RULS-AD-1985-340

10/31/85

Brief for Defendants/Appellants in Hills Dev. Co. v. Township of Bernards.

PGS - 29

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO.

CIVIL ACTION

THE HILLS DEVELOPMENT COMPANY,

Plaintiff/Respondent,

vs.

THE TOWNSHIP OF BERNARDS in the COUNTY OF SOMERSET, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS, THE PLANNING BOARD OF THE TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS,

Defendants/Appellants.

ON APPEAL FROM

ORDER OF THE HONORABLE EUGENE D. SERPENTELLI, A.J.S.C.
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-030039-84 P.W.

SAT BELOW

HONORABLE EUGENE D. SERPENTELLI

Filed 10/31/1985

BRIEF ~~AND APPENDIX~~
FOR
DEFENDANTS/APPELLANTS

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PROCEDURAL HISTORY

This is a Mt. Laurel action. This action was commenced on May 8, 1984. Answers were filed by defendants on June 5, 1984. Discovery was commenced by service of Interrogatories in June, 1984. No depositions have been taken and discovery has not been completed. No trial on any issue has been held. (See discussion below of Order dated December 19, 1985). Cross-Motions for Summary Judgment were heard in July, 1984 and were denied by Order of the Court dated August 3, 1984.

On November 12, 1984 defendant, Township of Bernards, adopted an ordinance (Ordinance 704) intended to better insure the construction of lower income housing which meets the standards and guidelines set forth in So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mt. Laurel II) and to provide a realistic opportunity for the construction of a variety of housing types and for a variety of income levels in the township. (Da 109a)

Subsequent to the adoption of Ordinance 704, and at the request of all the parties, the Trial Court entered an Order dated December 19, 1984 which order stayed the matter and appointed George Raymond as the "Court appointed expert." A subsequent order dated July 17, 1985 extended the stay until the Court has passed upon the compliance package of the Township of

Bernards. The Court appointed expert submitted his report dated June 12, 1985, in which he reviews Ordinance 704 and makes certain recommendations to the Court regarding Bernards Township's fair share and proposed compliance package. Such report is based on various concepts (i.e., the "consensus methodology" for determining a municipality's fair share) which existed prior to the adoption of the "Fair Housing Act" (L. 1985, c.222). (Da 113a)

The Fair Housing Act was adopted on July 2, 1985. Pursuant to §16 of the Fair Housing Act a motion to transfer this matter to the Council on Affordable Housing was filed on September 13, 1985. The matter was argued on October 4, 1985 and the Court entered an Order on October 16, 1985 denying the motion. (Da 1a) This motion requests leave to appeal the denial of the motion to transfer.

STATEMENT OF FACTS

Plaintiff (hereinafter referred to as "plaintiff" or "Hills") (See Complaint ¶ 1, for description, Da 48a) is the owner of a tract of land (in excess of 1000 acres) in the Township of Bernards. At the time of purchase of the tract (prior to 1976), the property was located in a low density zone (one unit for every three acres). Plaintiff instituted prior

litigation involving claims under Mt. Laurel I (So. Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 [1975]) The matter was settled and a Judgment was entered in 1980 which provided increased density, greater flexibility and the removal of cost generating features. The zoning ordinances of the Township of Bernards were amended accordingly. (See Complaint, Da 70a and Answer, Da 105a.) Notwithstanding the various claims of intent to provide housing for lower income families (or even "least cost" housing) no housing of any kind has been constructed on plaintiff's property and there was no indication that plaintiff intended to develop its property with Mt. Laurel housing.

This action was commenced on May 8, 1984. The action involves the same property which was the subject of the earlier litigation and demands a five-fold increase in density, and is based on the dictates of Mt. Laurel II, So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983).

