ML - Morris County Fair Housing Council 12/11/80
v. Boonton Twp

Brief of Intervenor-Respondent Attorney General of NJ

p 104

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SUPREME COURT OF NEW JERSEY
DOCKET NOS. A-122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133

MORRIS COUNTY FAIR HOUSING COUNCIL, et al.,

Plaintiffs-Respondents,

v.

BOONTON TOWNSHIP, et al.,

Defendants-Appellants,

and related cases on appeal.

Civil Action

On Appeal from the Interlocutoty Orders of the Superior Court, Law Division, Middlesex/ Morris Counties

Sat Below:

Honorable Stephen Skillman, J.S.C.
Honorable Eugene D. Serpentelli, A.J.S.C.

BRIEF OF INTERVENOR-RESPONDENT ATTORNEY GENERAL OF NEW JERSEY

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

MICHAEL R. COLE
First Assistant Attorney General
DEBORAH T. PORITZ
Deputy Attorney General
Of Counsel

EDWARD J. BOCCHER
MICHAEL J. HIAS
ROSS LEWIN
NANCY B. STILES
Deputy Attorneys General
On the Brief

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	
POINT I - THE FAIR HOUSING ACT IS A COMPREHENSIVE PLANNING AND IMPLEMENTATION RESPONSE ON THE PART OF THE LEGISLATURE TO THE MOUNT LAUREL CASES, EVIDENCING A STRONG PREFERENCE FOR ADMINISTRATIVE RESOLUTION OF EXCLUSIONARY ZONING DISPUTES; IN DETERMINING TRANSFER MOTIONS UNDER SECTION 16 OF THE ACT, THAT STRONG LEGISLATIVE PREFERENCE, TOGETHER WITH THE FELT NEED FOR A COORDINATED, UNIFORM ADMINISTRATIVE APPROACH TO THE MT. LAUREL PROBLEM, SHOULD PREVAIL ABSENT A SHOWING OF GROSS UNFAIRNESS. THE COURTS BELOW ERRED IN FAILING TO ACCORD APPROPRIATE WEIGHT TO THIS LEGISLATIVELY EXPRESSED PREFERENCE AND IN ACCORDING INORDINATE WEIGHT TO INCONVENIENCE TO LITIGANTS AND POTENTIAL DELAYS IN IMPLEMENTING AND COMPLETING THE ADMINISTRATIVE PROCESS.	11
POINT II - THE PROVISIONS OF THE FAIR HOUSING ACT ARE CLEARLY CONSTITUTIONAL AND SHOULD BE UPHELD.	33
A. INTRODUCTION	33
B. THE MT. LAUREL OBLIGATION MUST BE DISTINGUISHED FROM THE COMPLIANCE MECHANISM FORMULATED BY THE SUPREME COURT IN MT. LAUREL II FOR ACHIEVING THE CONSTITUTIONAL GOAL.	35
C. THE METHOD OF ACHIEVING THE MT. LAUREL OBLIGATION SET FORTH IN MT. LAUREL II IS NOT CONTSTITUTIONALLY REQUIRED.	37
D. A SECTION-BY-SECTION ANALYSIS OF THE ACT.	40

TABLE OF CONTENTS (cont.)

Page

POINT III - THE MORATORIUM ON THE BUILDER'S REMEDY ESTABLISHED IN THE FAIR HOUSING ACT IS CONSTITUTIONAL. 83

CONCLUSION 103

CASES CITED

	Page
Abbott v. Burke, 100 N.J. 269 (1985)	20, 24
Affiliated Distillers Brand Corp. v. Sills, 56 N.J. 251 (1970)	81
AMG Realty Co. v. Warren Tp., ___ N.J. ___ (Law Div. 1984)	45
Bd. of Ed. of Asbury Park Ed. Ass'n, 155 N.J. Super. 76 (App. Div. 1977)	15
Boss v. Rockland Elec. Co., 95 N.J. 33 (1983)	23
Brunetti v. Borough of New Milford, 68 N.J. 576 (1975)	34, 80
City of Hackensack v. Winner, 82 N.J. 1 (1980)	22
Donadio v. Cunningham, 58 N.J. 309 (1971)	95
Euclid v. Amber Realty Co., 272 U.S. 365 (1926)	100
Feiler v. New Jersey Dental Ass'n, 191 N.J. Super. 426 (App. Div. 1983), certif. den. 99 N.J. 162 (1984)	15, 16
Fischer v. Bedminster Tp., 5 N.J. 534 (1950)	96, 97
Hager v. Weber, 7 N.J. 201 (1951)	96, 97
Inganamort v. Borough of Fort Lee, 72 N.J. 412 (1977)	80, 81
In re Li Volsi, 85 N.J. 576 (1981)	97
In re Loch Arbour, 25 N.J. 258 (1957)	34, 71, 73
INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)	81

CASES CITED (cont.)

	Page
Juzek v. Hackensack Water Co., 48 N.J. 302	73
Knight v. Margate, 86 N.J. 374 (1981)	100
Marbury v. Madison, 2 L.Ed. 60 (1803)	102
Matter of Egg Harbor Assocs. (Bayshore Centre), 94 N.J. 358 (1983)	18, 33
McGlone v. Corbi, 59 N.J. 86 (1971)	86
Meadowlands Regional Development Agency v. Hackensack Meadowlands Development Commission, 119 N.J. Super. 572 (App. Div. 1972)	91
Morin v. Becker, 6 N.J. 457 (1951)	93
Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359 (Law Div. 1984)	16, 18, 19, 26 Passim
Morris County Fair Housing Council, et al. v. Boonton Township, et al., (Morris County), ___ N.J. Super. ___ (Law Div. 1985)	8, 12,
Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212 (1985)	
New Jersey Association of Correction v. Lan, 80 N.J. 199 (1979)	34, 39
New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1 (1972), app. dism. 409 U.S. 943, 93 S.Ct. 270, 34 L.Ed.2d 215 (1972)	39
Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977)	4
Patrolmants Benev. Assn. (PBA) v. Montclair, 70 N.J. 130 (1976)	24
Plaza Joint Venture v. Atlantic City, 174 N.J. Super. 231 (App. Div. 1980)	91

CASES CITED (cont.)

	Page
Quaremba v. Allan, 67 N.J. 1 (1975)	66
Robinson v. Cahill, 69 N.J. 449 (1976)	33, 34, 75
Roe v. Kervick, 42 N.J. 191 (1964)	36
Schierstead v. Brigantine, 29 N.J. 220 (1959)	58
Smith v. Penta, 81 N.J. 65 (1979)	34
So. Burl. Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151 (1975)	1
So. Burl. Cty. NAACP v. Tp. of Mt. Laurel, 92 N.J. 158 (1983)	1
State v. Abbati, 99 N.J. 418 (1984)	93
State v. McCrory, 97 N.J. 132 (1984)	93
State v. State Supervisory Employees Association, 78 N.J. 54 (1978)	23
Toms River Affiliates v. Dept. of Environmental Protection, 140 N.J. Super. 135 (App. Div. 1976)	15, 91
Van Dalen v. Washington Tp., ___ N.J. Super. ___ (Law Div. 1984)	45
Winberry v. Salisbury, 5 N.J. 240 (1950)	100

STATUTES CITED

N.J.S.A.	34:13A-1 et seq.	22
N.J.S.A.	34:13A-5.4c	22
N.J.S.A.	40:55D-28(d)	3
N.J.S.A.	40A:4-45.1 et seq.	58
N.J.S.A.	52:14B-1 et seq.	43, 70
N.J.S.A.	52:14B-10(c)	74

RULES CITED

	Page
R. 2:2-3(a)(2)	19
R. 2:2-3(b)	19
R. 2:2-4	19
R. 2:10-2	19
R. 2:11-3(e)(1)(E)	20
R. 2:12-4	19
R. 4:69-5	32

LAWS CITED

	Page
P.L. 1975, c. 291, §19	16
P.L. 1975, c. 291, §49	16
P.L. 1975, c. 225	17 Passim

MISCELLANEOUS

	Page
Constitutional Convention of 1947, Vol. II	98 Passim
Constitutional Convention of 1947, Vol. IV	97 Passim
Governor's Conditional Veto, April 26, 1985	5 Passim
Senate Bill No. 2046	12, 13
Senate Bill No. 2334	13

STATEMENT OF THE CASE

Over a decade ago, this Court held that a municipality's land use regulations must provide a realistic opportunity for low and moderate income housing. South Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975). Insofar as the Mt. Laurel Township zoning ordinance was deemed inconsistent with that requirement, the Court invalidated the ordinance; however, exercising judicial restraint, Mt. Laurel I deferred to the Township for reformation of its zoning ordinances stating:

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

Eight years later Mt. Laurel II reaffirmed the constitutional obligation of a municipality to exercise its governmental zoning powers in furtherance of the general welfare by providing the requisite opportunity for a fair share of the region's need for low and moderate income housing. 92 N.J. 158, 208-209 (1983). Finding that the need for satisfaction of the Mt. Laurel doctrine was greater than ever, the Court clarified various aspects of the doctrine, established procedural guidelines for the management of exclusionary zoning litigation, and expanded the remedies to be

implemented by the courts in instances where municipalities have failed to comply with their Mt. Laurel obligations.

The Court was acutely aware of its judicial role and acknowledged that it was, indeed, treading on sensitive ground by acting unilaterally, in the absence of an initiative from the Legislature, to enforce the constitutional mandate. Although the Court felt constrained to formulate an extraordinary remedial program as the only means available to bring about a realistic opportunity for low and moderate income housing, it took this singular action with reluctance, expressing its preference for legislative action:

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

See also Id. at 352. The Court noted that, since Mt. Laurel I, there had been some legislative initiative in the field of exclusionary zoning, citing the revision of the Municipal Land Use Law which contemplated zoning with regional consequence in mind,

N.J.S.A. 40:55D-28(d), and which relied on the State Development Guide Plan (1980). The Court also relied on that plan in establishing guidelines for a determination of a municipality's Mt. Laurel obligation. 92 N.J. at 213, 223-248. Repeatedly, however, the Court indicated its readiness to defer further to more substantial legislative and executive actions, explaining that, absent adequate legislative and executive assistance in this field, there was no choice but to resort to judicial devices "even if they are relatively less suitable." 92 N.J. at 213-214.

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

> (1) that the municipality adopt such resolutions and ordinances, including particular amendments to its zoning ordinance, and other land use regulations as will enable it to meet its Mount Laurel obligations;
>
> (2) that certain types of projects or construction as may be specified by the trial court be delayed within the municipality until its ordinance is satisfactorily revised, or until all or part of its fair share of lower income housing is constructed and/or firm

> commitments for its construction have been made by responsible developers;
>
> (3) that the zoning ordinance and other land use regulations of the municipality be deemed void in whole or in part so as to relax or eliminate building and use restrictions in all or selected portions of the municipality (the court may condition this remedy upon failure of the municipality to adopt resolutions or ordinances mentioned in (1) above); and
>
> (4) that particular applications to construct housing that includes lower income units be approved by the municipality, or any officer, board, agency, authority (independent or otherwise) or division thereof. [92 N.J. at 285-286].

In addition, in instances where the plaintiff is a developer, "the court shall determine whether a builder's remedy shall be granted." 92 N.J. at 278. The Court explained that its concern for compliance with Mt. Laurel was the basis for its departure from a prior reluctance to grant builder's remedies expressed in Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 549-552 (1977), and held that, where a developer succeeds in Mount Laurel litigation and has proposed a project which provides a substantial amount of lower income housing, a builder's remedy should be granted. Nevertheless, where the plaintiff's project is contrary to sound land use planning because of environmental or other substantial planning concerns the Court made it clear that the remedy should be denied. 92 N.J. 279-280.

That the builder's remedy and other enforcement measures established by the Court in Mount Laurel II were meant as interim devices for achieving compliance with the constitutional mandate cannot be doubted. The clear intention of the Court is plainly

stated throughout that opinion and is underscored in the Court's concluding remarks:

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

In response to this judicial acknowledgement of the need for legislative action to fulfill the obligations defined in Mount Laurel II, the Legislature enacted the Fair Housing Act, L. 1985, c. 255, effective July 2, 1985. The Act addresses the rulings of Mount Laurel I and Mount Laurel II thereby complying with the Court's request for a legislative initiative. Section 2(a)(b). Indeed, the central core of the Act consists of an administrative mechanism designed to answer the call of Mount Laurel II. As explained by Governor Kean in his Conditional Veto message to the Senate, "the expectation is that through these procedures, municipalities operating within State guidelines and with State oversight will be able to define and provide a reasonable opportunity for the implementation of their Mt. Laurel obligations." Governor's Conditional Veto, April 26, 1985. (Legislative History, Item No. 8).

The goals established by the Mount Laurel decisions are the underpinnings of the Act. In Mount Laurel II, the Court expressed three purposes for its rulings: (i) to encourage voluntary compliance on the part of municipalities with the constitutional obligation by defining it more clearly; (ii) to simplify litigation in the area of exclusionary zoning; (iii) to increase substantially the effectiveness of the judicial remedy by providing that in most cases, upon a determination of noncompliance, the trial court would

order an immediate revision of the ordinance and require the use of effective affirmative planning and zoning devices. 92 N.J. at 214. It was the Court's aim to accomplish these purposes "while preserving the fundamental legitimate control of municipalities over their own zoning and, indeed, their destiny." Ibid.

Consistent with these judicial goals, the Act establishes a blueprint for planning and implementation to the end that the "interest of all citizens, including low and moderate income families ... [will] be best served." Section 2(c). By means of a voluntary system for compliance with Mount Laurel obligations, municipalities may come before the Council on Affordable Housing to obtain certification of their planning efforts and, in the process, to resolve exclusionary zoning controversies. The Act thereby effectuates a legislative preference for the resolution of existing and future disputes before the Council. In place of protracted and expensive litigation the Act provides an administrative forum for the mediation and review of such disputes. Section 3.

As set forth in Point II, infra, various sections of the Act are designed to keep a municipality on track once it has elected to submit to review of its housing element by the Council. During the development of a municipality's housing element and zoning ordinance under the criteria to be developed by the Council, and in the event of a dispute over compliance with those criteria, the Act provides for a mediation and review process intended to obviate the necessity of seeking judicial recourse in such matters. It is also an expressed purpose of the Act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing. Section 3.

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

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

The trial courts are granted discretion under the Act to transfer ongoing exclusionary zoning lawsuits to the Council if the case was filed prior to May 3, 1985. Section 16, par. 1 (hereinafter referred to as Section 16(a)). The Act envisions that a transfer will be made unless to do so would result in "manifest injustice to any party to the litigation." In any case filed after May 3, the review and mediation process must be initiated with the Council pursuant to Section 16(b).

In the cases here before the Court the parties have either sought transfer to the Council or have objected to the implementation of Section 16 in such manner as to permit transfer to the Council. Various of the plaintiffs have questioned the constitutionality of the Fair Housing Act generally, or have focussed on specific provisions of the Act as violative of the Constitution. The key to these disputes, as recognized by this Court in

framing the issues to be addressed by the parties, is the meaning of "manifest injustice," for the opportunity for administrative resolution of these disputes envisioned by the Legislature will be considerably curtailed should the Court deny transfer to many of the municipal defendants now before it.

The State, therefore, differs with certain of the views expressed by a number of the parties as to what constitutes "manifest injustice" - particularly the all encompassing definition urged by the Public Advocate below. The Public Advocate seemingly argued that transfer to the Council is inappropriate in any case because of its view that the Constitution of New Jersey tolerates no delay whatsoever in the effectuation of the Mount Laurel obligation and his seeming conviction that a transfer to the Council will have that effect. The Public Advocate apparently views any transfer to the Council as being inappropriate because of his notion that a "transfer to the Affordable Housing Council will inevitably result in a failure to provide housing opportunities substantially equivalent to the municipality's fair share." Public Advocate Brief in Opposition to Motion to Transfer in Morris County Fair Housing Council, et al. v. Boonton Township, et al. This position strains credulity, proceeding as it does on an adversary's overly pessimistic view of the remedy provided by the Legislature.

