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~~Hoggs~~ Roseland

Brief in Opposition to Motion to Dismiss Complaint

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Plaintiff

ESSEX GLEN, INC.

vs.

*Defendant*s

MAYOR AND COUNCIL OF THE BOROUGH OF ROSELAND and THE BOROUGH OF ROSELAND

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION:
ESSEX COUNTY/
MIDDLESEX COUNTY

Docket No.

CIVIL ACTION

BRIEF IN OPPOSITION TO MOTION TO DISMISS COMPLAINT

Douglas K. Wolfson,
Of Counsel
Jeffrey R. Surenian,
On the Brief

STATEMENT OF FACTS

On February 19, 1985, Douglas K. Wolfson on behalf of Essex Glen, Inc. submitted a letter to the Borough of Roseland asking that the Borough promptly enter into negotiations with Essex Glen in an effort to cooperatively develop a housing project that would contain a substantial amount of lower income housing. See Appendix B of Defendant's Brief. After repeated efforts, representatives of Essex Glen were finally able to schedule a meeting with Borough officials. Indeed, it took almost two months after the mailing of the initial good faith letter before a meeting could even be scheduled.

As evidenced by the Borough's present attempt to dismiss Essex Glen's complaint, it is clear that the Borough never intended to accept Essex Glen's offer to construct a Mount Laurel project. Rather, the Borough was seeking to delay the process in an effort to be "saved by the legislation." Now that the long anticipated legislation has been enacted, the Borough is utilizing the legislation as a vehicle to thwart Essex Glen's attempt to construct a Mount Laurel project.

LEGAL ARGUMENT[1]

POINT I

NOWHERE IN THE FAIR HOUSING ACT DOES THE ACT REQUIRE THE DISMISSAL OF COMPLAINTS FILED WITHIN SIXTY DAYS FROM THE EFFECTIVE DATE OF THE ACT

A. Fair Housing Act, Section 16.b. Does Not Require Dismissal Of The Complaint

Section 16.b. of the Fair Housing Act requires that

> any person who institutes litigation less than sixty days before the effective date of this act . . . shall file a notice to request review and mediation with the council . . . . In the event that the municipality adopts a resolution of participation [by November 2, 1985], the person shall exhaust the review and mediation process of the council before being entitled to a trial on his complaint.

Contrary to defendant's suggestion that this language requires the Court to dismiss the complaint for actions commenced between May 2, 1985 and July 2, 1985, the language calls for the transfer of the case in the event that the municipality adopts an appropriate resolution - not for the dismissal of the complaint.

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[1] In order to minimize any duplication of effort and to avoid consuming more of this Court's time than is necessary, plaintiff hereby requests that the Court consider the briefs submitted by the plaintiffs in opposition to Denville Township's motion to transfer in the case Morris County Fair Housing Council, et al. v. Boonton Township, et al., Docket No. L-6001-78 P.W.. The arguments contained in those briefs are extremely pertinent to the case at bar, especially in regard to the constitutionality of the Act as a whole and as to various provisions.

Indeed, there are many sound reasons why this Court should keep the complaint active while the plaintiff exhausts any administrative remedies that may be required by the Act. For example, the Township may not file an appropriate resolution of participation by November 2, 1985. Fair Housing Act, Section 16.b. referring to Section 9.a. Similarly, the Act requires the municipality to submit a housing element within a timely[2] period after adopting a resolution of participation. Failure to submit the housing element within a timely basis "automatically expires" the plaintiff's obligation to exhaust his administrative remedies. Fair Housing Act, Section 18. The Act also mandates that the Council conduct a review and mediation process on a timely[3] basis. Again,

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2 The Act defines a timely period as "within five months after the council's adoption of its criteria and guidelines" for determining a municipality's obligation. Fair Housing Act, Section 9.a. The Council must develop its criteria and guidelines within "seven months after the confirmation of the last member initially appointed to the council or January 1, 1986, whichever is earlier." Fair Housing Act, Section 7. Since the Council can potentially establish its guidelines as late as January 1, 1986 and since five months thereafter would be June 1, 1986, the municipality in question may be permitted to file its housing element as late as June 1, 1986 without fear of being transferred back from the Council to the specialized trial court.

3 Fair Housing Act, Section 19 provides "In the case of review and mediation requests filed within nine months after this act takes effect, the six-month completion date shall not begin to run until nine months after this act takes effect." Therefore, if Essex Glen were to file a request to the Council for the Council to review and mediate, the Council need not even complete the review and mediation process until October 2, 1986 (15 months after July 2, 1985).

failure of the Council to act properly may relieve the plaintiff of the duty to exhaust. Fair Housing Act, Section 19. Assuming that exhaustion takes place promptly, but fails to effectuate a settlement, the Act calls for an administrative law judge to hold a hearing and to submit his recommendations to the Council within 90 days from transmittal of the matter to the Office of Administrative Law. Fair Housing Act, Section 15.c. Presumably, failure of the administrative law judge to dispose of the matter promptly again will relieve the plaintiff of the duty to exhaust.

If the case is never transferred because the Borough does not adopt a resolution of participation or because the Court declares the Act unconstitutional, then the Court should obviously proceed with the case rather than dismiss. Even if the case is transferred, the case may be transferred back to this Court if any of the circumstances specified above occur. Under these circumstances, the plaintiff should be entitled to have its complaint heard without the need for any further procedures.