As noted earlier, in November, 1984 the defendant, Township of Bernards, adopted Ordinance 704 which provides for increased density in two zones within the township and contains other provisions intended (a) to insure the construction of lower income housing which meets the standards and guidelines set forth in Mt. Laurel II, and (b) to provide a realistic opportunity for the construction of a variety of housing types and for a variety of income levels in the township. (Article

1101, Ordinance 704, Da 109a) Under that ordinance plaintiff is permitted to construct up to 2750 dwelling units. (Article 1104-2, Ordinance 704, Da 109a) Twenty percent (20%) of such dwelling units shall be affordable for lower income households. (Article 1110, Ordinance 704, Da 110a) Ordinance 704 also modified other provisions of the Bernards Township Land Development Ordinance in order to remove any unnecessary cost generating features. Plaintiff has indicated that it does not object to Ordinance 704 (Tr 29-6, Da 31a).

Subsequent to the adoption of Ordinance 704 the property owners in one of the zones which permits and requires _Mt. Laurel_ housing proceeded with various development applications in order to obtain approval of their projects which include _Mt. Laurel_ housing. One applicant has received final approval of a development which will provide 100 units of _Mt. Laurel_ housing which is now under construction. A second applicant has received conceptual approval of a development which will provide 90 units of _Mt. Laurel_ housing. The application process and the development of the zone (including the _Mt. Laurel_ housing) is continuing at the present time. (Certification of Peter Messina, Da 139a)

The other zone in which Mt. Laurel housing is permitted and required is all within the tract of land owned and controlled by plaintiff. Since the enactment of Ordinance 704 (in November, 1984), plaintiff has filed no application for subdivision, site

plan, or otherwise relating to that part of its property upon which Mt. Laurel housing is required.[1] The only relevant document submitted was a proposed conceptual plan which plaintiff discussed, in March 1985, with the Planning Board's Technical Coordinating Committee (TCC), as to which the TCC raised a number of serious design questions. No other action in furtherance of the construction of plaintiff's Mt. Laurel housing has been brought to the attention of the Township. (See Ferguson Certification, Da 144a)

With the Fair Housing Act having been enacted, with other Mt. Laurel development applications proceeding properly and expeditiously, and with plaintiff not having taken any significant steps toward developing its property or toward producing Mt. Laurel housing, the Township elected, pursuant to the provisions of the Act, to apply to the court for transfer of this matter to the Council on Affordable Housing in accordance with the Act.

The Court denied the motion. In doing so the court made the following conclusions of fact and law:

> a. "Party to the litigation", as used in the second sentence of §16 of the Act, includes persons other than those named in the action, such as low and moderate income families (Tr 11-15, Da 13a-17a).

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[1] We are informed that Hills has filed for conceptual approval for the development of its property since the trial court's denial of the motion to transfer.

b. It will take approximately 24 months before this matter can be completed before the council (Tr 16-22, Da 18a-24a) and the legislature was aware of and contemplated this (Tr 39-3, Da 41a).

c. It will take approximately 3 months to complete a compliance hearing before the court (Tr 30-11, Da 32a).

d. The failure to complete the matter (under either b or c, above) will hold up the construction of housing for low and moderate income families during that period.

e. The variation in time of completion of the matter will necessarily result in "manifest injustice" to low and moderate income families if the matter is transferred to the Council (Tr 16-15, Da 18a; Tr 38-13, Da 40a).

POINT I

THE COURT SHOULD GRANT THIS MOTION FOR LEAVE TO APPEAL IN VIEW OF THE IMPORTANCE OF THE ISSUES AND INTERESTS INVOLVED.

This matter involves the interpretation of §16 of the "Fair Housing Act" (L. 1985, c.222; N.J.S.A. 52:27D-301 et seq.), hereinafter referred to as the "Act". The Act became effective on July 2, 1985 and is the long-awaited legislative response to a series of cases culminating in the decision of the Supreme Court in So. Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mt. Laurel II), (see legislative findings -- Act §2) The Act will have far-reaching effect on the availability of housing for lower income families and on the planning for housing throughout the State.

The legislative findings make it very clear that (1) the legislature intended that the method of satisfying the Mt. Laurel obligation is better left to the legislature (Act §2b) and (2) the interests of all citizens (including low and moderate income families) is best served by a comprehensive planning and implementation response to the obligation. (Act §2c.)

