Municipality fights COAH Transfer
(~~Mts~~ South Plainfield)

9/28/85

Cover letter to Neisser re contents

enclosed: Alan Mallach Affidavit
Lawrence J. Massaro Affidavit
Eric Neisser Affidavit
UL memorandum in opposition to transfer to COAH

Pgs. 209

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School of Law-Newark • Constitutional Litigation Clinic
S.I. Newhouse Center For Law and Justice
15 Washington Street • Newark • New Jersey 07102-3192 • 201/648-5687

August 28, 1985

John M. Mayson, Clerk
Superior Court
Hughes Justice Complex
CN 971
Trenton, N.J. 08625

Re: Urban League v. Carteret, et al. (South Plainfield)
No. C 4122-73

Dear Sir:

Enclosed please find for filing the original Affidavits of Alan Mallach, Lawrence J. Massaro and Eric Neisser and Urban League Plaintiffs' Memorandum of Law in Opposition to South Plainfield's Motion to Transfer this Case to the Council for Affordable Housing, now returnable on Friday, September 6, 1985 before Judge Eugene Serpentelli at the Ocean County Court House in Toms River. I have filed two copies directly with Judge Serpentelli's chambers.

Please file stamp and return the copy enclosed herewith to me in the enclosed stamped, return envelope.

Sincerely yours,

Eric Neisser

Eric Neisser
Co-Counsel for Urban League
Plaintiffs

encls

cc/Judge Serpentelli
South Plainfield Service List

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - MIDDLESEX/
OCEAN COUNTIES (Mount Laurel)
Docket No. C-4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

v.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,

Defendants

AFFIDAVIT OF ALAN MALLACH
RE SOUTH PLAINFIELD

STATE OF NEW JERSEY :
: ss
COUNTY OF MONMOUTH :

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

1. I am a housing and development consultant, and am a member of the American Institute of Certified Planners (AICP). I have been actively involved in a wide variety of issues relating to the implementation of the Mount Laurel doctrine, and have acted as a consultant on planning, housing and zoning issues to the Urban League plaintiffs in the above case since late 1975.

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

ongoing Mount Laurel litigation may move to have the case transferred to the jurisdiction of the Council on Affordable Housing (the "Council") established by the Act.

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

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

5. While the precise effect of many of the provisions of Sec. 7 is uncertain, the numerical effect of one provision, however, can be directly measured. The provision reads as follows:

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

this should be assumed to incl. financial stand.- i.e. 30% of income

Since the terms "low and moderate income housing" are defined in Sec. 4(c) and 4(d) of the Act, it is possible to make a reasonably accurate numerical analysis of the number of units, statewide and for individual municipalities, that would represent fair share "credits" on the basis of a literal application of the above language; i.e., units that are at present either occupied by or reserved for occpancy by lower income households meeting the standards of the Act.

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

not if financ. need is counted.

7. The reason for this patently absurd outcome is that the language of the Act appears to permit credit to be taken for households in place, while the need assessment combines two elements (a) households in substandard housing, which is a very small percentage of total lower income households in place; and

(b) incremental lower income household growth, which is also a small percentage of the existing base of lower income households. Thus, even when those households in place spending excessive amounts for shelter, or living in substandard housing, are excluded, the remaining number is still greater than the sum of present and prospective need.

8. The existence of lower income households in place, living in sound and affordable housing, has little or no bearing on the meeting of lower income housing needs. In the borough of South Plainfield, for example, roughly 62% of the units meeting the standards of Sec. 7(c)(1) are occupied by moderate income homeowners/*. These are households who bought their units many years ago, at prices far below current market prices, and have either paid off their mortgages, or are making payments on mortgages at far below current mortgage interest rates. If and when these units come on the market in the future, they will not be affordable to lower income households under any even remotely plausible circumstances.

9. This single provision, therefore, if read literally, thoroughly distorts the determination of municipal fair share in a manner that, in my opinion, contravenes the clear intent of the Supreme Court in the Mount Laurel II decision, which held, regarding the municipal fair share obligation that "the housing

*/Moderate income homeowners make up 47% of the total lower income population in place in this municipality. This is a further indication of the disparity between a community such as South Plainfield and the typical lower income distribution, since statewide only 16% of all lower income households are moderate income homeowners.

opportunity provided must, in fact, be the substantial equivalent of the fair share' [92 NJ at 216]. With rare exceptions, the units for which this provision awards credit do not represent a lower income "housing opportunity" by any rational definition.

10. Other provisions governing the determination of fair share, although less amenable on their face to arithmetical measurement, are equally prejudicial in their language, and reflect the potentially harmful effects that would arise if the municipal fair share allocation were to be recalculated as a result of transfer to the council:

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

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

c. The determination of prospective need is to be based on "development and growth which is reasonably likely to occur...as a result of actual determination of public and private entities' [Sec.4(j)]. In determining prospective need, furthermore, the Council is instructed to give consid-

eration to approvals of development application[s] and real property transfers. These factors, which objectively have little or nothing to do with the actual lower income housing need, are likely to be used only to reduce the need figure that is established for purposes of municipal determination of fair share under Sec. 7(c).

Finally, under the provisions of Sec. 14(a) of the act, the Council must, prior to establishing the regional need that is to be the basis on which each municipality determines its fair share obligation, adjust the need figures on the basis of the above criteria and guidelines.

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

12. The second readily predictable effect of a transfer under the provisions of Sec. 16 of the Act is delay. Under the provisions of the Act, the municipality whose case has been transferred has five months from the date of promulgation of criteria and guidelines by the Council to file a housing element and fair share plan; the Council, in turn has seven months from "confirm-

ation of the last member initially appointed to the Council or January 1, 1986, whichever is earlier" [Sec.7] to adopt those criteria and guidelines. Thus, assuming the later date, a municipality need not file its fair share plan with the Council until as late as January 1, 1987.

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

14. The effects of delay on a development proposal are twofold. First, there are a variety of direct costs associated with delay, most substantially the cost of holding land, which includes both the costs of interest and property tax payments. In many cases, furthermore, a developer facing a 2 to 3 year delay must then confront a choice between making a massive up-front cash outlay, which may be realistically impossible to him, or losing

the land and the potential development in its entirety. The reason for this is that, in order to be able to hold land for such an extended period, it may be necessary to purchase it outright. Without massive cash resources, the developer may simply lose the land on which he is hoping to build. While this is a serious problem for individual developers, the second impact of delay is even more serious. This is, in essence, loss of the crucially important market opportunity that exists at present.

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

16. It is unlikely that these exceptional market conditions will continue indefinitely. The American economy, and the housing market within it, are notoriously cyclical. There is close to a consensus of economists that the economic growth of the 1983-1985 period cannot be indefinitely sustained, and that interest rates

are likely to begin to rise again in the future, for a variety of reasons, including massive Federal deficits now being incurred. The implications of these trends are that two to three years from now the market environment for development of housing in New Jersey is likely to be substantially changed, and that to the extent that it is changed, the change will be for the worse. Economic growth may be substantially less, interest rates may be substantially higher, and the pent-up demand that now exists may have been substantially eroded by the efforts of other builders (many of whom are not subject to setasides) not stymied by transfer motions.