The plaintiff's complaint should also be kept active to avoid jeopardizing Essex Glen's special "first plaintiff" status. The filing of the first complaint has important legal significance. In J.W. Field v. Franklin, Docket No. L-6583-84 P.W. at 13 (Law Div. 1985), the Court held that the plaintiff that is the first to file obtains a special status in the event

that there is a "priority battle" among various builders entitled to a builder's remedy for the actual award of such a remedy. Indeed, it is quite possible that a court may one day rule that the only plaintiff entitled to a builder's remedy is the first to file a complaint. Therefore, if Essex Glen loses the special "first plaintiff" status as a result of (1) the dismissal of the complaint and (2) the filing of a subsequent complaint by another plaintiff who is not required to exhaust, then Essex Glen would be severely prejudiced by such a dismissal.

B. Fair Housing Act, Section 27, The Moratorium Provision, Does Not Require Dismissal Of The Complaint

Fair Housing Act, Section 27 states:

> 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 defendant would apparently have this Court dismiss the Complaint and suspend all proceedings based on this language. However, aside from the unconstitutionality of the moratorium provision, which deprives the judiciary of the right to award a remedy, the Act clearly imposes a moratorium on court award of a builder's remedy for a limited period of time. The provision

does not prohibit a court from processing the case and issuing a builder's remedy after the moratorium period. Nor does the provision prevent the Council from processing the case and the builder from ultimately obtaining zoning relief. Therefore, rather than dismissing the case, the court should keep the Complaint active and the case should continue to be processed whether by the Court or the Council.

If this Court should retain this case, the moratorium period could be fruitfully utilized by resolving the many issues still existing in this case. For example, what is the municipality's obligation? Has the municipality satisfied its obligation? Is the plaintiff's site suitable for Mount Laurel relief? Has the municipality adequately revised its regulations to provide for the requisite number of lower income units? Practically, it will take at least a year to resolve these many questions at which time the Court would be free to grant plaintiff the relief requested. If the Council should obtain jurisdiction over this matter, the Council can also utilize the moratorium period effectively by developing fair share and compliance standards to evaluate any housing element submitted by the Borough.

From the perspective of Mount Laurel II, which seeks to promote the prompt, actual construction of lower income housing; and from the perspective of the Fair Housing Act, which purportedly seeks to promote the same result, it makes far more sense to keep the complaint active and to utilize the

moratorium period fruitfully than to dismiss the complaint and suspend all further processing of the case until after the moratorium expires. Were all proceedings in all Mount Laurel cases to be suspended until the expiration of the moratorium, this would create an administrative nightmare for the Courts as well for the Council when the moratorium expired and when the tribunals found themselves inundated.

POINT II

EQUITY REQUIRES THAT THIS COURT RETAIN JURISDICTION OVER THIS CASE

Fair Housing Act, Section 16 provides

> a. For those exclusionary cases instituted more than sixty days before the effective date of this act, any party to the litigation may file a motion with the court to seek transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation. . . . .
>
> b. Any person who institutes litigation less than sixty days before the effective date of this act . . . shall file a notice to request review and mediation with the council . . . .

Defendant argues that as a result of this language, the Act directs the Court (1) to transfer suits filed before the 60 day period preceding the effective date of the Act unless it would be manifestly unjust; and (2) to transfer cases filed within the 60 day period preceding the effective date of the Act automatically, regardless of whether such a transfer would cause a manifest injustice. The Court should not transfer the case if it would be manifestly unjust to do so, regardless of when the action was filed. Rule 4:69-5 directly supports this proposition. Surely the Legislature could not have intended to promote injustice and surely the courts should not be expected to

become an instrument of injustice. Therefore, this Court should closely examine the equities raised by the proposed transfer and exercise every precaution to achieve a fair result.

Such an examination reveals that a transfer would be extremely unfair both to Essex Glen as well as to those lower income households which are being denied the opportunity to obtain housing in Roseland as a result of the Borough's actions.

A. Transferring The Case Would Be Fundamentally Unfair To Essex Glen

Treating Essex Glen any differently based on whether Essex Glen filed suit before or after the 60 day mark preceding the effective date of the Act would be extremely unfair to Essex Glen. Had Essex Glen filed suit on February 19, 1985, rather than sending a good faith letter in the hopes of working out the dispute amicably, Essex Glen would not now find itself subject to Fair Housing Act, Section 16.b., which defendant argues requires automatic transfer in contrast to Section 16.a., which requires a transfer based on the discretion of the trial judge. Essex Glen should not be punished for its attempt to fulfill a principle that is fundamental to both Mount Laurel II and the Fair Housing Act - that settlement is preferable to litigation. Compare Mount Laurel II at 214 to Fair Housing Act, Section 3. Such attempts to resolve disputes amicably should be encouraged. Therefore, the phrase "institute litigation" in Fair Housing Act, Section 16.b., should constitute the

filing of an action, unless the plaintiff submits a good faith letter preliminary to the filing of the suit in order to promote voluntary compliance. Under such circumstances, clearly the litigation commences not with the filing of the action but with the submission of the letter. This is especially true in light of Judge Serpentelli's holding that a plaintiff must make a good faith effort prior to filing a suit. J.W. Field at 15. Clearly, it is inequitable to require specific good faith efforts and thereafter punish the plaintiff for such efforts.