The Act also sets forth specific declarations in Section 3 as follows:

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

In furtherance of its express intention to provide comprehensive planning and implementation, and of its express preference for resolving "existing and future disputes involving exclusionary zoning" by use of "the mediation and review process set forth in this Act and not litigation . . ." (Act §3) (emphasis added), the legislature provided, in Section 16, specific regulations relating to the transfer of existing cases to the Council on Affordable Housing. Those regulations address

two distinct situations: (i) Where an action was instituted less than 60 days before the effective date of the Act, the person instituting the action "shall file a notice to request review and mediation with the council . . ." (Act §16b); (ii) Where (as here) an action was instituted more than 60 days before the effective date of the Act, any "party to the litigation" desiring a transfer may file "a motion with the court to seek a transfer of the case to the council". (Act §16[2])

The interpretation of §16 is very important to the administration of the Act and ultimately in the administration of the construction and regulation of housing for low and moderate income familes throughout the State. Many of the municipalities in the State which are expected to produce lower income housing were in litigation when the Act became effective, and therefore are within the provisions of §16. The trial court's decision in this matter interpreted the terms "party to the litigation" and "manifest injustice", as used in §16, very liberally and denied the motion to transfer.

It is apparent that if the trial court's decision and rationale are followed, motions to transfer in many of the major cases will be denied, those matters will stay in the litigation system and will not be decided through the mediation and review

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(2) The Second Official Copy Reprint (advance sheet) of the Act shows a §16 and a §16b, but no paragraph expressly labeled "16a".

process implemented and favored by the Act, and the system envisioned by the legislature will be gutted.(3) Defendants-appellants contend that such a result is contrary to the intent and purpose of the Act.

If, on the other hand, the plain meaning of both the terms "party to the litigation" and "manifest injustice" is used, many cases will be transferred to the Council on Affordable Housing to be reviewed by the Council in accordance with the provisions, and the express intent, of the Act.

For the municipalities, including Bernards, the choice of approaches has serious ramifications. The Act includes a number of planning alternatives which may or may not be available before a court. The Act includes an administrative procedure aimed at obtaining mediation and review outside of the litigation process. The Act contains a set of new definitions and terms, and a methodology which is clearly different from that presently being used by the courts. In the Bernards matter

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(3) Defendants-appellants understand that the docket of the Superior Court will show that of at least eleven transfer motions heard by Judge Serpentelli only one case has been transferred to the Council. On October 28, 1985 the Honorable Stephen Skillman decided transfer motions under §16 of the Act in four actions. Morris County Fair Housing Council, et al. v. Boonton Township, et al., Docket No. L-6001-78 P.W. (decided October 28, 1985) (Slip Opinion, Da 166a) One case was transferred, three cases were not transferred. Defendant-Appellant does not mean to imply that any specific case, other than the present action should or should not be transferred. It merely argues that under the court's standard few §16 cases will reach the Council.

the court has indicated it will hold a compliance hearing. Presumably, the court intends to arrive at a fair share determination under the "consensus methodology" even though that methodology uses different regions than those prescribed in the Act and presumably different definitions of present and prospective need. (4)

We submit that if leave to appeal is granted at this time it will avoid a time-consuming and wasteful process (to both the court and the litigants) if it is ultimately determined that the matter should have been transferred. Failure to determine the issue at this time will result in the defendant being at risk of having its zoning powers impaired by a so-called compliance order entered by a court which should not properly have retained jurisdiction of the matter.

