RULS - AD - 1985 - 290

10/4/85

Transcript of Afternoon Session in Hills v. Bernards Township

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. L-30039-84 P.W., et al

THE HILLS DEVELOPMENT COMPANY, :

Plaintiff, :

vs. :

BERNARDS TOWNSHIP, :

Defendant, :

And Consolidated Cases. :

TRANSCRIPT
OF
AFTERNOON SESSION

October 4, 1985
Toms River, New Jersey

B E F O R E:

HONORABLE EUGENE D. SERPENTELLI, J.S.C.

A P P E A R A N C E S:

BRENER, WALLACK & HILL, ESQUIRES,
BY: HENRY A. HILL, ESQUIRE
and
THOMAS J. HALL, ESQUIRE,
For Hills Development Company;

MC DONOUGH, MURRAY & KORN, ESQUIRES,
BY: JOSEPH E. MURRAY, ESQUIRE,
For Z. V. Associates;

FRIZELL & POZCYKI, ESQUIRES,
BY: DAVID J. FRIZELL, ESQUIRE
and
KENNETH E. MEISER, ESQUIRE,
For Pozcyki, et als;

GAYLE GARRABRANDT, C.S.R.
Official Court Reporter

A P P E A R A N C E S (Contd.):

FARRELL, CURTIS, CARLIN & DAVIDSON, ESQUIRES,
BY: JAMES E. DAVIDSON, ESQUIRE,
For Bernards Township;

HAROLD G. PIERSON, ESQUIRE,
For Borough of Watchung;

GAGLIANO, TUCCI, IADANZA & REISNER, ESQUIRES,
BY: JAMES H. GORMAN, ESQUIRE,
For Manalapan Township;

JOHN MC DERMOTT, ESQUIRE,
For Muscarelle.

THE COURT: As I said before lunch, I apologize in advance for those of you who are going to hear for the second time some of what I am going to say today, particularly given the fact that we were here for six-and-a-half hours on Wednesday, and you had to stay till five-thirty to hear it.

I feel some of it is necessary to repeat simply to be sure that the thinking of the Court is adequately set forth on the record in the event that anyone seeks review of the decision of the Court. If I could incorporate the record which was made on Wednesday, I would do that, but I understand that that's not an acceptable arrangement.

Just to be clear, the Court is dealing here with transfer motions only. Any other issues raised by the motions or the pleadings are not before the Court. Any other -- any questions concerning the constitutionality of the legislation are not before the Court.

I also want to be clear that I do not intend by this opinion in these three cases to establish an exhaustive definition of the meaning of manifest injustice. I consider the cases are

fact-specific. To some extent, the cases today fall into a category, as did the five cases which I heard on October 2nd.

On that day, I heard matters, all of which involved cases which had been fully tried or, in the case of South Plainfield, settled during trial. And all of those cases are presently in a compliance stage, that is, in the process of reaching compliance.

The three cases today did not reach trial; rather, prior to the time that they would have reached trial, they were either settled by consent, or the municipality agreed voluntarily to comply with Mount Laurel II in exchange for an immunity from further builder remedy actions.

I think the next thing that I'd like to do as a preliminary matter is to place the issue of transfer in its proper perspective. When one hears all of the argument that goes on about the provisions of section sixteen, it is wondered whether the section means anything, whether, as the plaintiffs seem to argue, that the transfer, any transfer should be denied because of manifest injustice; and, as the defendants argue, that no transfer should be denied unless there is a clear,

manifest showing to -- of a specific injustice to the builder plaintiffs.

The legislation itself, if it is clear with respect to anything, in my view, evidences through section sixteen and elsewhere, including section nineteen, which deals with remand, section twenty-three, which deals with the supervision of phasing by the Court, and section twelve-B, which deals with the interplay between the Court and counsel concerning regional contributions, that the Legislature did not intend to totally exclude the Court from the housing process.

The legislation evidences an effort to strike a balance between the desire to place the housing issue squarely in the legislative-executive arena, and the need to recognize that, in some cases, because of fact-specific circumstances, it would be inappropriate, if not unlawful, to subject those cases to the Housing Council process.

And finally, as part of the overall perspective, something should be said about the oft-stated preference of our Supreme Court to have this matter dealt with in a legislative fashion. Given the fact that the Court has already

denied five motions for transfer, one might wonder if the Court is not abiding by its own words, and whether the trial Court is not heeding what the Supreme Court said with respect to that preference.