It would also be fundamentally unfair to Essex Glen to transfer the case to the Affordable Housing Council referred to in Fair Housing Act, Section 16.b. because the Council does not yet exist. The imposition of a transfer requirement under such circumstances serves only one purpose - delay. This delay will be accentuated by the inexperience of the Council, which contrasts so sharply to the vast experience which the specialized trial judges have acquired over the last few years. As a direct result of this delay, Essex Glen will be forced to absorb considerable carrying costs which will make it increasingly difficult to offset the cost of providing lower income housing.

Finally, it would be inequitable to require Essex Glen to commit a futile act. If Essex Glen's efforts to settle this matter prior to the institution of suit were unsuccessful, then certainly there is no reason to believe that the mediation efforts before the Council will be any more fruitful - espe-

cially since the Borough believes that the builder's remedy moratorium and the sewerage moratorium creates the freedom for the Borough to do nothing.

B. Transferring The Case Would Be Fundamentally Unfair To The Lower Income Households That Have Been Denied Housing Opportunities

Aside from the inequity to Essex Glen, the transfer would be fundamentally unfair to those for whom Mount Laurel II was written - the poor of our State. Should the Borough succeed in its efforts, this will substantially delay the day when lower income housing is ever provided in the Borough of Roseland. Indeed, the Council could still be contemplating whether to grant the municipality substantive certification well beyond January of 1987.[4] To compound the delay, the Act does not limit the time for the Council's deliberations. Thus, a builder, such as Essex Glen, which was ready, willing and able to produce a lower income housing project on February 19, 1985 may find himself desperately seeking the right to bring

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[4] As explained in Footnote 3, the Council would have until October 2, 1986 to complete the review and mediation process between Essex Glen and the Borough of Roseland. Thereafter, the administrative law judge would have at least ninety (90) days to hold a hearing and make recommendations of law and fact. This would bring the litigation to January 1, 1987. However, it is important to note that the ninety-day period may be extended for good cause. In light of the number of tasks that the administrative law judge would have to complete in the ninety-day period and in light of the inexperience of such a judge relative to a Mount Laurel judge, it is virtually assured that the ninety-day period will be regularly extended and probably substantially so. Therefore, it is quite foreseeable that the administrative law judge will not even submit his recommendations to the Council until well after January, 1987.

his complaint before an Appellate Court in 1987. While the builder waits, the poor are deprived of housing opportunities.

Delay is anethema to one of the basic tenants of the Mount Laurel doctrine - that there is a critical need for the prompt, actual construction of lower income housing and that the vast energy historically used to litigate Mount Laurel matters would be far better spent in constructing lower income units. Mount Laurel II at 219-20, 210-11 n.5, 352.

The Court's concern for speed is reflected in the stringent standards required to obtain interlocutory review:

> municipalities will not be able to appeal a trial court's determination that its ordinance is invalid, wait several years for adjudication of that appeal, and then, if unsuccessful, adopt another inadequate ordinance followed by more litigation and subsequent appeals. We intend by our remedy to conclude in one proceeding, with a single appeal, all questions involved.

Additional concern for dispatch was demonstrated by the Supreme Court's suggested ninety (90) day limitation period within which municipalities were to revise their land use regulations following an adjudication of non-compliance.[5] Mount Laurel II at 281. As noted by the Court:

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[5] The Supreme Court's ruling with regard to the traditional exhaustion of administrative requirements is also of significance:

> "We comment here on defendants' claim that plaintiffs should have
(continued on next page)

> We hope that individualized case management, the growth of expertise on the part of the judges in handling these matters, the simplification and elimination of issues resulting both from our rulings and from the act of involvement of judges early in the litigation, and the requirement that, generally, the matter be disposed of at the trial level in its entirety before any appeal was allowed, will result in an example of trial efficiency that needs copying, not explaining.

By way of contrast, the Supreme criticized the dilatory conduct of Mount Laurel Township:

> Nothing has really changed since the date of our first opinion, either in Mount Laurel or its land use regulations. The record indicates that the Township continues to thrive with added industry, some new businesses, and continued growth of middle, upper-middle, and upper income housing. As far as lower income housing is concerned, from the date of [Mount Laurel I] to today (as far as the record before us shows),

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> exhausted administrative remedies before bringing this suit. There is no such requirement in Mount Laurel litigation. If a party is alleging that a municipality has not met its Mount Laurel obligation, a constitutional issue is presented that local administrative bodies have no authority to decide. Thus, it is certainly appropriate for a party claiming a Mount Laurel violation to bring its claim directly to court."

Mount Laurel II at 342 n. 73. By eliminating the exhaustion requirement, the Supreme Court ensured that law suits would proceed more expeditiously and that housing would be produced more quickly.

> no one has yet constructed one unit of lower income housing - nor has anyone even tried to. Mount Laurel's lower income housing effort has either been a total failure or a total success - depending on its intention.
>
> We realize that given today's economy, especially as it affects housing, the failure of developers to build lower income housing does not necessarily prove that a town's zoning ordinances are unduly restrictive. One might have expected, however, that in the eight years that have elapsed since our decision, Mount Laurel would have something to show other than this utter cipher. . ."

Mount Laurel II at 296-97 (emphasis added). See also Mount Laurel II at 308.