Contrary to the Public Advocate's position, an objective reading of the Fair Housing Act yields the conclusion that in all reasonable probability, the Act can and will result in vindication of the Mount Laurel right, notwithstanding its voluntary character. And, while admittedly some delays will attend a transfer because of the time necessary for the Council's organization, adoption of

rules and regulations, and guidelines, those delays are reasonably needed to achieve an effective and efficiently functioning body, which is required if the problem is to be addressed in all its dimensions. Whether viewed sequentially, or overall, the durational time frames established by the Legislature are relatively short, given the magnitude of the undertaking. The Public Advocate's position therefore should be rejected by the Court.

The State respectfully submits that, after a careful review of each section of the statute challenged by plaintiffs, reading each in conformity with the purpose of the Act and the intention of the Legislature, it will be apparent that the Act properly effectuates the constitutional obligations and rights enunciated by this Court in Mount Laurel I and II. It is not disputed that the goal of the Act and the constitutional goal are the same. The methods selected by the judiciary and the Legislature to effectuate this goal differ to some degree. This, however, has no bearing on the constitutionality of the Act. The judicial remedies created by the Supreme Court in Mount Laurel II were not of constitutional dimension but, rather, were a means of bringing about compliance with the constitutional obligation. Nor is it a violation of the separation of powers doctrine of the Constitution, or of the prerogative writ jurisdiction of this Court, for the Legislature to impose a period of repose from the extraordinary remedy reluctantly imposed by the Court -- the builder's remedy --, in order to allow even those municipalities still before the trial courts time to take advantage of the opportunities offered by the Act. In formulating its compliance mechanism, the Court encouraged the Legislature to adopt its own pro-

cedure for enforcing the constitutional goal, one which hopefully would remove the judiciary from the process. That the Legislature's mechanism is different from that provided for by the Court, or perhaps different from one which certain of the Mt. Laurel plaintiffs may have favored, does not render the Act unconstitutional.

ARGUMENT

POINT I

THE FAIR HOUSING ACT IS A COMPREHENSIVE PLANNING AND IMPLEMENTATION RESPONSE ON THE PART OF THE LEGISLATURE TO THE MOUNT LAUREL CASES, EVIDENCING A STRONG PREFERENCE FOR ADMINISTRATIVE RESOLUTION OF EXCLUSIONARY ZONING DISPUTES; IN DETERMINING TRANSFER MOTIONS UNDER SECTION 16 OF THE ACT, THAT STRONG LEGISLATIVE PREFERENCE, TOGETHER WITH THE FELT NEED FOR A COORDINATED, UNIFORM ADMINISTRATIVE APPROACH TO THE MT. LAUREL PROBLEM, SHOULD PREVAIL ABSENT A SHOWING OF GROSS UNFAIRNESS. THE COURTS BELOW ERRED IN FAILING TO ACCORD APPROPRIATE WEIGHT TO THIS LEGISLATIVELY EXPRESSED PREFERENCE AND IN ACCORDING INORDINATE WEIGHT TO INCONVENIENCE TO LITIGANTS AND POTENTIAL DELAYS IN IMPLEMENTING AND COMPLETING THE ADMINISTRATIVE PROCESS.

Section 16 of the Fair Housing Act establishes a means by which exclusionary zoning matters, at various stages of litigation, may be transferred to the Council on Affordable Housing for resolution. Specifically, Section 16(a) of the statute provides that in lawsuits instituted more than 60 days before the effective date of the Act, i.e., before May 3, 1985, any party to the litigation may make a motion to transfer the case to the Council. That section further provides, "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." Section 16(a). In contrast, Section 16(b) requires that any person who institutes a lawsuit after the cut-off date, "shall file a notice to request review and mediation with the council;" and if a municipality has engaged the administrative provisions of the Act, a litigant "shall exhaust the review and mediation process of the Council before being entitled to a trial on his complaint."

These provisions reflect the Legislature's intent to shift responsibility for addressing exclusionary zoning disputes from the courts to the executive branch of government. To underscore this purpose the Legislature determined that the Council is to "have primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this State," Section 4(a), and explicitly stated:

> 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.... [Section 3].

Mindful, however, that it would be possibly unwise, and unfair to some parties to simply divest the courts of jurisdiction over all Mt. Laurel cases, regardless of the status of the litigation, the Legislature established the system of referral set forth in Section 16.

As noted by Judge Skillman below, the standard for considering transfer motions under Section 16(a) was considerably modified at various stages throughout the legislative history of the Act. Morris County Fair Housing Council, et al v. Boonton Township, et al., slip opinion at 42-44. The initial version of the bill provided that transfer motions were to be addressed to the discretion of the court. In exercising its discretion, the court was to specifically consider a range of elements, including the age and status of the case, the likely date by which the statute's administrative process would be completed, and whether the transfer would "facilitate and expedite the provision of a realistic opportunity for low and moderate income housing." Senate Bill No. 2046, introduced June 28, 1984, Section 14(a). (Legislative History,

Item No. 1). A subsequent revision of the bill by the Senate State Government, Federal and Interstate Relations and Veterans' Affairs Committee eliminated the enumerated criteria set forth in the original version and, instead, provided that no exhaustion of administrative remedies was required "unless the court determines that a transfer of the case to the council is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing." Senate Committee Amendments to Senate Bill No. 2046, November 26, 1984. (Legislative History, Item No. 28). Senate Bill 2046 was thereafter combined with Senate Bill No. 2334 by the Senate Revenue Finance and Appropriations Committee; this Senate committee substitute did not alter the standards established by the previous committee amendment and the substitute passed in the Senate. (Legislative History, Item No. 4A).

Upon consideration in the Assembly, the Assembly Municipal Government Committee completely eliminated the standard for transfers established by the Senate Committee amendment and instead inserted the "manifest injustice" standard now contained in the law. In the same amendment the Assembly Committee also inserted the language contained in Section 3, establishing a legislative presumption in favor of the administrative process created under the Act. In its statement, the Assembly Committee explained the purpose behind the legislation and the reasons for its proposed amendments:

> This bill provides for a legislative response to the Mount Laurel II decision. The bill encompasses a comprehensive housing planning and financing assistance mechanism which provides an alternative to the planning mecha-

nisms and remedies currently being enforced by the courts. The Assembly Committee Amendments would:

. . . .

5. Establish that a court in determining whether to transfer pending law suits to the council must consider whether or not a manifest injustice to a party to the suit would result, and not just whether or not the provision of low and moderate income housing would be expedited by the transfer.

. . . .

8. Declare the State's preference for the review and mediation process, rather than litigation, for resolving exclusionary zoning disputes....

[Assembly Municipal Government Committee Statement, February 28, 1985, Legislative History, Item No. 5B]

The minority statement criticized the committee amendments because the changes did "not go far enough," and because the committee did not tie the bill to legislative action to place a constitutional amendment removing the judiciary from Mount Laurel disputes on the ballot. Ibid.

The bill passed both the Assembly and the Senate and was signed into law with the manifest injustice standard intact.

The legislative history thus demonstrates that the Fair Housing Act evidences a decidedly strong preference for administrative resolution of Mount Laurel housing disputes as opposed to judicial resolution of those disputes. The depth of the legislative feeling in that regard, and the appropriate weight that should be accorded this finding in the resolution of transfer motions, is clear from a review of the sweeping changes made in preexisting law by the Act and the central role dispute resolution

before the Council was intended to play in achievement of the overall object of the legislative scheme: that "every municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing low and moderate income families." Section 2(a).

In furtherance of this legislative aim the Act* vests "primary jurisdiction" for the "administration of housing obligations" in the Council on Affordable Housing, and expresses the legislative determination to provide first and foremost an administrative means for addressing exclusionary zoning disputes:

> The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation review and process set forth in this act and not litigation.... [Section 3.]

The doctrine of primary jurisdiction "is concerned with 'promoting the proper relationship between the courts and administrative agencies charged with particular regulatory duties,'" Bd. of Ed. of Asbury Park v. Asbury Park Ed. Ass'n., 155 N.J. Super. 76, 78 (App. Div. 1977), citations omitted. Primary jurisdiction "instructs a court to decline to exercise the jurisdiction it possesses to hear issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." Feiler v. New

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* The Appellate Division has stated that the police power of the State is not exhausted by the delegation of zoning power to municipalities and that "[t]he State, with its reserve police power has the unquestioned authority to delegate that power to one or more agencies of government as the Legislature may deem appropriate." Toms River Affiliates v. Dept. of Environmental Protection, 140 N.J. Super. 135, 146 (App. Div. 1976), citation omitted.

Jersey Dental Ass'n, 191 N.J. Super. 426, 434 (App. Div. 1983). certif. den. 99 N.J. 162. The application of this doctrine is particularly apt here. By requiring that newly-filed lawsuits exhaust the administrative procedures established by the Act under Section 16(b), the Legislature underscored the primacy of the administrative mechanism it created. See also, Morris County Fair Housing Council, supra, slip opinion at 45.

Sound reasons exist to support the legislative aim to develop a "comprehensive planning and implementation response" to the Mt. Laurel obligation, as set forth in Section 2(c), not the least of which is to give added force to the doctrine by providing the tools and the resources to actually construct housing, on a statewide basis. Whereas realization of the mandate through litigation may depend in some measure upon a builder's disposition to sue, the Act, and related legislation, oblige all municipalities to account for their Mt. Laurel obligations. Section 29 of the Act amended the Municipal Land Use Law, P.L. 1975, c. 291, §19 (C40:55D-28), to require municipalities to include in their master plans a housing plan element developed pursuant to Section 10 of the Fair Housing Act. This provision is self-enforcing since a municipality's power to zone is conditioned upon the planning board having adopted a housing plan element. Section 30, amending P.L. 1975, c. 291, §49 (C40:55D-62). A municipality must comply with these provisions by August 1, 1988. Section 31.

Furthermore, the considerable financial resources of the Housing and Mortgage Finance Agency (HMFA) and the Department of Community Affairs (DCA), through 'affordable housing programs' and the 'Neighborhood Preservation Program' are made available to

municipalities who seek to meet their obligation to provide low and moderate income housing.* Sections 20, 21. This assistance need not await any formal Council action since the HMFA and DCA are both authorized, during the Act's 'start-up' period, to make their own determinations that assistance they provide aids a municipality in meeting its Mt. Laurel obligation. Ibid. Thereafter, however, a municipality must obtain substantive certification of its housing element and fair share plan in order to receive assistance under the Act. Sections 20(a), 21(b).

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* The Act appropriates $15 million to the HMFA to be used in its affordable housing programs, Section 33, and directs the Agency to allocate 25% of its single-family bond authority, estimated at $125 million, to be used in conjunction with housing to be constructed or rehabilitated under the Act. Section 21(a). The Agency is also authorized to establish affordable housing programs utilizing subsidiary corporations or development corporations, which possess condemnation powers. Section 21(g).

The Act appropriates $2 million to DCA to be used in the Neighborhood Preservation Program. An increase in the Realty Transfer Tax, P.L. 1985, c. 225, dedicated to this program, will increase the funding for NPP to $10 million, and will maintain it at $10-12 million in forthcoming years. Section 34.

Both HMFA and DCA have established January 31, 1986 as the initial closing date to receive applications for these programs and have worked in close cooperation to administer these programs and in assisting the Council's organizational efforts.

Also indicative of the depth of legislative concern for this problem and the commitment to deal with it adequately is S-1464, establishing the State Planning Commission and an Office of State Planning in the Department of Treasury. In this bill, presently under consideration by the Governor, the Legislature established a long-awaited planning body with authority to develop a State Development and Redevelopment Plan to regulate, plan and monitor statewide planning objectives in the areas of "land use, housing, economic development, transportation, natural resource and conservation, agriculture and farmland retention, recreation, urban and suburban redevelopment, historic preservation, public facilities and services and intergovernmental coordination." Senate No. 1464, Section 5(f). (Legislative History, Item No. 14.)

It is within this context of a general legislative plan restructuring the laws regarding land use and housing that the provisions of the Fair Housing Act must be viewed. The sections of that Act are all part of an overall and comprehensive scheme of planning in New Jersey and it is this seminal consideration which was ignored by the courts below.* Central to achievement of this object is the Council and its role in the resolution of zoning disputes. Obviously, if the Council is to effectively play such a role, municipalities must come before it, rather than remain actors in the alternative, and less legislatively favored, judicial dispute resolution process. Whether municipalities will have an opportunity to do so, however, depends in large measure on the definition given the "manifest injustice" standard of section 16(a).

In his opinion Judge Skillman reviewed a range of definitions of manifest injustice suggested by the parties. While he concluded that the term does not have "a single, constant meaning" and "varies with the context in which it is used," and conceded his responsibility to "interpret this term in a manner which is consistent with the overall intent of the Act....," Morris County Fair

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* In further evidence of the comprehensive nature of these statewide planning initiatives, and how they are being reconciled with regional planning and development, on November 18, 1985, at its third public meeting, the Council on Affordable Housing met with representatives of the Hackensack Meadowlands Development Commission, the Pinelands Commission and the DEP Coastal Areas Facility Review Board. The purpose of this meeting was to establish a working relationship with these regional planning agencies and particularly to address the effect of the Mt. Laurel obligation upon planning within each of these regions. Matter of Egg Harbor Associates, (Bayshore Centre), 94 N.J. 358 (1983).

Housing Council, supra, slip opinion at 44-45, he nevertheless sought out an established use of the phrase. Judge Skillman settled on the 'exhaustion of administrative remedies' standard as the approach to be followed. Thus, the court determined that manifest injustice as referred to in the Act is substantially similar to the "interest of justice" standard contained in the court rule of exhaustion, id. at 45-46, and decided:

> Therefore, it must be assumed that the Legislature was aware when it enacted section 16(a) that the standard of "manifest injustice" contained therein was essentially the same standard as the courts have long used in determining when exhaustion of administrative remedies is required. It also must be assumed that the Legislature intended section 16(a) to be interpreted in light of the well-established body of case law governing exhaustion of administrative remedies.
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> * * * *
>
> Therefore the pending motions to transfer must be assessed in light of the considerations recognized in the cases dealing with exhaustion of administrative remedies. [Id. at 46-47]*

The "interests of justice standard" envisions a balancing of competing interests in furtherance of the goal to work substan-

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* It should be noted that the courts also use the "interest of justice" standard in a variety of circumstances other than considering whether administrative remedies should be exhausted. In the appellate rules alone the term is employed no less than five times to guide appellate courts in such matters as motions for leave to appeal from interlocutory orders, R. 2:2-4, 2:2-3(b), and when courts may "notice plain error not brought to the attention of the trial or appellate court." R. 2:10-2; but see, R. 2:2-3(a)(2). In fact, one of the grounds upon which the Court may grant certification is "if the interest of justice requires." R. 2:12-4.

Apparently, however, the "manifest injustice" and "interest of justice" standards should both be distinguished from a "manifest

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tial justice. Cases describing the balancing process are legion. One in point is Abbott v. Burke, 100 N.J. 269, 297-98 (1985), where this Court explained:

> The interests that may be furthered by an exhaustion requirement were identified in City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979):
>
> > (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts.
>
> However, as explained in Garrow, 79 N.J. at 561,
>
> > [t]he exhaustion doctrine is not an absolute. Exceptions exist when only a question of law need be resolved, Nolan v. Fitzpatrick, 9 N.J. 477, 487 (1952); when the administrative remedies would be futile, Naylor v. Harkins, 11 N.J. 435, 444 (1953); when irreparable harm would result, Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 142 (1962); when jurisdiction of the agency is doubtful, Ward v. Keenan, 3 N.J. 298, 308-309 (1949); or when an overriding public interest calls for a prompt judicial decision, Baldwin Const. Co. v. Essex Cty. Bd. of Taxation, 24 N.J. Super. 252, 274 (Law Div. 1952), aff'd 27 N.J. Super. 240 (App. Div. 1953). The assertion of a constitutional right may be one factor to be considered in determining whether judicial intervention is justified--but it is only one of many relevant considerations. * * * Brunetti v.

