a new Mixed Residential Development zone and detailed provisions on low and moderate income housing. I recommend rezoning 540 acres, with a potential to yield 1,080 units of low and moderate income housing, assuming a gross density of 10 dwelling units per acre and a 20% set-aside of affordable housing. This rezoning is intentional overzoning of 122% of Denville's obligation.

5. Five builder-plaintiffs in the Denville Township Mount Laurel II exclusionary zoning litigation seek a "builder's remedy." I find that there are environmental and substantial planning reasons not to grant this remedy to Siegeler Associates and Maurice and Esther Soussa. I find the projects and sites of the other three builder-plaintiffs -- Affordable Living Corporation, Angelo Cali, and Stonehedge Associates -- to be acceptable and suitable for inclusionary developments.

6. I recommend that the phased fair share housing obligation of the Township through 1990 be set at 529 low and moderate income units, in recognition of the likely builders with suitable sites for inclusionary developments and in order to moderate the impact on Denville of these developments. I also recommend that one half of the Township's Prospective Need (354 units) for 1980-1990 be deferred until 1990-1995.

7. I recommend steps to be taken by Denville Township and the Rockaway Valley Regional Sewerage Authority to provide adequate wastewater treatment capacity for Denville and its recommended inclusionary developments.

8. I recommend a special application review process for developments in the Mixed Residential Development zone.

CONTENTS

LIST OF FIGURES

PART ONE - INTRODUCTION

The Master's Assignment and Report

On March 5, 1985, Judge Stephen Skillman of the New Jersey Superior Court appointed me as advisory master in the Denville Township Mount Laurel II litigation. These consolidated matters now include:

Morris County Fair Housing Council et al. v. Township of Boonton et al., filed October 13, 1978,

Siegler Associates v. Mayor and Council of the Township of Denville, filed April 30, 1984, consolidated June 8, 1984,

Affordable Living Corporation v. Mayor and Council of the Township of Denville, filed June 29, 1984; Shongum-Union Hill Civic Association, filed as an intervenor in opposition on August 31, 1984,

Stonehedge Associates v. The Township of Denville, Municipal Council of the Township of Denville, and the Planning Board of the Township of Denville, filed December 31, 1984, consolidated February 5, 1985,

Maurice Soussa and Esther H. Soussa v. Denville Township and The Denville Township Planning Board, filed May 31, 1984, consolidated June 21, 1985, and

Angelo Cali v. The Township of Denville, The Municipal Council of the Township of Denville and the Planning Board of the Township of Denville, filed July 9, 1985.

Judge Skillman assigned me three tasks:

1. Assist the officials of Denville in developing zoning to provide a realistic opportunity for the construction of 883 units of low and moderate income housing.

2. Evaluate whether there are environmental or other substantial planning reasons not to award a "builder's remedy" to the developer plaintiffs, assuming that they are otherwise entitled to such relief.

3. Consider whether there should be phasing in connection with implementation of Denville's Mount Laurel obligation.

Denville Township submitted a compliance program to master and the parties on June 13, 1985. Judge Skillman held a status conference on June 20, 1985, and extended the for submission of my master's report to August 1, 1985.

On July 3, 1985, the Township filed a motion to transfer Mount Laurel litigation to the Council on Affordable Ho established in the New Jersey Department of Community Affai the Fair Housing Act (P.L. 1985, c. 222, enacted July 2, 1 The Township also moved that my appointment as advisory mast terminated.

Judge Skillman denied the Township's motion on July 19, to the extent that it sought to terminate my appointment stated, "...the public interest will be served by permittin Special Master to complete his review of the steps require Denville to comply with its Mount Laurel obligations..." Skillman adjourned the remainder of the Township's moti transfer to September 9, 1985.

This report now responds to Judge Skillman's original as ment to me, as reiterated in his recent request for a revi the steps required for Denville Township to comply with Laurel II. The remainder of PART ONE of this report trace Mount Laurel compliance planning process involving the Town the other parties to the litigation, and the public, sin appointment on March 5, 1985, and sketches a portrait of Den in 1985, to provide a planning context for the report.

PART TWO of this report evaluates the Township's Jun 1985, submission of a compliance program, reproduced in fu Appendix A, as requested by Township officials on July 11, This evaluation then sets the stage for my recommended compl program.

PART THREE of the report proposes amendments to the Lan Ordinance of the Township of Denville designed to create re tic opportunities, through zoning changes, for the constru of low and moderate income housing. I present the recomm ordinance in full in Appendix B and explain its provisio PART THREE.

PART FOUR of this report analyzes the acceptability o projects and the suitability of the sites of the five bui plaintiffs in this Mount Laurel II litigation: Affordable L Corporation, Angelo Cali, Siegler Associates, Maurice and E H. Soussa, and Stonehedge Associates.

PART FIVE of the report examines whether a phasing b 1990 of Denville's fair share housing obligation of 883 uni appropriate, particularly in light of infrastructure, comm

services, and other planning and environmental constraints. As requested by Judge Skillman at his June 20, 1985, status conference, I examine in some detail the availability of adequate wastewater treatment capacity at the Rockaway Valley Regional Sewerage Authority (RVRSA) and the allocation of adequate capacity to Denville Township, once the new regional wastewater treatment plant begins operations in early 1986.

This master's report concludes in PART SIX with recommendations, followed by several appendices.

The sources of information for this report are the various written submissions and oral presentations to me by the Township, builder-plaintiffs, Public Advocate, and intervenor Shongum-Union Hill Civic Association since late March 1985, my own observations through site inspections and interviews, published books and articles, and other public documents. I list these sources and submissions in the BIBLIOGRAPHY at the end of this report.

The Master's Planning Process: March - July 1985

Simply stated, the master's charge in Denville is to find sufficient, suitable sites for 883 low and moderate income housing units, the Township's fair share obligation determined, after a trial, by Judge Skillman on January 14, 1985.

My planning process began with initial telephone consultations with all of the attorneys of record in this matter. On March 14, 1985, I met at 9:30 am in Denville with the Mayor, Council President, Township Administrator, Special Counsel, and Township Planner. Beginning March 25, 1985, I met on nearly a weekly basis, beginning at 10 am in the Denville Municipal Building, with all of the attorneys of record to organize and schedule the compliance planning process, receive written submissions, hear presentations, inspect sites of builder-plaintiffs and non-plaintiff builders and owners willing to sell to builders, discuss the components of a compliance program, analyze the suitability of sites, and explore environmental and planning constraints with implications for phasing the municipality's obligation. These weekly sessions lasted through June 12, 1985, with an additional session held in Denville on July 18, 1985.

I declined the Township's invitation to hold these working sessions in the evening. The Township made a tape recording of all of the working sessions, beginning on April 9, 1985. The sessions were open to the public. Members of Concerned Citizens of Denville, Inc. attended all sessions. The press attended sporadically.

In March 1985, I offered to meet with local officials, in the early morning or in the evening, to assist them in developing

zoning and other measures to comply with Mount Laurel. Towns officials first responded positively to my offer three mo later. I met with the Mayor and Special Counsel on June 1985, and then with the Township Council, Mayor, and Spe Counsel in a session closed at their request, on July 11, 1985

The Township Council held one public evening meeting du this process, on May 14, 1985, for the purpose of a brief st report from the master and a presentation on alternatives to builder's remedy approach by Alan Mallach, a housing and deve ment expert made available by the Public Advocate. The Towns Planning Board held two well-attended evening public meetings May 30, 1985, and June 20, 1985, for presentations by the buil plaintiffs.

Throughout the process I issued a series of twenty memor to the parties on varied topics, on the schedule, agendas for weekly meetings, requests for information, and transmittal information and my initial site suitability criteria reports. I issued a 60 page initial evaluation of the proj and sites of four builder-plaintiffs on July 17, 1985. Fina I also submitted several written status reports to J Skillman.

At my request, the Township submitted an inventory of va land on individual sheets for all vacant parcels of three a or more in area. Consulting engineers to the Township made submitted reports on water supply and the sewer system. Township also arranged for a presentation by the Rockaway Va Regional Sewerage Authority. The Township retained environme engineering consultants, Camp Dresser McKee Inc., who atte most of the weekly sessions, joined in site inspections, prepared the preliminary draft Township compliance program ponents submitted in late May and mid June 1985. The Town also provided me in due course with considerable readily av able planning and environmental information about Denvi However, I did not receive until July 27, 1985, the Townsh December 1984 draft Master Plan reexamination report th requested in mid-March 1985.