Not only would the delay substantiate impinge upon the poor's rights to lower income housing promptly, but also the delay might substantially diminish the amount of lower income housing available in the Borough. For example, over the next few years, the demand for sewage capacity will only increase thereby intensifying the competition for capacity when the sewage moritorium ultimately expires. In addition to the sewerage capacity problem, over the course of the next few years, the Borough might grant site plan application to a number of sites or the Borough might condemn tracts well suited for Mount Laurel developments. In either case, this would create substantial obstacles to lower income housing - especially if, upon closer examination, it is revealed that the Borough lacks adequate vacant developed land to satisfy its full obligation.

POINT III

THIS COURT SHOULD NOT TRANSFER THIS CASE TO THE AFFORDABLE HOUSING COUNCIL BECAUSE THE FAIR HOUSING ACT IS UNCONSTITUTIONAL

The Fair Housing Act raises significant questions as to its constitutionality. Had Mount Laurel II never been decided and had the specialized trial judges never expended such considerable effort to clarify the constitutional obligation, it would be difficult to challenge the constitutionality of the Fair Housing Act. However, through Mount Laurel II and its progeny, the law has become relatively well settled, the constitutional obligation has been clarified and the yardstick against which the legislation must be measured has been established. Relative to this yardstick, the legislation clearly does not pass constitutional muster. Indeed, a close examination of the legislation reveals that, contrary to its stated intent, the Act seeks to undermine the constitutional obligation as set forth in Mount Laurel II and as clarified by its progeny.

The basic issues are the same in a Mount Laurel challenge, regardless of whether those issues are resolved in the context of the Fair Housing Act or in the context of Mount Laurel II and its progeny. To demonstrate how the Fair Housing Act undermines the Mount Laurel doctrine, it is necessary to show how these basic issues are resolved differently pursuant to the Fair Housing Act than pursuant to Mount Laurel II.

The basic issues may be summarized as follows:

(1) What is the appropriate procedure to determine quickly and fairly the rights and duties of Mount Laurel challengers and municipalities?

(2) What is the appropriate methodology to determine what is the scope of the constitutional obligation of each municipality?

(3) What mechanisms are acceptable means for a municipality to satisfy its obligation?

(4) What rights do Mount Laurel challengers have to a rezoning of their particular parcels?

A. This Court Should Declare The Fair Housing Act Unconsitutional Because The Act's Procedures Delay The Production Of Lower Income Housing.

As explained above in full, the Supreme Court's interpretation of the constitutional obligation in Mount Laurel II reveals that the Supreme Court was not just concerned with the actual production of lower income housing. The Court was equally concerned with the production of that housing on a timely basis. This concern for timeliness is at the root of (1) the Court's creation of its many new procedural rulings, and (2) the Court's substantive decisions as to the time of decision rule, exhaustion of administrative remedies requirement and grant of a builder's remedy. See generally supra at 11-14.

Very often delay can result in the severe reduction of the amount of lower income housing that can be produced. As sewerage capacity is used up, as land suitable for Mount Laurel

development is condemned for other purposes, and as site plan approval is given on other parcels, further obstacles to the production of lower income housing are created. The longer the municipality takes to revise its regulations, the greater the potential for the creation of such obstacles.

When examining the timing of the production of lower income housing pursuant to the Fair Housing Act, it is clear that the legislation is designed to slow the process which the judiciary designed to move quickly. The Act contemplates the existence of three categories of challengers:

> (1) Plaintiffs in Mount Laurel actions commenced before the sixty day period preceding the effective date of the Act (before May 2, 1985);
>
> (2) Plaintiffs in Mount Laurel actions commenced during the sixty day period preceding the effective date of the Act (between May 2, and July 2, 1985); and
>
> (3) Plaintiffs in Mount Laurel actions commenced after the effective date on the Act (after July 2, 1985).

See generally Fair Housing Act, Section 16.

In all three categories, rather than mandating that the municipality provide for its fair share of lower income housing promptly, the Act establishes a series of dates by which time the municipality must take certain actions.

First, municipalities must adopt a "resolution of participation," no later than November 2, 1985. Fair Housing

Act, Section 16.b. referring to Sections 9.a. A "resolution of participation" is a resolution by a municipality stating that the municipality intends to participate in the legislative process before the Affordable Housing Council. Fair Housing Act, Section 4.e.

Second, even if the municipality adopts a resolution of participation as late as November 2, 1985, the municipality may do nothing until June 1, 1986,[6] at which time the municipality must submit a "housing element." Fair Housing Act, Section 16.a. and 18. A "housing element" is a report submitted by a municipality to the Council in which the municipality presents an analysis of (1) what it perceives as its obligation and (2) how it plans to satisfy its obligation. Fair Housing Act, Section 10 and 11 (explaining, respectively what a municipality should include in its housing element relative to the identity of its obligation and the establishment of a compliance package).

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6 The Act defines a timely period as "within five months after the council's adoption of its criteria and guidelines" for determining a municipality's obligation. Fair Housing Act, Section 9.a. The Council must develop its criteria and guidelines within "seven months after the confirmation of the last member initially appointed to the council or January 1, 1986, whichever is earlier." Fair Housing Act, Section 7. Since the Council can potentially establish its guidelines as late as January 1, 1986 and since five months thereafter would be June 1, 1986, the municipality in question may be permitted to file its housing element as late as June 1, 1986 without fear of being transferred back from the Council to the specialized trial court.