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denial of justice," which is employed by appellate courts in reviewing a trial court's decision on a motion for a new trial. R. 2:11-3(e)(1)(E).

Borough of New Milford, 68 N.J. 576, [590-91] (1975).

However, if the balancing process is to have credibility, all interests must be represented; and, of equal import, appropriate weight must be accorded each element. While the courts below arguably selected a correct test -- any standard that balanced competing interests would arguably suffice -- they applied it incorrectly. Their essential error was to consider only one side of the balance, the convenience of litigants and the perceived overriding need to avoid any delay whatsoever in implementation of the Mt. Laurel mandate. Left out of the balance altogether or at the very least minimized was consideration of the impact of the transfer decision on achievement of the legislative object, and the fairness of having municipalities forfeit the full range of opportunities presented by the Fair Housing Act in meeting their constitutional obligations. The court thus neglected to address the legislative restructuring of the State's system of planning and land use described above and consequently was unable to assess the transfer motions in light of the most important element of the manifest injustice standard: whether implementation of the legislative aim for predictable, coherent and comprehensive land use decisions, embodied in a presumptive transfer to the Council, could be superseded by a party's particular interest in the lawsuit. Worse, the very point the Court's seemingly gave overriding weight to -- delay in implementing the Mt. Laurel obligation -- was one the Legislature had previously rejected as being of controlling significance. See supra, pp. 12-14: legislative history of evolution of "manifest injustice" standard.

The legislative preference for referral of lawsuits to the Council contained in the Act should have been accorded much greater weight in striking the balance. As pointed out by the Court, the rule of exhaustion of administrative remedies places a heavy presumption of choice upon an administrative alternative and correspondingly imposes a heavy burden on those who seek to avoid that forum:

> This Court has recognized that the exhaustion of remedies requirement is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts .... Therefore, while it is neither a jurisdictional nor an absolute requirement, there is nonetheless a strong presumption favoring the requirement of exhaustion of remedies [Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975, citations omitted].

Certainly, it is not unusual for the Legislature to establish a specialized agency, responsible for addressing issues of public importance, and to express a preference for the agency's jurisdiction, even over that of the courts.

In City of Hackensack v. Winner, 82 N.J. 1 (1980), this Court considered the effect of an amendment to the Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. The Court determined that the statute granted the Public Employee Relations Commission (PERC) exclusive administrative power to deal with complaints of unlawful practices relating to employee rights not covered by other laws. 82 N.J. at 25. The amendment granted PERC "exclusive power" to hear unfair practice charges, N.J.S.A. 34:13A-5.4c, which prompted the Court to find:

> The Legislature obviously believed that the existence or occurrence of unlawful practices called for the expert handling of a specialized

> administrative agency such as PERC and that in these matters that agency's jurisdiction was indeed to be preferred even to that of the courts. [City of Hackensack, 82 N.J. at 24].

See also Boss v. Rockland Elec. Co., 95 N.J. 33, 42 (1983), "[w]here the resolution of a contested legal issue properly brought before a court necessarily turns on factual issues within the special province of an administrative agency, the court should refer the factual issues to that agency."

Indeed, the courts have determined that PERC's primary jurisdiction, to determine whether a matter is within the scope of collective negotiations, is exclusive even as to any trial court:

> We believe that a construction of the Act which admits the possibility of concurrent jurisdiction over scope questions in the trial division of this Court and PERC would only serve to frustrate a principal purpose of the act:
>
> > ***the voluntary mediation of such public *** employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent public *** employer-employee peace and the health, welfare, comfort and safety of the people of the State. *** [N.J.S.A. 34:13A-2; emphasis supplied].
>
> [Bd. of Ed. of Plainfield v. Plainfield Edu. Association, 144 N.J. Super. 521, 525 (App. Div. 1976)].

This Court reiterated that determination of the Appellate Division in State v. State Supervisory Employees Association, 78 N.J. 54, 83 (1978):

> PERC is the forum for the initial determination of whether a matter in dispute is within the scope of collective negotiations. PERC's jurisdiction in this area is primary .... No court of this State is empowered to make this initial determination.

Thus, where the Legislature vests an agency with primary jurisdiction, review of an issue within the agency's expertise should presumptively be undertaken by the agency. See also, Abbott v. Burke, supra, 100 N.J. at 297 ("[E]xcept in those cases where the legislature vests primary jurisdiction in an agency, a plaintiff may seek relief in our trial courts"). This is so even in those circumstances wherein the courts have initially exercised jurisdiction and only later does the Legislature create an agency with expertise to consider the issues presented. In that situation the legislative presumption should continue to hold sway, although the showing required to overcome the presumption may be somewhat less than otherwise. Just such a rule was employed by this Court, again in circumstances involving the PERC statute. In Patrolman's Benev. Assn. (PBA) v. Montclair, 70 N.J. 130 (1976), the PBA sought to litigate charges that the public-employer town had engaged in unfair labor practices. After a hearing in the trial court, and consideration of the matter by the Appellate Division, and while the case was pending appeal in this Court, the Legislature amended the Public Employer-Employee Relations Act, vesting primary jurisdiction to hear such matters in PERC, as recounted above. The Court held:

> We determine that the foregoing amendment procedurally has retroactive effect and applies to the pending and unresolved charges of unfair practices in the dispute between plaintiff and defendants herein over the fixing of salaries and other wage benefits of police officers of the Town of Montclair for the calendar year 1974.
>
> Accordingly, we vacate the judgment of the Appellate Division and remand the matter to the trial court with directions to enter an order transferring the dispute to PERC for appro-

priate proceedings under the statute .... [Id. at 136].

In the case at bar there is no doubt but that the Legislature has vested the Council with "primary jurisdiction" to resolve exclusionary zoning disputes, see Section 4(a), and that the Legislature has expressly declared that the administrative process is presumptively favored over litigation in the courts. Section 3. Certainly, such an express declaration of intent is to be accorded primary consideration by the courts in resolving motions to transfer, particularly in view of the overall realignment of the system for regulating land use and planning in the State. Accordingly, we respectfully assert that the courts below erred in not considering the presumptive nature of the legislative preference for the transfer of exclusionary zoning cases to the Council on Affordable Housing and in not giving it appropriate weight in their determinations.

The issue next becomes what weight should be accorded the legislative preference for the administrative mechanism contained in the Fair Housing Act and what showing of harm or inconvenience is necessary to overcome the legislative preference. It is respectfully submitted that only in the most extreme case should the legislative preference be disregarded. The mere fact that a case has been in a judicial forum for a substantial period of time or that certain judicial actions have been taken with respect to the dispute, should not of itself warrant disregard of the legislative preference. The legislative history of the Fair Housing Act makes that clear. The Legislature specifically rejected a balancing standard which would be so focused. See supra, pp. 12-14, 21.

The reason potential delays in achievement of the Mt. Laurel mandate should not suffice as grounds for denial of a transfer is that those delays will not be unreasonably long, given the magnitude of the task assigned to the Council. The fact is that those who will be temporarily disadvantaged most by the delays -- low and moderate income persons who are in need of housing -- will ultimately be the most advantaged by virtue of full implementation of the Fair Housing Act. Moreover, on the other side of the equation failure to transfer pending cases puts achievement of the legislative scheme at serious risk.

From the standpoint of low and moderate income persons, temporary delay is the only factor at issue. The Fair Housing Act does not effect any substantive change in the constitutional obligation identified by the Court in Mt. Laurel but, rather, provides for a means to address the constitutional obligation. Hence, the right of lower income persons to seek housing without being subject to economic discrimination caused by exclusionary zoning, Morris County Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359, 365 (Law Div. 1984), is the one and the same right sought to be protected by the Legislature under provisions of the Act, which embodies the legislative consensus as to how the right best may be realized.

Moreover a qualitative difference exists between how the constitutional obligation will be vindicated under the legislative scheme and how it is addressed by the courts. Because the Council will be establishing guidelines for municipalities throughout the State, and because the Council will be acting in concert with the State Planning Commission, it will exercise statewide powers and

make housing decisions which truly address the needs of a wider range of lower income people than can the courts in hearing unrelated lawsuits initiated in the business judgment of a developer.* In furtherance of the goal of coherent statewide development the Legislature has directed that municipalities include a housing element in their master plans before they may exercise their delegated power to pass a zoning ordinance. Therefore, the so-called 'voluntary nature' of the legislative program should not be overstated; the steps taken by the Legislature in fact compel municipalities to address the obligation identified by this Court in the Mt. Laurel cases.**

This system, new as it may be, must be compared to the current method of addressing exclusionary zoning in sporadic bursts of litigation, some of which is 'resolved' by explosive development while other cases drag on interminably, but all of which are undertaken without regard to statewide standards. The resultant chaos and disarray, as well as the inherent unfairness of such a system, cries out for a comprehensive approach on behalf of lower income persons.*** Therefore, "giving way" to the legislative approach

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* In this regard even those lawsuits instituted by non-profit entities or the Public Advocate do not further a general plan of development with statewide consequences but are isolated attacks upon symptoms of the problem: the lack of adequate planning.

** Also, as noted previously, considerable financial resources have been committed to this effort, as well as the innovative use of newly created state development corporations and subsidiary corporations. See supra, pp. 16-17.

*** The system as it now exists is inherently unfair because it relies upon the fortuitous filing of a lawsuit; one town may escape

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will hardly visit "deleterious" consequences on this group. And, while there may be some initial delays -- a point we do not minimize -- the broader and more far reaching remedy promised by the Act* should stand this interest group in better stead overall than insisting on trying to conclusion a few isolated cases in a judicial forum. On the other hand, a failure to transfer cases will disrupt and threaten achievement of the overall legislative objective.

The other group impacted by a decision to transfer are the plaintiff developers. The interest of this group lies in the fact that some, and in many cases much, time, energy and resources have already been expended in pursuit of a judicial remedy. However, those interests pale in comparison to the advantages of a cohesive statewide approach to the Mount Laurel problem. Plaintiff developers are being deprived of no vested right whatsoever; indeed, their standing to bring a Mount Laurel action is predicated on the rights of others--the low and moderate income persons who stand to benefit from the creation of affordable housing. Whereas devel-

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litigation and another not -- simply on the basis of which is ripe for profitable development. The result is unfair to the towns, but even more unfair to those lower-income persons whose rights did not add up to a high enough number on the developer's balance sheet to justify a 'representative action'.

* Some of the parties and, indirectly the trial court, have expressed doubts about the "expertise" of the Council. Morris County Fair Housing Council, supra., slip opinion at 51. Such doubts cannot be seriously entertained. The Council numbers among its members the Executive Director of the HMFA, (New Jersey's primary financing agency for housing), one of the largest builder-developers in the State, the Mayor of New Jersey's largest city, county and local government officials, and private citizens.

opers and property owners with land suitable for lower income housing may have standing to pursue Mount Laurel litigation, "such litigants are granted standing not to pursue their own interests, but rather as representatives of lower income persons whose constitutional rights allegedly have been violated by exclusionary zoning." Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 365-366 (Law Div. 1984). Consequently, such private litigants can demonstrate no entitlement in their own right to pursue a course of litigation in the courts with an aim towards securing approval to construct high density developments. In fact, the issue of whether a private litigant is entitled to such a "builder's remedy" is separate and distinct from the initial determination of whether a municipality has engaged in exclusionary zoning in contravention of its Mount Laurel obligation.* Accordingly, any claimed entitlement to such a remedy is speculative and provides no basis for impeding the uniform implementation of the legislative initiative.

Moreover, if the legislative presumption in favor of an administrative mechanism is given effect, such litigants' speculative interest in a site specific remedy would not be automatically voided. These litigants may participate in proceedings before the Council as objectors to a municipal housing element and,

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* This latter point is illustrated most clearly by the observation of the trial court in reviewing the Denville cases, one of the older Mount Laurel actions, that "there is doubt whether any of the developer-plaintiffs who have filed suits against Denville will be found to have 'succeeded' in Mount Laurel litigation and hence to be eligible for a builder's remedy." Morris County Fair Housing Council, supra, slip opinion at 24, citations omitted.

significantly, the Act does not prohibit the Council on Affordable Housing from including a builder's remedy where appropriate as a condition of substantive certification insofar as the moratorium on builder's remedies does not apply to determinations made by the Council.

In short the most that can be said on the side of the plaintiff-developers is that they have expended time, effort and expense in pursuing a judicial remedy. That may have resulted in beneficial (from their standpoint) zoning of their property. However, that is a mere expectancy, which parenthetically is not forfeit by the transfer. It remains an expectancy, albeit one whose fruition depends on the actions of a non judicial body.

Balanced against the delay visited on the low and moderate income class, but not the forfeiture of any rights, and the wasted time and energy losses of developers, is the fact that the comprehensive purpose behind the Fair Housing Act in establishing a uniform administrative means of addressing municipal Mt. Laurel obligations as part of a coordinated state and regional planning scheme will suffer if transfer is denied. It is evident that the legislative presumption in favor of executive review should be given effect in these circumstance. Such a transfer will advance, in the final analysis, the interests of low and moderate income persons by creating a broader, more far reaching remedy, albeit with some unavoidable delay. The interests of plaintiffs developers -- where appropriate -- can be considered by the Council. There is therefore no fundamental unfairness worked by a transfer. A non-transfer, on the other hand, will disrupt the legislative scheme. Moreover, it would be unfair to the concerned

municipalities, which have a presumptive right to have their Mt. Laurel obligations determined administratively under the legislative standards fixed by the Fair Housing Act and to be fixed by the council, as opposed to those judicially mandated prior to legislative entry into the arena. And, municipalities have a presumptive right to avail themselves of the benefits of the full range of new techniques fixed by the Act for achievement of affordable housing. Denials of transfer should be limited to the egregious case where the movant's conduct demonstrates an utter lack of good faith and intent to use the Council proceedings simply to avoid or interminably delay satisfaction of the constitutional mandate for provision of low and income housing. Motions to transfer pending law suits to the Council on Affordable Housing should therefore be judged with this legislative purpose and presumption in mind; only upon an affirmative showing that such a transfer would result in gross unfairness should the motion for a transfer be denied and the legislative presumption overcome.*

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* The Court has asked the parties to address the question whether section 16(b) of the Act, providing for mandatory exhaustion of administrative remedies in cases filed after May 3, 1985, conflicts with the court's power to dispense with exhaustion in matters in lieu of prerogative writs. The court below determined that R. 4:69-5 could be employed in section 16(b) cases, notwithstanding the mandatory tone of that section, if necessary to preserve the constitutionality of the Act. Morris County Fair Housing Council, supra., slip opinion at 19, n. 8. We agree with this interpretation.

In any event, applying the trial court's analysis of the exhaustion principle, as would be appropriate in §16(b) cases, as distinct from the transfer of ongoing cases, would likely reveal that very little activity had occurred in the case. Hence, a balancing of the considerations identified by the court below would

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Because the courts below failed to give adequate (if indeed any) weight to the legislative preference for administrative adjudication and the policy objectives underlying that preferences, the decisions to deny transfer were predicated on a less than complete balancing of the interests. Moreover, as noted, the trial court decisions give controlling significance to a factor -- delay in achievement of Mt. Laurel rights -- which the Legislature specifically rejected as having such import. Because the decisions below this ignore the legislative will and because the balancing test they utilize is so skewed, they should be reversed and the matters remanded for reconsideration in light of the standard adopted by this Court. For the reasons set forth above, that standard should be one which places an extraordinarily heavy burden on a party objecting to a transfer application. Only where it appears that the transfer will not further the legislative objectives or results in gross unfairness should the trial court deny a transfer motion.

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also likely reveal little reason to deny use of the administrative process. However, where extraordinary circumstances are present, a court may exercise its prerogative under R. 4:69-5 and take jurisdiction of the case "in the interest of justice."

POINT II

THE PROVISIONS OF THE FAIR HOUSING ACT ARE CLEARLY CONSTITUTIONAL AND SHOULD BE UPHELD.