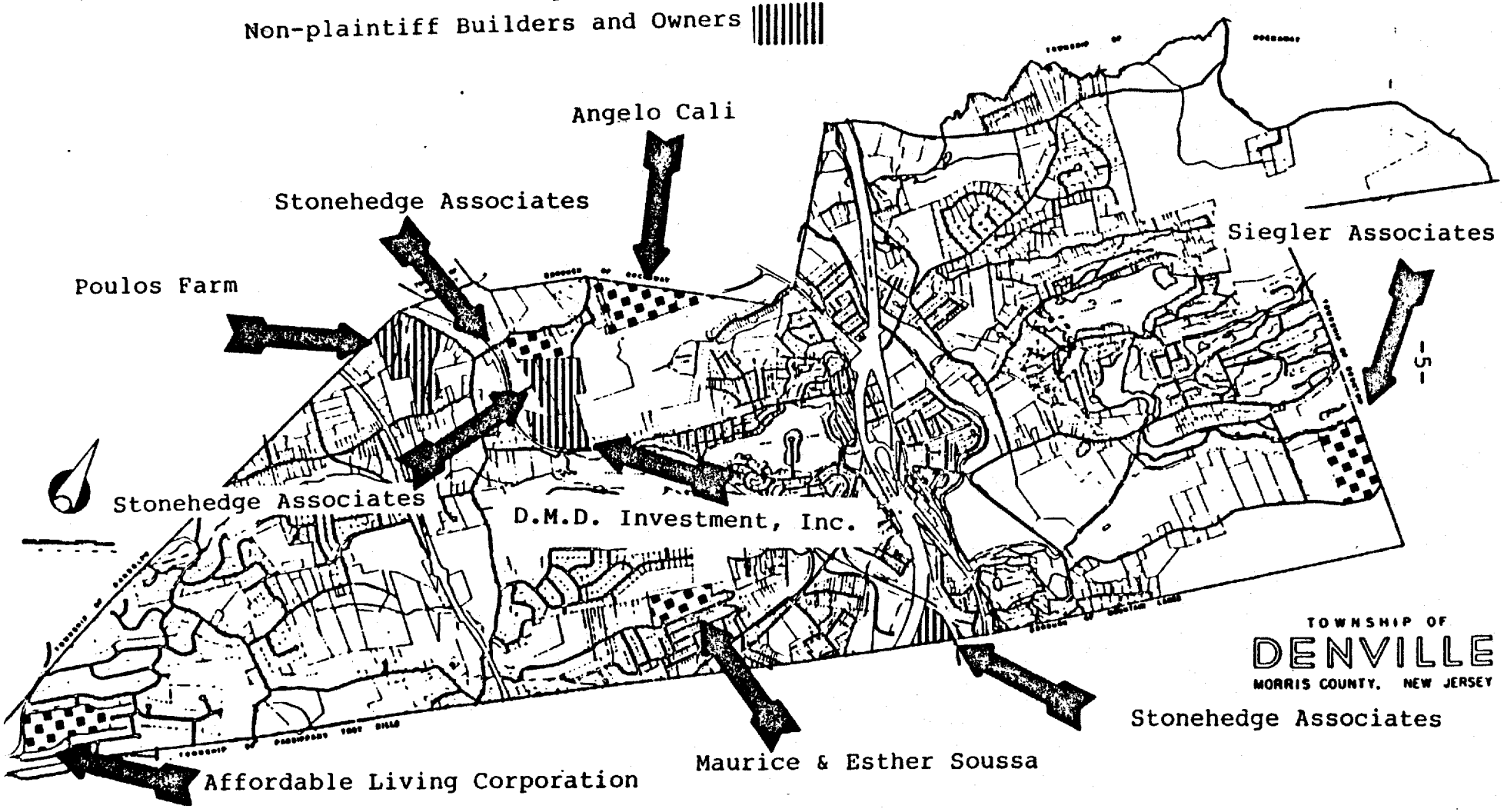
The plaintiffs responded to my request and submitted re mended zoning ordinance provisions. The builder-plaint responded to my request and submitted conceptual site plans, in some cases supplementary site suitability and enginee information. The intervenor submitted expert planning, envi mental, and traffic reports. At my invitation, a representa of the Upper Rockaway River Watershed Association made a pre tation on water resources issues that affect the Valley.

Throughout this March-July planning process, the low moderate income units proposed by builders and land owners, plaintiffs and non-plaintiffs, evolved somewhat, as buil

Figure 1: Sites of Inclusionary Developments Proposed by Builders and Land Owners in Denville, August 1985

Key: Builder-Plaintiffs

Non-plaintiff Builders and Owners



modified their proposed densities and project designs. S builders and land owners acquired and offered new sites. Figu maps these sites.

Figure 2 displays the current projects proposed by the builder-plaintiffs. The major addition since the maste planning process began is the project by Angelo Cali, who be a plaintiff on July 9, 1985. These five developers have com ted to building 333 units of low and moderate income housing 37.7% of Denville's fair share housing obligation of 883 units

Figure 2: Builder-Plaintiffs' Projects Proposed with Low Moderate Income Housing, August 1985

Builder-Plaintiff	Low and Moderate Income Units	Total Units	Site Area (acres)	Gross Densit (du/a
Affordable Living Corp. Block 10001, Lot 3	72	360	40	9
Angelo Cali Block 40001, Lot 4 & 5 Block 40203, Lot 1	90	450	45	10
Siegler Associates Block 50004, Lot 1	80	400	49.6	8
Maurice & Esther Soussa Block 31001, Lot 1	25	125	20.22	6.
Stonehedge Associates Stonehedge Village 1 Block 40001, Lot 13	66	330	22	15
TOTAL UNITS	333	1,665		

In addition to the builder-plaintiffs, other builder land owners in Denville are willing to sell their land a build low and moderate income housing, as shown in Figu Stonehedge Associates, one of the builder-plaintiffs, acq three additional sites for multi-family housing construc including low and moderate income housing, during the mas planning process in the spring of 1985. Those three site not, however, part of that plaintiff's pending litigation. attorney for one land owner - builder, D.M.D. Investment

Figure 3: Non-plaintiff Builders and Owners Willing to Sell, August 1985

Builder-Owner	Low and Moderate Income Units	Total Units	Site Area (acres)	Gross Density (du/ac)
Stonehedge Associates				
Sweetwood (Village 2) Block 40001, Lot 8	27	135	13.5	10
Burger (Village 3) Block 40001, Lot 11	60	280	28.0	10
Mountain Crest Block 50109, Lot 1 Block 31602, Lot 1	38	193	14.8*	13.0**
D.M.D. Investment Inc. Block 40001, Lots 6 & 9	52***	266	26.6	10
Poulos Farm Block 20901, Lots 1, 2, 19 & 20	108***	544	54.37	10
TOTAL UNITS	285	1,418		

* Plus 5.13 acres of the site in Parsippany-Troy Hills (Block 101, Lots 1 & 2)
** Density on Denville acreage only (gross density is 9.7 du/ac for entire site in both municipalities)
*** Master's estimate assuming a density of 10 du/ac.

contacted me and indicated a willingness to develop low and moderate income housing. The attorney for several owners of an area known as the Poulus Farm contacted me and indicated a willingness to sell the land to a developer of low and moderate income housing.

An attorney representing the developer of a proposed 145 unit single family residential development, Lake Shore Estates, contacted me and advised me that his client was not interested in developing any low and moderate income housing.

Harrisburg, PA based developers of a community and consumer

oriented small-scale, low cost housing development system, us precut post-and-beam frames, and their Mendham, New Jersey, r estate consultant (Bakshi/GNP) contacted the Township's Spec Counsel and me to offer their combination of planning and bui ing services to build low and moderate income housing without builder's remedy.

I initiated no contacts with land owners or prospect builders throughout the March-July 1985 master's plan process.

Figure 4 shows the current total of low and moderate inc housing units proposed in Denville by builders and land owners.

Figure 4: Total Proposed Low and Moderate Income Housing Un August 1985

Builder-Owner	Low and Moderate Income Units	Total Units
Builder-Plaintiffs	333	1,665
Non-plaintiff Builders and Willing Sellers	285	1,418
TOTAL UNITS	618	3,083

TOTAL FAIR SHARE HOUSING OBLIGATION OF DENVILLE TOWNSHIP

883 units

TOTAL EXISTING DWELLING UNITS IN DENVILLE TOWNSHIP IN 1980 CEN

4,571

Figure 4 makes clear that builders and land owners are e to provide 69.9% of Denville's fair share obligation, but would also lead, if all of the projects were approved, two-thirds increase in the number of dwelling units in community. However, the Township does have other options complying with Mount Laurel II, including affirmative meas that do not rely on builders to construct low and moderate in housing as part of larger, market rate residential development

Denville Township in 1985

One key number, Denville's fair share housing obligation to provide a realistic opportunity for the construction of 883 units of low and moderate income housing by 1990, needs a planning context.