Third, even if a municipality adopts its resolution of participation on November 2, 1985 and even if the municipality files its housing element on June 1, 1985, the actual production of lower income housing still will not begin. The party challenging the municipality's regulations must participate in the Council's review and mediation process. For all requests to review and mediate filed before April 2, 1986, the Council has until October 2, 1986 to complete mediation. Fair Housing Act, Section 19. For all requests to view and mediate filed after April 2, 1986, the Council has six months from the point of the request to complete review and mediation. Fair Housing Act, Section 19. Failure of the Council to complete its review and mediation within the six month period does not result in an automatic release of the challenger of the requirement that the challenger submit to mediation. Rather, the challenger must now seek the leave of a court of competent jurisdiction to be relieved of the obligation to exhaust. Id.

Fourth, if the mediation efforts fail to culminate in a settlement, the Act directs the Council to transfer the case to the Office Administrative Law for proceedings before an administrative law judge. Fair Housing Act, Section 15.c. The Act requires the administrative law judge to conduct a complete evidentiary hearing within 90 days and to submit a preliminary decision to the Council within this 90 day period - "unless the time is extended by the Director of Administrative Law for good

cause shown." Fair Housing Act, Section 15.c. If a specialized trial judge, well seasoned in the complexities of Mount Laurel litigation cannot complete an evidentiary hearing and submit a decision within 90 days from the time the judge receives the case, certainly it is unrealistic to expect that the administrative law judge will be able to complete the proceedings with any degree of frequency within 90 days. Thus, one can reasonably expect that these proceedings will take substantially longer.

Fifth, the Act does not specify the time for action by the Council once it has received the recommendations of the administrative law judge to make a decision on whether to issue a substantive certification. Even if the Council issues a substantive certification, no housing will be built until the municipality adopts ordinances consistent with the housing element submitted to the Council. This best case scenario still contemplates that the municipality will have 45 days from the issuance of the substantive certification to adopt such an ordinance. Fair Housing Act, Section 14. If the Council denies or conditions the issuance of the substantive certification, the municipality has 60 days to petition the Council to reconsider its denial or to satisfy the Council's conditions. Fair Housing Act, Section 14.b. Assuming that the Council either reverses its denial or that the municipality satisfies the conditions, again the municipality has 45 days to

adopt an appropriate ordinance. Id. If the Council denies certification and if the municipality fails to persuade the Council to reverse itself, then the municipality must appeal the refusal of the issuance of the substantive certification to an appellate court. Similarly, if the Council issues a substantive certification, the challenger must appeal to an appellate court.

The point of tracing the laborious exercise is to illustrate the attenuated procedures established by the Act which will substantially delay the day when lower income housing is produced. This result is most offensive in the context of suits involving plaintiffs that had filed suit before May 2, 1985. If the defendant prevails, it is possible for a municipality on the brink of settling on July 1, 1985 to now successfully petition the specialized trial court for a transfer and thereby substantially delay the day that lower income housing is produced.

As frustrating as the procedure may be, even the time frames established by the Act are not likely to be satisfied. The Act substitutes a totally inexperienced Council and administrative law judge for the specialized judiciary, which the Supreme Court designed to be a model of "trial efficiency". Once the Council is established, it will have to determine the procedural rules that will govern it as well as numerous guidelines relating to issues involving the identification of the

obligation and the determination of compliance with that obligation. Fair Housing Act, Sections 7 and 8. Similarly, the administrative law judge is to take elaborate proofs within a 90 day period regarding various compliance packages and proposals for Mount Laurel projects. There remains a litany of delay inducing factors, all similarly frustrating.

This raises yet another factor that is critical in this diagnosis of delay. The Act does not specify what happens if deadlines are not met. For example, within 30 days from the enactment of the Fair Housing Act, the Governor was to nominate the nine members to the Council. Fair Housing Act, Section 5.d. Already the 30 day mark has passed and no such nominations have been made. However, the Act specifies no consequences for the tardiness. What should happen if the Legislature refuses to approve the Governor's appointments. Or, what if the Council fails to establish the rules that will govern its procedures or if the Council fails to establish appropriate fair share guidelines. The point is that the Act's failure to identify specific consequences for satisfying deadlines creates a series of unanswered questions, which will only lead to more litigation, which in turn will lead to further delay.

Our Supreme Court described procedure under Mount Laurel I as follows:

> The deficiencies in its applications range from uncertainty and inconsistency at the trial level to inflexible review at the appellate level. The waste of judicial energy

> involved in every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue.

Mount Laurel II at 200. This passage aptly describes the procedure created by the Fair Housing Act. Thus, the Act frustrates the ultimate goal of Mount Laurel II-the refocusing of the litigation on the actual and prompt construction of lower income housing. The Mount Laurel obligation was designed to provide a realistic opportunity for housing, not litigation. Mount Laurel II at 352. The Act will achieve just the reverse - more litigation and less housing.

B. The Act Substantially Dilutes The Constitutional Obligation Of The Municipalities Of Our State To Provide Lower Income Housing.