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

18. As a result of these factors, if projects now being proposed are forced to suffer a two to three year delay, it is likely that (a) many projects will not be able to go forward at all at the end of that period; and (b) of those projects which could go forward in some fashion, the economic circumstances will have become more adverse, therefore threatening the provision of the amount of lower income housing now proposed. The overall

effect of delays resulting from the granting of transfer motions on the provision of lower income housing in those communities is likely to be overwhelming; indeed, it could come close to completely nullifying the builder's remedy provisions set forth in the Mount Laurel II decision.

19. These last points are of significance to both developers and public interest or low income plaintiffs. A further effect of delay of particular concern to the latter group is the risk that sites available and vacant today, which would be suitable and desirable for lower income housing development (either through setasides or otherwise), are likely, absent the imposition of binding legal restraints, to be utilized for other purposes during the period of delay. The availability of desirable sites for lower income housing, which is already limited in many communities involved in Mount Laurel litigation, will be further constrained, or even eliminated, after two, three, or more years of delay.

20. In conclusion, it is my opinion that the effects of the fair share language of the Act, either separately or in conjunction with the extensive delays necessarily resulting from the procedures following a transfer of a case to the jurisdiction of the Council, will result in a drastic reduction in the number of lower income units that will be produced, both in individual municipalities and statewide, as well as substantial and unjustified delay in the provision of even that reduced number. Whatever the effects of granting a transfer motion may be on a particular developer, I believe that to grant such motions would have a disastrous effect on the interests of New Jersey's lower income

population in need of housing, the population whose needs were so clearly addressed in the Mount Laurel decision. Whatever the meaning of "manifest injustice" may be in the strict legal sense, I believe that the above effects clearly represent a manifest injustice to this population by any reasonable definition of the term.

Alan Mallach, AICP

Sworn to and subscribed before me this 27th day of August, 1985

Barbara J. Williams
Attorney at Law, State of New Jersey

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

PREPARED BY

Alan Mallach, AICP
Roosevelt, New Jersey

AUGUST 1985

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

Prepared by Alan Mallach, AICP

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

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

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

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

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

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

c(1) if it is:

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

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

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

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

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

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

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

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

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

we have made the following assumptions:

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

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

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

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

1. STATEWIDE ANALYSIS

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

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

figure for present housing need in all cases/5.

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

1. DETERMINATION OF AFFORDABLE UNITS

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

2. DETERMINATION OF POTENTIAL NUMBER OF FAIR SHARE CREDITS

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

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

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

1. CUPR NEED DETERMINATION/GROSS HOUSING NEED

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

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

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

2. WARREN NEED DETERMINATION

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

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

The excess of potential fair share credits over need to be

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

2. REGIONAL ANALYSIS

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

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

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

Should that or a similar interpretation prevail, the effect on the region in which Middlesex County municipalities are likely to be included would be dramatic. To assess the potential effect, we have calculated the potential "credit" and its relationship to housing need for the for a four-county region based on the New Brunswick-Perth Amboy PMSA, including Hunterdon, Middelesex, Somerset, and Warren Counties/6. Table 3, which presents this

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6/Sec. 4(b) of the act provides that the regions to be used by the council must (a) contain no less than two and no more than four counties; and (b) constitute to the greatest extent practicable the PMSAs defined by the Census Bureau. In this case it is likely that the three-county PMSA will be the starting point for regional definition; as was done by the Center for Urban Policy Research in their regional analysis, it appears logical to add Warren County to the PMSA for this purpose. why

analysis, is given below. In the four-county region created as described above, as the table indicates, the potential credits also exceed the regional need, substantially when compared with the CUPR analysis, and modestly when compared with the regional need defined by the consensus methodology. This suggests the possibility of an utterly absurd outcome; namely, that on the basis of a straightforward interpretation of the act, the council could "logically" determine that there was no unmet housing need to be allocated within the hypothetical region delinated here/7.

TABLE 3: DETERMINATION OF POTENTIAL FAIR SHARE CREDITS UNDER SEC. 7 c(1) FOR REGION CONTAINING HUNTERDON, MIDDLESEX, SOMERSET, AND WARREN COUNTIES AND COMPARISON WITH REGIONAL HOUSING NEED

1. DETERMINATION OF POTENTIAL CREDITS AVAILABLE

	$0 - $11875	$11876 - $19000	TOTAL
Number of affordable units (housing cost < 30% of gross income):			
OWNER	8275	17660	
RENTER	7963	14890	
TOTAL	16238	32550	48788
[less 50% of deficient housing units in region]			[5728]
Potential fair share credits available			43060

2. COMPARISON OF POTENTIAL CREDITS WITH REGIONAL NEED

	CUPR/GROSS HOUSING NEED	CUPR/TO BE ALLOCATED	WARREN HOUSING NEED (ADJUSTED)
Present need	8520	8091	8520
Prospective need	22002	20283	34213
TOTAL REGIONAL NEED	30522	28374	42733
less credits	[43060]	[43060]	[43060]
NET REGIONAL NEED TO BE ALLOCATED	[-12538]	[-14686]	[-327]

7/The analysis indicates that the median household income for the region in 1980 was approximately $23,750, so that we have used the ranges of $0-$11875 as equivalent to low income, and $11876-$19000 as equivalent to moderate income, substantially higher figures than used in the statewide analysis. We have interpolated evenly within the ranges, thus overstating the share of "credits" associated with low income units, since the population in the range between $10000 and $15000 is not actually evenly distributed.

3. MUNICIPAL ANALYSIS

Using the same methodology as shown above with regard to the State of New Jersey as a whole, or with regard to its constituent regions, we have computed the fair share credits potentially available to South Plainfield in Middlesex County. The analysis is shown in Table 4 on the following

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TABLE 4: DETERMINATION OF POTENTIAL FAIR SHARE CREDITS FOR BOROUGH OF SOUTH PLAINFIELD

	$0 - $11875/*		$11876 - $19000/*		TOTAL
	RENTER	OWNER	RENTER	OWNER	
1. households by % of household income for housing costs:					
< 25%	7	115	96	378	
25% - 34%	19	101	50	250	
35% +	100	354	34	146	
n.c.	8	14	5	0	
2. Collapsed value ranges (without n.c. adjustment):					
< 30%	16	165	121	503	
30% +	110	405	59	271	
3. Number of affordable units after n.c. adjustment:					
< 30%	17	169	124	503	813
[less 50% of indigenous housing need]/**					[64]
Potential fair share credits available					749

*Interpolation within the $10000-$14999 income range was adjusted for skewed distribution of population within range.
**Indigenous need determined by multiplying total deficient units by .7 (CUPR percentage of deficient units for Region III occupied by lower income households, p. 142).