Unless the issue is decided quickly the problem will continue to exist in other cases. This procedure would have no beneficial effect on providing housing for lower income families and would result in enormous effort on the part of the parties

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(4) It is not at all clear whether this trial court will adopt the various provisions of the Act, which became effective on July 2, 1985. Some of the factors used in the consensus methodology directly conflict with the provisions of the Act. Thus, if this matter or any matter is heard by the court, it will not only be heard and decided by a different tribunal but in all likelihood under different law. It is hard to believe that this anomaly was intended. See also comment of dissenting members of Assembly committee referred to by Judge Skillman in Morris County Fair Housing, et al., (decided October 28, 1985) (Slip Opinion p. 43, Da 208a).

and the court to complete the existing litigation. Lastly, the result would be the continued proliferation of additional market housing which has led to strong criticism of the Mt. Laurel doctrine. (5)

The Appellate Division has unlimited discretion as to whether to grant or deny leave to appeal. Campbell v. Schlaifer, 88 N.J. Super. 66 (App. Div. 1965). The court has indicated it will grant leave to appeal "in the exceptional cases where, on a balance of interests, justice suggests the need for review." Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div. 1956).

In Romano, supra, the court described some instances where leave may be granted, including where grave danger or injustice may be caused by the order below; or, where the appeal if sustained will terminate the litigation and thus conserve litigants and courts' time and expense "as in the case where the

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(5) There is no reason to believe that eventually the amount of housing for lower income familes will be substantially different under either system. One of the purposes of the Act is to have an administrative agency, with expertise in the field, establish criteria for determining what volume of lower income housing is, in fact, needed in each region and in each municipality, in order to satisfy the constitutional Mt. Laurel obligation. Those who have objected to the Mt. Laurel doctrine point to the large amount of market-priced housing which appears likely to result from the "Builders Remedy" favored by the Supreme Court (92 N.J. at 279) and followed by the decisions in the trial courts, as well as to the lack of planning which appears to result from this scheme. These are two of the major factors which are intended to be corrected or at least alleviated by the Act. (Act §2; Act §28)

order attacked determines that the court or agency below has jurisdiction of the subject matter or person" (at p. 568). Further in Rosenau v. New Brunswick, 93 N.J. Super. 49 (App. Div. 1966), modified on other grounds, 51 N.J. 130 (1968), the court indicated it would grant leave to appeal in view of the advisability of an early disposition of the issues involved.

This case is appropriate for the Appellate Division to grant the motion for leave to appeal. The proper interpretation of §16 and the determination of the issue of which tribunal should hear these matters is of great importance to the State and the administration of the Fair Housing Act and requires early disposition. This is "the exceptional case where, on a balance of interests, justice suggests the need for review." Romano, supra.

POINT II

THIS ACTION SHOULD BE TRANSFERRED TO THE COUNCIL ON AFFORDABLE HOUSING PURSUANT TO THE INTENT AND PROVISIONS OF THE "FAIR HOUSING ACT".

As noted in Point I this matter involves only one major issue, the interpretation of §16 of the Act. The legislative intent is made very clear from a review of §2 and §3 of the Act (among other provisions), i.e., existing and future disputes involving exclusionary zoning should be resolved by use of the

mediation and review process set forth in the Act and not by litigation. Section 16 must be interpreted with that in mind. To say that the standards set forth in §16 are neutral or that they should be interpreted liberally ignores this express legislative intent.

In a §16 situation, the Act specifies only one criterion for denying a motion to transfer. That criterion is as follows:

> "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." (Act §16)

Thus, on a transfer motion the only issue which the statute directs the Court to consider is whether the transfer would result in "manifest injustice" to a "party to the litigation." The Act does not give the Court any other basis for denying a transfer application. By contrast, the Act strongly and repeatedly expresses the legislative preference for the specified comprehensive administrative mechanism over Court adjudication of affordable housing cases (e.g., Act §§2a through 2h, 3, 16, 17a, 17b). This combination of a strong legislative statement of preference for administrative proceedings, with the specification of a very narrow and stringent basis for denying a transfer application, indicates that unless the court affirmatively finds that manifest injustice will result, it should grant the application for transfer. (See also, Morris County Fair Housing Council, et al., (decided October 28, 1985) at p. 44, Da 209a)

The Supreme Court itself, in Mt. Laurel II, stated unequivocally its preference for a legislative remedy over a judicial one, and stated also that the courts should and would defer to the legislative remedies if and when they were enacted. 92 N.J. 212, 213, 213n7.