Mount Laurel II did not set forth the specific methodology by which the obligation of each municipality would be identified. Rather, Mount Laurel II set forth some broad guidelines ostensibly with the hope that the specialized judiciary it created would find a means of resolving the most troubling and vexing issue in all of Mount Laurel litigation - the fair share issue. Mount Laurel II at 248. In AMG v. Warren Twp., Docket Nos. L-23277-80PW and L-67820-80PW (Law Div. 1984) (unreported), Judge Serpentelli accepted the Supreme Court's challenge and issued an elaborate opinion specifying a

methodology which could be utilized to identify with precision the obligation of each municipality in the State. That opinion also set forth in detail the specific reasons for each step in the methodology as well as the justification for the methodology as a whole. This Court, with equal rigor, has developed alternative methodologies in Countryside Properties v. Borough of Ringwood, Docket No. L-42095-81 (1984) (unreported) and Van Dalen Associates v. Washington Tp., Docket No. L-045137-83P.W. Whether applying the AMG methodology or any variation of the AMG methodology, the estimates of the need for lower income housing across our state are very close.

When evaluating the standards set forth in the Fair Housing Act relative to the existing standards, it becomes clear that the Fair Housing Act's standards do not measure up. Indeed, the standards are little more than a transparent attempt to dilute the constitutional obligation and save suburban municipalities from the more substantial obligations that would be produced by the existing standards.

The definitions that form the vocabulary of the Act are themselves exclusionary when viewed in light of the standards developed by the specialist trial courts. "Housing region" is defined as a configuration of between two to four contiguous counties "which exhibit significant social, economic and income similarities, and which . . .". Fair Housing Act, Section 4.b. By grouping counties with similar social and economic conditions to form a region, the Act tends to preserve

exclusionary patterns. The emphasis on smaller regions tends to ensure that many municipalities will be better able to exclude from their region Essex County in which Newark is located and Camden County in which Camden is located. The presence of these two cities in a municipality's region tends to increase a municipality's obligation because these cities contain substantial numbers of substandard units, thereby raising the present need of the region and the obligation of any municipality in that region. The AMG methodology deliberately established an expansive present need region for Warren Township to ensure that there would be adequate land resources in the outlying counties to address the tremendous need for lower income housing generated by the urban core areas surrounding Newark. AMG at 32-34.

In a similarly exclusionary fashion, the Act states that "prospective need" is to be based on the development and growth which is likely to occur in a region or municipality. In this regard, the Council is to consider the approvals of development applications. Fair Housing Act, Section 4.j.

In the AMG case, Warren Township proposed a similar argument in an attempt to persuade the Court to reduce the Township's obligation. More specifically, the defendant argued that if one were to compare (1) the number of units that would have to be built across our state to satisfy the obligation of each municipality as derived from a strict application of the

AMG methodology to (2) the number of units that are likely to be built across the state based on the greatest number of units that have been produced in the state in any given year, one reaches the conclusion that the statewide obligation will never be satisfied because there never will be enough units built in any given year. Therefore, defendant argued that the obligation of each municipality should be reduced to reflect what the market will bear. This argument misunderstands a fundamental principle in the law concerning fair share and compliance. The Supreme Court deliberately urged its specialized trial courts to establish the obligation of any given municipality in the ideal and to let the marketplace determine whether or not that ideal would be satisfied. AMG at 73-74 citing Mount Laurel II at 352. By arguing that courts should consider the maximum number of units built in the past, or the approvals of development applications, as in the Fair Housing Act, municipalities are asking the courts to account for the marketplace in establishing the obligation. Thus, if there had been few approvals issued in a region because of widespread exclusionary practices, the municipalities in that region are likely to be rewarded for the exclusionary practices. Id.

As with the above definitions, the guidelines which the Act directs the Council to formulate for purposes of evaluating housing elements submitted by municipalities are similarly designed to facilitate the dilution of the constitutional

obligation. Fair Housing Act, Sections 7.c., d. and e. For example, any municipality may argue that the Council should permit it to accept a lower obligation because (1) the municipality is entitled to credits; (2) the municipality lacks adequate vacant developable land; (3) the municipality lacks adequate infrastructure; or (4) the municipality has a sensitive environment. Fair Housing Act, Sections 7.c.(1), 7.c.(2)(f), 7.c.(2)(g) and 7.c.(2)(a).

While all of these defenses appear to be available to a municipality before a specialized trial judge, the Fair Housing Act would have the Council not only adopt particularly lenient standards for these defenses, but also provide additional defenses.

As an example of leniency, the Act calls for the municipality to receive a full credit towards its obligation for each standard unit occupied by a lower income household. Fair Housing Act, Section 7.c.(1). According to this credits standard, the date the lower income unit came into existence is not relevant nor is it relevant whether there are any re-sale or re-rental controls to ensure that the lower income unit remains affordable to a lower income household. The disregard for the lack of re-sale and re-rental controls results in a municipality receiving a full credit for a unit if an upper income household purchases the lower income unit the day after the Council issues a substantive certification. The disregard for

the date the lower income unit came into existence results in a municipality receiving full credit for a unit even if the unit was never part of the municipality's indigenous need to begin with because the unit was rehabilitated before 1980 - the date upon which the data is based which is used to calculate the indigenous need. Since a municipality automatically receives credit for lower income units rehabilitated before 1980 by having a lower indigenous need, the Act promotes a double counting of credits by granting a municipality an additional credit for the same unit. For precisely this reason, this Court rejected the Borough of Ringwood's request to obtain credits for units rehabilitated before 1980. Countryside Properties at 15-16.