Under the consensus methodology, the fair share allocation of South Plainfield is approximately 1,700, so that this "credit" reduces the total by somewhat less than 45%, a substantial amount. As part of the earlier process leading to what appeared to be a resolution of South Plainfield's Mount Laurel obligations, in recognition of the limited amount of vacant land suitable for multifamily development in the community, the parties agreed to a municipal goal of 900 low and moderate income units. Clearly, if the above "credit" were to be subtracted from that figure, the

result might well be to enable the municipality to argue that they had only a nominal fair share obligation.

It is extremely doubtful that the provisions of Sec. 7 c(1), as they have been described in this analysis can be reconciled in any rational fashion with the letter or intent of the Mount Laurel decision. In this respect, a noteworthy feature of these "credits" is that the substantial majority of units for which South Plainfield would get credit under this approach are of a particular nature: owner-occupied units, occupied by a moderate income household. Such units represent nearly 2/3 of the units for which South Plainfield may receive credits.

These units appear in the Census data as affordable, it can reasonably be assumed, because they were bought many years ago, at far lower prices, and with mortgages at interest rates far lower than those prevaiiling today. In many cases, the affordability of the unit reflects the fact that the mortgage has been paid off, and the unit owned free and clear. Those units, when they may next come onto the market, are unlikely in the extreme to be affordable by either low or moderate income households. Thus, bona fide housing needs may end up being disregarded or excluded from consideration, on the basis of a historical artifact bearing no relationship to the meeting of today's needs.

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

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
CIVIL ACTION
No. C-4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,
Plaintiffs,

v.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,
Defendants.

ELDERLODGE, INCORPORATED, A New Jersey Corporation,
Plaintiff,

v.

SOUTH PLAINFIELD BOARD OF ADJUSTMENT BY ITS MAJORITY MEMBERS (Ronald Hepburn, Chairman; Carl Abbruzzese; Robert Horne; Carl LaFerrara; Cynthia GaNun, First Alternate); BOROUGH OF SOUTH PLAINFIELD BY ITS MAYOR AND COUNCIL: JOHN GRAF BUILDING INSPECTOR OF THE BOROUGH OF SOUTH PLAINFIELD; AND PLANNING BOARD OF THE BOROUGH OF SOUTH PLAINFIELD,
Defendants.

LAW DIVISION
MIDDLESEX COUNTY

No. 56349-81

CERTIFICATION OF LAWRENCE J. MASSARO IN OPPOSITION TO MOTION TO TRANSFER CAUSE TO AFFORDABLE HOUSING COUNCIL

TO: The Honorable Eugene D. Serpentelli
Assignment Judge, Superior Court
Ocean County Court House
Toms River, New Jersey 08754

John M. Mayson
Clerk, Superior Court
Hughes Justice Complex
Trenton, New Jersey 08625

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Frank A. Santoro, Esq.
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South Plainfield, New Jersey 07080
201-561-6868
Attorney for BOROUGH OF SOUTH PLAINFIELD

TO: ERIC NEISSER, ESQ.
BARBARA J. WILLIAMS, ESQ.
JOHN M. PAYNE, ESQ.
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
ATTORNEYS FOR URBAN LEAGUE PLAINTIFFS

Lawrence J. Massaro hereby certifies as follows:

1. I am the equitable owner of the following described real estate:

All being referred to in accordance with the Tax Map of the Borough of South Plainfield being Block 427, Lot 1.01, and Block 448, Lot 4.01 consisting of a total of approximately 24 acres.

2. I acquired this property from the Borough of South Plainfield at public bid held on August 13, 1984, which was duly published by copy of Notice of Sale of Land - LMC 11/84, a copy of which is attached hereto as Exhibit "A".

3. On August 23, 1985, in accordance with a time of the essence demand for closing from the Borough of South Plainfield, I delivered the total purchase price of $1,270,318.50 for the property to the Borough of South Plainfield, thereby completing my obligation concerning the purchase of the property from the Borough.

4. The Borough, however, was unable to convey title because of the restraints in effect by virtue of the Orders of the Court dated August 9, 1985 and July 19, 1985, as well as the inability of the Borough to convey title by a bargain and sale deed as required by the terms of the public bid.

5. On May 15, 1985, I entered into an Agreement of Sale with a residential developer whereby the residential developer is to develop a portion of the property in accordance with the Ordinances #1009 and #1010 recently adopted under protest by the Borough of South Plainfield and which are in accordance with the Court's Judgment as to South Plainfield, filed May 22, 1984, as well as the Court's Orders of December 13, 1984; July 3, 1985; July 19, 1985 and August 9, 1985 whereby, South Plainfield was found,

inter alia, to have a fair share obligation for lower income housing; to not have its then existing zoning ordinances structured so as to create a realistic opportunity that its fair share obligation for lower income housing will be met, and that in order to create such realistic opportunity, it had to adopt Ordinances #1009 and #1010.

6. Under the May 15, 1985 Agreement, I was to develop a portion of the property which was not to be rezoned for multi-family residential and will be pursuing approvals jointly with the developer of the multi-family portion.

7. The developer with whom I have contracted for the multi-family portion of the tract has established itself as the "front runner" in the implementation of lower income housing, presently having seven multi-family developments under construction which include lower income housing and actually having lower income families owning and occupying their lower income homes in two of these projects with occupancy to take place in the very near future in four more of developments.

8. The obligation of the developer to proceed with the construction of the multi-family portion, as expressed in the Agreement of Sale, is contingent upon the Borough rezoning the property in accordance with Ordinances #1009 and #1010; the Borough vacating some "paper" streets which are dedicated, but neither accepted nor improved; and the proposed development receiving all the necessary approvals and permits.

9. The developer and I stand ready, willing and able to proceed with seeking necessary approvals and permits for development by this property which is to include a significant number of lower income homes to be credited against the fair share obligation of the Borough of South Plainfield as adjucated on May 22, 1984.

10. The Borough has filed a motion seeking to have this cause transferred to the Affordable Housing Council which was created by the recently enacted New Jersey legislation.

11. Such legislation refers specifically to the consideration of "whether or not the transfer would result in a manifest injustice to any party to the litigation."

12. Given the length of time this cause has already been pending before the Court; the fact that judgment was rendered on May 22, 1984; the reality that South Plainfield's fair share obligation has been adjudicated and their compliance requirements determined; and the substantial delay by the Borough in adopting the compliance ordinance, there would be manifest injustice to not only the plaintiffs by transferring this cause to the Affordable Housing Council, but also grossly manifest injustice to the unnamed lower income families for whom the plaintiffs are seeking to create a realistic opportunity that homes will be built.

13. The members of the Affordable Housing Council have not yet been named and have not yet been confirmed; they have not adopted their rules and regulations, nor criteria and guidelines and according to the maximum timetables provided by the legislation, these procedures could take at least another thirteen (13) months, not accounting for the fact that there

is no time limit upon confirmation of nominated members and ignoring the possibility of an appeal from the recommendations of the Affordable Housing Council.

14. All matters in this action appear to have been finally resolved; the Borough has adopted its compliance package as ordered by the Court and in accordance with the fair share obligation determined for the Borough on May 22, 1984; and the developer and I are presently ready, willing and able to commence with the procedures necessary to build and deliver the lower income homes to be included within the development upon this property.