Denville is a suburban community crossed by three major east-west regional highways (I-90, U.S. Route 46, and State Highway 10). Several narrow and winding streets with country lane origins provide north-south traffic routes. A hilly topography, often shallow bedrock, private lakes with summer cottages converted to year-round use, the constant threat of flooding downtown and throughout the valley from the overflowing Rockaway River, and nineteenth century railroad rights-of-way all shape the pattern of development. A sewer connection ban in effect since 1968 has limited development. Major corporations such as Georgia-Pacific and Hewlitt-Packard have large warehouses in Denville, due to its excellent highway access. Some new office park developments are sprouting. A hospital and related health facilities, two high schools, and a county park serve a larger than municipal region. Many older single family detached houses sit on small lots of only 7,500 square feet, while some new homes on large lots sell for more than $300,000.

Beyond these impressionistic characterizations of the community, the statistics about Denville in Figure 5, obtained from public documents cited in the Bibliography, will help provide a helpful context for the remainder of this report.

Figure 5: An Index of Denville

Population, 1980	14,380
Population, 1970	14,045
Percent Change in Population, 1970-1980	2.4%
Percent of Population Age 60+, 1980	13.4%
Percent of Blacks in Population, 1980	0.34%
Total dwelling units, 1981	4,692
Single family residences, 1981	4,447 (94.7%)
Apartment units, 1981	196 (0.4%)
Area of Denville Township	8,216.31 acres
Percent of undeveloped lands (non-water), 1981	40.22%
Percent of land area in residential uses, 1981	30.98%
Percent in streets, 1981	6.98%
Percent owned by private clubs, 1982	5.3%
Percent in slopes of 25%+, 1979	3.14%
Percent in industrial uses, 1981	1.57%
Percent in apartment uses	0.19%
Total residential building permits, 1960-1982	1,516 units
Average annual residential permits, 1960-1982	66 units
Average annual residential permits, 1980-1982	22 units
State equalized tax rate, 1983	$ 2.26
Per capita gross debt, 1983	$456.77
Per capita debt service, 1983	$ 19.15
Per capita total tax levy, 1983	$768.98
Per capita municipal expenditures, 1983	$303.79

PART TWO - EVALUATION OF THE TOWNSHIP'S COMPLIANCE PROGRAM

The Township's June 12, 1985 Compliance Program Submission

On June 13, 1985, the Township submitted to the master and other parties a six page document entitled "Denville Township, Mount Laurel II Compliance Program, II. Fair Share Compliance," dated June 12, 1985 and marked PRELIMINARY DRAFT. This submission is reproduced in full as Appendix A to this report.

The submission proposes five mechanisms for the provision of the Township's fair share of low and moderate income housing, as outlined below in Figure 6.

Figure 6: The Township's Proposed Compliance Program, June 12, 1985

Five Affordable Housing Mechanisms	Low and Moderate Income Units
1. Rehabilitation of Existing Substandard Units	62
2. Accessory Conversions and Additions (5% of existing 3,200 units with 3 or more bedrooms)	160
3. Senior Citizen Housing (Vanderhoof Ave. or Luger Road sites at 7.5 du/ac)	150
4. High Density Development (Angelo Cali and Stonehedge Associates sites, at 7 du/ac with a 30% mandatory set-aside)	122
5. General Mandatory Set-Aside (30% of new units in subdivisions of 5 or more lots, at four times the zoned density for only the low and moderate income units, and a housing trust fee for subdivisions of less than 5 lots)	386
TOTAL LOW AND MODERATE INCOME HOUSING UNITS	880

The Township's submission also outlines a mechanisr selecting buyers and renters for this housing through a prc Denville Affordable Housing Board.

Denville's submission did not include any proposed ordir or amendments to existing ordinances. Nor did the subm include any maps or documentation for its assertions.

The Township did not submit the proposed compliance p under protest. Also, the Township Council did not take a vote on the proposed program.

I have prepared Figure 7, on the following page, to id the location of the two sites deemed suitable by the Townsh "high density development" at 7 dwelling units per acre 30% set-aside and the two alternative sites proposed for citizen housing.

Issues Raised by the Proposed Compliance Program

The Township's submission raises at least eleven concerning its compliance with Mount Laurel II.

1. Adequacy of the Program to meet the Fair Share Obligatio

The Township's submission appears to yield, under th optimistic circumstances, only 880 units of low and mc income housing, or three units fewer than the Township' share housing obligation of 883 units through 1990, as lished by Judge Skillman's order of February 14, 1985. assumes the highly optimistic scenario of a full build Denville's vacant developable land under its proposed c mandatory set-aside requirement between 1985 and 1990. T clearly unrealistic and probably unwise.

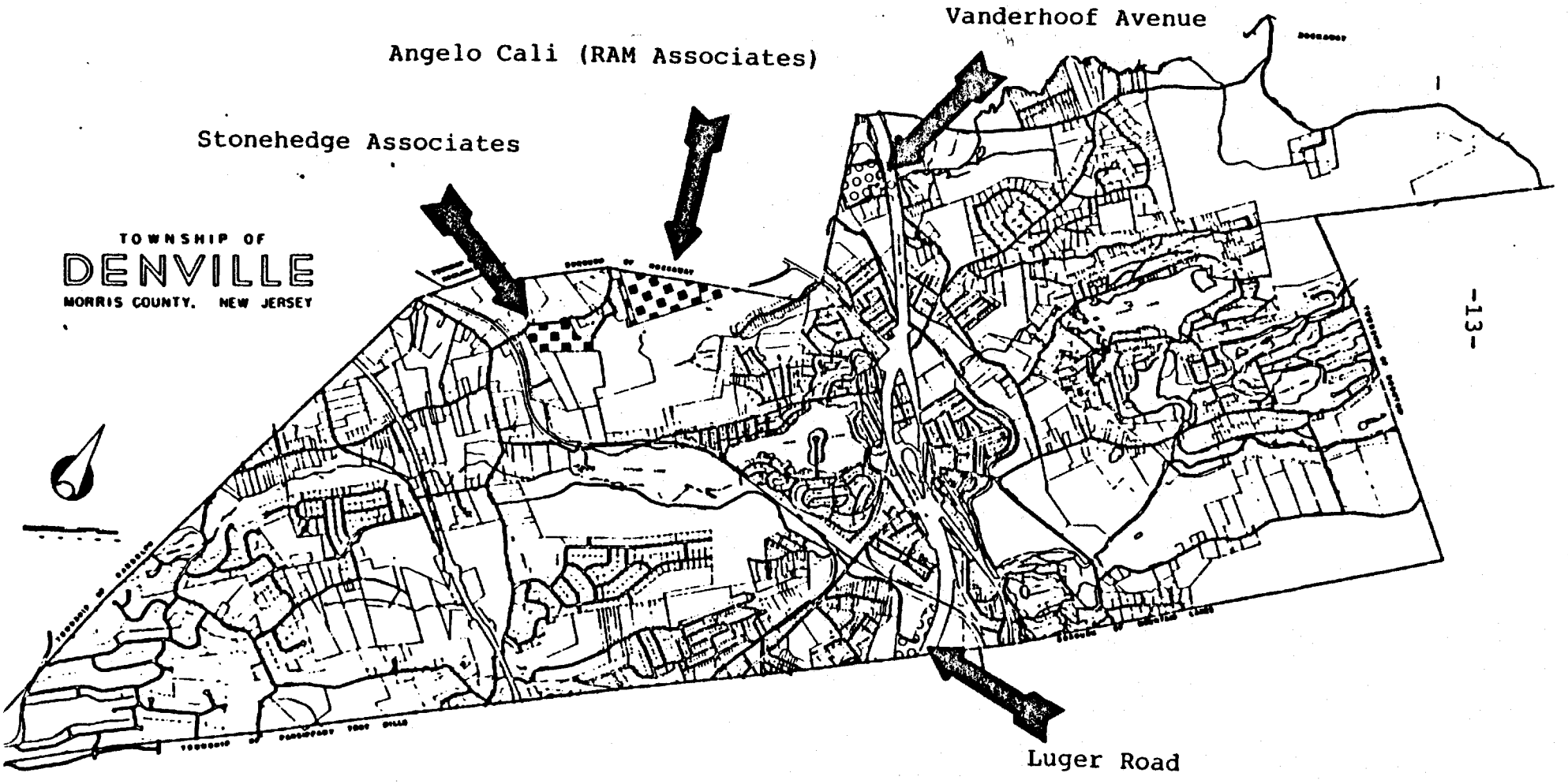
2. Economic feasibility of the proposal

The Township has presented no information in support economic feasibility of its proposal, particularly it set-aside percentage - low density proposal for "high development" and its general mandatory set-aside mechanism.