Therefore, in the absence of a specific finding that "manifest injustice" will result to a "party to the litigation" from the transfer of an action to the Council on Affordable Housing, the Court should "defer" to the legislative initiative which is designed to produce lower income housing through comprehensive regional planning and central administration.

(A)

The term "party to the litigation" should be interpreted in accordance with its plain meaning, i.e., the plaintiff and defendants in this specific litigation. The wording of the statute and the legislative intent do not support the court's reading that the term "party to the litigation" includes any person, etc. who may benefit from the action. Several items should be pointed out:

(1) The term "party to the litigation" appears in §16 in two places. The first two sentences provide:

> "For those exclusionary zoning cases instituted more than 60 days before the effective date of this Act any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer,

> the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation. (emphasis added).

"[A] word or phrase should have the same meaning throughout the statute in the absence of a clear indication to the contrary." Perez v. Pantasote, Inc., 95 N.J. 105, 116 (1984). Yet, if the trial court's reading of the second sentence is correct then either (a) any member of the alleged beneficiary class could bring a motion to transfer (an incredible result, e.g., what if the actual plaintiff did not want to transfer) or (b) the term has a different meaning two places within the same section (equally unlikely, and a violation of the rule of construction just cited). In this context the trial court's interpretation is nonsensical.

The term "party" as used in this context appears in at least two other sections of the Act:

> §17C -- "The council shall be made a party in any exclusionary zoning suit against a municipality which receives substantive certification . . ." (emphasis added)

> §19 -- "If the council has not completed its review and mediation . . . within six months of receipt of a request by a party who has instituted litigation, the party may file a motion . . ." (emphasis added)

In each case it is clear from the provision that the word "party" as used in the Act refers to an actual named party to the litigation.

(2) The term "party to the litigation" is a term of art familiar to lawmakers, lawyers and courts, the plain meaning of

which is the actual named litigant who has standing to appear and argue before the court. (6)

(3) The Governor's veto message (at Page 7) provides as follows:

> "With respect to pending litigation, the bill permits a party in current litigation to request the court to transfer the case to the Council on Affordable Housing for mediation procedures. When reviewing such a request, the courts must consider whether or not the transfer would result in a manifest injustice to one of the litigants." (Da 236a)

(4) The prior version of the legislation provided as follows:

> "For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, [no exhaustion of the review and mediation procedures established in sections 14 and 15 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 provision of a realistic opportunity for low and moderate income housing]."

The bracketed language was removed and replaced with the current language. The result of the trial court's test in this matter, including its definition of "party to the litigation", is to revive the standard that was specifically removed. (Tr 16-7, Da 18a)

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(6) In the case relied on by the trial court, Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359 (Law Div. 1984), Judge Skillman describes the interest of lower income families in this type of litigation. However, even in that case, he does not treat them as actual parties to the litigation and in fact he refers to lower income families as "non-parties." (at p. 364-366)

(5) The court's interpretation unnecessarily limits the eligibility of cases to be transferred, contrary to the intent of the statute. If the legislators had intended to use a broad definition or had intended to restrict the transfer of cases, it would have done so, as it had attempted to do in prior drafts of the Act. Morris County Fair Housing Council , et al., (decided October 28, 1985) at p. 42, Da 209a, et seq.. It specifically failed to do so. The court should not rewrite the legislation.

While the Act as a whole is intended to benefit lower income families, the selection of the body having jurisdiction is clearly based on the effect of the transfer on the actual "parties to the litigation." The Act established the council as the means for promoting the interests of those families. The legislature did not intend that a transfer to the council should be construed as any detriment to these interests.

(B)

"Manifest injustice" does not exist merely because an action has been commenced pursuant to Mt. Laurel II, nor even because such action has been pending for some time.[7] If that were enough to constitute "manifest injustice", then the Act's provision for transfer of existing cases, instituted more than

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(7) This is so without regard to how the term "party" is defined.

60 days before the Act's effective date, would be rendered illusory and meaningless.