15. To transfer this cause to the Affordable Housing Council achieves no purpose but to further frustrate and delay efforts to build and deliver these lower income homes which only results in manifest injustice to the unnamed lower income families whom plaintiffs represent.

16. I believe that the present economic climate is ideally suited for the economic viability of the proposed multi-family development and that there presently exists an economic incentive for the developer to include the lower income homes in the project.

17. The minimum of a thirteen (13) month delay caused by transferring this cause to the Affordable Housing Council would expose the development to substantial risks due to possible changes in the economic climate, employment situation and dempographics and that adverse changes could jeopardize the fiscal viability of the project thus completely defeating the objective of actually having lower income homes built in South Plainfield.

18. I do not want this cause transferred, but would ask the Court to enforce its judgment of May 22, 1984 and its orders of December 13, 1984; July 3, 1985, July 19, 1985 and August 9, 1985 in so far as such judgments and orders obligate South Plainfield to create a realistic opportunity for its adjudicated fair share obligation of lower income homes to be built.

19. I hereby certify that the foregoing are true. I am aware that if any of the foregoing stated by me are false, I am subject to punishment.

Lawrence J. Massaro

Dated: August 27, 1985

LMC 11184

TO WHOM IT MAY CONCERN:

At a regular meeting of the Mayor and Common Council of the Borough of South Plainfield, County of Middlesex, State of New Jersey held on June 11, 1984, I was directed to advertise the fact that the Mayor and Council will meet in the Municipal Building, 2480 Plainfield Avenue, South Plainfield, New Jersey, on August 13, 1984 at 8:00 p.m., to expose and sell at a public sale to the highest bidder, according to terms of sale on file with the Borough Clerk, the property described below.

Take further notice that the Mayor and Council have, by resolution and pursuant to law, fixed the minimum price at which said property will be sold together with all other details pertinent, said minimum price being as shown below, plus costs of preparing deeds and advertising this sale.

Take further notice that at set sale or any date or place to which it may be adjourned, the Mayor and Council reserve the right in its discretion to reject any or all bids and to sell said property to such bidder as it may select, due regard being given to terms and manner of payment in case one or more minimum bids shall be received.

Upon acceptance of the minimum bid or bid above mimimum, by the Council and the payment thereof by the purchaser according to the manner of purchase in accordance with terms of sale on file, the Borough will deliver a Bargain and Sale Deed for said premises.

s/William T. DeSabato, Borough Clerk

Bids to be advertised in The Reporter on July 26, 1984 and August 2, 1984 to be sold on August 13, 1984 at the Municipal Building, 2480 Plainfield Avenue, South Plainfield, New Jersey at 8:00 p.m.

Block	Lots	Name	Street	Amt. of Bid
427	p/o 1.01	Lawrence Massaro	Clinton & Pomponio	$1,270,318.50
448	p/o 4.01			

SCHEDULE "A"
LMC 11184

METES AND BOUNDS DESCRIPTION
PORTION OF LOT 1.01 IN BLOCK 427
AN
PORTION OF LOT 4.01 IN BLOCK 448

BEGINNING at a point on the easterly sideline of SOUTH CLINTON AVENUE (80' R.O.W.) Said point being N. 0__ - 17'E., distant 530.00 feet from the northerly sideline of POMPONIO AVEnUE (60' R.O.W.)as shown on the Tax Assessment Maps of the Borough of South Plainfield and running thence:

(1) N. 0__ - 17' E. along the easterly sideline of SOUTH CLINTON AVENUE, a distance of 383.43 feet

(2) S. 76__ - 52' - 30" E. along the southerly boundaries of Lot 11.02 in Block 449, and Lot 30.01 in Block 308, a distance of 1194.92 feet, more or less, to a point; thence

(3) S. 85__ - 15' E. along the southerly boundaries of Lot 53 in Block 308, Lot 34 in Block 427, and along the rear line of Lots fronting on CHRISTOPHER AVENUE, a distance of 953.96 feet, more or less, to a point on the westerly sideline of the proposed extension of RUSH STREET (50') R.O.W.); thence the following three courses along the last mentioned westerly sideline:

(4) Southerly along a curve to the left, having a radius of 325.00 feet, an arc length distance of 63.41 feet, more or less, to a point of tangency; thence

(5) S. 14__ - 59' - 30" E. a distance of 100.00 feet, more or less, to a point of curvature; thence

(6) Southerly along a curve to the right, having a radius of 275.00 feet, an arc lengthdistance of 94.75 feet, more or less, to a point of tangency on the westerly sideline of SECOND PLACE (50' R.OW.); thence

(7) S. 4__ - 45' W. along the westerly sideline of SECOND PLACE, a distance of 1.61 feet, more or less, to a point; thence

(8) N. 85__ - 15' W. a distance of 100.00 feet to a point; thence

(9) S. 4__ - 45' W. a distance of 350.00 feet to a point on the northerly sideline of POMPONIO AVENUE (50' R.O.W.); thence

(10) N. 85__ - 15' W. along the northerly sideline of POMPONIO AVENUE, a distance of 410.32 feet, more or less, to a point; thence

(11) N. 89__ - 43' W. still along the northerly sideline of POMPONIO AVENUE, a distance of 275.14 feet, more or less, to a point; thence

(12) N. 1__ - 15' E. a distance of 10.00 feet to a point on the northerly sideline of POMPONIO AVENUE (60' R.O.W.); thence

(13) N. 89__ - 43' W. along the northerly sideline of POMPONIO AVENUE, A distance of 535.88 feet, more or less, to a point; thence

(14) N. 0__ - 17' E. along the easterly boundary of Lot 1 in Block 448, a distance of 530.00 feet to a point; thence

(15) N. 89__ - 43' W. along the northerly boundary of Lot 1 in block 448, a disance of 815.00 feet to a point on the easterly sideline of SOUTH CLINTON AVENUE, the point and place of BEGINNING.

Being further described as portions of Lot 1.01 in Block 427 and Lot 4.01 in Block 448. Containing 23.33 acres, more or less, subject to disclosures of an accurate survey. Subject to all easements of record and not of record, including drainage easements as recorded in Book 3208, Page 388, and Book 3281, Page 381.

Sale of the property described above will be made subject to the following conditions.