A. INTRODUCTION

As noted, the Fair Housing Act is the legislative response to the Supreme Court's encouragement of legislative initiatives to address the problems of housing for lower income families. The central role in providing this response is assigned to the Council on Affordable Housing. The Council has the responsibility to determine housing regions, to estimate the present and prospective need for low and moderate income housing and to adopt "criteria and guidelines" for a municipality's determination of its present and prospective fair share of the housing need in its region. Section 7.

The constitutional challenges to the Act which have been raised by plaintiffs are premised in large part upon the Mt. Laurel doctrine and focus, therefore, upon that part of Article 1, paragraph 1 from which the Mt. Laurel doctrine derives. Further, the constitutionality of conferring authority upon an administrative agency in the executive branch of government to adopt regulations and to conduct administrative hearings to enforce constitutional rights has not been questioned. See Matter of Egg Harbor Assocs. (Bayshore Centre), 94 N.J. 358 (1983); Robinson v. Cahill, 69 N.J. 449 (1976); see also Mt. Laurel II, 92 N.J. at 250-251. Rather, plaintiffs argue that individual sections of the Act, considered independently or in combination, so fundamentally undermine the Mt. Laurel doctrine that the Act must be declared unconstitutional in its entirety.

Before responding to the specific challenges raised, it is important to note, at the outset, the difficult burden which must be met by a party attempting to challenge the validity of a legislative enactment on constitutional grounds. It is well established that there is a strong presumption that a statute passed by the Legislature is constitutional. All doubts are to be resolved in favor of upholding the validity of the statute. New Jersey Association of Correction v. Lan, 80 N.J. 199, 218-219 (1979); In re Loch Arbour, 25 N.J. 258, 264-265 (1957). A legislative enactment will not be declared void unless its repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt. Brunetti v. Borough of New Milford, 68 N.J. 576, 599 (1975). When a state statute is challenged on state constitutional grounds, the plaintiffs' burden is a heavy one. Smith v. Penta, 81 N.J. 65, 74 (1979).

As Judge Skillman found in holding that "the Fair Housing Act is on its face constitutional," the case applying these principles which is most analogous to the Mt. Laurel cases is Robinson v. Cahill, 69 N.J. 449 (1976). Morris County Fair Housing Council, slip opinion at 13, 41. In both Robinson v. Cahill and Mt. Laurel, the Court had determined that a long-established part of the system of local government violated the New Jersey Constitution. In each case, the Legislature, after prolonged debate, enacted comprehensive legislation providing for enforcement by a state administrative agency of the constitutional rights involved -- by the Commissioner of Education in Robinson v. Cahill and by the Council on Affordable Housing in the present cases. In Robinson v. Cahill, as in the present cases, plaintiffs pointed to

a host of problems with the interpretation of the new law. "Nonetheless, a majority of the Court concluded that faithfulness to the presumption of validity of legislative enactments required it to sustain the validity of the law on its face and to afford the Commissioner an opportunity to administer its provisions in a manner which would fulfill the constitutional guarantee of a 'thorough and efficient' system of public schools." Morris County Fair Housing Council, supra, slip opinion at 14. It is respectfully submitted that the Court should follow a similar approach in reviewing the constitutionality of the Fair Housing Act.

B. THE MT. LAUREL OBLIGATION MUST BE DISTINGUISHED FROM THE COMPLIANCE MECHANISM FORMULATED BY THE SUPREME COURT IN MT. LAUREL II FOR ACHIEVING THE CONSTITUTIONAL GOAL.

1. THE MT. LAUREL OBLIGATION IS NOT ABROGATED BY THE FAIR HOUSING ACT.

In considering the constitutional attacks made by plaintiffs in these cases, it is extremely important to distinguish between the Mt. Laurel obligation itself and the mechanism formulated by this Court, in the absence of legislative action, to implement and enforce the obligation. In Mt. Laurel I, 67 N.J. 150 (1975), the Court held that a zoning ordinance that contravened the general welfare was unconstitutional. The Court further held that a "developing" municipality violates the constitutional mandate by excluding housing for moderate and lower income people and that such a municipality, in its land use ordinances, was required to provide a realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing. 67 N.J. at 174. In Mt. Laurel II, 92

N.J. 158 (1983), the Court reaffirmed the Mt. Laurel doctrine, holding that zoning regulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the Constitution. 92 N.J. at 208-209.

As the Court stated in Mt. Laurel II, the above-stated holdings are "the core" of the Mt. Laurel doctrine. 92 N.J. at 205. This constitutional requirement, that a municipality's land use regulations must provide a realistic opportunity for its fair share of the region's need for low and moderate income housing, is in no way contradicted or rescinded by the Fair Housing Act. Indeed, the stated purpose of the Act is "that the statutory scheme set forth ... is in the public interest in that it comprehends a low and moderate housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court." Section 3, (emphasis added); see Roe v. Kervick, 42 N.J. 191, 229-230 (1964) (Legislative declaration that statute represented a means of accomplishing a valid public purpose is entitled to great weight in determining whether it did in fact serve such purpose). The Legislature further found that "[t]he interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation." Section 2(c) (emphasis added). Thus, it is clear that the Fair Housing Act expressly recognizes that municipalities have the constitutional obligation, in adopting land use regulations, to affirmatively afford a realistic opportunity for

the construction of their fair share of low and moderate income housing. The goal sought to be achieved by the Legislature in the Fair Housing Act is identical to the constitutional goal established by this Court in Mt. Laurel.*

C. THE METHOD OF ACHIEVING THE MT. LAUREL OBLIGATION SET FORTH IN MT. LAUREL II IS NOT CONSTITUTIONALLY REQUIRED.

Plaintiffs here cannot successfully contend that the Legislature, in enacting the Fair Housing Act, has abrogated the constitutional requirement of Mt. Laurel. However, plaintiffs argue that the Act is somehow unconstitutional because the Legislature has enacted a statutory scheme to effectuate the doctrine which is different from the compliance mechanism created by the Court in Mt. Laurel II. However, that the Mt. Laurel II compliance mechanism is not constitutionally required is readily apparent. While this mechanism was utilized by the Court, in the absence of legislative action, in effectuating the constitutional obligation, 92 N.J. at 212, the judicial mechanism itself is simply that - a means of achieving the constitutional requirement and not the requirement itself. Nowhere is this more clear than in the Court's discussion of its rationale for redefining the type of municipality that would have a Mt. Laurel obligation from that of a "developing municipality" to that of a municipality in a designated "growth

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* See also Sections 10, 29(b)(3) and 30 of the Act which require, as a result of the Act's amendment to the Municipal Land Use Law, that every municipality, as a precondition of zoning, adopt a housing element which "shall be designed to achieve the goal of access to affordable housing to meet present and prospective housing needs with particular attention to low and moderate income housing...."

area" specified in the State Development Guide Plan. 92 N.J. at 223-238. In making this revision, the Court stated:

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

The remedies formulated by the Court in Mt. Laurel II are judicial remedies that the Court believed would, in the absence of legislative action, achieve the constitutional goal. 92 N.J. at 237. To reiterate, "[a]chievement of the constitutional goal, rather than the method of relief selected to achieve it, was [and is] the constitutional requirement." Ibid. The judicial compliance mechanism, therefore, is not constitutionally required and the Legislature, by enacting legislative methods to achieve the

constitutional goal, has neither violated the Constitution nor abrogated the constitutional doctrine of the Mt. Laurel cases.

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

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

> resolve reasonably conflicting doubts in favor of conformity to our organic charter. [New Jersey Sports & Exposition Auth. v. McCrane, supra, 61 N.J. at 8.]

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

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

In the remaining sections of this point heading, the State will set forth a detailed section-by-section analysis of the Act, with particular emphasis on those sections which the Court has specifically requested the parties to address. This analysis is intended to provide assistance to the Court in interpreting the Act and will also discuss the specific arguments made by plaintiffs regarding each challenged statutory provision.*

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

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* The builder's remedy moratorium, Section 28, is addressed in Point III of this brief. The alleged conflict between mandatory consideration by the Council and the constitutional power of courts to dispense with exhaustion requirements in matters in lieu of prerogative writs, Section 16(b), is addressed in Point I, supra at p. 31 n.

As discussed above, the Fair Housing Act is designed to provide an administrative mechanism to resolve exclusionary zoning disputes in place of the judicial mechanism formulated by the Court in Mt. Laurel II. Through this administrative mechanism, municipalities operating within state guidelines and with State oversight will be able to define and provide a reasonable opportunity for the implementation of their Mt. Laurel obligations. Sections 2(b), 3; see also Governor's Conditional Veto, April 26, 1985, at 1 (Legislative History, Item No. 8). To effectuate the constitutional goal, the Act establishes a voluntary system through which municipalities can submit plans for providing their fair share of low and moderate income housing to the Council on Affordable Housing which, upon the petition of the municipality, would certify the plan if it satisfies the Council's requirements. Substantive certification would shift the burden of proof to the complaining party to show that the plan does not provide a realistic opportunity for the provision of the municipality's fair share. Governor's Conditional Veto, April 26, 1985, at 1.

Under the legislative compliance mechanism, the Council "shall have primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this State." Section 4(a). The Council, which has been established in, but not of, the Department of Community Affairs, consists of nine members appointed by the Governor with the advice and consent of the Senate.

Under Section 6(a) of the act, the Council may establish a plan of organization and may incur expenses within the limits of

funds available to it.* The Council may also contract for the services of other professional, technical and operations personnel and consultants as may be necessary to assist it in the performance of its duties. Section 6(b). These organizational powers go a far way toward answering plaintiffs' arguments that the Council will be "too inexperienced" to deal with Mt. Laurel issues, in comparison with the three Mt. Laurel judges, who have dealt with such cases at least since January 20, 1983. Beside the fact that this argument is certainly not of a constitutional dimension, the argument ignores the fact that the Council will be comprised of individuals representing the very interests that are involved in Mt. Laurel litigation, i.e., those of municipalities, builders, households in need of low and moderate income housing, and the public at large. Moreover, Section 6(b) permits the Council to quickly add to its expertise by contracting for professional and consulting services to assist it in meeting its obligations under the Act. In any case, the Council will not be operating in a void. Under Section 7(e), the Council must give appropriate weight to pertinent research studies, government reports, decisions of other branches of government (which would include the written decisions rendered by the Mt. Laurel judges after January 20, 1983), implementation of the State Development and Redevelopment Plan and public comment. These resources should enable the Council to fulfill its duties in a timely fashion as required by the Act. Clearly, plaintiffs'

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

argument that the Council is "too inexperienced" to carry out its functions is without merit and should be rejected.

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

a. THE COUNCIL'S PROCEDURAL REGULATIONS.

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

b. DETERMINATIONS TO BE MADE BY THE COUNCIL.

i. HOUSING REGIONS

Section 7 of the Act is the statutory provision which requires the Council to determine to which regions of the State the Mt. Laurel obligation will apply, the need for low and moderate income housing in these regions and throughout the State, and the municipalities' fair share of such housing. Section 7(a) requires the Council to determine housing regions of the State within seven months of the date the last Council member is confirmed or within

seven months from January 1, 1986, whichever is earlier. "Housing region" is defined in Section 4(b) of the Act and means:

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

Plaintiffs complain that the "two to four" county limitation of Section 4(b) is "too restrictive." They contend that a housing region must be much larger to reflect fairly the needs of the housing market area of which the municipality forms a part. This contention is not ripe for disposition at this time since the State's housing regions have not yet been determined by the Council. Until this is accomplished, plaintiffs' argument is merely speculative and should be rejected. Moreover, the argument clearly does not raise a constitutional question. In Mt. Laurel II, the Court nowhere stated that a housing region, as a constitutional requirement, must be of a certain fixed size and make-up. Rather, the Court left this determination to the Mt. Laurel judges and "the experts," envisioning that, over a period of time, "a regional pattern for the entire state will be established...." 92 N.J. at 254, 256.

In his decision in the Morris County case, Judge Skillman described the various methods which have been utilized by the trial courts in delineating housing regions for the purpose of determining a municipality's regional fair share obligation and found that there was "an element of arbitrariness" in each. Morris County Fair Housing Council, supra, slip opinion at 27. Judge

Skillman found that the method which appeared to "follow most closely the definition of region set forth in Mt. Laurel II, that is, 'the housing market area of which the subject municipality is a part,' (92 N.J. at 256), delineates individual commutershed regions for each municipality." Morris County Fair Housing Council, supra, slip opinion at 27. This method requires determining the time within which a person reasonably may be expected to commute to work and drawing a line around all municipalities which may be reached within that time. Ibid. However, Judge Skillman found that there "are serious practical problems in delineating commutershed regions," including problems in determining what constitutes a reasonable commuting time; problems in determining how far a person can travel within that time during commuting hours, and difficulties in obtaining the type of detailed data required to determine the extent of regional need. Id. at 28.

Due to these problems with the "commutershed methodology," the trial courts and the experts have determined that housing regions must be comprised of whole counties. Id. at 28; Van Dalen v. Washington Tp., ___ N.J. Super. ___ (Law Div. 1984) (slip opinion at 17); AMG Realty Co. v. Warren Tp., ___ N.J. ___ (Law Div. 1984) (slip opinion at 23-27). Again, however, "the use of whole counties can have the effect of expanding the size of a region beyond the reasonable commuting distances on which the commutershed is premised." Morris County Fair Housing Council, supra, slip opinion at 28. Furthermore, adjoining municipalities in the same county may be located in significally different regions under this methodology and research has shown that "the total fair share obligations of all municipalities calculated on the basis of

commutershed regions does not equal the total Mt. Laurel housing need of the State." Ibid.

Judge Skillman found that "[t]he alternative to delineating individual commutershed regions for each municipality is to use fixed regions." Morris County Fair Housing Council, supra, slip opinion at 28. Although such regions avoid the need for determining an individual commutershed region for each municipality, there are also problems with this approach. Id. at 28-29. Under this methodology, a municipality at the outer edge of a region may be a substantial distance from another municipality at the opposite end of the region and, at the same time, immediately adjoin a neighboring municipality which is outside the region. Id. at 29. Therefore, "a fixed region may not accurately reflect the housing market of a constituent municipality on the perimeter of the region." Ibid.

In his opinion, Judge Skillman concluded:

> In short, every approach to the delineation of regions for the purpose of establishing fair share housing obligations raises practical and conceptual problems. But as the court noted in AMG Realty, supra, "while the defining of regions is of paramount importance in designing a method to distribute fair share, it is only a vehicle toward accomplishing the ultimate goal -- satisfaction of the constitutional obligation." ___ N.J. Super. at ___ (slip opinion at 28). Therefore, the issue is whether it is possible for the Council to establish regions in accordance with section 4(b) which will satisfy the constitutional obligation. Ibid.

Under the Act, the Legislature has chosen the Council to make this determination based upon the county standards set out in Section 4(b). Under the statewide plan established by the Legislature, which is based upon regional, rather than on single munici-

pality-by-single municipality considerations, the use of counties to define regional need is certainly not arbitrary. Clearly, the Court did not preclude the use of counties to determine regional need (92 N.J. at 349-350) and it just as clearly encouraged the Legislature to develop a statewide land use plan. 92 N.J. at 236.* It must be presumed that the Council will establish the "two to four" county regions in a manner consistent with achieving the constitutional goal. Therefore, plaintiffs' argument should be rejected. Morris County Fair Housing Council, supra, slip opinion at 30.