The Township proposes "high density development" at density of 7 dwelling units per acre and a net densi maximum of 10 dwelling units, depending upon its negot with a developer over "contributions" to infrastructure i ments and undefined efforts to minimize environmental impa must note that the Township does not have and did not prc off-tract improvements ordinance to provide a structure fc negotiations.

Figure 7: High Density Development and Alternative Senior Citizen Housing Sites, Township Proposal, June 1985

Key: High Density Development Senior Citizen Housing



I question the economic feasibility of the To proposed gross and net densities and high set-aside Serpentelli stated concisely the relationship between den set-aside percentages in AMG Realty Company v. Town Warren, decided July 16, 1984 (hereinafter AMG):

> For a mandatory set aside to be effective, the set as must be reasonable and the unit density must be reas able. If the set aside is reasonable and the u density is reasonable, actual construction will resu If the set aside is too high or the density too low, construction will occur because the project must profitable. (at 67)

The Township's proposed set-aside is higher than any app date in any Mount Laurel litigation to my knowledge, Township offers no precedent, argument, or feasibility to support this proposal. Instead, the precedents run to the Township's proposal.

Warren Township, Somerset County, also proposed set-aside. Judge Serpentelli, in AMG, did not rul appropriateness of that high percentage, but did direc Township to "...reexamine its position..." as "...the 30 mandatory set aside could actually frustrate the constru lower income housing." (at 67)

Mahwah Township, Bergen County, proposed a 25% se Judge Smith, in Urban League of Essex County v. Tow Mahwah, decided August 1, 1984 (hereinafter Mahwah), this issue that:

> The weight of the credible evidence presented combi with the intent of Mount Laurel II and marketpl factors compels a finding that a 20% set-aside is maximum permissible to engender the construction of and moderate income housing. (at 34)

I find that there is no basis for the proposed 30% set

Nor has the Township provided any proof of the feasibility of its general mandatory set-aside me proposed as an overlay zone "allowing" the constructio and moderate income units at a density four times tha zoned density, but requiring a 30% set-aside in all new sions of five or more lots.

The Township's proposal is confusing and not presen any examples to help the reader. Here is my understandin it works, using an imaginary 10 acre subdivision, Hypo Acres, located in the current RC or R-1 zones, where the

lot size is 0.92 acres. Most of the undeveloped land in Denville is zoned for such large lot single family residences.

A 10 acre lot is sufficient to develop a maximum of nine lots (9 lots @ 0.92 acres/lot = 9.2 acres). The developer would then be required to build three units of low and moderate income housing (9 lots of market rate housing multiplied by the 30% set-aside = 2.7, rounded to 3 low and moderate income units). These three units could be developed on smaller lots at one-fourth the zoned density, i.e. lots of 0.23 acre (0.92 acre/4 = 0.23 acre). These three units would occupy a minimum of 0.69 acre of the subdivision. The remaining six market units would occupy 5.52 acres, making a total of 6.21 acres of the 10 acre subdivision that had been planned (0.23 acre for the three low and moderate income units + 5.52 acres for the six market units = 6.21 acres).

At this stage in planning Hypothetical Acres, the developer would presumably plan to develop the remainder of the subdivision with three additional market units, on minimum 0.92 acre lots. This makes a total of 2.76 more acres, which in turn would require the development of one more low and moderate income unit (3 units x 30% set-aside = 0.82 units, rounded to 1 unit) on a small 0.23 acre lot.

Hypothetical Acres now has nine large lots for market housing, four smaller lots for low and moderate income housing, and 0.8 acre left over for streets.

This is not a density bonus. Rather, it is a density penalty.

Under the current zoning, the developer of Hypothetical Acres could develop 10 lots at the minimum size of 0.92 acres/lot. Under the Township's proposal, the same developer on the same 10 acre site could only develop nine units of market rate housing, but would be required to set-aside and subsidize four units of low and moderate income housing. This is not an incentive; it is instead a penalty, which one of the builder-plaintiff's aptly called a disincentive to any residential development in Denville.

Judge Skillman clearly stated the important link between a density bonus and a reasonable set-aside in Van Dalen v. Washington Township (decided December 6, 1984):

> The theory of mandatory set-asides without subsidization is that the requirement will be accompanied by higher-density zoning than normally would be permitted. Such higher-density permits a developer to construct more units and thereby to cover any shortfall between what lower income households can afford and the real

> cost of construction. In effect, an increase permitted densities generates any subsidies necessa for lower income housing, without either cost to t developer or non-lower income residents of t development. (at 32)

Denville recognizes that small subdivisions of less th lots will not contain enough market rate units to g sufficient subsidies to develop low and moderate income site. The Township's solution is to require such develo pay an unspecified fee to an undefined Denville Aff Housing Board. The Township states that it will "...spec structure of this fee after further economic analysis." (T submission, p. II-5) It is not clear when that analys take place. Also, the legality of this builder's tr development fee technique is in dispute, and presentl heard by Judge Serpentelli in Carlton Homes, Inc. v. Pr Township.

In short, the Township has not presented any evidence economic feasibility of its general mandatory set-aside me to generate the necessary subsidies.

3. Likelihood that the affordable units will be built

The Township presented very little evidence that the l moderate income units will be built under its five pr housing mechanisms.

The most likely units are twelve existing substandarc that are likely to be rehabilitated, as the County of M Department of Community Development is, for the period 1984 - May 1985, already assisting twelve households in De or has determined them to be eligible for assistance.

The Township proposes an ambitious accessory conv program, but with no incentives to property owners, such cost loans. Denville expects that 5% of its 3,200 house three or more bedrooms (67.7% of its total dwelling un 1981) will be converted, yielding a total of 160 accessory ments. The Township provides no evidence of property interest in this approach or the economic feasibility of c sions without financial incentives.

In Mahwah, Judge Smith found that municipality's acc apartment conversion ordinance to be overly restrictive a projection of property owner interest in the option overly mistic. Judge Smith credited Mahwah with 25 likely acc units, instead of its projection of 100 likely units. (at 9-

As Denville did not even present the type of expert rep

conversions offered by Mahwah, I find that there is little likelihood of 160 units of accessory apartments being created. I do believe, however, that a properly structured accessory apartments conversion program is an appropriate component of a Mount Laurel compliance program.

The Township proposes 150 units of senior citizen housing, at one of two alternative sites, but offers no firm financing plan for these units. I find therefore that there is little likelihood that the units will be built.

There is little likelihood that the "high density development" proposed by the Township will take place, because of its high set-aside and density that is lower than prevailing practice in Mount Laurel compliance programs in the Morris County housing market.

There is little likelihood that the general mandatory set-aside proposed by the Township will produce affordable units, as it provides a density and affordable unit penalty, rather than a density bonus as an incentive.

In brief, the Township's compliance program is likely to produce only 12 affordable units, through rehabilitation of existing substandard units.

4. Need for overzoning

The Township's proposal is silent on the issue of overzoning, despite the guidance offered by the Supreme Court in Mount Laurel II:

> In some cases, a realistic opportunity to provide the municipality's fair share may require over-zoning, i.e. zoning to allow for more than the fair share if it is likely, as it usually is, that not all of the property made available for lower income housing will actually result in such housing. (92 N.J. 270)

The Township's proposal presents no information that the property it would make available for lower income housing would actually be built. Rather, the owners of the two sites the Township proposes to rezone for "high density development" have advised me that the Township's proposal is not acceptable. These facts reinforce the need for overzoning.

5. Amendments to the Land Use Ordinance with Subdivision and Site Plan Standards

The Township has not presented any proposed amendments to its Land Use Ordinance. It is therefore impossible to evaluate the

subdivision and site plan standards that would apply t
proposed affordable housing mechanisms. It is clear, hov
that none of the Ordinance's current cost-generating provis
such as its densities and design standards, have been removec

6. Denville Affordable Housing Board Ordinance

The Township's six page proposal devotes parts of two
to an eight step priority list for the selection of lc
moderate income tenants and purchasers, to be used by a Der
Affordable Housing Board.

This proposal would establish an overwhelming preferenc
present residents and employees of Denville, as well as wc
in Denville, former residents of Denville, and persons
within 10 miles of Denville. Only at the seventh rung of
eight step ladder is there a recognition that the constitut
obligation under Mount Laurel II is to provide the municipal
share of the region's housing needs.