Estimates contained in a book published by the Center for Urban Policy and Research in 1983, entitled "Mount Laurel II-Challenge and Delivery of Low-Cost Housing" reveal the severest flaw in the Act's credit standard. The authors of this book estimated that 960,080 units in New Jersey would satisfy the type of credit standard promulgated by the Act. Id. at 142. The authors also estimated that the state has a present need of 120,160 units. Id. Since the supply of lower income housing far outweighs the need, application of the Act's credit standard leads to the conclusion that there is an overabundance of lower income housing in our state.

As an example of new defenses, the Council is instructed to accept a lower obligation for any given municipa-

lity if the preservation of historically or important architecture may be jeopardized by the provision of the full obligation. Fair Housing Act, Section 7.c.(2)(a). If "the established pattern of development in the community would be drastically altered," again the Council should permit a reduction in the obligation. Fair Housing Act, Section 7.c.(2)(b). Thus, an exclusionary municipality which has succeeded in depressing the intensity of development through exclusionary practices could obtain a lower obligation as a direct result of these exclusionary policies because in such a municipality any intensive high density development for Mount Laurel purposes would tend to drastically alter the established pattern of exclusionary development. A municipality may also assert that it wishes to preserve farmlands or open space to justify a reduced obligation. Fair Housing Act, Sections 7.c.(2)(c) and (d).

Under the standards set forth in this Act, a municipality would be unimaginative indeed not to find a way to substantially reduce its obligation. In the event that a municipality is unimaginative, however, the Act provides additional mechanisms designed to ensure a substantial reduction of a municipality's obligation. For example, the Act calls for a phasing of the issuance of final approvals for units in Mount Laurel housing projects based upon the size of a municipality's obligation. Fair Housing Act, Sections 7.c.(3) and 23. Furthermore, the Council may establish caps for the obligation

of any municipality based on the number of jobs in the municipality or "any other criteria ...which the council deems appropriate." Fair Housing Act, Section 7.e.

C. This Court Should Declare The Fair Housing Act Unconstitutional Because The Act Promotes The Use Of An Unconstitutional Compliance Mechanism.

In the spirit of Mount Laurel II, the specialized trial judges have been extremely willing to entertain the use of new compliance mechanisms. Mount Laurel II at 265-66. However, to date, no court has permitted a municipality to comply by transferring its obligation to other municipalities. Nonetheless, the Fair Housing Act has created precisely this type of new compliance mechanism.

This new compliance mechanism would permit a municipality to transfer up to half of its obligation to another municipality within its region by entering into a contractual agreement with the receiving municipality. Fair Housing Act, Section 12. For example, if Municipality A, a suburban municipality, had an obligation of 500 units, Municipality A might provide the opportunity for 250 lower income units within its borders and 250 lower income units within the borders of Municipality B, an urban municipality, by making monetary contributions to Municipality B in such amounts that Municipality B could produce lower income housing either through rehabilitation of existing substandard units or through the development of new units. Fair Housing Act, Section 12.f.

This mechanism tends to ensure that Municipality A will remain an enclave of affluence contrary to the intent of our Supreme Court. Mount Laurel II at 211.

D. This Court Should Declare The Fair Housing Act Unconstitutional Because The Act Eliminates The Builder's Remedy.

In contrast to Mount Laurel II, in which the Supreme Court deliberately urged the trial courts to liberally grant builders' remedies, the Fair Housing Act just as deliberately seeks to preclude builders' remedies. Indeed, the Act states:

> "it is the intention of the act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing."

Fair Housing Act, Section 3. Consistent with this objective, the Act directs municipalities, when designing their housing element, to include:

> "[a] consideration of lands that are most appropriate for low and moderate income housing...including a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing."

Fair Housing Act, Section 10.f.(emphasis added).

In further support of the proposition that the Act seeks to eliminate the builder's remedy, an examination of the Act reveals that nowhere in the elongated process does any entity have the authority to award a builder's remedy. Thus, in the first step of the Act's new procedure, the Mount Laurel challenger must submit to mediation before the Council.

However, the Council only has the authority to grant, deny or condition the issuance of a substantive certification to the municipality. Fair Housing Act, Sections 14. and 15. The Council does not have the authority to issue a builder's remedy to the challenger. Similarly, if the Council's mediation efforts fail and if the challenger now finds himself before an administrative law judge, the judge may not grant a builder's remedy. Rather, the administrative law judge may only submit his recommendations and conclusions of law and fact to the Council. Fair Housing Act, Section 15.c. The Council is free to reject the judge's recommendations even if the judge were to recommend rezoning the challenger's parcel.[7]

Assuming the Council issues a substantive certification, the final stage in the Act's new procedure is an appeal to an appellate court. In this proceeding, the plaintiff must meet the heavy burden of demonstrating that there was no basis as to the Council's factual conclusions or that the Council was arbitrary and capricious as to its legal conclusions. See generally New Jersey Standards For Appellate Review at 12-14 (1982) In short, it is clear that the plaintiff challenging the issuance of a substantive certification at the appellate level has an extremely difficult burden. Even if the plaintiff overcomes this burden, it is not clear that the

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[7] Assuming the Council were to accept a recommendation, even then the Council would continue to lack the authority to grant a builder's remedy.

plaintiff's victory renders him a "successful" plaintiff entitled to a builder's remedy upon satisfaction of the remaining two elements of the test for a builder's remedy. Mount Laurel II at 279-80.