Plaintiffs also contend that the housing region definition set forth in Section 4(b) is defective because it requires that the counties within a region "exhibit significant social economic and income similarities" which, they assert, will tend to preserve "exclusionary patterns." Again, however, this argument is not ripe for consideration since the Council has not yet determined housing regions. Morris County Fair Housing Council, supra, slip opinion at 29-31. Moreover, the general legislative directive that counties within a region "exhibit significant social, economic and income similarities" neither compels the inclusion of multiple

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* In this regard, it should be noted that, while the Supreme Court did not reject the use of a single county as a means of determining regional need, it did express reluctance in sanctioning the use of only one county for this purpose. 92 N.J. at 349. The Legislature, consistent with Mt. Laurel II, has determined that housing regions must be made up of two to four counties. Indeed, the "two to four" county configuration chosen by the Legislature appears to have been taken from the Report filed by the Center for Urban Policy Research of Rutgers University. Morris County Fair Housing Council, supra, slip opinion at 30-31.

urban counties in a single region nor prohibits the combination of urban and suburban municipalities. Id. at 30. In addition,

> this legislative directive must be read in light of the further legislative directive that regions 'constitute to the greatest extent practicable the primary metropolitan statistical areas as last defined by the United States Census Bureau.' Ibid. Some primary metropolitan statistical areas (PMSAs) mix urban and suburban counties: for example, the Newark PMSA consists of Essex, Union, Morris and Sussex counties. Rutgers Report I, at 58-61. [Id.].

Therefore, it can reasonably be assumed that the Legislature did not consider an area which includes both urban and suburban counties to be inconsistent with the statutory definition of region. Accordingly, the regions to be developed by the Council are consistent with the objectives of Mt. Laurel and plaintiffs' challenge to the constitutionality of Section 4(b) should be rejected. Morris County Fair Housing Council, supra, slip opinion at 31.

ii. OTHER DETERMINATIONS.

At the same time that it determines the housing regions of the State, the Council must also estimate the present and prospective need for low and moderate income housing at the State and regional level, and provide population and household projections for the State and housing regions. Sections 7(b), 7(d). "Prospective need" is defined in Section 4(j) of the Act as:

> a projection of housing needs based on development and growth which is reasonably likely to occur in a region or a municipality, as the case may be, as a result of actual determination of public and private entities.

Plaintiffs in the present cases did not challenge this basic definition. However, plaintiffs did challenge the requirement that, in determining prospective need, the Council must give "considera-

tion ... to approvals of development applications, real property transfers, and economic projections prepared by the State Planning Commission...." Section 4(j). Plaintiffs argued that if only a small number of development applications had been approved in a region because of past exclusionary practices, municipalities would be rewarded by this legislative directive for practices which violate Mt. Laurel.

This argument, which is merely hypothetical at this point, was correctly rejected by Judge Skillman. Morris County Fair Housing Council, supra, slip opinion at 31-32. In enacting, Section 4(j), "all the Legislature has said is that 'consideration' should be given to 'development applications' in making projections of housing needs." Id. at 32. It did not specify how development applications are to be considered by the Council or what weight it should assign to them. Ibid. There is no reason to assume, at this early date, that the Council will make inappropriate use of "development application" data in determining prospective need. Ibid. Therefore, plaintiffs' speculative argument should be rejected.

iii. THE COUNCIL'S CRITERIA AND GUIDELINES.

a. THE FAIR SHARE CREDIT.

Section 7(c)(1) of the Act requires the Council to adopt criteria and guidelines for a municipal determination of its present and prospective fair share of the housing need in a given region. Plaintiffs challenge this provision because they assert that it permits a municipality's fair share to be determined after "crediting on a one to one basis each current unit of low and

moderate income housing of adequate standard, including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households." Section 7(c)(1). Plaintiffs allege that this credit is impermissible since units constructed prior to the 1980 census are already accounted for in the need projections and, therefore, will be counted twice.

Once again, this argument is not ripe for judicial consideration. At this time, no determination of allowable credits has been made by the Council. Contrary to plaintiff's assertions, the 1980 census is not even mentioned in the Act. The Act does not indicate what data should be examined nor does it mandate that need be calculated by the Council in any fixed manner. Under these circumstances, the Court must assume that the Council will develop a methodology for determining present need for lower income housing which is compatible with the methodology it develops for determining credits pursuant to Section 7(c)(1). Morris County Fair Housing Council, supra, slip opinion at 36.

Moreover, the Legislature clearly did not intend that the credits section be utilized by the Council to unconstitutionally dilute a municipality's Mt. Laurel obligation. The Council will determine regional need for each of the housing regions pursuant to Section 7(b). Under Section 7(c)(1), the municipality must then determine its present and prospective fair share of the region's need for low and moderate income housing. In making this determination, the municipality must be able to count in its inventory of existing housing those units of low and moderate income housing which are currently available to meet this need. To achieve this

goal, Section 10 of the Act requires the municipality to conduct an inventory of its housing stock by age, condition and occupancy characteristics and enables the municipality to inspect "all necessary property tax assessment records" to ensure that an accurate count is made. Thus, the credit referred to in Section 7(c)(1) is merely a recognition by the Legislature of the need to make an accurate count of current low and moderate income housing units already existing in a municipality so that the municipality will be correctly allocated only its fair share of any additional housing that may be needed in the region. Plaintiffs' fear that the credit will act to reduce the municipality's obligation is, therefore, without merit and should be rejected.

b. CRITERIA FOR MUNICIPAL ADJUSTMENT OF FAIR SHARE.

Section 7(c)(2) of the Act requires the Council to adopt criteria and guidelines, within the time frame set forth in Section 7, for municipal adjustment of fair share based upon a consideration of the factors set forth in Sections 7(c)(2)(a) through (2)(g). Plaintiffs challenge this provision, arguing that making adjustments based upon these considerations could dilute the constitutional requirement and make it impossible to achieve. Specifically, plaintiffs challenge Section 7(c)(2)(a) (requiring adjustment for the preservation of historically or important architecture or environmentally sensitive lands); Section 7(c)(2)(b) (requiring adjustment when the established pattern of development in the community will be drastically altered); Sections 7(c)(2)(c) and (d) (requiring adjustment for the provision of adequate land for recreational, conservation and farmland preservation purposes and for

adequate open space), and Section 7(c)(2)(f) (requiring adjustment when adequate public facilities and infrastructure capacities are not available). Plaintiffs contend that allowing such adjustments may create means for municipalities to avoid, rather than to meet, their Mt. Laurel obligations.

Again, this argument is speculative and not ripe for judicial consideration. At this time, the criteria and guidelines for adjustment have not been established by the Council and no adjustments have been made. Morris County Fair Housing Council, supra, slip opinion at 33. Moreover, the adjustment of a municipality's fair share, based upon the factors set forth in Section 7(c)(2), is not inconsistent with Mt. Laurel II, where the Court stated:

> We reassure all concerned that Mount Laurel is not designed to sweep away all land use restrictions or leave our open spaces and natural resources prey to speculators. Municipalities consisting largely of conservation, agricultural, or environmentally sensitive areas will not be required to grow because of Mount Laurel. No forests or small towns need be paved over and covered with high-rise apartments as a result of today's decision.
>
> As for those municipalities that may have to make adjustments in their lifestyles to provide for their fair share of low and moderate income housing, they should remember that they are not being required to provide more than their fair share. No one community need be concerned that it will be radically transformed by a deluge of low and moderate income developments. Nor should any community conclude that its residents will move to other suburbs as a result of this decision, for those "other suburbs" may very well be required to do their part to provide the same housing. Finally, once a community has satisfied its fair share obligation, the Mount Laurel doctrine will not restrict other measures, including large-lot and open area zoning, that would

maintain its beauty and communal character. [92 N.J. at 219-220.]

The adjustments set forth in Section 7(c)(2), to be made in making these fair share determinations are not inconsistent with the reassurances of the Court. As under the judicial mechanism, conservation, agricultural and environmentally sensitive areas will be preserved as will town parks and recreational areas. The adjustment to be made when developmental patterns of a community will be "drastically altered" (Section 7(c)(2)(b)) will ensure that a municipality will not have to be "radically transformed" to meet its Mt. Laurel obligation. 92 N.J. at 219, 259-260. All of these adjustments are also consistent with the comprehensive statewide development plan envisioned by the Act and, therefore, should be upheld. See Section 7(c)(2)(e); Governor's Conditional Veto, April 26, 1985, at 4-5. (Legislative History, Item No. 8).

c. LIMITATIONS ON A MUNICIPALITY'S FAIR SHARE.

Plaintiffs also challenge Section 7(e) of the Act, which permits the Council, in its discretion, to place a limit, based upon criteria to be developed, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing. Plaintiffs assert that this provision might enable the Council to permit municipalities to avoid their Mt. Laurel obligation. However, this argument is clearly speculative. The provision is entirely discretionary and may never be utilized by the Council. Moreover, it must be assumed that the Council will exercise its discretionary powers in a manner consistent with Mt. Laurel. Morris County Fair Housing Council, supra, slip opinion at

34. Furthermore, the criteria to be adopted by the Council may allay plaintiffs' fears that this portion of the Act will somehow dilute a municipality's Mt. Laurel obligation. Finally, this section appears to represent nothing more than the Legislature's recognition that a municipality is only required to meet its fair share of the regional need, not more. This principle is entirely consistent with this Court's view. 92 N.J. at 219-220, 259-260. Therefore, plaintiffs' contentions on this point should be rejected.

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

a. THE RESOLUTION OF PARTICIPATION.

Sections 9 through 12 and Sections 22, 23, 24, 25 and 27 of the Act set forth the actions which a municipality must take if it chooses to comply with, and obtain the benefits and protections of, the Fair Housing Act. Under Section 9(a), a municipality, which elects to come under the Act, must file a resolution of participation to notify the Council of its intent to later submit a fair share housing plan. A resolution of participation is "a resolution adopted by a municipality in which the municipality chooses to prepare a fair share plan and housing element in accordance with [the Act]." Section 4(e). Within five months after the Council's adoption of its criteria and guidelines (under Section 7), the municipality must prepare and file with the Council a housing element and any fair share ordinance, properly introduced and implementing the housing element.

Under Section 9(b), if a municipality does not file the resolution of participation within the initial four month period,

it may still do so at any time thereafter. However, to encourage municipalities to voluntarily come under the administrative procedures established by the Act as quickly as possible, Section 9(b) provides that "there shall be no exhaustion of administrative remedy requirements pursuant to section 16 of [the Act] unless the municipality also files its fair share plan and housing element with the [Council] prior to the institution of the litigation." Thus, the Act provides municipalities with a strong incentive to bring themselves within the administrative mechanism at an early date in order to take advantage of the presumptions and benefits offered thereunder.

b. THE MUNICIPALITY'S HOUSING ELEMENT.

Pursuant to Section 10 of the Act, a municipality's housing element "shall be designed to achieve the goal of access to affordable housing needs, with particular attention to low and moderate income housing...." Thus, the ultimate standard against which a municipality's housing element and land use ordinances will be measured is identical to the constitutional obligation established by the Court in Mt. Laurel. At a minimum, the housing element must consider, for example, the municipality's current inventory of housing stock, Section 10(a); the municipality's demographic characteristics, Section 10(c); the existing and probable future employment characteristics of the municipality, Section 10(d), and the land most appropriate for the construction of low and moderate income housing, Section 10(f).

c. COMPLIANCE TECHNIQUES.

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

i. RELATED STATUTORY PROVISIONS.

In related statutory provisions, the Legislature has taken further steps to assist municipalities in meeting their Mount Laurel obligations. Under Section 24, the New Jersey Housing and Mortgage Finance Agency Section 4(i), must establish procedures for entering into, and must enter into, contractual agreements with willing municipalities or developers of inclusionary developments whereby the Agency will administer resale controls and rent controls in municipalities where no appropriate agency exists. This

section is entirely consistent with this Court's discussion of the importance of resale and rent controls in Mt. Laurel II, 92 N.J. at 269-270, and will help to ensure that low and moderate income housing remains available for a reasonable period of time. See also Sections 11(a)(3); 12(e); 20(e); 21(f).

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

Section 11(d) of the Act provides that a municipality is not required to raise or expend municipal revenues in order to provide low and moderate income housing. In the Morris County case, the Public Advocate argued, by distorting Section 11(d) beyond what the Legislature had intended, that this provision would enable a municipality to refuse to grant tax abatements to a developer since such tax abatements could be construed as the "expending of municipal revenues." This overbroad "construction" is clearly contrary to the plain language of Section 11. Sections 11(a)(4), (a)(5), (a)(6), (a)(7), and (a)(8) specifically require the municipality to consider plans for infrastructure expansion, donations or use of municipally-owned land, tax abatements, state or federal subsidies, and the utilization of municipally generated funds. In formulating its housing element, the municipality is not required to implement any one particular method of providing its fair share of the regional need. However, the "package" of compliance methods it selects must provide a realistic opportunity for

the construction of low and moderate income housing. Section 11. Contrary to the Public Advocate's argument, the Council would be able to condition certification of a municipality's housing element upon the requirement that it utilize one, or more, of the affirmative measures set forth in Section 11, (including those which may impose a financial obligation on a municipality), in meeting its constitutional obligation. Mt. Laurel II, 92 N.J. at 265. However, no court has ever required a municipality to directly finance or actually construct low and moderate income housing units. This is all that Section 11(d) (which states that a municipality is not required "to raise or expend municipal revenues in order to provide low and moderate housing" (emphasis added)), is meant to reflect. Thus, Section 11(d) should be interpreted consistently with the other provisions of the Act and with Mt. Laurel II to mean that the municipality need not directly finance the actual construction of the low and moderate income units. See Schierstead v. Brigantine, 29 N.J. 220, 230 (1959) (statutes are to be read sensibly and the controlling legislative intent is to be presumed as consonant to reason and good discretion).*

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

Section 11(b) of the Act provides that a municipality may provide for a phasing schedule for the achievement of its fair share of low and moderate income housing. Section 23 sets forth

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* It should be noted that, under Section 27, amounts expended by a municipality in preparing and implementing a housing element and fair share plan are mandated expenditures that are exempt from the limitations on final appropriations imposed by N.J.S.A. 40A:4-45.1 et seq.

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

e. REGIONAL CONTRIBUTION AGREEMENTS.

Section 11(c) of the Act enables the municipality to propose that a portion of its fair share be met through a regional contribution agreement. Section 12 sets forth the standards which must be met before such an agreement may be approved. Under this compliance method, a municipality may propose the transfer of up to 50% of its fair share to another municipality within its housing region by means of a contractual agreement into which the two municipalities voluntarily enter. Section 12(a). The agreement must specify how the receiving municipality will provide the housing and the amount of contributions to be made by the sending municipality. Regional planning agreements may only be approved by the Council, Section 12(c), or by a court (in matters in litigation as described in Section 12(b)), if the agreement provides a realistic opportunity for the provision of low and moderate income

housing within the housing region and within convenient access to employment opportunities in accordance with sound comprehensive planning. The Council will receive the input of the county planning board of the receiving municipality in its review of proposed regional contribution agreements and will, if there is no county planning board, examine the master plan and zoning ordinances of both municipalities, the master plan of the county involved and the State development and redevelopment plan before rendering its decision. Section 12(c).

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

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* Under Section 17(b), a presumption of validity will attach to any regional contribution agreement approved by the Council. This presumption can only be rebutted by clear and convincing evidence demonstrating that the approved agreement does not provide for a realistic opportunity for the provision of low and moderate income housing within the housing region. In addition, under Section

(Footnote Continued On Following Page)

Plaintiffs allege that these provisions are unconstitutional because they would enable a municipality to transfer a portion of its fair share to another municipality. Plaintiffs are apparently concerned that such an agreement would permit the sending municipality to avoid meeting its full Mt. Laurel obligation. This argument should be rejected. As Judge Skillman found, in holding that Section 12 was constitutional, the transfer provision is limited to a maximum of 50% of a municipality's fair share obligation. "Therefore, it does not permit a municipality to remain solely an enclave for the rich and middle class." Morris County Fair Housing Council, supra, slip opinion at 37.