1. The conveyance by the Borough of South Plainfield shall be by bargain and sale deed, without covenants, and without representations as to the marketability of title. In the event the purchaser shall determine that title to the property in question shall not be good and marketable, any questions as to marketability of title shall be submitted to the Borough Clerks Office within 45 days of the date of sale. In the event said questions have not been raised within said 45 day period, then and in that event all questions relating to the marketability of title shall be deemed waived and this matter shall proceed to closing of title within 90 days of the date of sale.
2. Easements, both of record and not of record.
3. Restrictions of record.
4. Zoning ordinance of the Borough of South Plainfield as presently constituted without representations as to the use to which said property can be put.
5. In the event that the purchaser is unable to close title within ninety (90) days of the date of sale, they shall forward to the Borough of South Plainfield a check representing the balance of the purchase price to be held by the Borough until closing of title.
6. In the event that the purchaser fails or refuses to close title and/or pay the consideration therefore within the time period stated herein, then in that event, the Borough of South Plainfield may, at its own option, exercise any or all of the following rights:
   (a) Declare the transaction null and void and the purchasers deposit shall be retained by the borough as liquidated damages.
   (b) Any other rights as provided by law which may be available to the Borough.
7. The cost of advertising, preparation and filing of the deed shall be paid by the purchaser.
8. All costs of sub-division, including but not limited to on site and off site improvements as required by appropriate Borough Boards, Agencies and Officers, shall be paid by the purchaser.

2 Times: 7-26-84 & 8-2-84
Fee: $166.40

JUL 24 REC'D

F PUBLICATION

ss.

; V. ECKERT

r oath, that he/she is the Publisher of THE
Borough of South Plainfield, Middlesex County,
which the annexed is a true copy, was published
aks.....
July 26, 1984 & August 2, 1984
..... commencing on the
day of July
25th day of
A.D., 1984

Notary Public of New Jersey

NOTARY PUBLIC OF NEW JERSEY
Commission Expires May 23, 1985

ERIC NEISSER, ESQ.
BARBARA J. WILLIAMS, ESQ.
JOHN M. PAYNE, ESQ.
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
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201-648-5687
ATTORNEYS FOR URBAN LEAGUE PLAINTIFFS
On Behalf of the ACLU of NJ

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs,	Civil Action No. C 4122-73 (South Plainfield)
vs.	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	AFFIDAVIT IN OPPOSITION TO SOUTH PLAINFIELD'S MOTION TO TRANSFER CASE TO COUNCIL ON AFFORDABLE HOUSING

STATE OF NEW JERSEY)
: ss.:
COUNTY OF ESSEX)

ERIC NEISSER, being duly sworn, deposes and says:

1. I am co-counsel for the Urban League plaintiffs and submit this affidavit in opposition to South Plainfield's motion under Section 16(a) of the Fair Housing Act of 1985 to transfer this case to the Council on Affordable Housing.

2. This affidavit supplements the existing record with regard to South Plainfield by: (a) documenting the actions of the South Plainfield Borough Council on July 29, 1985; (b) rebutting the inaccurate statement in Frank Santoro's

Certification of July 18, 1985 that under the Judgment As To South Plainfield of May 22, 1984: "The Borough of South Plainfield shall be required to allow for the construction of up to 4500 new residential housing units"; and (c) detailing certain other aspects of the discovery and negotiations that led to the Stipulation of May 10, 1984 upon which summary judgment was entered as well as subsequent negotiations concerning the implementing ordinances.

July 29 Council Meeting

3. On July 29, 1985, the South Plainfield Borough Mayor and Council held a public meeting to consider adoption of Ordinances No. 1009 and 1010, the zoning and affordable housing ordinances necessary to bring the Borough into compliance with the Judgment As to South Plainfield. Prior to the meeting, my co-counsel Barbara Williams informed Mr. Santoro, the Borough Attorney, that the Urban League plaintiffs considered the ordinances satisfactory to achieve compliance except for the failure to specify the block and lot numbers of the affected land in the zoning ordinance and some minor typographical errors. At the meeting, Mr. Santoro recommended to the Council that it table the ordinances pending this Court's consideration of this transfer motion. After extended discussion, the Council voted 4-2 to table both ordinances. A copy of the official transcript of the July 29, 1985 meeting of the Mayor and Council of South Plainfield, provided to plaintiffs by Mr. Santoro, is attached hereto and made a part hereof as Exhibit A.

Number of Units Required by Judgment

4. I was the attorney primarily responsible for the South Plainfield litigation from September 1983 to September 1984. For details see my Affidavit in Support of Motion to Hold South Plainfield in Contempt and for Temporary Restraints, sworn on June 21, 1985. As set forth in that affidavit, I negotiated the Stipulation between the Borough and the plaintiffs executed on May 10, 1984, which is annexed as Exhibit F to that affidavit.

5. Although the Stipulation agrees to reduce South Plainfield's fair share obligation to 900 units in light of the limited remaining vacant land, the Stipulation and, of course, the ensuing Judgment, do not require rezoning to produce 900 units. Rather, the eight sites (not seven as stated in Mr. Santoro's Certification) specifically designated for rezoning would produce only between 553 and 603 lower income units at best. These figures are derived by multiplying the stated acreage times the specified gross density and then multiplying the total resulting units by 20 percent. Moreover, because not all of the rezoning will require a four-to-one construction ratio, the new rezoning will not produce even five times the 553-603 number. The Morris Avenue senior citizen project of 100-150 units is to consist exclusively of lower income units. Thus, only the 453 lower income units on the seven other sites will be accompanied by market production, resulting in a total possible production on those seven sites of 2267 units, 1814 market and 453 lower income units. Adding in the Morris Avenue site, the

total number of units that could realistically be produced by the Stipulation and Judgment as now formulated is 2367-2417 of which 1814 would be market units and 553-603 lower income units. The calculations leading to these totals, presented in the order in Paragraphs 12-19 of the Stipulation and Paragraphs 3(A)-(H) of the Judgment, are set forth in Exhibit B.

6. The reason that the Stipulation specified a fair share number greater than the number of units for which land would be rezoned is that plaintiffs wanted to insure that the Borough would be obligated to do everything possible to produce lower income units, in the event, considered by all to be unlikely, that substantial rehabilitation or rent subsidy money were to become available, redevelopment were to occur, or significant additional land were to become available as a result of fire or demolition. It is for this reason also that Paragraphs 21 and 22 were inserted in the Stipulation and Paragraphs 3(J) and 6 in the Judgment, requiring the Borough to permit higher density multi-family development with a set-aside on any site over three acres, precluding such higher densities without a set-aside, and obligating the Borough to adopt a resolution, as yet not adopted, committing the Borough to apply for all government funding that might become available for rehabilitation of existing deficient units or for subsidization of construction or rental of new units.

7. In a telephone conversation on July 15, 1985, among other matters, I explained to Mr. Santoro that the eight sites in

the Judgment would produce only approximately 500 or 550 lower income units and that, because 100-150 of these units would be in the senior citizens project, only some 400 units would be in higher density inclusionary projects which would produce some 2000 units. I informed Mr. Santoro that the parties were aware of this at the time the Stipulation was negotiated and I explained why the higher number of 900 was nevertheless chosen. I urged him to contact Patrick Diegnan, the former Borough Attorney, to confirm these facts if not satisfied by his own mathematical calculations. Attached hereto and made a part hereof as Exhibit C are my contemporaneous handwritten notes of that telephone conversation; see circled notation on page 2.