First, I reacknowledge that it is clear from Mount Laurel that it was the wish of the Supreme Court, and I can assure you it is the wish of this Court, to give due deference and preference to the legislative process.

I am sure that my own personal wishes are personally motivated; however, the Supreme Court saw clearly in its decision that the housing issue belonged with a legislative solution.

Ten years later, it still is the position of the Court that that is where the resolution of this problem belongs; and as a result of that, it should motivate the trial Court in all appropriate cases to give deference to the legislation, not only with respect to the provisions of section sixteen as they relate to transfer, but in each and every case with respect to the balance of the provisions of the Act, whenever possible.

It has to be noted, however, that the Court's patience and the legislative default has

created some circumstances in which it is no longer viable to vindicate the constitutional obligation by a total abdication to the legislative-executive process; and indeed, section sixteen of the Act recognizes that.

One cannot find any other reason why section sixteen would be in the Act, but for the fact that the Legislature saw that, in certain instances at least, there would be a need to retain some cases in the court system; therefore, preference for the legislative-executive solution cannot in all cases be translated to a circumstance where the constitutional imperative of Mount Laurel would be violated.

At the minimum, the manifest injustice exception must contemplate that we avoid the situation in which transfer would seriously undermine the constitutional imperative which the legislation itself would satisfy if the legislation is not to experience any constitutional infirmity.

To that extent, the terms should be interpreted in such a manner so as to support rather than undermine the fundamental goal of the Act to satisfy a constitutional mandate in a reasonable manner.

Now, something should be said about the literal meaning of section sixteen. We are dealing today with the first portion of the statute, of a section of a statute which has been referred to as section sixteen-A. In actuality, the statute does not have a sixteen-A but, rather, sixteen-B, the A apparently having been inadvertently omitted in the printing of the Act.

But just so we are clear, we are talking about the language which reads, quote: "For those exclusionary zoning 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 a transfer to the Council. In determining whether or not to transfer, the Court shall consider whether or not the transfer will" -- I'm sorry -- "would result in a manifest injustice to any party to the litigation."

The pertinent section does not define transfer. It does not define manifest injustice, and it does not define party.

Now, the language that I quoted, starting with the words, quote, "Any party to the litigation may file a motion with the Court to seek a transfer," unquote, replaced a different

standard in the prior draft of the Act which read in part, quote, "No exhaustion of the review and mediation procedures established in section fourteen and fifteen of this Act shall be required unless the Court determines that a transfer of the case to the Council is likely to facilitate and expedite the provisions of a realistic opportunity for low- and moderate-income housing."

It is by no means clear what the Legislature intended to accomplish by the change from a standard of facilitating and expediting the provision of low-cost housing to a standard of manifest injustice to any party.

I believe it is fair to say that the final version emphasizes at least more explicitly the interest of the parties, whereas the prior version more explicitly emphasizes expedition in the provision of lower-income housing.

One cannot assume that the change in wording did not intend a change in meaning. Beyond that, however, absent some clear legislative history which is yet to be found, it is extremely difficult to discern whether the Legislature sought to limit or broaden the Court's discretion, or whether it sought to limit or broaden the

potential for transfer of cases which were more than sixty days old.

Now, I would suggest that strong interpretive arguments can be made on both sides. I do not intend by this opinion to either reconcile the language or to give a complete definition of the term, "manifest injustice."

As I noted, the term tends to be fact-specific; and thus, I deem it more appropriate to define it within the context of the cases as they appear before me. Its full meaning will evolve as the transfer motions now pending before this Court and other Mount Laurel judges are heard and decided, and I believe ultimately it will be more fully explored in a written opinion.

In cases at the factual extremes, the term will be relatively easy to interpret, as I indicated on Wednesday. Just like obscenity, to paraphrase Justice Stewart, you should be able to know it when you see it.

And finally, in terms of a definition, as I noted, there is no clear -- there is no definition, in fact, of the term "transfer" or "party."

As to the term, "transfer," that issue

might be relevant to manifest injustice to the extent that if a case is transferred in its present posture, with a full record, and the Council being bound by issues decided by the Court, the potential for delay and the possible cost of litigation might be reduced.