Moreover, the Court expressly envisioned that such transfer agreements, if carefully constructed and monitored, would become possible if changes in the zoning laws were made by the Legislature. Thus, in Mt. Laurel I, in discussing a "developing municipality's" obligation to meet its fair share of the present and prospective regional need for low and moderate income housing, the Court stated:

> Frequently it might be sounder to have more of such housing, like some specialized land uses, in one municipality in a region than in another, because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason. But, under present New Jersey legislation, zoning must be on an individual municipal basis, rather than regionally. So long as that situation persists

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(Footnote Continued From Previous Page)

11(c), a municipality's housing element must demonstrate the manner in which that portion of its fair share, which it proposes to meet under a regional contribution agreement, will be met if an agreement is not consummated or approved by the Council.

> under the present tax structure, or in the absence of some kind of binding agreement among all the municipalities of a region, we feel that every municipality therein must bear its fair share of the regional burden. [67 N.J. at 189; footnote omitted.]

Here, the Act specifically permits the "kind of binding agreements" between municipalities in a region which the Court in Mt. Laurel I stated might be "sounder," in terms of comprehensive State and regional planning, than requiring each separate municipality to become a "microcosm" of housing need throughout the State. While not a tax, the contributions to be made by the sending municipality to the receiving municipality clearly constitute the means (lacking at the time of Mt. Laurel I) necessary to make such regional planning a viable, and permissible, alternative to the judicial compliance scheme. Morris County Fair Housing Council, supra, slip opinion at 37.

Not only is Section 12 consistent with the Court's analysis in Mt. Laurel I, it is consistent with the Court's statements concerning this subject in Mt. Laurel II, where the Court found that "zoning in accordance with regional planning is not only permissible, it is mandated . . . " 92 N.J. at 238; (emphasis added). In response to plaintiffs' argument that the transfer agreement provision is unconstitutional, the State points to the statement in Mt. Laurel II, that "[t]he Constitution of the State of New Jersey does not require bad planning . . . There is nothing in our Constitution that says we cannot satisfy our constitutional obligation to provide lower income housing and, at the same time, plan the future of the state intelligently." 92 N.J. at 238. In enacting Sections 11(c) and 12, the Legislature has met the chal-

lenge, posed to it by this Court, of developing a comprehensive, statewide planning scheme. Its decision, to allocate fair share on a regional basis among the several municipalities, under closely-controlled circumstances, is based upon sound planning principles as recognized by the Court; acknowledges and attempts to meet the need to rehabilitate substandard housing in the State; and, at the same time, clearly adheres to and fulfills the constitutional goal of ensuring a realistic opportunity for the provision of low and moderate income housing in the housing regions.

Finally, any proposal to transfer part of a municipality's Mt. Laurel obligation to another municipality must be approved by the Council, which must determine that "the agreement provides a realistic opportunity for low and moderate income housing within convenient access to employment opportunities, and ... is consistent with sound comprehensive regional planning." Section 12(c). It must be assumed by the Court that the Council will exercise this approval power in a manner which appropriately implements the objectives of the Mt. Laurel doctrine. Morris County Fair Housing Council, supra, slip opinion at 37-38. Plaintiffs' arguments on this point, therefore, should be rejected.

f. PAST SETTLEMENTS AND REPOSE FOR MUNICIPALITIES UNDER SECTION 22.

Section 22 of the Fair Housing Act provides that:

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

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

Plaintiffs have argued that this provision is invalid because it could apply literally to any settlement of a Mt. Laurel case, regardless of whether the settlement had been approved by a court or had resulted in any rezoning for lower income housing. In fact, this section violates neither the constitution nor the Mt. Laurel II decision when properly read to implement the legislative objective of assuring a "sound comprehensive planning and implementation response" to the recognized need to maximize the amount of low and moderate income housing provided in the State. Section 2(d).

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

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* Section 22 is completed by the following provision:

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

from the threat of litigation. 92 N.J. at 291-292. That six year period mirrored the time provided in the Municipal Land Use Law after which a municipality must reexamine and amend its land use regulations. Id. at 291.

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

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

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

The Legislature would not have intended to give six years of repose to a municipality which had entered into a non-compliant settlement. Indeed, as Judge Skillman found in the Morris County case, "the overwhelming majority of settlements in Mt. Laurel cases

have been submitted for court approval...." (slip opinion at 38; citation omitted). The Legislature may be presumed to have been aware of these approvals and the procedures utilized by the trial courts for judicial approval of Mt. Laurel settlements. Cf. Quaremba v. Allan, 67 N.J. 1, 14, (1975). Therefore, the reference in Section 22 to "a settlement of any exclusionary zoning litigation" should be construed to mean a settlement which has received court approval embodied in a judgment of compliance. Morris County Fair Housing Council, supra, slip opinion at 38-39.

Plaintiffs in the Morris County case also argued that Section 22 unconstitutionally expands the res judicata effect of a judgment of compliance recognized in Mt. Laurel II by conferring six years repose from further Mt. Laurel litigation upon a municipality even if it subsequently undergoes a "substantial transformation." The statute clearly provides absolute repose. Even though the Court stated in Mount Laurel II that compliance judgments would have res judicata effect for six years "despite changed circumstances," 92 N.J. at 291, it added in a latter footnote that "(a) substantial transformation of the municipality, however, may trigger a valid Mount Laurel claim before the six years have expired." 92 N.J. at 292, n.44. The threshold between "changed circumstances" and "substantial transformation" was not identified. Nevertheless, this conflict in the decision has been resolved by the Legislature. The six years of repose has become absolute. There is no constitutional requirement that only a conditional repose attach. Morris County Fair Housing Council, supra, slip opinion at 39. Moreover, this issue is purely hypothetical at this time since there is no indication that any municipality which has

settled a Mt. Laurel case has subsequently undergone a "substantial transformation" and no party in this action has sought repose pursuant to Section 22 of the Act. Morris County Fair Housing Council, supra, slip opinion at 39.

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

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

Section 13 of the Act permits a municipality which has filed a housing element with the Council to petition the Council for a substantive certification of its element and ordinances. Within 45 days of the publication of the notice of the municipality's petition, the Council must review the petition and issue a substantive certification if it finds (1) that the municipality's plan is consistent with its criteria "and not inconsistent with achievement of the low and moderate income housing needs of the region as adjusted" under Section 7; and (2) that "the combination of the elimination of unnecessary housing cost generating features from the municipality's land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible after allowing for the implementation of any regional contribution agreement approved by the Council." Sections 14(a) and (b).

In conducting its review, the Council may meet with the municipality. Section 14. If the Council determines that the element does not meet the requirements of Section 14(a) and (b), it may deny the petition or condition its certification upon timely changes in the element or ordinances. Section 14. The municipal-

ity is given 60 days after such denial or conditional approval to refile its petition with changes satisfactory to the Council. If this is accomplished, the Council will issue a substantive certification to the municipality. Section 14. If the municipality fails to meet these conditions, its petition for substantive certification will be deemed to be denied. Once substantive certification is granted, the municipality must adopt its fair share housing ordinance as approved by the Council within 45 days. Section 14. Again, the failure of the municipality to adopt the approved fair share housing ordinance within this time period will constitute a denial of the municipality's petition.

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

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

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

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

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

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

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

If mediation efforts are unsuccessful, the review process will begin and the matter must be transferred to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. Section 15(c). The OAL must expedite its normal hearing process as much as practicable and must assign an administrative law judge to the matter, who must promptly schedule, conduct and conclude an evidentiary hearing. Section 15(c). The administrative law judge must limit the time allotted for briefs, make proposed findings of fact, conclusions of law and promptly prepare an initial decision resolving the dispute. Ibid. Within 90 days of transmittal of the matter to the OAL, the initial decision, the transcript of the evidentiary hearing and copies of all exhibits introduced in evidence before the OAL must be filed with the Council. Section 15(c). The Council will then review the administrative record and issue a final decision determining whether a substantive certification should be issued to the municipality. Appeals may be taken from the Council's final decision to the Appellate Division of the Superior Court. Governor's Conditional Veto, April 26, 1985, at 7. (Legislative History, Item No. 8).

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

Section 16 of the Act sets forth the procedures which will be followed for cases in which a party has challenged the municipality's land use ordinances by instituting legal action in the Superior Court. For those exclusionary zoning cases initiated more than 60 days before the Act's effective date, Section 16(a) provides that any party to the litigation may file a motion with the court to seek a transfer of the case to the Council. In determining whether to not to transfer the case, the Court must consider whether the transfer would result in "a manifest injustice to any party to the litigation." Section 16(a). This standard is addressed in a separate section of this brief.

In a Section 16(a) case, if the municipality fails to file a housing element and fair share plan with the Council within five months from the date of transfer, or from the promulgation of the Council's guidelines and criteria pursuant to Section 7 of the Act, whichever occurs later, jurisdiction over the dispute shall revert to the court. Although Section 16(a) does not expressly state what will occur once the case is transferred to the Council, in view of the Act's purpose of providing an administrative mechanism for resolving fair share disputes, the request to transfer clearly should be interpreted as requiring that the municipality making the request is deemed to seek substantive certification of its housing element. Morris County Fair Housing Council, supra, slip opinion at 16, n. 3. Otherwise, there would be no reason for the transfer. See In re Loch Arbour, 25 N.J. 258, 262-263 (1957) (it is recognized as a fundamental principle of construction that a

statute often speaks as plainly by inference as by express words; matters which are clearly implied are considered an integral part of the enactment itself). Thus, the request for transfer should be interpreted to also constitute a petition for substantive certification filed as of the date the housing element is filed with the Council under the time limitations set forth in Section 16(a). The other parties to the litigation may then review the housing element. If no objection is filed within the 45-day period provided by Section 14(a), the element will be reviewed by the Council under Section 14 and a substantive certification will be issued if the criteria set forth in that provision are met. If an objection is filed, the mediation and review process of Section 15 of the Act will be automatically invoked and the dispute will be resolved through the mediation and review process described earlier.

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

Section 16(b) presents statutory interpretation problems which should be resolved by reference to the legislative intent underlying the provision. While Section 16(b) requires the plaintiff to file a notice to request review and mediation with the Council, it does not expressly require the defendant (municipality) to file even a resolution of participation. If the municipality does not file a housing element and fair share plan and a petition for substantive certification of its housing element, there would be nothing for the Council to review and mediate. Therefore, to be consistent with the interpretation of Section 16(a) set forth above, and for the same reasons, Section 16(b) should be interpreted as requiring that the municipality file a housing element and fair share plan and a petition for substantive certification. In re Loch Arbour, supra; see also Juzek v. Hackensack Water Co., 48 N.J. 302, 315 (1966). If the municipality fails to file a housing element within the required time periods (See Sections 9(a) and 9(b)), the obligation to exhaust administrative remedies should automatically expire. See Section 18. Also, as in the case of a Section 16(a) matter, the filing of the housing element should be interpreted to constitute a petition for substantive certification as of the date the housing element is filed with the Council. The Council, if an objection to certification is filed, would then begin its mediation and review process as described earlier.

i. ALLEGED DELAY IN ENFORCEMENT OF THE CONSTITUTIONAL OBLIGATION.

Plaintiffs have challenged the mediation and review process established by Section 16 of the Act on the ground that they believe it will cause unreasonable delays in the resolution of

their lawsuits and possibly delay the construction of lower and moderate income housing.* However, the mere fact that the Act may cause some delay in the final disposition of some Mt. Laurel claims does not render the Act unconstitutional on its face or as applied. In enacting the Fair Housing Act, the Legislature clearly recognized the need to have low and moderate income housing built as rapidly as feasible consistent with sound land use principles and comprehensive planning. However, as the Legislature declared:

> [t]here are a number of essential ingredients to a comprehensive planning and implementation

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* Judge Skillman found in the Morris County case that if the maximum time period permitted by the Act was taken at each of the steps in the Council's review process, exhaustion of the entire administrative process might not be concluded until September 1, 1987. Morris County Fair Housing Council, supra, slip opinion at 17 n. 6. This calculation for transferred cases was made as follows:

(1)	Commencement of period for Council to devise criteria and guidelines (§7) -	January 1, 1986
(2)	Deadline for adoption of criteria and guidelines by Council (§7) -	August 1, 1986
(3)	Deadline for municipality to file housing element (§9(c)) - (If mediation is not concluded when the housing element is filed, this date would have to be extended accordingly.) -	January 1, 1987
(4)	Issuance of an initial decision by an Administrative Law Judge (§15(c)) -	April 1, 1987
(5)	Issuance of a final decision by the Council (N.J.S.A. 52:14B-10(c)) -	May 15, 1987
(6)	Corrective action by the municipality if required by the Council (§14(b)) -	July 15, 1987
(7)	Adoption of an ordinance which complies with Mt. Laurel (§14(b)) -	September 1, 1987

> response, including the establishment of reasonable fair share housing guidelines and standards, the initial determination of fair share by officials at the municipal level and the preparation of a municipal housing elements, State review of the local fair share study housing element, and continuous state funding for low and moderate income housing to replace the federal housing subsidy programs which have been almost completely eliminated. [Section 2(d).]

Any administrative scheme which must provide mechanisms for the orderly implementation of each of these "essential ingredients" will necessarily require the consumption of time. Although the total aggregate of time for the Council's mediation and review processes may appear to be lengthy, none of the required steps can occur in a vacuum or before its precedent step has been completed. As former Chief Justice Hughes observed in his concurring opinion in Robinson v. Cahill, supra:

> In the area of judicial restraint and moderation there is room for accommodation to the exigencies of government, as pointed out by Judge Conford, in the consideration of practical possibilities of accomplishment. Brown v. Board of Educ. of Topeka, 349 U.S. 294, 300-01, 75 S.Ct. 753, 756, 99 L.Ed. 1083, 1106 (1955). This Court has exercised this restraint in the timing of required accomplishment of a constitutional goal, without abandoning its eventual enforcement. [69 N.J. at 474-475].

In Mt. Laurel II, this Court aggressively sought the Legislature's participation in the affordable housing area. The Court repeatedly stated that the policy decisions necessary to resolve the social and economic issues raised by its enunciation of the constitutional obligation of the municipalities were more properly within the Legislature's jurisdiction. 92 N.J. at 212. The Court could not have intended that the comprehensive legislative resolution spring

into existence without the passage of a reasonable period of time necessary to formulate the Council's processes to ensure that the constitutional obligation would be achieved. Clearly, no such unreasonable time schedule has been enacted so as to render the entire statutory scheme unconstitutional. Morris County Fair Housing Council, supra, slip opinion at 20.

Moreover, it must be pointed out that the Legislature took affirmative steps to ameliorate the problems that could be caused by undue delays in the Council's mediation and review process. With regard to cases filed more than 60 days prior to the effective date of the Act, Section 16(a) does not mandate that the Council's administrative procedures be exhausted. Instead, Section 16(a) requires that the trial courts determine on a case-by-case basis "whether or not the transfer [to the Council] would result in manifest injustice to any party to the litigation." As is discussed in greater detail in Point I, delay is one factor (but only one) to be weighed by the trial court in considering whether to transfer a particular case to the Council. With regard to cases filed within 60 days of the enactment of the Fair Housing Act, Judge Skillman correctly found that exhaustion of the Council's administrative procedures "should not cause undue delay...." Id. at 19. As Judge Skillman stated:

> Experience has demonstrated that Mount Laurel litigation, even under the simplified procedures set down in Mount Laurel II, is extremely time consuming. Detailed expert reports still must be prepared and lengthy discovery conducted before a case is ready for trial. The trials, which often have been bifurcated to simplify consideration of issues, have taken from a few weeks to a month. Moreover, the process of rezoning in conformity with Mount Laurel generally has taken much longer than the

> 90 days envisioned in Mount Laurel II. Therefore, if mediation under the act is successful, cases may be brought to a conclusion by the Council sooner than if they were fully litigated before the courts. In addition, while some delay in bringing cases to trial will occur if mediation is unsuccessful, that delay should not be unduly lengthy because much of the review and analysis in the administrative process is the same as normal pretrial preparation. [Morris County Fair Housing Council, supra, slip opinion at 19-20, footnote omitted.]