In sum, in contrast to the certainty created by the test for a builder's remedy set forth in Mount Laurel II, the Fair Housing Act renders the builder's fate uncertain in those municipalities that have elected to participate in the Act's legislative procedures. It is entirely possible for the builder to undergo a process that is longer and more arduous than the Mount Laurel II process and to be denied a Mount Laurel rezoning in the end.

The Supreme Court created the builder's remedy because these remedies are (i) essential to maintain a significant level of Mount Laurel litigation, and the only effective method to date of enforcing compliance. Mount Laurel II at 279. Therefore, elimination of the remedy in municipalities participating in the Act's procedures will remove the builders' desire to participate in the process. This, in turn, will eliminate the pressure on exclusionary municipalities to do any more than necessary to satisfy the Council. The Act establishes such lenient standards for fair share and compliance purposes that one can hardly expect that the Council will demand as much as is necessary to ensure constitutional

satisfaction.[8]

History has demonstrated that the tribunal must be steadfast if lower income housing opportunities will ever be produced. Thus, Mount Laurel II repeatedly calls for the "strong hand of the judge at trial". Mount Laurel II at 199,292. The Act appears to replace the strong hand of the trial judge with the weak hand of the Council in municipalities participating in the legislative process. Thus, to the extent that a significant number of municipalities elect to participate in the procedures before the Council, the Act ensures that there will be fewer housing opportunities for lower income households-especially in the suburbs. Mount Laurel II expressly sought to open the doors of suburban municipalities to the poor. Mount Laurel II at 210-11 n.5.

The Supreme Court also created the builder's remedy because "these remedies are required by principles of fairness to compensate developers who have invested substantial time and resources in pursuing such litigation." Mount Laurel II at 279. The Act's elimination of the builder's remedies in municipalities participating in the legislative process is fundamentally unfair. If equity required the trial court to reward builders efforts under the favorable procedural and substantive law of Mount Laurel II, then certainly equity

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[8] In contrast to the specialized trial judge who can award a builder's remedy or implement the remedies for noncompliance, the Council can only grant, conditionally grant or deny a request for a substantive certification.

should require the Council, administrative law judge or appellate court to reward the builder under the law established by the Act, which does nothing more than create a series of obstacles for the builder.

Finally, the Supreme Court created the builder's remedy because "these remedies are the most likely means of ensuring that lower income housing is actually built." Mount Laurel II at 279. Elimination of the builder's remedy destroys the surest source of lower income housing. All other sources are speculative, relative to the builder that stands before the court claiming readiness and waging the expensive legal battle necessary to obtain the right to a Mount Laurel rezoning. Mount Laurel II at 249 citing Oakwood at Madison, Inc. v. Tp. of Madison, 72 N.J. 481, 499 (1977).

CONCLUSION

Notwithstanding our Court's clear mandate to municipalities in Mount Laurel I that these municipalities have a constitutional obligation to use their powers to regulate the use of land to provide lower income housing opportunities, few municipalities took the Court's demand seriously and little lower income housing was produced. Mount Laurel II ended the reign of municipal complacency. However, Mount Laurel II left critical issues unresolved. For example, what was a municipality's "fair share" of the regional need? When did a municipality in fact create a "realistic opportunity"? When was a builder's site "suitable" for a rezoning? In less than two years from the date of their appointment, the specialized trial judges have largely resolved these critical issues and the law is relatively well settled. As a result, municipal energy that once was used to delay and avoid the constitutional obligation is now being used to develop creative means to comply. Similarly, the tremendous amount of builder time and resources that once were directed towards fighting a seemingly endless battle are now being used to build the lower income housing.

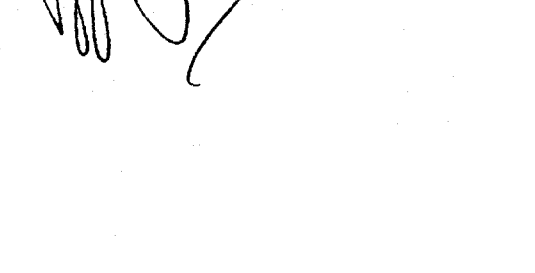
On this judicial landscape, the Fair Housing Act emerged. The Act created a procedure that invites municipalities to play the delay game once again. The Act substantially dilutes the obligations of municipalities relative to the constitutional mandate. The Act enables exclusionary suburban

municipalities to transfer half their obligation to other municipalities and thereby remain enclaves of affluence. Finally, the Act eliminates builder's remedies in those municipalities that elect to participate in the legislative process and the Act imposes a moratorium on the builder's remedy in those municipalities that remain under the jurisdiction of the specialized judiciary.

In short, the Act is nothing more than an attempt to undermine the Mount Laurel doctrine. It was precisely because Mount Laurel II was so effective in producing the lower income housing it promised that the political pressure was created that gave birth to the Act. Therefore, whatever lofty ideals the Act purports to promote, the above examination demonstrates that the Act is designed to delay the process, reduce the obligations of suburban municipalities, maintain these municipalities as enclaves of affluence, and eliminate the builder's remedy - which is the fuel that propels the whole process.

Respectfully submitted,

GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN

By: 
Jeffrey R. Surenian

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