The procedural scheme which is evidenced by the Act does not seem to disclose an intent to bind the Council with what has happened in the Court. The municipalities which have appeared before the Court so far with respect to these transfer motions have stressed the potential under the Act for a fresh, new, comprehensive approach to the housing issue. And I would tend to agree, without deciding the issue, that, on first reading, the Act would give one the impression that that is what the Legislature intended.

In any event, I do not intend to decide that issue today, either.

As to the term, "party," something should be said about the interest of the group which we call lower-income households. One of the defendants in the cases on Wednesday referred to the lower-income people as hidden beneficiaries.

Today we have gone even further and

indicated that lower-income people are not parties to this litigation at all. And it's been indicated that they are, quote, "not here."

It should have long since been clear that the status of lower-income households rises far above the category of a hidden or third-party beneficiary, and that they are very much here. As a matter of fact, they are more here than the plaintiffs themselves, because the plaintiffs themselves are nominal plaintiffs, representing the interests of the class.

Even where an Urban League or other civic or non-builder plaintiff is not involved, the lower-income class must be considered a party to the action. If that were not the case, we would have the anomaly of considering whether there is manifest injustice to the Urban League or to the Public Advocate or to the fair housing groups which have sought relief as plaintiffs, and yet we would not consider that as a manifest injustice to other plaintiffs by a different name who seek the same relief for the same group.

The prospect of a builder's remedy was the genius of the Supreme Court decision, because it brought forth those nominal plaintiffs to

represent the interests of the groups which otherwise would not have been as adequately represented.

The Court saw the limits in the ability of the non-profit organizations to represent the interests of the class, and therefore created the remedies so that they would be, they would in fact be represented.

With all of that, it is incredible to imagine that lower-income people could not be considered as parties to Mount Laurel actions. Our Supreme Court has described Mount Laurel actions as institutional or public law litigation. It is at 92 New Jersey 288, 289, and in Footnote 43.

The actions are brought to vindicate resistance to a constitutional obligation for the affected group. It makes no difference that they're also brought for another reason.

The secondary motive of the plaintiff may be primary to the plaintiff, but it was secondary to the goal of the Court. It was the motive upon which the Court seized to reach its ultimate goal, which was the vindication of the constitutional right.

In that sense, Mount Laurel actions are class actions, and I think Judge Skillman has said it very well in his decision in Morris County Fair Housing Council versus Boonton Township, 197 New Jersey 359, Law Division 1984, at pages 365 and 366, where he said, in part: A Mount Laurel case may appropriately be viewed as a representative action which is binding on non-parties. The constitutional right protected by the Mount Laurel Doctrine is the right of lower-income persons to seek housing without being subject to economic discrimination caused by exclusionary zoning.

The Public Advocate and such organizations as the Fair Housing Council and the NAACP have standing to pursue Mount Laurel litigation on behalf of lower-income persons. Developers and property owners are also conferred standing to pursue Mount Laurel litigation. In fact, the Supreme Court has held that any individual demonstrating an interest in or any organization that has the objective of securing lower-income housing opportunities in a municipality will have standing to sue such municipalities on Mount Laurel grounds.

However, such litigants are granted standing not to pursue their own interests, but rather as representatives of lower-income persons whose constitutional rights are allegedly being violated by exclusionary zoning.

It was this group that the Supreme Court was talking about when, at page 337 of the opinion, it referred to lower-income people as having the, quote, "greatest interest in ending exclusionary zoning." And it is that interest that we are dealing with in these transfer motions and throughout the Mount Laurel process here in court.

Now, before turning to a factual analysis of the three cases here today, something should be said about the consequences of a transfer as it relates to the potential for delay or expedition of the process which leads to the production of lower-income housing, since it should be evident that, I believe, that delay in those terms relates to a definition of manifest injustice.

It seems that the parties here today, as on Wednesday, all agree that speed in the resolution of the housing issues and expediting

lower-income is, in fact, one important element in the definition of manifest injustice.

Clearly, the defendants today and earlier this week maintained that delay alone, in a vacuum, is not enough; and I will address myself to that in a minute.

As a practical matter, if we agree that speed in providing housing is an element of manifest injustice, we are, in effect, reading back into the statute what was in there before the final amendment, that we should consider whether a transfer will facilitate and expedite the provision of the realistic opportunity to build lower-income housing.

In the context of manifest injustice to the parties, we are asking whether or not the transfer will aid the lower-income people by speeding the day when the realistic opportunity for housing will arrive; and, of course, it is at this point where the arguments diverge.