In addition, the Legislature has taken steps to prevent municipalities or other parties from utilizing the Council's mediation and review processes as a means for delay. Section 18 of the Act provides that if a municipality which has adopted a resolution of participation pursuant to Section 9, fails to meet the deadline for submitting its housing element to the Council prior to the institution of exclusionary zoning litigation, the obligation to exhaust administrative remedies contained in Section 16(b) automatically expires. The obligation will also expire if the Council rejects the municipality's request for certification or conditions its certification upon changes which are not made within the time periods established by the Act and the Council. Section 18; see also Section 14. Furthermore, Section 19 provides that if the review and mediation process is not completed by the Council within six months of receipt of a request by a party who has instituted litigation, the party may file a motion with a court of competent jurisdiction to be relieved of the duty to exhaust administrative remedies. Id. at 61, n. 20. Based upon the foregoing, plaintiffs' contention that the Council's mediation and review processes will cause unconstitutional delays in the enforcement of Mt. Laurel obligations should be rejected.

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

Plaintiffs do not challenge the portions of the Act which establish loan and grant programs, to be administered by the State, of which municipalities may take advantage if they choose to comply with the Act. To promote administrative and economic efficiency, existing State agencies have established programs to assist the municipalities to provide housing for low and moderate income households. Pursuant to Section 21 of the Act, the New Jersey Housing and Mortgage Finance Agency has set up an Affordable Housing Program to help finance Mount Laurel housing projects. The Program includes assistance for home purchases and improvement through interest rate, down payment and closing cost assistance as well as capital buy downs; rental programs including loans or grants for projects with low and moderate income units; moderate rehabilitation of existing rental housing; congregate care and retirement facilities; and conversions, infrastructure assistance, and grants and loans to municipalities, housing sponsors and community organizations for innovative affordable housing programs. The Program will be funded with a set aside of 25% of the Agency bond revenues, which is estimated to be $25 million, and a legislative appropriation of $15 million. Section 33.

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

qualified housings sponsors, infrastructure and other housing costs. Section 20.

These sections of the Act demonstrate, through the appropriation of new funds and through the refocusing of funds and programs previously in existence, that the Legislature is firmly committed to the Mt. Laurel goal. The programs established clearly will assist municipalities in providing a realistic opportunity for a fair share of their region's present and prospective needs for housing for low and moderate income families.

6. LEGISLATIVE REPORTING REQUIREMENTS; SECTION 26.

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

the constitutional obligation is not frustrated by changed circumstances. Ibid. Section 26, therefore, will enable the Legislature to carefully monitor the Council's administrative process and to make changes in the Act when experience shows that such changes are necessary to effectuate the constitutional goal.

7. SEVERABILITY; SECTION 32.

In the Morris County case, plaintiffs argued that, because the Fair Housing Act is designed to provide a "comprehensive planning and implementation response" to Mt. Laurel II, if any of the Act's provisions are found to be unconstitutional, the entire Act must fall. However, in making this contention, plaintiffs all but ignored the fact that the Act contains an express severability clause. Section 32 of the Act provides:

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

As Judge Skillman held (Morris County Fair Housing Council, supra, slip opinion at 25-26), the language of Section 32 is unambiguous and gives rise to a strong presumption that the Legislature did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether any particular provision of the Act was invalid. See Inganamort v. Borough of Fort Lee, 72 N.J. 412, 422 (1977) (inclusion of a severability clause in a municipal ordinance creates a presumption that each section of the ordinance is severable); Brunetti v. Borough of New Milford, 68 N.J. 576, 600, n. 23 (1975) (the fact that an ordinance contains a severability or saving clause evinces an intent on the

part of the municipality to make each provision of the ordinance severable); see also INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 2774, 77 L.Ed.2d 317, 332 (1983) (further inquiry of legislative intent concerning severability need not be undertaken where a severability clause is present in the statute). As set forth above, the Legislature has expressly stated in Section 32 that if any part of the Act shall be held invalid, the remainder of the Act shall not be affected thereby. The Legislature's intent that the Act would survive a finding that one of its provisions was unconstitutional is further demonstrated by the fact that Section 32 specifically provides that if any application of the Act is found invalid, the Act shall remain in effect in all of its valid applications. Thus, even if in a particular factual situation, a court found that a provision of the Act would be unconstitutional if applied to a particular person or entity, the Legislature clearly intended that the provision should remain in effect as applied to other persons or circumstances.

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

clearly constitutional and, therefore, plaintiffs' contention need not even be considered.

POINT III

ARGUMENT

THE MORATORIUM ON THE BUILDER'S REMEDY ESTABLISHED IN THE FAIR HOUSING ACT IS CONSTITUTIONAL.

In Mt. Laurel II this Court twice reiterated its strong conviction that "until the Legislature acts" the Court had no choice but to carry out its duty under the Constitution. 92 N.J. at 212, 352. The Legislature has acted. The administrative mechanism established by the Fair Housing Act for the implementation of the Mt. Laurel mandate is in place. Under criteria and guidelines to be established by the Council within seven months, municipalities will be given the opportunity to plan for low and moderate income housing "in accordance with regional considerations" and in a manner "which satisfies the constitutional obligation enunciated by [this] Court." Section 3. Under programs established by the Housing and Mortgage Finance Agency and the Department of Community Affairs, municipalities are now given the opportunity to seek assistance in meeting their Mt. Laurel obligations through grants or awards administered by these two state agencies. Sections 20 and 21. Prospective home purchasers and housing sponsors, as well as municipalities, may obtain HMFA subsidies, including contributions to mortgage revenue bonds or multi-family housing bonds. Section 21(c).* Under the Act municipalities are further given the opportunity to enter into regional contribution agreements upon a

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* Additionally, 25% of the mortgage bond authority of the HMFA is to be allocated to housing constructed or rehabilitated under the Act. Section 21(a).

determination by the Council that such agreements "provide[] a realistic opportunity for low and moderate income housing within convenient access to employment opportunities," and that they are in accord with sound regional planning. Section 12(c); see also Section 12(b). It is clear then, that under the Act municipalities may now engage in sound planning efforts -- coordinated at the state level -- and that they may seek assistance in developing low and moderate income housing without, at the same time, being forced to accept an unplanned development explosion fueled by construction of relatively expensive housing that supports a much smaller number of Mt. Laurel units.

The moratorium on the builder's remedy is a means toward the legislative goal of compliance with Mt. Laurel. It is a way of providing time, time to take advantage of the new opportunities made available by the Act. Yet, various parties before the Court have contended that the moratorium bears no rational relationship to the legislative purpose, indeed, that no public purpose is served by further delay. Some plaintiffs have claimed that the moratorium is an improper intrusion upon the remedial powers of the Court and a violation of the separation of powers doctrine of our State Constitution. And some, relying in part on dictum in Judge Skillman's opinion, focus upon Article VI, Section V, paragraph 4 of the Constitution, and assert that only the Supreme Court may limit remedies in actions in lieu of prerogative writs. Not one of these contentions survives close scrutiny.

Before considering these constitutional attacks on the builder's moratorium it is important initially to focus upon the specific statutory language in Section 28 of the Act. Section 28

establishes a carefully tailored restriction on the award of builder's remedies in exclusionary zoning litigation. Specifically, the Act provides that:

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

The Act defines the term "builder's remedy" to mean a "court imposed remedy for a litigant who is an individual or a profit-making entity" in which the court mandates the use of certain inclusionary zoning techniques such as mandatory set-asides or density bonuses.

The limitations on the award of the builder's remedy set forth in Section 28 are narrowly drawn. First, the restriction will remain in effect only through the end of 1986 at the latest. By this time, municipalities that have elected to participate in the administrative structure established in the Fair Housing Act will have submitted to the Council a housing element designed to meet their fair share of the region's need for affordable housing. The moratorium established in Section 28 will expire on the date by which these municipal housing elements must be submitted to the Council.

Moreover, the restrictions set forth in Section 28 only apply to inclusionary housing developments sponsored by profit-making entities, which developments typically create four units of market price housing for each unit of affordable housing. The restrictions set forth in Section 28 do not apply, however, to

nonprofit housing corporations whose developments typically are composed in their entirety of housing affordable to low and moderate income families.

A further restriction on the scope of the Section 28 moratorium is its inapplicability to litigation filed before the Mt. Laurel II decision. Certain plaintiffs argue before this Court that this exemption also applies to lawsuits which were filed after Mt. Laurel II, but were consolidated with other actions brought prior to the Mt. Laurel II decision. They rely principally on Rule 4:38-1(c), which states that "in consolidated actions the action first instituted shall determine which party shall have the privilege to open and close and in other respects shall govern the conduct of subsequent proceedings." This Court Rule applies solely to the "conduct" of proceedings and does not alter the filing date of any lawsuit or the legal effect resulting therefrom. Cf. McGlone v. Corbi, 59 N.J. 86 (1971) (statute of limitations applies to new causes of action sought to be added by amendment of complaint). In fact, there is no reason why those developers who chose after Mt. Laurel II to file suit against a municipality already subject to a court challenge should receive special treatment by virtue of the fact that the town targeted by their lawsuit has previously been the subject of litigation.

While the restrictions on the builder's remedy set forth in Section 28 do apply to plaintiffs that filed their complaints after the date of Mt. Laurel II, the exception for complaints filed prior to Mt. Laurel II, coupled with other statutory provisions, serves to circumscribe narrowly the effect of the moratorium. Clearly, the moratorium will have no practical impact upon those

matters transferred to the Affordable Housing Council under Section 16 of the Act. The moratorium will expire by the end of 1986 when municipalities must file their housing elements with the Council. Because cases transferred to the Council will still be in the administrative process established by the Act, the restriction on a court award of the builder's remedy will have no real effect in these cases. Thus, in practice, the Section 28 moratorium will only apply to those cases not transferred to the Council. Because of the manifest injustice standard established in Section 16(a) of the Act, any cases remaining in the court system will likely be those filed prior to Mt. Laurel II -- to which the moratorium on the builder's remedy in Section 28 does not apply. Thus, the moratorium on the builder's remedy will be narrowly circumscribed by operation of Section 16 and will affect only those few cases where the complaint was filed after the date of Mt. Laurel II and where transfer to the Affordable Housing Council has been denied because of a manifest injustice.* As will be shown infra, this narrowly drawn moratorium does not lack a rational relationship to legitimate public purposes, nor does it improperly intrude upon the remedial powers of the Court or upon its jurisdiction over prerogative writs.

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* Some cases filed by developers after Mt. Laurel II have been consolidated with other pre-Mt. Laurel II cases in which the courts may find that transfer would cause a manifest injustice. Although these post-Mt. Laurel II suits may thus not be transferred to the Council, it is likely that the developers who have joined the litigation at a late date will not be deemed to be "successful" plaintiffs for purposes of the builder's remedy. See Morris County Fair Housing Council v. Boonton Twp., supra, slip opinion at 24. The Section 28 moratorium will therefore have no real consequences in this situation.

A. Section 28 is Rationally Related to a Legitimate Legislative Purpose and is Consistent with the Requirements of Due Process of Law.

Some of those before the Court claim that the Section 28 moratorium on the builder's remedy is violative of due process of law because it serves no rational purpose in those cases where transfer of the lawsuits to the Affordable Housing Council does not occur (which, as explained above, is the only situation in which the moratorium actually will apply). According to these parties, because no administrative process will be initiated before the Affordable Housing Council in the absence of transfer, the Section 28 moratorium on the builder's remedy is arbitrary, capricious and illegal.

By focusing on the procedures for substantive certification, those who make this argument have failed to recognize that the Fair Housing Act establishes a number of tools not previous available to municipalities to enable them to meet their fair share obligations. Because the moratorium permits municipalities to avail themselves of these opportunities prior to judicial consideration of whether to grant a builder's remedy, the moratorium serves a legitimate legislative purpose in cases that are not transferred to the Council and fulfills the constitutional requirement of due process.

Thus, in addition to creating an administrative procedure before the Affordable Housing Council, the Fair Housing Act provides two significant alternative vehicles that may be utilized by municipalities to meet their fair share obligations even when a court retains jurisdiction over the lawsuit challenging the munici-

pality's zoning practices. First, as indicated supra, the Department of Community Affairs and the New Jersey Housing and Mortgage Finance Agency are authorized to encourage the development of affordable housing through a broad range of grant, loan and mortgage assistance programs. The Fair Housing Act provides an appropriation of $2,000,000, Section 33, plus an estimated $10,000,000 annually from an increase in the real estate transfer tax dedicated to the Department of Community Affairs' Neighborhood Preservation Fund, P.L. 1985, c. 225. The Neighborhood Preservation Fund will be used for such purposes as rehabilitation of substandard units; construction of new units and conversion of nonresidential units; costs of studies, plans, architectural, engineering and other technical services; and costs of land or property acquisition, demolition, infrastructure projects, and other activities related to the creation of low and moderate income housing units. Similarly, the Affordable Housing Program administered by the HMFA will provide permanent mortgage loans for the purchase of owner-occupied housing, construction and/or permanent loans for multifamily rental housing and grants or loans to make either home purchases or multifamily rental housing more affordable. Both of these programs are already in the implementation stage and are open for participation by municipalities whose cases are not transferred to the Affordable Housing Council. See Sections 20(c) and 21(b).

The Fair Housing Act also empowers a municipality to transfer up to 50% of its fair share obligations to another municipality within its housing region by means of a contractual agreement between the two municipalities. Section 12(a). In order to transfer a portion of its fair share, a municipality must apply to

the Affordable Housing Council, which will match the application with a municipality that has filed a statement indicating its intent to serve as a receiving municipality. Although this option is open to municipalities that are defendants in exclusionary zoning litigation with the approval of the trial court, see Section 12(b), matching by the Council of potential sending and receiving municipalities in the same region must await, at a minimum, the definition by the Council of housing regions. Since the delineation of regions will occur not later than August 1, 1986, matching of interested municipalities and negotiations between the municipalities cannot be anticipated until the latter portion of 1986.

Both of these devices -- the affordable housing financing programs and the transfer arrangements -- serve to aid municipalities in meeting their fair share obligation in a manner preferred by the Legislature. Unlike the builder's remedy, where the judiciary authorizes spot zoning, both tools permit a planned response to a municipality's Mt. Laurel obligation. Municipalities, through the use of state funding and by means of approved transfers, are in a better position to control the use of their land, even though they remain before the trial courts. And, unlike the builder's remedy, these vehicles will lead to the construction of affordable housing without the detrimental effects of the uncontrolled growth engendered by the utilization of inclusionary zoning measures where such measures are not needed to meet a fair share obligation.

Section 28 permits municipalities to take advantage of these new opportunities for the provision of low and moderate income housing and to avoid the builder's remedy. Of course, municipalities that do not act by the end of 1986 will be subject

once again to judicial imposition of a builder's remedy. In effect, the Legislature has used the threat of the builder's remedy down the line to create an incentive to take advantage of these legislatively-devised alternatives contained in the Fair Housing Act. And, those municipalities that respond in a meaningful way to the legislative invitation and develop a planned response to their fair share obligation may be spared the costs of unplanned growth inherent in the award of the builder's remedy.*

The reasonableness of the Section 28 moratorium on the builder's remedy is amply demonstrated by prior caselaw evaluating development moratoria. In numerous instances, the courts have approved the imposition of a moratorium on development in order to permit development of a comprehensive planning program, especially during the transition to a new regulatory scheme. See Plaza Joint Venture v. Atlantic City, 174 N.J. Super. 231, 237 (App. Div. 1980); Toms River Affiliates v. Dept. of Environmental Protection, 140 N.J. Super. 135 (App. Div. 1976); Meadowlands Regional Development Agency v. Hackensack Meadowlands Development Commission, 119 N.J. Super. 572 (App. Div. 1972). Here, the moratorium on the builder's remedy will temporarily halt explosive, unplanned development, thereby enabling municipalities to implement other alternatives. In this sense, Section 28 creates a moratorium on develop-

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* A municipality's use of the moratorium period to create affordable housing opportunities may affect the eventual decision on whether to award a builder's remedy. Since one of the principal reasons for using the builder's remedy is to construct affordable housing, see 92 N.J. at 279, consideration of municipal actions to meet the Mt. Laurel obligation is clearly proper in evaluating whether to grant a builder's remedy. Of course, the weight to be given this factor will be within the court's discretion.

ment with the objective of permitting municipalities an opportunity for rational land use planning -- an objective recognized by the courts to be reasonable in numerous similar contexts. Because imposition of a temporary moratorium on the award of a builder's remedy in those cases filed after Mt. Laurel II provides time for municipalities to utilize the alternative tools contained in the Fair Housing Act, this limited moratorium is reasonable, is rationally related to the Legislature's aim to encourage planned development of affordable housing, and accords with the constitutional requirement of due process.