The term "manifest injustice" has been interpreted in cases where, as here, the issues involved retroactive application of statutes to existing situations. (The present matter involves application of Act §16, and all other provisions of the Act to an existing lawsuit.) In Gibbons v. Gibbons, 86 N.J. 515, 522-524 (1981), the Supreme Court discussed in detail such retroactive applications, and stated that retroactivity is appropriate where, for example, the Legislature expressly states an intent to apply the statute retroactively, or where the statute is ameliorative or curative. Id. The Act (§16) expressly permits the transfer of existing actions, and it is obviously intended to be curative of the shortage of lower income housing and of the absence of statewide and regional planning for the purpose of solving that shortage. Thus, it fits into at least two categories of retroactivity.

But, said Gibbons, even if a statute is subject to retroactive application, before so applying it a court must inquire into whether "manifest injustice" to a party will result therefrom.

> "The essence of this inquiry is whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively."

Id., at 523-524.

The test includes, therefore, the following factors:

(1) Reliance to the prejudice of the party; and

(2) Deleterious and irrevocable consequences arising out of the reliance.

In order to meet the test of manifest injustice the party opposing application of the statute must show a very high level of harm together with reliance on the existing law. In State, Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 498 (1983), the court again discussed "manifest injustice", holding:

> "[W]hen the Legislature has clearly indicated that a statute should be given retroactive effect, the courts will give it that effect unless it will violate the constitution or result in a manifest injustice."

The court stated that the due process clause does not prohibit retroactive civil legislation unless "the consequences are particularly harsh and oppressive," Id., at 499, and indicated that retroactive application is particularly appropriate where the statute is designed to protect an important public interest. It is submitted that the public interest in providing affordable housing and in doing so in the context of sound comprehensive planning is of paramount importance, and that the Supreme Court recognized its importance in Mt. Laurel II. (8) Transferring this matter from a judicial

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(8) In Mt. Laurel II the court so stated: e.g., 92 N.J. at 215 (discussing State Development Guide Plan as a "conscious determination of the State . . . as to how best to plan its

forum to a legislatively created administrative forum, specifically designed to promote that public interest and to implement it, hardly seems a harsh and oppressive result.

Ventron, supra, involves the application of the environmental Spill Act, N.J.S.A. 59:10-23.11 et seq., to existing industrial and other facilities. The court pointed out that the Spill Act does not so much change substantive liability as it establishes new remedies for tortious acts recognized by prior law. The court pointed out that:

> "A statute that gives retrospective effect to essentially remedial changes does not unconstitutionally interfere with vested rights. Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 381 (1954)."

The Fair Housing Act expressly acknowledges the substantive rights and obligations described in Mt. Laurel II (Act §2), and does not impair that substantive law. Rather, it provides a new forum and alternative remedies designed to implement that law.

Another line of cases holds that when legislation affecting an action is amended while the matter is before the Court (trial or appellate), the Court should apply the statute in effect at the time of its decision. See, e.g., Kruvant v. Mayor of Cedar Grove, 82 N.J. 435, 440 (1980). The purpose of this principle

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future"); 92 N.J. at 238 ("[Z]oning in accordance with regional considerations is not only permissible, it is mandated . . .."; "The Constitution of the State of New Jersey does not require bad planning.").

is to "effectuate the current policy declared by the legislative body -- a policy which presumably is in the public interest. By applying the presently effective statute, a court does not undercut the legislative intent." Id., at 440. See also Orleans Builders and Developers v. Byrne, 186 N.J. Super. 432, 445 (App. Div. 1982), certif. denied, 91 N.J. 528 (1982) (court upholds a statute requiring a new administrative scheme for regulating the Pinelands). Where legislation creates a new forum designed to process cases of a particular type, it is appropriate for the Court to transfer a pending case of that type to the newly-created jurisdiction of such forum. See, e.g., Patrolman's Benev. Assn. v. Montclair, 70 N.J. 130 (1976), ordering transfer of a labor dispute to the Public Employment Relations Commission (PERC), after a trial court decision and two levels of appeal, because PERC's jurisdiction had been legislatively expanded during the pendency of the appeal.