A brief review of the timing and procedure of the Act is appropriate. The Act, of course, became effective on July 2nd, 1985. Section five creates a Council on Affordable Housing which, for the sake of ease, we have all

come to call the Housing Council, or the Council; and section D requires the governor to nominate the members within thirty days of the effective date.

Section eight requires the Council to propose procedural rules within four months after the confirmation of its last member initially appointed, or by January 1, 1986, whichever is earlier.

Given that the Council members have not yet been confirmed, it is likely that the procedural rules will be proposed around May 1st or perhaps a little earlier.

Section nine-A requires any municipality which elects to submit a housing plan to the Council to notify the Council of its intent to participate within four months of the effective date of the Act, so that the notification procedure will certainly not cause any delay in and of itself, since the procedural rules will not be adopted until after the deadline for notification, in any event.

Section seven requires the Council to adopt criteria and guidelines for the housing plan within seven months of the confirmation of

the last member initially appointed, or by January 1st, 1986, whichever is earlier. Assuming confirmation of the membership is accomplished near the end of this year, the Council would have until approximately August 1, '86 to adopt the criteria.

Section nine-A gives the municipality five months from the date of the adoption of the criteria to file its housing element, and if the criteria are not adopted until August 1 of '86, the municipality would have until January 1 of '87.

I realize that in each of these assumptions, there is the possibility that the Council -- whether the municipality might move faster. And as I go through this scenario, I think some of the assumptions I will make will adequately make up for that possibility.

Section thirteen provides that a municipality may file for substantive certification of its plan at any time within a six-year period from filing of the housing element. Nothing seems to expressly require expeditious filing for substantive approval, but if we assume that it is requested, the township has to give public notice

within an unspecified period of the requested certification. Once public notice is given, the forty-five-day objection period begins to run.

It is not clear from the Act that there is a time limit on the Council to respond to the requested certification; thus, though the objection period is forty-five days, the review period could be longer and might be expected not to commence until after the objection period expires.

Assuming, however, the very unlikely scenario of the township petition for substantive certification, a simultaneous public notice that is on the same day, and assuming that the Council does not wait for the objection period to expire before it starts review, the procedure would have to consume forty-five days, since that is the minimum period allowed for objection. That would take us to approximately February 15th, 1987.

As a practical matter, of course, it is highly unlikely. It would seem to be highly inefficient that the Council would start to review a petition for certification before it found out whether or not there were objections to it. But I am assuming for the purposes of my

review that they will do so.

If at the end of the forty-five-day period the Council denies certification, or conditionally approves it, the municipality has sixty days to refile, which would then bring us to April 15th, 1987. And the Council has an unspecified period to review.

Once the Council grants substantive certification, the municipality has forty-five days to adopt its implementing ordinance; and thus, the procedure might extend to June 1, 1987, even allowing for no time for review by the Council.

Of course, in the best of all worlds, at the end of the forty-five-day objection period, if there's no objection and if the Council has reviewed during the objection period, substantive certification could then be granted, and within forty-five days an ordinance could be adopted; and under that scenario, we would have reached April 1, 1987, which appears to be, within any reasonable estimation of times, the earliest date that the procedure could be completed.

If, on the other hand, an objection is filed, it must be done within forty-five days, as

I indicated; and assuming public notice has been given on January 1, 1987, the objections would be completed by February 15th, '87.

Pursuant to section fifteen-A, mediation would then be commenced. No time limit is set for that process. I will assume it would take a minimum of sixty days. I believe if the Council had one case to act on, a minimum of sixty days would be reasonable.

We don't know how many cases they will have, but I am going to assume there are no others, and we are limiting ourself to a single case. The mediation process in these highly complex cases, given the other duties of the Council, would then expire on April 15th, 1987.

If the mediation is unsuccessful, the matter is then referred to an administrative law judge, who has ninety days to issue a decision unless that period is extended for good cause. That procedure would then extend to July 15th, 1987, assuming there is no extension. The administrative law judge's findings would then be forwarded to the Housing Council with the record of the proceedings.

Now, under N.J.A.C. 1:1-165, the Council

then has forty-five days to act on the decision by accepting, rejecting, modifying or remanding the initial decision to the administrative law judge; and assuming no remand, we would then, within a ninety-day period, have reached September 1, 1987, or approximately two years from now. Thereafter, an appeal would lie with the Appellate Division; and presumably, there would be no difference in the time frame than an appeal from the Superior Court, or at least no substantial difference. There is some difference in the rules.