B. The Moratorium on the Builder's Remedy Set Forth in Section 28 Does Not Impair the Judicial Power to Fashion Effective Remedies to Address Constitutional Violations.

In a facial challenge to the constitutionality of the limited moratorium on the builder's remedy established by Section 28, some parties before this Court allege that Section 28 is violative of the inherent judicial power to fashion effective remedies to constitutional violations. The gravamen of this claim is the empirical assumption that the modest limitations on the builder's remedy set forth in the Fair Housing Act will prevent courts from enforcing the constitutional obligations articulated in the Mt. Laurel doctrine. Because of the availability of an array of other remedial devices, including those articulated in Mt. Laurel II as well as those created by the Fair Housing Act, and because of the speculative nature of this facial attack on the constitutionality of Section 28, the Court should conclude that Section 28 does not intrude on the judicial power to craft effective remedies.

The source and nature of the judicial remedial power has recently been reviewed by this Court in State v. Abbati, 99 N.J. 418 (1984). In that decision, the Court noted that:

> Despite the exiguity of the judicial article, an unbroken conceptual thread running throughout our decisions applying that article is that the judicial power imports the power to fashion needed and appropriate remedies. [Id. at 428].

See also, State v. McCrory, 97 N.J. 132, 139 (1984). Although the scope of the judicial remedial power is not exhaustively defined in the caselaw, judicial commentary has focussed on the inherent judicial authority to fashion an effective remedy. As implied by the invitation for legislative action in Mt. Laurel II, the selection of any particular remedial scheme is not of constitutional dimension. See Morin v. Becker, 6 N.J. 457 (1951).

The Section 28 moratorium will leave untouched the vast majority of the devices identified in Mt. Laurel II to encourage the construction of affordable housing. Section 28 leaves in place the trial courts' authority to issue orders including any one of the following:

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

> or eliminate building and use restrictions in all or selected portions of the municipality (the court may condition this remedy upon failure of the municipality to adopt resolutions or ordinances mentioned in (1) above). [92 N.J. at 285-286].

The Section 28 moratorium affects only the builder's remedy and only in cases filed after Mt. Laurel II that are not transferred to the Affordable Housing Council. And, even in these cases, its effect is only temporary; the moratorium expires at the end of 1986.

In contrast to this narrowly-drawn restriction on the award of builder's remedies, the Fair Housing Act adds new tools that will aid municipalities in meeting their fair share obligations. As mentioned above, to counter the decline in lower income housing subsidies noted in Mt. Laurel II, 92 N.J. at 263, the Legislature has established a program of grants, loans and reduced-rate financing to encourage construction and rehabilitation of affordable housing. The Legislature has also authorized regional contribution agreements through which a municipality can transfer a portion of its fair share and make financial contributions to another municipality in the region better able to provide for affordable housing. These additional tools will greatly supplement municipalities' ability to meet their fair share obligations. Indeed, the moratorium on the builder's remedy serves to permit municipalities a chance to take advantage of these opportunities prior to judicial consideration of whether to award a builder's remedy.

Plainly, the range of judicially-designed remedies set forth in Mt. Laurel II, coupled with the additional tools provided

by the Fair Housing Act, leave trial courts with an effective arsenal of remedial alternatives to combat constitutional violations -- even with the moratorium on the builder's remedy. To conclude otherwise, a court must engage in a speculative assessment of the effects of legislation without the benefit of a record -- exactly the type of inquiry this Court has adjured trial courts to avoid. See Donadio v. Cunningham, 58 N.J. 309, 324-26 (1971) (in a declaratory judgment action challenging the constitutionality of a zoning ordinance, a court should not issue abstract declaratory relief where the court must enter into a speculative inquiry of the circumstances surrounding the ordinance). Consequently, in recognition of the continued vitality of the remedial structure of Mt. Laurel II as complemented by the provisions of the Fair Housing Act, this Court should reject the contention that the inherent authority of the judiciary to mold an effective remedy will be compromised by the moratorium on the builder's remedy.

C. The Moratorium On The Builder's Remedy Set Forth In Section 28 Does Not Intrude On The Jurisdiction Of The Court In Prerogative Writ Actions.

Consistent with the doctrine that a court should not render a determination on a constitutional issue unless that determination is clearly required, Judge Skillman found it unnecessary to pass upon the constitutionality of Section 28 of the Fair Housing Act. See Morris County Fair Housing Council, slip opinion at 23, 26. Nonetheless, the court suggested in dictum that the moratorium on the builder's remedy cannot "be reconciled with the prohibition of the New Jersey Constitution against legislative interference with judicial remedies." Id. at 23. After making the

broad statement that "[j]udicial remedies are secured against legislative interference by the Judicial Article (Article VI) of the 1947 New Jersey Constitution" (citing Hager v. Weber, 7 N.J. 201 (1951)), Judge Skillman focused upon the applicability of this "constitutional restraint . . to actions in lieu of prerogative writs. . . ." Morris County Fair Housing Council, slip opinion at 22. In this context, he relied upon Justice Heher's opinion in Fischer v. Bedminster Tp., 5 N.J. 534 (1950), quoting from Fischer to support an inference that the prerogative writ jurisdiction of this Court is somehow interfered with by legislative regulation of the builder's remedy. Such is not the case.

In addressing this suggestion -- and several of the parties before the Court have now argued in reliance on Judge Skillman's dictum -- Justice Heher bears repeating:

> By the clearest language, the Constitution commits to the Supreme Court the regulation of the new remedies provided in lieu of prerogative writs. Review, hearing and relief shall be had on such terms and in such manner as the Supreme Court alone may provide by rule. In the administration of these remedies, there is to be no division of authority. It may well be that the framers of the Constitution were guided by what they considered the lessons of experience; but, whatever the reason, the provision is to be read and enforced in accordance with the plain terms of the grant. No distinction is made between the substantive jurisdiction to afford the relief theretofore available through the prerogative writs and the mode and manner of the exercise of the power. The whole is within the exclusive jurisdiction of the Supreme Court. Neither the exercise of the power inherent in the old Supreme Court by means of the prerogative writs nor the regulation of the remedy is subject to legislative control. [5 N.J. at 541 (emphasis added)].

It is immediately obvious that in speaking of "the new remedies" or of "the administration of these remedies," or even of "the remedy

[as not] subject to legislative control," Fischer is speaking of the remedy of the writ itself. Simply put, the writs are to be regulated by the Court -- and are not within the province of the Legislature. Indeed, the writs are the remedy. Fischer was about a legislative bar to a suit under the writ, a statute of limitations which prevented access to the courts altogether and denied the use of the "newly-devised remedies in lieu of the extraordinary common-law writs." Id. at 539. In this setting, the Court held that the regulation of the writ "is within the exclusive jurisdiction of the Supreme Court." Id. at 541; see also Hager v. Weber, supra, 7 N.J. at 205-206.

This reading of Fischer is borne out by both the language of the prerogative writs provision of the Constitution and, also, by the recorded history of that provision. See generally Constitutional Convention of 1947, Vol. IV, Committee on the Judiciary. Article VI, Section V, paragraph 4 provides:

> Prerogative writs are superseded, and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary.

In In re Li Volsi, 85 N.J. 576, 593 (1981), the Court reviewed the changes wrought by paragraph 4:

> The prerogative writ clause of the 1947 New Jersey Constitution was intended to streamline and strengthen the traditional prerogative writs which were available in the pre-1947 Supreme Court. The provision first consolidates the old prerogative writs (certiorari, quo warranto, prohibitions, and mandamus) into one action -- which has come to be know as an action "in lieu of prerogative writs." Also, the provision removes the courts' traditional discretion not to hear the writs and makes the new action "in lieu of prerogative writs"

> available as of right, except in criminal cases. See Ward v. Keenan, 3 N.J. 298, 303-05 (1949); Jacobs, "Procedure in Lieu of Prerogative Writs," Rut. L. Rev. (special number) 34, 38 (1948).

For the purposes of that case, wherein the Court rejected the contention that there is a right to an appeal in lieu of prerogative writs from a determination of the Fee Arbitration Committees, Chief Justice Wilentz found it "significant that Art. VI, §V, par. 4 did not change the substance of prerogative writ appeals when it created the new [form of] action. . . ." Ibid. Thus, where the traditional writ provided a right of appeal, the new provision continued to make that right available. Id. at 594.

The proceedings of the Judiciary Committee convened as part of the Constitutional Convention of 1947 furnish the backdrop for the Li Volsi holding and provide insight into the intention of those who prepared the Judicial Article. In "Appendix A - Annotations of Judicial Article," the Committee commented "wherever the award of relief, as distinguished from permission to commence the proceedings, is discretionary as a matter of substantive law, that discretion is not disturbed." Constitutional Convention of 1947, Vol. II, Convention Proceedings, at 1193; see also Jacobs, "Procedure in Lieu of Prerogative Writs," Rut. L. Rev. (special number) 34, 38 (1948). In the hearings before the Judiciary Committee, the testimony centered upon the need to do away with the formalistic distinctions between the old writs (where a plaintiff who brought suit under the "wrong writ" was thrown out of court no matter how meritorious his suit), and the need to do away with the court's discretion to hear the writs in the first instance. Constitutional Convention of 1947, Vol. IV, at 49-52; 220-222; 235-236; Appendix

at 623-630. It was clearly understood that the writs were, in the new in lieu form, to continue to be available as they were before 1947, and that they were to be brought through procedures established by the new Supreme Court.

Moreover, the constitutional language "review, hearing and relief shall be afforded in the Superior Court" derived from the concern of some that the initial language considered by the Committee -- "review shall be afforded by the General Court," -- would be misconstrued. See Constitutional Convention of 1947, Vol. II, at 1168 for the tentative proposal. Herbert J. Hannoch spoke to this potential problem:

> Now, it seems to me that the word "review" is ill-chosen. Prerogative writs cover two classes of matters. One class consists of matters in which you review or effect an appeal from the action of a lower tribunal. But there are many actions which are actions of original jurisdiction, such as mandamus and quo warranto. They are not matters of review. They are entirely new actions. I therefore suggested the word "relief." [Constitutional Convention of 1947, Vol. IV, at 538].

Hannoch clearly wanted to make sure that there was no mistake about the inclusion of all the writs under the new form of action. He knew that the Committee was reluctant to use "relief" because of the inference that there was an entitlement to a particular form of relief (his speculative plaintiff had only to say "'I want so and so, and under the Constitution and as a matter of right I am entitled to it.'"), but in the end the Committee added "hearing and relief" thereby addressing Hannoch's concern. See also Id. at 499.

Article VI, Section V, paragraph 4 is about all of the writs; it is about the right to bring in lieu actions and it is about exclusive control by the Court over the procedures governing

their conduct. Cf. Winberry v. Salisbury, 5 N.J. 240, 255 (1950) (judicial rule-making power is "confined to practice, procedure and administration as such."). It is not about the form of relief provided by a court to a successful plaintiff in an in lieu suit and it does not grant to the judiciary exclusive control over that relief.

This conclusion is underscored by the separation of powers doctrine of the 1947 Constitution. Even if the Legislature is deemed to have stepped into the domain of the Judiciary, it has done so by exercising powers peculiarly within its sphere. See Euclid v. Amber Realty Co., 272 U.S. 365 (1926). Article IV, Section VI, paragraph 2 of the 1947 Constitution gives the Legislature, under the police power, exclusive control over municipal zoning:

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

While the Court has held that this power has been exercised in an unconstitutional manner, it is important to recognize that the builder's remedy constituted a necessary but unfortunate incursion upon the legislative prerogative.

The teaching of Knight v. Margate, 86 N.J. 374, 388-389 (1981), is particularly instructive in mapping out a course for this case:

The constitutional doctrine of the separation of powers denotes not only independence but also interdependence among the branches of government. Indeed, the division of governmental powers implants a symbiotic relationship between the separate governmental parts so that the governmental organism will not only survive but will flourish. E.g., State v. Leonardis, 73 N.J. 360 (1977); cf. City of Hackensack v. Winner, 82 N.J. 1 (1980). "The separation-of-powers doctrine contemplates that the several branches will cooperate to the end that government will succeed in its mission." In re Zicarelli, 55 N.J. 249, 264-265 (1970), aff'd sub. nom. Zicarelli v. Investigation Commission, 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972). See also State v. Leonardis, supra, 73 N.J. at 367-375.

It was observed in In re Salaries Prob. Off. Bergen County, 58 N.J. 422, 425 (1971) that "... the doctrine of the separation of powers was never intended to create, and certainly never did create, utterly exclusive spheres of competence. The compartmentalization of governmental powers among the executive, legislative and judicial branches has never been watertight." See also Massett Building Co. v. Bennett, 4 N.J. 53, 57 (1950). Inevitably some osmosis occurs when the branches of government touch one another; the powers of one branch sometimes take on the hue and characteristics of the powers of the others. E.g., Mt. Laurel Tp. v. Public Advocate of N.J., 83 N.J. 522, 530-534 (1980); State v. Leonardis, supra; David v. Vesta Co., 45 N.J. 301, 321-328 (1965). It occasionally happens that an underlying matter defies exact placement or neat categorization; it may not always be possible to identify a subject as belonging exclusively to a particular branch. In those situations responsibility is joint and governmental powers must be shared and exercised by the branches on a complementary basis if the ultimate governmental objective is to be achieved. E.g., State v. Leonardis, supra, (judicial and legislative); In re Salaries Prob. Off. Bergen County, supra, (same); Brown v. Heymann, 62 N.J. 1 (1972) (legislative and executive); Mt. Laurel Tp. v. Public Advocate of N.J., supra, (same); David v. Vesta, supra, (executive and judicial).

In Mt. Laurel I and Mt. Laurel II this Court exercised its judicial power to declare unconstitutional municipal zoning ordinances which have not made provision for low and moderate income housing. Marbury v. Madison, 2 L.Ed. 60 (1803). In the absence of corrective legislative action, the Court felt constrained to devise a remedial scheme to enforce the constitutional rights it had recognized. But the Court recognized, also, that the Legislature has primary authority under the constitution to control zoning, and that the builder's remedy collided with that authority.

Because of this necessary intrusion upon the Legislature's power, the Court invited action by that body. By the Fair Housing Act, the Legislature has responded to the Court's invitation with a comprehensive administrative scheme for the implementation of the Mt. Laurel obligation. Along with alternative planned remedies, the Legislature has instituted a moratorium on the builder's remedy to permit municipalities to take advantage of the new opportunities provided by the Act. This approach to the complexities of Mt. Laurel is eminently reasonable and does not intrude upon the judicial prerogatives of the Court. Rather, it is consistent with "the interdependence among the branches of government" as defined in our State Charter and should be upheld by the Court in the spirit of cooperation engendered by that Charter.

CONCLUSION

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

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

For all of the foregoing reasons, the State respectfully urges the Court to reject plaintiffs' constitutional challenge to the Act. The State also urges the Court to adopt a standard of manifest injustice that accords due and proper respect to the judgment of the Legislature that an administrative remedy for Mt. Laurel zoning disputes is the preferred alternative and, consistent therewith, to find that existing cases, except in extraordinary situations, should be transferred to the Affordable Housing Council for resolution. Since the courts below failed to accord proper weight to the legislative preference in denying transfer applications, the cases should be remanded for reconsideration in light of standards to be set by this Court.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY

By: Michael R. Cole
Michael R. Cole
First Assistant Attorney General

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