Other Aspects of Discovery and Negotiation

8. As noted in my Affidavit of June 21, 1985, Para. 4, the defendant's assertedly "complete" listing of vacant lots in the Borough did not include certain sites later identified by the plaintiffs as a result of careful review of the tax maps and assessment rolls. Most importantly, plaintiffs uncovered what were then the two largest sites -- the 84.8 acre Harris Steel site and the 27 acre Coppola farm. James Higgins, who was the associate of Robert Rosa, the Borough's planning consultant, and Mr. Diegnan explained to me that those two sites were not on their vacant land list because they were assessed as farms and thus did not show up on the computer program they used for identifying vacant land.

9. The fair share number of 900 in the Stipulation was itself a compromise. Plaintiffs had originally proposed 1000, see plaintiffs' draft of proposed stipulation attached hereto as Exhibit D, Para. 2, but ultimately acceded to defendants' proposal of 900. See defendant's draft of proposed stipulation attached hereto as Exhibit E, Para. 2. Transcript of July 29 meeting, Exhibit A, at 57 (Mayor English).

10. Other aspects of the Stipulation were also the product of negotiation and hence of compromise. Plaintiffs did not insist on rezoning of all vacant sites over three acres, which was one of our original demands. Rather, as set forth in my letter of April 3, 1984 to Mr. Diegnan, then counsel for the Borough, we agreed "to forego the firehouse site next to Shadyside, the westernmost tip of the municipally owned Pomponio site, and some other smaller sites, which we also consider appropriate for multi-family development." Neisser Affidavit of June 21, 1985, Exhibit B, at 3. We made these concessions because Mr. Diegnan insisted that they were politically sensitive sites and that it would be impossible to get Council agreement to the Stipulation if they were included. We also later gave up the Bayberry site of 6.9 acres, Exhibit D, Para. 18, and our demand that the municipal contribution include construction of roads for the Pomponio Avenue, Universal Avenue, and Frederick Avenue sites. Id., Paras. 14-16. We also modified the general provision in Paragraph 21 of the Stipulation to make high-density multi-family use with a set-aside a permitted, rather than

exclusive, use for other sites over three acres that were then or would in the future become available within residential zones. Transcript of July 29 Borough Council Meeting, Exhibit A, at 46.

11. In the proposed Judgment that I submitted with Plaintiffs' Motion for Summary Judgment, I asked that the Borough be given 90 days for rezoning. Exhibit F to Neisser Affidavit of June 21, 1985. However, in light of the objections of Mr. Diegnan and his request for additional time because of the limited number of Planning Board and Council meetings on the 1984 summer schedule, I agreed to his request to make the deadline 120 days. The Judgment also provided that the time would not start to run until five days after the Court-appointed expert reported to the Court. Neisser Affidavit of June 21, 1985, Exhibit H, Para. 11.

12. In late July 1984, Mr. Rosa, the Borough's planning consultant provided me with drafts of the proposed zoning and affordable housing ordinances. Although I was about to leave on vacation, I immediately contacted and extensively consulted with Alan Mallach, the plaintiffs' housing and development consultant. On the evening of July 26, 1984, I had a telephone conversation of approximately one hour with Mr. Rosa, in which I described to him in detail plaintiffs' concerns and objections and the reasons for each of them. New drafts were provided some four weeks later, on August 22nd. The remaining objections of plaintiffs were conveyed in my September 5, 1984 letter to Mr. Rosa, which was Exhibit G-2 to the Williams Affidavit of October 26, 1984,

submitted with plaintiffs' first motion for restraints concerning South Plainfield. On November 19, Mr. Rosa met with Mr. Mallach and reviewed plaintiffs' concerns. On January 23, 1985, Mr. Rosa sent the Council the ordinances with the Planning Board's recommendation for approval under protest.

13. Finally, in a letter of June 25, 1985 to Mr. Santoro, after this Court granted our motion of June 21 for temporary restraints, I requested appropriate documentation as to the ownership of the Morris Avenue site parcels, in light of our discovery that the Buccellato parcel was still privately owned. By letter dated July 26, Mr. Santoro provided a two-page inventory of Borough land sales that ended on April 22, 1985. He also explained that he had requested the chairmen of the Economic Development Committee and the Land Management Advisory Committee to provide information concerning the Buccellato site. On June 28, I wrote Mr. Santoro seeking documentation as to all Borough sales of land within lots specified in the Judgment, a written explanation and documentation of the moratorium on sale of Borough-owned land, which he told me had been imposed in April, 1985, and a written representation that no sales had occurred since April 22, 1985. On July 10, Barbara Williams, my co-counsel, after reviewing the sales inventory in detail, wrote Mr. Santoro requesting clarification of certain illegible or incomplete information. Copies of Mr. Santoro's June 26 letter and attached sales inventory, my June 28 letter, and Ms. Williams' July 10 letter are attached hereto and made a part

hereof as Exhibits F, G and H. In our telephone conversation on July 15, I again requested that Mr. Santoro provide us with the documentation as to Borough land sales, subdivisions of any lots within the Judgment, and information as to the Buccellato site. Exhibit C at 4, circled note. To date, plaintiffs have not received the requested documentation of the listed land sales, clarification of the illegible or incomplete data on the land sale inventory, verification of the reason for the inventory terminating in April 1985 and that no further sales have occurred, information concerning the Buccellato site, or information as to lots in the Judgment that have been subdivided. This information would bear directly upon the defendant's bad faith, which is relevant to this transfer motion, as well as on what modifications must be made in the Judgment for additional rezoning or municipal contributions to compensate for units lost through Borough land sales, lot subdivisions, and inconsistent development approvals. When I called Mr. Santoro's office on August 20 to inquire about this material, I was told that he was out of the office until September 3, 1985; thus, I will receive this material too late for inclusion with this affidavit.

ERIC NEISSER

SWORN TO and SUBSCRIBED
before me this 28th day
of August, 1985.

Barbara J. Williams
Attorney at Law, State of New Jersey

EXHIBIT A TO NEISSER AFFIDAVIT OF AUGUST 28, 1985

STATE OF NEW JERSEY - MIDDLESEX COUNTY
BOROUGH OF SOUTH PLAINFIELD
SPECIAL MEETING OF THE MAYOR AND COUNCIL

IN THE MATTER OF:

1. Adoption of Resolutions Numbers 1 through 10.

2. Ordinance 1009 - Final Reading and Public Hearing.

3. Ordinance 1010 - Final Reading and Public Hearing.

PUBLIC MEETING

TRANSCRIPT OF PROCEEDINGS

Monday, July 29, 1985
South Plainfield Municipal Building
South Plainfield, New Jersey
Commencing at 8:07 P.M.

THE HONORABLE MICHAEL P. ENGLISH, Presiding
Mayor, Borough of South Plainfield

MEMBERS OF THE COUNCIL PRESENT:

FERDINAND A. THIEL, Council President
BERNARD J. CONLON
ADDIE LEVINE
MICHAEL WOSKEY
DONALD ACRIN
DANIEL J. GALLAGHER

APPEARANCES:

FRANK A. SANTORO, Esq., Borough Attorney.
WILLIAM T. DeSABATO, Borough Clerk Administrator.