Now, before reaching the ultimate issue in this case, I would like to just review the status of the three cases that are before me today, because I believe that it's pertinent to the decision of whether to transfer or not.

With regard to Manalapan, the suit was filed against the Township in February of 1976. There was an initial trial Court decision invalidating the ordinance in March of 1977. That decision was affirmed in October of '78. A petition for certification was denied in January of '79.

In May of '79, the trial Court invalidated the second ordinance, and the

Appellate Division remanded the case to this Court in light of Mount Laurel II in August of 1983.

Thereafter, there was, as there has been with almost every Mount Laurel case, some extensive case management conferencing; and as a result, the case was settled. A consent order setting the fair share at nine hundred and authorizing the plaintiffs to provide seven hundred eighty-six of those units was entered on May 11th, 1984.

The Court withheld the appointment of a master, since the consent order resolved most of the issues of the case by judgment; but at the request of the municipality, so that it might retain -- obtain repose, the Court appointed a master to review the final details of the compliance ordinance as it related to the remaining one hundred fourteen units and the overall rezoning for Mount Laurel compliance.

The Court responded to the municipal request in that regard when the municipal attorney submitted the town expert's report concerning its compliance plan.

On May 13th, 1985, the successor

township attorney advised the Court that the ordinance, a compliance ordinance had been introduced on first reading on May 8th, 1985. The court expert advised that she could approve, with a few technical changes, the compliance ordinance. She did this on May 29th, 1985.

The plaintiffs in the case apparently submitted applications for development approval to the Planning Board in June of 1985; and I say "apparently," because it is so alleged and it is not refuted.

The plaintiffs negotiated a consent order with the Utilities Authority by which sewer service will be provided, pursuant to an order of August 11th, 1985. The Township Committee thereafter adopted a resolution requesting that the Authority refrain from entering into any consent order until it could meet with the Township with respect to that issue.

Meanwhile, on July 30th, 1985, almost nine years after the first complaint was filed and approximately fourteen months after the entry of a consent order, which was in fact a partial judgment, and three months after the introduction of the compliance ordinance on first reading, the

Township sought to vacate its judgment on the grounds that the township attorney who had entered into the judgment was not authorized to do so.

The plaintiffs responded with an ample record, which demonstrated beyond a shadow of a doubt the authorization and the knowledge of the governing body of the settlement.

The Court rejected the motion, finding that it was totally meritless, that even if there was some factual basis for it, which there was not, that the municipality was subject to estoppel and, finally, that the motion was brought in bad faith.

Now what is left to be done in the Manalapan case is a compliance hearing dealing with the balance of the hundred and fourteen units -- the seven hundred eighty-six are covered in large part by the consent order; the review of sale and resale controls on the seven hundred eighty-six units, and the establishment of controls on the others, of course; and the revision of the ordinance, if necessary.

As indicated, the master has found the ordinance to be satisfactory but for some minor

technical changes, and it would not appear that a Court-ordered revision of the ordinance will be necessary.

By that I mean, the ordinance would apparently be capable of being approved subject to some minor conditions which could, in effect, amend the ordinance itself, or which could be embodied in an amending ordinance. All of this could be accomplished within a ninety-day period.

Now, with regard to Bernards, the complaint was filed by Hills on May 8th. The plaintiff's motion for summary judgment was denied, and the Township thereafter adopted the revised zoning ordinance 704 -- I should have said, of course, May of 1984 -- and the ordinance was adopted in November of '84.

There was correspondence with the Court concerning the entry of an immunity order. The Court at first declined to enter an immunity order, based on the fact that there was not adequate stipulation. Ultimately, it was entered. A master was appointed. And the immunity was extended three times.

The initial order was entered on December 19th, 1984, with an extension on May 15th,

June 15th, to the -- and then to the date of the compliance hearing.

In a further effort to expedite the settlement, the Court further reduced the fair share of the municipality by a hundred and forty-one units, as was indicated earlier, based on its voluntary compliance, based upon the size of its fair share number, and other equities which I need not repeat.

The only thing standing in the way of a rapid resolution of the case at that posture was a suit brought by a property owner included in the compliance package who alleged wrongful exclusion.

With the thought that the matter had been resolved with the Hills plaintiff, the Court allowed the Township to reduce its fair share number by an amount equivalent to the units which would be generated by the parcel to be removed from the package.