Also, the proposal is silent on the composition, resp
bilities, and powers of this Board; the Township provic
proposed enabling ordinance. Nor does the proposal specif
Township's definitions of low and moderate income household
the measures to be used to insure that the units remain af
able.

7. Environmental and Planning Reasons that Support the Propc

The Township's submission contains little information c
environmental and planning reasons that support its program.

For example, the proposal suggests only three criteri
selecting sites for senior citizen housing: (a) proximi
existing adequate infrastructure, (b) proximity to p
transportation, and (c) proximity to community services.
Township then identifies two possible sites, on Vanderhoof A
and at the end of Luger Road (see Figure 6), but fai
indicate how these sites meet these criteria.

In fact, I question the suitability of both sites for s
citizen housing, for the following three reasons.

First, both sites are now zoned for industry and have
cent existing industrial development, with frequent 18-
tractor-trailer trucks on roads without sidewalks. Even if
walks were available for safe pedestrian movement, neithe
is in close proximity to either public transportation or c
ity services. The Luger Road site is about 3,000 feet b
from heavily-traveled East Main Street (State Route 53)
Vanderhoof site is about 1,500 feet by road from the mun

boundary with the Borough of Rockaway, and that community's existing industrial area.

Second, while both sites have existing sewer and water mains, which is not surprising given their location in active, ratable paying industrial zones, both sites have environmental constraints.

The Vanderhoof Avenue site (Block 62002, Lot 1) has a 150 feet wide power line easement and a 15 feet wide easement for a municipal sewer right-of-way. A significant part of this wooded site lies within the flood hazard area of Beaver Brook, which runs through and along the northern quarter of the site. Vehicular access to the site would require a bridge over Beaver Brook, or use of Dock Road, an unimproved lane with a 25 feet wide right-of-way along the site's southwestern boundary. The Township of Denville owns the 19 acre site.

The 21 acre Luger Road site (Block 3161, Lots 4, 6, and 7) has steep and excessive slopes and may include a pocket of perched wetlands.

Third, the symbolism of the two sites should not be overlooked. Both sites are on dead-end, industrial streets, at the municipal borders, far from the center of the community, far from its Senior Citizen Center. The Vanderhoof Avenue site is accessible only through the Borough of Rockaway. Noise may be a concern at both sites. The Luger Road site backs up against Interstate 80. The Vanderhoof Avenue site is across Vanderhoof Avenue from Interstate 80. I believe that more appropriate sites, closer to the center of Denville, should and can be found for the senior citizen housing the Township professes to encourage.

The Township has also not advanced any environmental and planning reasons for its general mandatory set-aside proposal. If implemented, this proposal could lead to the scattered construction throughout the municipality of tiny pockets of single family residences on 10,062.5 square feet lots (one-fourth the present minimum lot size of 40,250 square feet in the RC and R-1 zones) surrounded by large lots in the same subdivisions. This is hardly sound planning to have a helter-skelter mix of residential densities which would clearly not preserve the community character which is of legitimate concern to Denville.

8. Environmental and Planning Reasons for Rejecting Three of the Builder-Plaintiffs' Projects

The Township's June 13, 1985 submission gave no reasons for rejecting the projects of three of the builder-plaintiffs (or for accepting the sites of two of the builder-plaintiffs). A subse-

quent submission, dated June 19, 1985, provided indivic suitability analyses for the sites of the four builders then plaintiffs (Angelo Cali became a plaintiff on July 9 I review and evaluate the Township's analyses in Part this report, in my analysis of the five builder-pla projects and sites.

9. Funding Sources and Alternate Funding Sources

The Township provided few details in its submissio: funding sources, and backup or alternate funding sources, rehabilitation, accessory apartment conversion, and citizen housing proposals.

For its rehabilitation program, Denville relies u County of Morris, Department of Community Development federal Community Development Block Grant funds. Approval U.S. Congress of its 1986 federal budget resolution on Au 1985, made clear the uncertainty and risk of Denville's r on these funds, without an alternative funding source. C voted, in its FY86 Budget Resolution, to terminate the Co Development Block Grant program (revenue sharing to sta local governments) as of October 1, 1987 (The New York August 2, 1985, p. 1).

For its accessory apartment conversion program, De relies solely on the entrepreneurial spirit and capita instincts of its owners of houses with three or more bec The Township proposes no financial incentives, such as a lc loan program financed by municipal borrowing at tax- interest rates, to facilitate this compliance mechanism.

For its senior citizen housing program, the Townshi presumably offer the municipally-owned Vanderhoof Avenue although its submission is cryptic on how this housing w funded or financed at either this or the alternative site.

The Township proposes no tax abatements to assist the de ment of low and moderate income housing, nor does the To commit to passing a "resolution of need," as required by N. 55:14J-6(b) for a developer to obtain some subsidies, al the Supreme Court made clear these potential obligation: municipality in Mount Laurel II (92 N.J. 264-264).

10. Sewer Capacity and Allocation

While the Township submitted reports and organized pres tions to the master and the parties on sewer capacity and a: tion, the Township's compliance program submission make reference to the potential lack of any capacity for waste treatment for new development being available or being allc to Denville by the Rockaway Valley Regional Sewerage Auth

(RVRSA), when its new 12 MGD treatment plant begins operations in early 1986. Of course the possible lack of readily available wastewater treatment options makes the Township's submission problematic; I will address this issue in PART FIVE - PHASING of this report.

11. Phasing

The Township's submission is silent on whether it expects all 880 units of low and moderate income housing, under its five proposed mechanisms, to be built during the period 1985-1990, or under a different schedule. The submission does state that "...Denville's fair share should be provided at a pace consistent with the overall development of the community." This "pace," however, is not defined.

In summary, I conclude that Denville Township has not submitted an acceptable program of compliance with Mount Laurel II. I find that there is little likelihood, based on my analysis of the Township's submission, that more than 12 units of low and moderate income housing will be built, and that these units will be existing substandard units rehabilitated by the County of Morris using federal Community Development Block Grant funds. I now turn to my recommended zoning ordinance to enable Denville to comply with Mount Laurel II.

APPENDIX I

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

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

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

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

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

APPENDIX J

ALFRED SLOCUM, PUBLIC ADVOCATE OF NEW JERSEY
BY: STEVEN EISDORFER, ESQ.
ASSISTANT DEPUTY PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
DEPARTMENT OF THE PUBLIC ADVOCATE
CN 850
TRENTON, NEW JERSEY 08625
609-292-1692

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

MORRIS COUNTY FAIR HOUSING COUNCIL ET AL,	
Plaintiffs	Civil Action (Mount Laurel)
vs.	
TOWNSHIP OF BOONTON ET AL	AFFIDAVIT OF ALAN MALLACH
Defendants	

STATE OF NEW JERSEY :
: ss
COUNTY OF MONMOUTH :

ALAN MALLACH, being of full age and duly sworn, upon his oath deposes and says:

1. I am a housing and development consultant, and am a member of the American Institute of Certified Planners (AICP). I have been actively involved in a wide variety of issues relating to the implementation of the Mount Laurel doctrine, and have acted as a consultant on affordable housing to the Department of the Public Advocate in the above case since its inception.

2. In connection with the above, I have reviewed the provisions of the recently-enacted Fair Housing Act (referred to below as the "Act"), with particular reference to the potential effect of Sec. 16 of the Act, which provides that parties to ongoing Mount Laurel litigation may move to have the case

transfered to the jurisdiction of the Council on Affordable Housing (the "Council") established by the Act.

3. The Act provides that, in evaluating whether to grant such a motion, the court must consider whether permitting the transfer would "result in a manifest injustice to any party to the litigation" [Sec. 16(a)]. To that end, it is necessary to try as best one can to evaluate the effects that would result from a transfer. While to some extent this may be highly speculative, there are at least two areas in which the provisions of the Act make possible a rational evaluation of effects. These are, first, the manner in which a transfer will affect the determination of the municipal fair share; and second, the extent to which the transfer will delay resolution of the matter currently before the court.

4. Should a transfer be permitted, the municipality would then be required to enact a housing element and fair share plan consistent with the provisions of the Act. Sec. 7 of the Act provides that the Council shall (a) determine housing regions, (b) estimate the present and prospective need for lower income housing by region, and (c) "adopt criteria and guidelines for <u>municipal determination</u> of its present and prospective fair share of the housing need in a given region (emphasis added)"[Sec. 7(c)(1)]. Sec. 7 of the Act further provides extensively for adjustment of the municipal fair share, on the basis of a variety of criteria or conditions.