In the current matter it is apparent that in enacting the Fair Housing Act the legislature intended a policy to regulate the construction of Mt. Laurel housing through a comprehensive administrative procedure; that the Act results in essentially remedial changes; and that no "harsh or oppressive" consequences, as the terms are used in the case law, will result to plaintiff (or lower income families if they are included in

the term "party to the litigation.") if the matter is transferred.[9]

(C)

As noted in the facts the court hypothesized that the matter would take at least 24 months to reach a conclusion before the council and could be completed within 90 days before the court. The apparent ultimate conclusion was that this time differential would result in "manifest injustice" to low and moderate income families. This conclusion is not supportable.

(1) Initially it should be pointed out that the term "manifest injustice" can be defined with some certainty so that it can be applied against a set of facts or circumstances. As pointed out earlier, in the context of retroactive application of a statute, something is manifestly unjust when it results in consequences that are irrevocably harsh or oppressive. No such consequences are present in this matter.

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(9) In Morris County Fair Housing Council v. Boonton Township (decided October 28, 1985) Judge Skillman failed to adopt this interpretation but rather found the line of cases involving exhaustion of administrative remedies to be applicable. (Slip Opinion p. 45-48, Da 210a - 213a). This conclusion would appear to be a more liberal test. This conclusion ignores the strong legislative intent exhibited by the Act and the legislature as previously discussed. It also fails to recognize that different substantive law will be used by the courts than by the Council. It is therefore contended that the test set forth in Gibbons, supra. should be applied.

(2) Secondly the time period required by the various start-up procedures of the statute had to be known to the legislature and cannot result in "manifest injustice" in and of itself. Although the court indicated that time in and of itself could not be within the meaning of the term as intended by the legislature (Tr 39-1, Da 41a) it did, however, ignore that conclusion and applied precisely that standard.

(3) The court's conclusion that housing will result sooner (we assume that had to be its ultimate conclusion) merely because its trial-type hearing will terminate sooner is entirely speculative. We would expect that in the Bernards Township situation that its Mt. Laurel ordinance will be satisfactory (It apparently is now) and that no further proceedings will be necessary. Alternatively, the court's proceedings and decisions (if based on the report of the court appointed expert and the "consensus methodology") will not necessarily be satisfactory to all interested parties and will not result in immediate termination of the proceedings.

(4) Finally, and most importantly, there is no reason to conclude, in this matter, that the court's decision will result in any increase in the speed of development of lower income housing. It should be emphasized that Bernards Township already has in place an ordinance requiring mandatory set-asides and providing certain bonuses or give-backs, all for the purpose of better ensuring compliance with the Mt. Laurel obligation.

Ordinance 704 was adopted in November 1984. Since that time a number of developers have shown an interest in developing lower income housing as part of their development where permitted or required. One hundred units have received final approval. (Da 139a) Another ninety units have received conceptual approval. (Da 139a) Other developments appear to be in the process of completing development applications. The only area in the Township (where permitted) which has not been subject to development application for low and moderate income housing is that area controlled by plaintiff.

Clearly plaintiff could have submitted development applications many months ago. (We again note that plaintiff has represented to the court that it has no objection to Ordinance 704.) Just as clearly, plaintiff could submit such applications now, and transfer of this case to the council would not change or impede that. It is assumed that they will do so when it is in their own best interest, not Bernards' best interest and not the best interest of lower income families. The decision by the body having jurisdiction (court or council), however, will not dictate the development timetable or speed the development. Development is proceeding and will continue to proceed. The trial court did not seem to consider this reality. If the matter proceeds before the Council, development will proceed in accordance with the applicable ordinance. If the matter proceeds before the court, there is no reason to believe that development will proceed any quicker.

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CONCLUSION

Based upon the foregoing reasons, Defendants' Motion for Leave to Appeal should be granted and the matter should be transferred to the Council on Affordable Housing.

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