In June of 1985, the defendant's counsel wrote to the Court advising that an agreement had been reached, requesting a compliance hearing and an extension of a stay until that time. At or about the same time, the Court-appointed master

wrote to the Court, submitting his report, recommending approval of the ordinance subject to some minor changes.

It is then alleged between the parties -- of course, the Court was not involved in these negotiations, but it does not seem to be disputed that there were drafts of settlement exchanged.

Plaintiff alleges that the draft was acceptable to it, but the Court has no way of knowing what was in it. But today, at least, the plaintiff stipulates that the ordinance in its present form will not be challenged at a compliance hearing.

Ultimately, the Court, because of its prior notification, contacted plaintiff -- defendant's counsel with respect to whether or not the Township wished to proceed before the Court, or wished to file a motion for transfer. Defendant's counsel, after due consultation with his client, advised the Court that a motion for transfer would be filed; and it was in fact filed on September 13th, 1985.

Now, what is left to be done in this case is not totally clear to the Court, in light of the colloquy between the Court and counsel

during oral argument.

It would appear to me that a compliance hearing would be held on Ordinance 704, which the defendant contends is in accordance with Mount Laurel II, which the plaintiff is willing to accept, and which the master approves subject to some minor changes.

Under those circumstances, that could be accomplished very quickly, and there would appear to be no need for revision except for some technical items.

Under those circumstances, the Court would approve the ordinance if it found no major defect itself, subject to the technical revisions, if necessary, being accomplished within a short time span.

The municipality would thereafter have a compliant ordinance. It is -- in effect, it does contain a self-destruct clause, which is not uncommon in Mount Laurel ordinances. I don't fault the municipality for that at all. It has been the procedure in most -- in many of the municipalities to adopt the ordinances contingent upon Court approval in a compliance setting.

In any event, the fact that it does have

a termination date is not at all fatal to its validity. Whether or not the compliance hearing is held before or after its termination date, since the municipality takes the position that the ordinance is compliant, and since the time for it to submit a compliant ordinance has now expired, it would either have to come to a compliance hearing without an ordinance, or with the ordinance that it has adopted, designated 704.

Under all of those circumstances, it would appear that a ninety-day period would be adequate to allow for the completion of this case.

Now, with regard to Watchung, this complaint was filed on December 18th, 1984. My secretary has translated, having here '85, so your complaint hasn't been filed yet. You're free now, when the sixty-day period has not even run.

The consent order in this case was entered on June 19th, 1984, and it was somewhat typical in form to approximately sixteen other orders entered by this Court, in that it gave the municipality an immunity from a builder's remedy suit based upon the conceded invalidity of the ordinance.

It set a fair share, it appointed a master, and it provided, in effect, that if the builder's remedy issue could not be resolved between the parties, it would be resolved by the Court.

The court master then set about establishing a schedule for development of an acceptable compliance ordinance and, under letter of July 19th, 1985, established the deadline for the submission to the Court as September 28th, 1985.

On August 15th, 1985, the Township adopted a resolution of participation under the Housing Act. A month later, this Court entered an order extending the immunity, which is somewhat ironic, until October 4th.

But I say that with just a certain amount of jest, because the reason was that the Township wanted to know whether or not its case would be transferred and, therefore, wanted immunity until that date.

The master, on September 11th, 1985, in recognition of the delays which had occurred, established a new time schedule which was subject to the Court action on the transfer motion. And

the deadline for submission under that schedule is December 1st, 1985. That is the deadline for submission of the compliance ordinance to the Court.

So what is left to be done in Watchung is the submission of the ordinance by December 1st; a compliance hearing thereafter, which would include a hearing with respect to the builder's remedy, if the builder is not satisfied by the compliance ordinance; a revision of the ordinance if the Court does not accept the compliance ordinance; and then an adoption by the municipality of the ordinance, or adoption of the ordinance by Court order, which is, of course, an alternative in each one of these cases.

The Watchung timetable would seem to be somewhat longer than the other two cases here today; but in any event, I would presume that by the end of February or sometime into March, we can extend it to the end of March, the Watchung case could easily be completed.

Now, with that overview of the statute and the review of the procedures under the statute, the time frames and the specific analyses of the progress of each of the cases

before the Court, there remains only the ultimate issue of whether these cases should be transferred to the Council or retained here.