5. While the precise effect of many of the provisions of Sec. 7 is uncertain, the numerical effect of one provision,

however, can be directly measured. The provision reads as follows:

> Municipal fair share shall be determined after crediting on a one to one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households. [Sec. 7(c)(1)]

Since the terms "low and moderate income housing" are defined in the Act, it is possible to make a reasonably accurate numerical analysis of the number of units, statewide and for individual municipalities, that would represent fair share "credits" on the basis of the application of the above language.

6. I have prepared such an analysis, which is attached, with supporting documentation, as Appendix A to this affidavit, and which is iorporated herein by reference. Based on this analysis, and for reasons explained therein, I have concluded that the sum total of fair share "credits" permitted by Sec. 7(c)(1) of the Act Act exceeds the combined total present and prospective statewide lower income housing need as determine under generally accepted and used methodologies.

7. The reason for this patently absurd outcome is that the language of the Act permits credit to be taken for households in place, while the need assessment combines two elements (a) households in substandard housing, which is a very small percentage of total lower income households in place; and (b) incremental lower income household growth, which is also a small percentage of the existing base of lower income households. Thus, even when those households in place spending excessive amounts for shelter, or living in substandard housing, are excluded, the remaining number is still greater than the sum of present and prospective need.

8. The existence of lower income households in place, living in sound and affordable housing, has little or no bearing on the meeting of lower income housing needs. In both Washington Township and Denville, for example, 80% to 90% of the units meeting the standards of Sec. 7(c)(1) are occupied by moderate income homeowners/*. These are households who bought their units many years ago, at prices far below current market prices, and have either paid off their mortgages, or are making payments on mortgages at far below current mortgage interest rates. If and when these units come on the market in the future, they will not be affordable to lower income households under any even remotely plausible circumstances.

9. This single provision, therefore, thoroughly distorts the determination of municipal fair share in a manner that, in my opinion, contravenes the clear intent of the Supreme Court in the Mount Laurel II decision, which held, regarding the municipal fair share obligation that "the housing opportunity provided must, in fact, be the substantial equivalent of the fair share' [92 NJ at 216]. With rare exceptions, the units for which this provision awards credit do not represent a lower income "housing opportunity" by any rational definition.

10. Other provisions governing the determination of fair share, although less amenable on their face to arithmetical

*/Moderate income homeowners make up 40% to 50% of the total lower income population in place in these two communities. This is a further indication of the disparity between these communities and the typical distribution, since statewide only 16% of all lower income households are moderate income homeowners.

measurement, are equally prejudicial in their language and in their potential effect:

a. The provisions for further adjustment of the fair share obligation [Sec. 7(c)(2)] are entirely oriented toward reduction of the fair share; e.g., provision is made for [downward] adjustment where adequate infrastructure is not available, but not for upward adjustment in those communities which have adequate infrastructure to accomodate substantial growth. The act provides for seven separate such adjustments to be made.

b. Over and above any adjustments, the Council, at its discretion and on the basis of such criteria that it deems appropriate, may place a limit upon the magnitude of any municipality's fair share obligation [Sec. 7(e)].

c. The determination of prospective need is to be based on "development and growth which is reasonably likely to occur...as a result of actual determination of public and private entities' [Sec.4(j)]. In determining prospective need, furthermore, the Council is instructed to give consideration to approvals of development application[s] and real property transfers. These factors, which objectively have little or nothing to do with the actual lower income housing need, are likely to be used only to reduce the need figure that is established for purposes of municipal determination of fair share under Sec. 7(c).

Finally, under the provisions of Sec. 14(a) of the act, the Council must, prior to establishing the regional need that is to

be the basis on which each municipality determines its fair share obligation, adjust the need figures on the basis of the above criteria and guidelines.

11. While it is theoretically possible for the Council, given its broad discretion under the Act, to implement these provisions in a manner that would not impair the rational determination of fair share obligations, given the tendentious language of each of these provisions, such an outcome appears unlikely in the extreme. The intent of these provisions of the Act, and the likely outcome of their implementation, particularly when combined with the effects of the more clearly defined language of Sec. 7(c)(1), appear clearly to further undermine the execution of the Mount Laurel doctrine as set forth by the New Jersey Supreme Court.

12. The second readily predictable effect of a transfer under the provisions of Sec. 16 of the Act is delay. Under the provisions of the Act, the municipality whose case has been transferred has five months from the date of promulgation of criteria and guidelines by the Council to file a housing element and fair share plan; the Council, in turn has seven months from "confirmation of the last member initially appointed to the Council or January 1, 1986, whichever is earlier" [Sec.7] to adopt those criteria and guidelines. Thus, assuming the later date, a municipality need not file its fair share plan with the Council until as late as January 1, 1987.

13. The Act is ambiguous in the extreme with regard to the nature and duration of proceedings arising from a transfer subsequent to the filing of the municipal housing element and fair

share plan. It is clear, however, that in the event the housing element does not accomodate the proposal of a developer plaintiff, or, in the alternative, reflect the concerns of a public interest or lower income plaintiff, a considerable further delay, in all probability more than a year, is likely to take place before that plaintiff would be back in a position to seek relief from the courts; i.e., the position he was in prior to granting of the transfer motion. Thus, the total delay resulting from granting of the motion is likely to be between two and three years, assuming that the municipality does indeed move for substantive certification of its housing plan before the Council, an action which the Act does not require.

14. The effects of delay on a development proposal are twofold. First, there are a variety of direct costs associated with delay, most substantially the cost of holding land, which includes both the costs of interest and property tax payments. In many cases, furthermore, a developer facing a 2 to 3 year delay must then confront a choice between making a massive up-front cash outlay, which may be realistically impossible to him, or losing the land and the potential development in its entirety. The reason for this is that, in order to be able to hold land for such an extended period, it may be necessary to purchase it outright. Without massive cash resources, the developer may simply lose the land on which he is hoping to build. While this is a serious problem for individual developers, the second impact of delay is even more serious. This is, in essence, loss of the crucially important market opportunity that exists at present.

15. To the extent that production of Mount Laurel housing is conditioned on production of market housing, through the mandatory setaside approach, the amount of lower income housing constructed will be a function of the market demand that exists. At this point, and since 1983, market demand in New Jersey has been unusually strong. This is the result of a host of factors, most notably (a) lower interest rates; (b) massive pent-up demand from the preceding period, during which period little housing was built; and (c) strong and sustained economic growth throughout most of New Jersey. The explosion of developer-initiated Mount Laurel cases that followed the 1983 Mount Laurel II decision was a reflection of these factors; if the decision had come in 1980, for example, it is unlikely that more than a trickle of lawsuits would have been initiated by developers during the following two years.

16. It is unlikely that these exceptional market conditions will continue indefinitely. The American economy, and the housing market within it, are notoriously cyclical. There is close to a consensus of economists that the economic growth of the 1983-1985 period cannot be indefinitely sustained, and that interest rates are likely to begin to rise again in the future, for a variety of reasons, including massive Federal deficits now being incurred. The implications of these trends are that two to three years from now the market environment for development of housing in New Jersey is likely to be substantially changed, and that to the extent that it is changed, the change will be for the worse. Economic growth may be substantially less, interest rates may be substantially higher, and the pent-up demand that now exists may have

been substantially eroded by the efforts of other builders (many of whom are not subject to setasides) not stymied by transfer motions.

17. A further consideration, which compounds these effects, is the fact that available infrastructure (particularly sewerage treatment capacity) is often very limited. There is a strong possibility, even a likelihood, that within the next two to three years in many communities there will no longer be sewerage treatment capacity available to prospective developers. Such capacity as exists today will have been fully utilized by the non-residential development and the non-Mount Laurel residential development that will take place between then and now.

18. As a result of these factors, if projects now being proposed are forced to suffer a two to three year delay, it is likely that (a) many projects will not be able to go forward at all at the end of that period; and (b) of those projects which could go forward in some fashion, the economic circumstances will have become more adverse, therefore threatening the provision of the amount of lower income housing now proposed. The overall effect of delays resulting from the granting of transfer motions on the provision of lower income housing in those communities is likely to be overwhelming; indeed, it could come close to completely nullifying the builder's remedy provisions set forth in the Mount Laurel II decision.

19. These last points are of significance to both developers and public interest or low income plaintiffs. A further effect of delay of particular concern to the latter group is the risk that

sites available and vacant today, which would be suitable and desireable for lower income housing development (either through setasides or otherwise), are likely to be utilized for other purposes during the period of delay. The availability of desireable sites for lower income housing, which is already limited in many communities involved in Mount Laurel litigation, will be further constrained after two, three, or more years of delay.