JANICE M. SMITH, C.S.R.
136 Teeple Place
South Plainfield, New Jersey

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(Mayor English called the meeting to order and asked for a roll call. The roll call was taken and all Councilpersons were present. The Pledge of Allegiance and Invocation then took place.)

THE MAYOR: Ladies and gentlemen of the audience, this is a special meeting. The original intent of the meeting was to only discuss Ordinance Number 1009 and 1010, but what we are doing is because there is added work and we are in summer session and, therefore, do not necessarily meet the third and fourth Mondays, we have taken the opportunity to add on some Resolutions that we feel vital and necessary to pass tonight. Those are Resolutions 1 through 10.

The public will be given an opportunity to speak on those items. The Ordinances you will be given, because it is a final reading, there will be a public hearing and you can speak on them at that specific time.

Is there anyone in the audience who would like to discuss the Resolutions 1 through 10?

(No response.)

THE MAYOR: Seeing no one, I will close that portion of the public hearing and I call for a motion on the Resolutions.

MR. THIEL: So moved.

MR. CONLON: Second.

THE MAYOR: So moved by Council President Thiel and seconded by Councilman Conlon.

Any discussion?

MS. LEVINE: I would like to ask one question.

THE MAYOR: Yes, Councilwoman Levine.

MS. LEVINE: On Resolution 2, I would just like to ask where we are getting the $40,000 that we're going to put into that program. Where is that coming out of in our budget?

MR. DE SABATO: It will be through the -- if you notice Resolution number 7 -- not 7 but Resolution number 8 makes a provision for matching funds. It's done through a vehicle known as an Emergency Appropriation where you pay it -- where you use the funds this year and raise it in full in the 1986 budget.

MS. LEVINE: So actually we're not taking -- let's see. The $40,000 then will actually come out of next year's budget?

MR. DE SABATO: It will pay for it in next year's budget. We will take it out of funds that are available this year.

MS. LEVINE: And the funds are in what

appropriation? A particular appropriation that is just --

MR. DE SABATO: No, not an appropriation. What we are doing is we are appropriating as an emergency. We are spending money that you have which you have to appropriate next year to replace it.

MS. LEVINE: Yes. But I am asking where are we taking it out of this year?

MR. DE SABATO: Surplus funds. Surplus funds are available.

MS. LEVINE: So it is coming out of the surplus?

MR. DE SABATO: Whatever.

THE MAYOR: Any other discussion? Seeing none, roll call, please.

(Roll call taken on Resolutions 1 through 10. All Councilpersons vote unanimously in favor.)

THE MAYOR: All right. Now, Ordinance 1009. Bill, if you will please read it. Not the Ordinance, but the Resolution.

MR. DE SABATO: The title. "An Ordinance amending Ordinance 1008 entitled Zoning Ordinance of the Borough of South Plainfield, 1978."

THE MAYOR: All right. This being a Final Reading, I will open this Ordinance up to the public.

Anyone who wishes to discuss it may do so at this time. Would you please do us a favor? Simply state your name and address so we can get it down on the records.

A VOICE: I am Lenore Slothower. My address is 10 Thorton Lane, Piscataway, New Jersey, however, at the present time I am here representing the Piscataway Planning Board as an Assistant Planner for the Township of Piscataway.

I beg your indulgence while I read a letter directed to you, Mayor, and the Township Council of the Borough of South Plainfield from the Piscataway Planning Board.

"Dear Town Council of the Borough of South Plainfield: Piscataway Township Planning Board has directed me to attend your meeting and voice their concerns to you regarding the rezoning of two tracts of land in your Borough to PRD 1 status. The two tracts are adjacent to New Brunswick Avenue and New Durham Avenue respectively.

"The Township of Piscataway has had a monumental task before it in managing the traffic travelling on New Brunswick Avenue, particularly where it intersects with Stelton Road. The same circulation problem has proven to be true where New

Durham Road intersects with Stelton Road.

"Because of the additional traffic which would be generated by the two planned residential tracts, the Borough of South Plainfield's properties, the Planning Board of Piscataway Township would respectfully like to make the following suggestions to your Honorable Body: 1, that you might reconsider allowing 12 units per acre and you might reduce that number to 10 units per acre; 2, that you might consider acting with the Township of Piscataway in a collaborative effort to effect road improvements to New Brunswick Avenue and its intersections with Stelton Road, Lakeview Avenue, and West 7th Street proportionately with development of tracts adjoining the roadway.

"This request is especially meaningful since both South Plainfield and Piscataway Master Plans show New Brunswick Avenue as a four lane highway.

"And, 3, that both the Borough of South Plainfield and the Township of Piscataway act in a dual effort to review site plans for development of the planned residential tracts which adjoin the boundary lines of both, especially with regard to drainage studies, traffic impact reports and proposed road improvements.

"Signed, Lenore Sothower, Assistant Planner to the Planner for the Piscataway Township Planning Board."

THE MAYOR: Thank you.

Is there anyone else who would like to speak and discuss this Ordinance from the public?

(No response.)

THE MAYOR: Seeing no one, I will close the public portion and I will call for the Resolution.

MR. DE SABATO: "Be it Resolved, the Mayor and Council of the Borough of South Plainfield, New Jersey, that Ordinance Number 1009 entitled An Ordinance Amending Ordinance 1008 entitled Zoning Ordinance of the Borough of South Plainfield, 1978, be finally adopted and advertised according to law."

THE MAYOR: Ladies and gentlemen of the Council, you have heard the Resolution.

MR. ACRIN: Excuse me, Mr. Mayor. Before we vote on this I would like to get a status report from the Borough Attorney in reference to the request to transfer this matter to the Housing Council.

THE MAYOR: I thought it would be more appropriate if that would be under discussion, but if you want to place it now, that's perfectly fine with me. Frank?

MR. SANTORO: Surely. You all got copies of the letter received by me today from Eric Neisser to Judge Serpentelli in which he asks that the motion which has been filed with the Court, the motion I might add that was filed on short notice and which the Court has chosen not to deem necessary, which means essentially we didn't get down before the Judge for the Judge to decide that motion before tonight.

As a matter of fact, as of four o'clock this afternoon I still had no date from the Judge as to when this motion is indeed going to be heard.

The letter of Eric Neisser suggests that the Township of Cranbury, Monroe Township and one other who have also filed similar motions for the transfer be consolidated with our request and be heard sometime in September.

With reference to the Ordinances that are before the Governing Body tonight for adoption, as of four o'clock this afternoon in a telephone conversation with Barbara Williams, believe it or not, they passed muster; that is to say, that other than some minor typographical corrections, the Ordinances are in proper form for adoption.