The parties to these motions and others filed with the Court have suggested a host of criteria by which the applications are to be judged. And I listed them the last time, thinking that it would be useful to counsel in future cases; and apparently, it was partially useful, at least, to counsel.

I am going to list them again and expand just slightly on them, because as we go through these cases, new issues are developed, and all of them should be considered.

I emphasize again, however, that I do not list them in order of preference, and clearly with no intention to imply approval or disapproval of any factor which I don't specifically discuss. In any given case, one of them may have greater relevancy than the other, may not apply, or may be the determining factor.

The factors include the age of the case; the complexity of the issues; the stage of the litigation, that is, discovery, pretrial, trial, compliance, settlement; the number and nature of

previous determinations of substantive issues; the relative degree of judicial and administrative expertise on the issues involved.

The need for development of an evidentiary record; the conduct of the parties; the likelihood that the Council determinations would differ from the Court's; the likelihood that Council determinations would have a basis in broader state-wide policy.

Whether harm would be caused by a delay in the transfer or, conversely, whether a denial of a transfer would cause a greater delay.

Whether the Council process, absent the ability to impose restraint, would cause the irreparable loss of vacant developable land for Mount Laurel construction; whether the transfer would facilitate or expedite the realistic opportunity for lower-income housing.

Whether a change in the housing market could occur if the venue selected causes delay; the loss of the plaintiff's right to participate in the Council process at least up to the point of mediation; and the loss of alleged rights existing under Court orders.

We are up to fifteen factors at this

point. They may encompass some others which have not been mentioned, and there may be others which have not yet been considered. As noted, I do not see any need to dwell on each factor.

All of the cases today have a certain number of factors in common. They have all settled voluntarily, in the sense that the municipalities have either settled directly with the parties or have chosen to voluntarily comply with Mount Laurel, and the parties have all acted, until recently, in accordance with the provisions of those voluntary orders.

The record in each case is replete with evidence that the parties have, through their own conduct, defined the issues of region, regional need and fair share, just as though a trial had been held in the case.

During the process, all three municipalities have been given much more than the ninety days envisioned by our Supreme Court to revise their ordinances, and indeed much more time than any municipality which had not voluntarily complied, since that municipality or those types of municipalities would have been brought to trial within the time frame consumed

by these cases.

In any event, the compliance ordinances have been accomplished in Manalapan and in Bernards; and in large part, they seem to have the general approval of the master.

In the Watchung case, its ordinance is in progress and is due to be submitted in less than sixty days.

Furthermore, each of the municipalities has received significant fair share reductions because of voluntary compliance. I applaud that. Some have criticized it as a reward for obeying the law.

There are aspects of estoppel in each case. Had the defendants not sought to -- sought entry of consent orders or immunity orders, it is entirely likely that each of these cases would have been tried, the fair share established, certainly in both Manalapan and in Bernards, and a compliance ordinance under review.

In Watchung, we might have been near or would have been completed the trial and been in the compliance stage.

The Court has, in short, been a patient partner with the towns, because they demonstrated

their desire to voluntarily comply. In fact, many plaintiffs have chastized the Court for being too patient.

There are additional factors which are unique to each case, which I need not dwell upon, nor do I give them excessive weight; yet they deserve just brief notice, and they are considered in the total picture.

The Manalapan case is now over nine years old, and it is now within a few months of total resolution. Even without a compliance ordinance, it has a binding Court order which will provide seven hundred eighty-six units of its nine hundred fair share.

The Bernards case was and, from what the Court hears today, is for all intents and purposes settled, and the plaintiff is as ready a builder as the Court has before it.

It's demonstrated that rather conclusively in Bedminster. The evidence in the Bedminster case may be considered in this matter. It is entirely clear that the effort of Hills Development is within a confined area, that it has control of the important aspects of construction which go to making rapid construction

possible. It has control of its sewer plant, it has sewer capacity. It has all of the necessary other infrastructure at hand, and it has the site immediately adjacent to its site in Bedminster.

In Watchung, the immunity order has given the town a two-sided protection somewhat unique to Watchung, does exist in a few other municipalities. It has an opportunity to settle now, and still later seek a reduction of the fair share based on what might happen in the Housing Council. That arrangement rings of fairness to the defendant.

Of predominant importance in these cases is the status of each case and the inevitable delay which will be caused by transfer. As the facts were cited show, each of the cases before the Court are very near to completion. The Court's best estimate is that they could be done in anywhere from three to six months. They could be done even sooner than that.