20. In conclusion, it is my opinion that the effects of the fair share language of the Act, either separately or in conjunction with the extensive delays necessarily resulting from the procedures following a transfer of a case to the jurisdiction of the Council, will result in a drastic reduction in the number of lower income units that will be produced, both in individual municipalities and statewide, as well as substantial and unjustified delay in the provision of even that reduced number. Whatever the effects of granting a transfer motion may be on a particular developer, I believe that to grant such motions would have a disastrous effect on the interests of New Jersey's lower income population in need of housing, the population whose needs were so clearly addressed in the Mount Laurel decision. Whatever the meaning of "manifest injustice" may be in the strict legal sense, I believe that the above effects clearly represent a manifest injustice to this population by any reasonable definition of the term.

Alan Mallach, AICP

Sworn to and subscribed before
me this 12th day of August, 1985

Geraldine T. Millar

GERALDINE T. MILLAR
Notary Public of New Jersey
My Commission Expires Aug. 11, 1987

AN ANALYSIS OF SECTION 7 C(1) OF THE FAIR HOUSING ACT PROVIDING FOR THE DETERMINATION OF HOUSING CREDITS AGAINST MUNICIPAL FAIR SHARE ALLOCATIONS

Prepared by Alan Mallach, AICP

In July 1985, the Fair Housing Act was enacted into law by the New Jersey Legislature, and signed by the governor. This act provides generally for the future implementation of what is known as the Mount Laurel doctrine through administrative machinery, including the determination of fair share obligations for New Jersey municipalities. For the most part, the provisions governing the determination of fair share are couched in broad and general language, with substantial administrative discretion granted by the act to the Council on Affordable Housing established by the act, as well as to local government/1. The act does, however, provide explicitly for municipalities to receive one particular clearly-defined credit against the municipal fair share, in Section 7 c(1) of the act, which is to be calculated as follows:--

> Municipal fair share shall be determined after crediting on a one to one basis each current unit of low and moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households.

The language of this section makes clear that, while subsidized housing is to be included in this credit provision, units eligible for credit are not to be limited to subsidized housing. In order to be able to estimate the potential magnitude of the credit made possible by the above provision, some definition is necessary, which is provided elsewhere in the act, in Section 4:

> c. "Low Income Housing" means housing affordable according to federal Department of Housing and Urban Development or other recognized standards for home ownership and rental costs and occupied or reserved for occupancy by households with a gross household income equal to 50% or less of the median gross household income for households of the same size within the housing region in which the housing is located.

The definition for "moderate income" is identical, except that the income range is specified to be 50% to 80% of the area median income. Thus, a unit would clearly meet the standard of Sec. 7

1/Contrary to some impressions that have arisen, the Council does not determine the municipal fair share allocations. The Council determines the regions and total need figures to be used, and then adopts "criteria and guidelines" on the basis of which each municipality determines its fair share. Thus, depending on the degree of specificity of those guidelines, municipalities may retain broad discretion to determine their own fair share allocations.

c(1) if it is:

1. Of adequate standard, which can reasonably be interpreted as meaning (on the basis of the most generally utilized definition) that it is neither substandard nor overcrowded.

2. Affordable, meaning that the household is not spending an excessive amount for shelter.

3. Occupied or reserved for occupancy/2 by a household falling within the above income definition.

This definition clearly includes a substantial part of New Jersey's housing stock. Roughly 40% of New Jersey's households are of low and moderate income, and the great majority of them live in physically sound housing. While the number of units occupied by lower income households which also meets the affordability standard is substantially smaller, it is still a substantial number.

In order to estimate the magnitude of the credit, first at a statewide level, then for a representative region, and then for selected municipalities, it is necessary to turn to 1980 Census data. Although a literal interpretation of the language of the act would suggest that a showing be made that the units are affordable and occupied by lower income households now; i.e., in 1985, no data more recent than the 1980 Census is available/3. For purposes of estimation, therefore, the Census appears to be a reasonable source. The 1980 Census [STF-3, Part XI, Tables 30 and 31] provide a cross-tabulation of household income by percentage of income for shelter, for owners and renters, distributed on the basis of the following value ranges:

INCOME	% OF INCOME FOR SHELTER
$0 - $4999	under 20%
$5000 - $9999	20% - 24%
$10000 - $14999	25% - 34%
$15000 - $19999	35% and over
$20000 and over	[not computed]

In order to estimate the number of lower income households, and the number paying no more than an affordable amount for shelter,

---

2/We have focused in this discussion only on occupied lower income units, since the number of such units reserved for occupancy but vacant is likely to be negligible.

3/There is an open question whether, at such time that the Council establishes guidelines for this matter, they will accept a showing under this section based solely on 1980 Census data, or whether they will require a more up-to-date study to be made by the municipality.

we have made the following assumptions:

1. Since in 1980, the median household income in New Jersey was $19,800, we have used $10,000 as the cut-off for the low income population, and $16,000 as the cut-off for the moderate income population. Wherever we have interpolated within ranges, we have assumed that households are evenly distributed throughout the range.

2. We have assumed, for both owners and renters, that a unit in which the household spends under 30% of gross income for housing costs is considered affordable. Again, we have assumed that households are evenly distributed within each range.

3. We have assumed that the households listed in the Census tables as "not computed" (n.c.) are evenly distributed among the value ranges within the category in which they are found.

Having determined the total number of lower income households living in housing considered affordable, it was necessary to make an adjustment to reflect the fact that some of these units would be physically substandard or overcrowded; we have assumed, in the absence of a more detailed analysis, that half of all substandard and overcrowded units occupied by lower income households are also affordable by the definition given earlier. This is based on the proposition that, since the substandard units are likely to be less expensive on the average than sound units, a moderately larger percentage of substandard than of sound units will be found to be "affordable" to lower income households. In this analysis, we have used the total of deficient housing established by the Rutgers Center for Urban Policy Research/4. This figure was subtracted from the total number of affordable units occupied by lower income households obtained from the Census data analysis in order to determine the number of potential fair share credits.

1. STATEWIDE ANALYSIS

Table 1 on the following page presents the outcome of the analysis for the State of New Jersey as a whole, using the assumptions cited above. It will be noted that, although low income households make up the great majority of the total lower income population, moderate income households make up the great majority (nearly 70%) of the households in this "credit" pool. The significance of the number obtained in Table 1, however, is that it is larger than the total universe of fair share housing need, as determined either through the methodology used by the Center for Urban Policy Research, or that used by the court in the Warren decision. These figures, and the comparison with the pool of "credits" is given in Table 2. Note that we have used the CUPR

4/Mount Laurel II: Challenge and Delivery of Low-Cost Housing, p. 115.

figure for present housing need in all cases/5.

TABLE 1: ANALYSIS OF POTENTIAL FAIR SHARE CREDITS BASED ON CENSUS DATA ON AFFORDABILITY BY HOUSEHOLD INCOME - STATE OF NEW JERSEY

1. DETERMINATION OF AFFORDABLE UNITS

	RENTER		OWNER		TOTAL
	LOW	MODERATE	LOW	MODERATE	
% OF INCOME FOR SHELTER:					
< 20%	21219	48595	10416	50104	
20-24%	24747	49151	13911	27315	
25-34%	54363	69981	32975	37946	
35% +	246459	29305	103879	37380	
n.c.	28201	6718	6211	0	
Collapsed value ranges (without n.c. adjustment):					
< 30%	73147	132737	40815	96392	
30% +	273640	64295	120366	56353	
Number of affordable units after n.c. adjustment:					
< 30%	79072	137250	42386	96392	

2. DETERMINATION OF POTENTIAL NUMBER OF FAIR SHARE CREDITS

Total number of affordable units occupied by lower income households	355,100
[less estimated number of substandard and overcrowded affordable units]	[60,080]
POTENTIAL FAIR SHARE CREDITS AVAILABLE	295,020

5/The reason for this choice is that it appears at this point that the Mount Laurel courts have determined that with regard to one aspect of the procedure by which present need is determined; that is, the determination of the percentage of substandard units which are occupied by lower income households, the CUPR methodology is more reliable than that methodology developed by the Consensus Group, and subsequenty embodied in the Warren decision.