Even if the estimate is overly-optimistic, the time span is significantly shorter than the minimum period of time which was calculated in the analysis of the Act.

We are not looking at delay in a vacuum,

because as the defendants' counsel have properly pointed out, the Housing Council process must take some time. And at this posture, we have to presume that the Legislature chose a reasonable time frame for cases which belong before the Council.

That presumption is a right to which the legislation is entitled. But in transfer cases, we have to look at delay in relative terms, that is, relative to the status of the case before the Court, because delay before the Council, excessive delay, in relationship to delay before the Court, equates to postponing the day until the realistic opportunity is afforded and housing is built.

In each of these cases, we have builders who are ready to proceed. Indeed, we have builders proceeding in two of the cases, just as builders have moved promptly to get construction under way in other towns where compliance has already occurred.

Of course, avoidance of delay at all costs is not an acceptable goal; however, no one has demonstrated to the Court that the Court does not have the expertise to complete these matters

and to meet the special issues involved.

All the municipalities before the Court today and in other matters have been evaluated based upon statewide planning criteria which have been carefully developed.

I might note that the Act itself does not call for statewide planning; it calls for regional planning. Presumably, they're one and the same, or hopefully they would be one and the same, except for the fact that the Act limits the regions to a maximum of four counties.

In any event, and that is an aside, the methodology which the Court uses leaves room for adjustments based upon the very criteria which the Act itself has adopted. In fact, if one were to read the Act, it would look like a compendium of those issues raised by the defendants in Mount Laurel proceedings.

I don't say that with any criticism. It is entirely appropriate. But section seven-C of the Act calls upon the Council to consider various criteria in reviewing the housing element.

And I believe that a review of them will track the sort of defenses which the Court has dealt with here in the judicial setting and

responded to in that setting.

So the methodology has left room for adjustment based upon vacant land, based upon environmental constraints, the need for preservation of agricultural areas, historic areas, recreational areas, open space, and other special categories of land uses.

The Court has allowed for adjustments of the compliance ordinance based upon prior land use patterns, and thus, as a result, in Freehold Township, reduced the fair share of that community by thirty-five percent because of prior efforts made to provide a variety and mix of housing.

The methodology allows for many other practical and equitable adjustments, as is evidenced indeed in the instance of Bernards and in many other cases in which there has been voluntary compliance.

The determination of the manifest injustice issue is and will be a balancing process in all of the cases. In each case before the Court today, the balance tips heavily in favor of a denial of the motions to transfer.

The statutory test is manifest injustice

to any party. The defendants have failed to demonstrate the slightest injustice to them, whereas the injustice to the lower-income households is entirely evident and manifest.

With respect to the other collateral issue in Manalapan, that is of phasing, the Court will deal with it on the compliance hearing. I suggest that it can be dealt with as to the hundred and fourteen units so as to satisfy the entire phasing issue, and I need not decide the applicability of section twenty-three to the settlement, and adequate phasing of those hundred and fourteen units will accomplish the legislative intent even if it is applicable, which is a substantial doubt.

All right. I will entertain a motion from each plaintiff denying -- I mean an order denying the motion. Anything further?

MR. MURRAY: Judge, in each of the two times you read the -- your opinion, you referred to Judge Skillman's citation as N. J. It probably is N. J. Super.

THE COURT: Did I say that? Well, he deserves to be elevated. Maybe I'm predicting something. I'm sorry. It certainly is New Jersey

Super.

MR. HILL: Technically, in submitting the orders, Your Honor, there was a cross-motion for a hearing on compliance which I think Your Honor spoke to. Should the judgment reflect that that would take place at a date to be set by the Court?

THE COURT: That will happen whether or not you put it in the order.

MR. HILL: I just was wondering how to write the order.

THE COURT: It need not go in the order, but there will be a compliance hearing set. Okay? Gentlemen, have a good day.

ALL ATTORNEYS: Thank you, Your Honor.

(End of proceedings.)

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CERTIFICATE

I, GAYLE L. GARRABRANDT, Certified Shorthand Reporter and Notary Public of New Jersey, do certify the foregoing to be a true and accurate transcript of my original stenographic notes taken in the above matter to the best of my knowledge and ability.

GAYLE L. GARRABRANDT, C.S.R.
License No. XI00737

DATED: 10-18-85