TABLE 2: COMPARISON OF POTENTIAL FAIR SHARE CREDITS WITH TOTAL NEED TO BE ALLOCATED

1. CUPR NEED DETERMINATION/GROSS HOUSING NEED

Present need (from p. 115)	120,100
Prospective need (from p. 126)	133,981
	254,081
less potential fair share credits	[295,020]
NET FAIR SHARE TO BE ALLOCATED	[40,939]

2. CUPR NEED DETERMINATION/HOUSING NEED TO BE ALLOCATED (gross need less need meet through private market without assistance; see p. 316)

Present need not housed	99,166
Prospective need not housed	118,561
	217,727
less potential fair share credits	[295,020]
NET FAIR SHARE TO BE ALLOCATED	[77,293]

2. WARREN NEED DETERMINATION

Present need	120,100
Prospective need	158,708
	278,808
less potential fair share crediits	[295,020]
NET FAIR SHARE TO BE ALLOCATED	[16,212]

Under all three alternative approaches, the potential pool of credits exceeds the total need to be allocated. Upon reflection, this is not surprising. The statutory language of Sec. 7 c(1) provides, in essence, for credit to be taken on the basis of households and units in place. The need allocation, under all methodologies in use, is based in part on substandard and overcrowded housing and in part on future household increment. These factors have only the most general relationship with one another, and it is largely attributable to chance or coincidence that the two totals are as close as they are. If, for example, affordable units as a percentage of all units occupied by lower income households were even slightly higher, the number of potential credits, and thus the disparity between credits and need, would be substantially greater.

The excess of potential fair share credits over need to be

allocated will not necessarily recur in all, or even in most, municipalities. Although there is a modest (although tangential) relationship between the factors that determine this credit, and housing need generally, the relationship between the factors that determine a municipality's potential "credits" and its fair share allocation is nonexistent. Thus, in some municipalities the potential "credits" will vastly exceed the fair share, while in others they will be only a modest percentage of the fair share allocation. This statement should not be interpreted to suggest that in some cases the credit derived from Sec. 7 c(1) is "reasonable"; it is clearly nothing of the kind, even where its practical implications may not be substantial.

2. REGIONAL ANALYSIS

The same methodology can be applied to housing regions within the state. Indeed, the language of the Fair Housing Act requires this to be done, in some fashion, as stated in Sec. 14 (a) of the act:

> ....The Council shall review the petition and shall issue a substantive certification if it shall find that:
>
> a. The municipality's fair share plan is consistent with the rules and criteria adopted by the council and not inconsistent with achievement of the low and moderate income housing needs of the region as adjusted pursuant to the council's criteria and guidelines adopted pursuant to subsection c. of section 7 of this act.....

The specific "credit" discussed in this analysis is clearly included within the adjustment specified in this paragraph. While the precise manner in which the council will choose to make such adjustments is left to that body's discretion, it is at least arguable that the paragraph calls for the regional need to be reduced by the amount of the "credit" before transmission to the municipalities for purposes of fair share allocation.

Should that or a similar interpretation prevail, the effect on the region in which Morris County municipalities are likely to be included would be dramatic. To assess the potential effect, we have calculated the potential "credit" and its relationship to housing need for the Newark PMSA, an area which contains Essex, Morris, Sussex and Union Counties/6. Table 3, presenting this analysis, is given on the following page. In the region created by

---

6/Sec. 4(b) of the act provides that the regions to be used by the council must (a) contain no less than two and no more than four counties; and (b) constitute to the greatest extent practicable the PMSAs defined by the Census Bureau. Thus, it is highly likely that Morris County will be eventually defined by the council to be in the Newark PMSA.

by the Newark PMSA/7, as the table indicates, the potential credits also exceed the regional need, by a far greater extent in proportionate terms than was the case with the statewide figures. This suggests the possibility of an utterly absurd outcome; namely, that on the basis of a straightforward interpretation of the act, the council could "logically" determine that there was no unmet housing need to be allocated within the Newark PMSA.

TABLE 3: DETERMINATION OF POTENTIAL FAIR SHARE CREDITS UNDER SEC. 7 c(1) FOR NEWARK PMSA AND COMPARISON WITH REGIONAL HOUSING NEED

1. DETERMINATION OF POTENTIAL CREDITS AVAILABLE

	$0 - $9999	$10000 - $15999	TOTAL
Number of affordable units (housing cost < 30% of gross income) after n.c. adjustments:			
Essex	20478	30624	51102
Morris	1964	12701	14665
Sussex	890	3164	4054
Union	5985	17054	23039
			92860
[less 50% of deficient housing units in region]			[16720]
Potential fair share credits available			76140

2. COMPARISON OF POTENTIAL CREDITS WITH REGIONAL NEED

	CUPR/GROSS HOUSING NEED	CUPR/TO BE ALLOCATED	WARREN HOUSING NEED (ADJUSTED)
Present need	33440	26551	33440
Prospective need	8669	5223	23659
TOTAL REGIONAL NEED	42109	31774	57099
less credits	[76140]	[76140]	[76140]
NET REGIONAL NEED TO BE ALLOCATED	[34031]	[44366]	[19041]

7/The analysis indicates that the median household income for the PMSA in 1980 was approximately $20,000, so that we have used the ranges of $0-$9999 as equivalent to low income, and $10000-$16000 as equivalent to moderate income, as in the statewide analysis.

3. MUNICIPAL ANALYSIS

Using the same methodology as shown above with regard to the State of New Jersey as a whole, we have computed the fair share credits potentially available to Washington and Denville Townships in Morris County. These totals are then compared with the fair share allocations for each township that have already been established through the litigation process. Table 4 for Washington Township is immediately below, while Table 5 for Denville is given on the following page.

TABLE 4: DETERMINATION OF POTENTIAL FAIR SHARE CREDITS FOR WASHINGTON TOWNSHIP [MORRIS COUNTY] AND COMPARISON WITH FAIR SHARE ALLOCATION

	$0 - $9999	$10000 - $16000	TOTAL
1. households by % of household income for housing costs:			
< 20%	0	56	
20% - 24%	0	60	
25% - 34%	41	112	
35% +	189	80	
n.c.	7	10	
2. Collapsed value ranges (without n.c. adjustment):			
< 30%	21	172	
30% +	209	136	
3. Number of affordable units after n.c. adjustment:			
< 30%	22	179	201
[less 50% of indigenous housing need]/*			[52]
Potential fair share credits available			149
Fair share allocation as determined by Court			[227]
NET MUNICIPAL FAIR SHARE OBLIGATION			78

*Indigenous need determined by multiplying total deficient units by .673 (CUPR percentage of deficient units for Region II occupied by lower income households, p. 142).

The effect of the credit provision on Washington Township is to eliminate approximately 2/3 of the court-determined fair share obligation of the municipality. Since Washington Township would not be precluded from making further adjustments under the various provisions of Sec. 7(c) of the act, it might well be able to argue

under the provisions of the act that it has no fair share obligation at all.

TABLE 5: DETERMINATION OF POTENTIAL FAIR SHARE CREDITS FOR DENVILLE TOWNSHIP AND COMPARISON WITH FAIR SHARE ALLOCATION

	$0 - $9999	$10000 - $16000	TOTAL
1. Households by % of household income for housing costs			
< 20%	15	145	
20% - 24%	15	63	
25% - 34%	54	145	
35% +	336	120	
n.c.	12	16	
2. Collapsed value ranges (without n.c. adjustment):			
< 30 %	57	281	
30% +	363	192	
3. Number of affordable units after n.c. adjustment			
< 30%	59	291	350
[less 50% of indigenous housing need]/*			[46]
Potential fair share credits available			304
Fair share allocation as determined by Court/**			883
NET MUNICIPAL FAIR SHARE OBLIGATION			579

*Indigenous need determined by multiplying deficient housing total by .673 (see note to Table 4).
**Credit for 41 units of rehabilitation has already been subtracted from this figure.

While the effect of the "credit" on Denville is more modest, in that it only removes slightly more than 1/3 of the fair share allocation, it is still substantial.

It is extremely doubtful that the provisions of Sec. 7 c(1), as they have been described in this analysis can be reconciled in any rational fashion with the letter or intent of the Mount Laurel decision. In this respect, a noteworthy feature of these "credits" is that the overwhelming majority of units for which both Denville and Washington Townships would get credit under this approach are of a particular nature: owner-occupied units, occupied by a moderate income household. Such units represent nearly 90% of the

units for which Denville may receive credits, and roughly 80% of Washington Township's credits. These units appear in Census data as affordable, it can reasonably be assumed, because they were bought many years ago, at far lower prices, and with mortgages at interest rates far lower than those prevailing today/8. Those units, when they may next come onto the market, will not be affordable by either low or moderate income households. Thus, bona fide housing needs may end up being disregarded or excluded from consideration, on the basis of a historical artifact bearing no relationship to the meeting of today's needs.

In conclusion, the implications of the provisions of Sec. 7 c(1) of the Fair Housing Act, as well as many other features of the act not discussed in this analysis, are worrisome in the extreme for those who hope that the Fair Housing Act will result in a fair process of balancing municipal interests with those of the lower income population.

8/In many cases, furthermore, the affordability may be a function of the mortgage having been paid off already, and the unit being owned free and clear.