I think it also becomes important at this

1 point if I were just to -- all of you have copies,
2 the Court has copies. However, many of those in
3 the audience do not have copies of the moving papers
4 that were filed. I think it appropriate to point
5 out that the motion that was filed was filed pursuant
6 to the Fair Housing Act, the much sought for
7 Legislation that the Courts have been trying for
8 for a number of years. As a matter of fact, Mount
9 Laurel I and Mount Laurel II has language that
10 indicates that the courts were really reluctant
11 to do what they had to do or what they thought they
12 had to do because the Legislature failed to act.
13 Ladies and gentlemen of the Council, as you
14 know, the Legislature has indeed acted. It is a
15 combined Senate Bill 2046 and 2334 called the Lynch,
16 Littman, Stockman Bill which was adopted by both
17 houses of our Legislature, signed into law July
18 3rd, 1985.
19 The appropriate sections of this which I
20 would like to read into the record because I think
21 they are very pertinent and I will also give the
22 individuals in the audience an opportunity to hear
23 firsthand since this new law is not really yet
24 available in most of your usual sources.
25 The first section on which our motion for the

1 transfer is based is found in Section 16, and it
2 says, and I quote:"Any party to litigation of
3 exclusionary zoning cases may file a motion with
4 the Court to seek a transfer of the case to the
5 Council."
6 Now, the Council they are referring to is the
7 Council on Affordable Housing that is in the process
8 of being set up by the Fair Housing Act. The intent
9 of the Legislature and the intent of this Legislation
10 is to allow for mediation and arbitration between
11 municipalities, the Fair Housing Council, the Office
12 of Administrative Law, the Appellate Division, and
13 the like.
14 What we have done and we could not have done
15 it before the law became effective, is to ask Judge
16 Serpentelli to allow us to go to this Housing Council
17 and have the Housing Council decide whether or not
18 the present and prospective fair share allocations as
19 contained in the May 22, 1984 Judgment are proper under
20 all the circumstances. The Judge, as I said, has
21 not given us, although I fully expect that the
22 request of the Urban League to have the matter set
23 down in September for oral argument, will more than
24 likely be honored by the Court.
25 The criteria for and by which the Housing

Council decides if the present and prospective need in terms of least cost housing is met can be found on page 6 of the original Bill, and just a couple of the items which may generate some questions, and if I could, I will read those sections into the record. These are the criteria and guidelines the Housing Council will establish to review the housing element that must as a necessary procedure in the step towards substantive certification of the municipalities' housing plan be filed. The Housing element which is developed, and there is another section which has about 15 different items that a municipality is to use in developing such a housing element, is then reviewed by the Housing Council and the following are very particularly pertinent to the Borough of South Plainfield.

The guidelines and criteria will look at, for example, "the established pattern of development in the community would be drastically altered." Another section of equal importance is, "adequate land for recreational, conversation (sic)--" Conservation Depends on if you want to talk. "...conservation or agricultural and farmland preservation purposes would not be provided." and last and by certainly no means least, and I think it was just brought to our

1 attention with the first publis speaker, the
2 Assistant Township Planner of Piscataway, namely,
3 "adequate public facilities and infrastructure
4 capacities are not available, or would result in
5 costs prohibitive to the public if provided."
6 Now, going back to our request and keeping
7 that in mind that the Court Order of May 22nd, 1984
8 has as its basis, as its legal basis Mount Laurel II
9 and Mount Laurel II which resulted because the
10 Legislature failed to act, now provides the
11 mechanism for the Borough of South Plainfield as
12 well as the other municipalities to have decided for it
13 the least cost housing units which would be their
14 present and prospective fair share. I think that if
15 I were to read all of the memoranda, it would take
16 a considerable length of time. I am sure most of it
17 will be covered with questions both from the Members
18 of the Governing Body and members of the audience.
19 But, needless to say, the one statement or
20 comment of Judge Serpentelli in the hearing on
21 November 2nd, 1984 certainly predicted in the event
22 that such Legislation as the Fair Housing Act were
23 to be adopted what the most logical and natural
24 step for South Plainfield would be tonight.
25 The Court stated in that transcript on pages

10 and 11 -- that transcript, by the way, which has been available to anyone in the Borough Clerk's Office -- the Court stated that, "Rezoning under Mount Laurel II doesn't prejudice the town's right to appeal, seeing that the Legislature acts as it should act so the Courts don't have to."

In a nutshell, the current motion before Judge Serpentelli is exactly that. Your Honor, the Legislature has indeed acted. The original basis of the Judgment of May 22nd, which is in essence the basis of Mount Laurel II, is no longer valid. It is now time for South Plainfield to get its fair share housing decided by the Council on Affordable Housing.

So, my recommendation based upon the fact that the motion is still pending and that the Court has not deemed it convenient or whatever to hear that motion before tonight is that you do not adopt tonight but that a motion to table the adoption is in order pending the return date and determination by Judge Serpentelli of whether we can or whether we cannot go to the Housing Council.

With that, any questions?

MS. LEVINE: Can I make a comment?

THE MAYOR: First of all, Mr. Attorney, I want

to know what the consequences would be if we do not pass this within the time limitation given to us by Judge Serpentelli.

MR. SANTORO: Certainly.

THE MAYOR: What are all the possible consequences that would happen to this town?

MR. SANTORO: Well, for one thing, I would probably have to put two more phone lines in my office.

THE MAYOR: I think this is a little bit too serious to make fun of it. I would like to know what the possible consequences are.

MR. SANTORO: Yes. The possible consequences are eloquently set forth in the transcript that I referred to before. They include among other things the appointment of a Master, the Master who would then look at all of South Plainfield and essentially tell the Court where and how least cost housing should be put in. He could shut the town down or I should say in this in this instance continue to have the town shut down, i.e., no building permits, no site plan approvals, no subdivision approvals. He could under other language in Mount Laurel II which he also alluded to at the November 2nd hearing decide South Plainfield is not zoned. It is unregulated. You can follow the usual consequences.

If there is no zoning ordinance and someone has a single family lot, I suppose that if no appeal were possible that particular individual, that property owner could go and ask for a building permit to put a high rise, commercial office building on a 10,000 square foot lot.

Those are some of the more important and salient warnings, if you will, choices that Judge Serpentelli has in the event that the town never adopts.

THE MAYOR: How about a financial consequence?

MR. SANTORO: Mount Laurel II has never, not even in dicta allowed for any civil penalties such as what --

THE MAYOR: Has anyone to this date absolutely refused to comply?

MR. SANTORO: Yes. Piscataway.

THE MAYOR: Piscataway has not complied?

MR. SANTORO: Piscataway originally did not comply and then they came in with a Master and as I recall they went to trial and the results of that trial, which concluded last Friday, reduced the number of least cost housing units by approximately one thousand.

THE MAYOR: Okay. Who would the Master

probably be?

MR. SANTORO: Could be Carla Lerner.. Could be Alan Mallick.

THE MAYOR: Who has been the person that's been most of the time involved with the case in South Plainfield?

MR. SANTORO: Carla Lerner..

THE MAYOR: What was her original determination as to how many low and moderate income housing South Plainfield needed?

MR. SANTORO: Some thirteen hundred or so as I recall.

THE MAYOR: I think it was 1,840 to be exact. So, the Master, the Master Planner who might be appointed who would probably be appointed has already stated publicly because she has already looked at South Plainfield at one point, she said that we needed around 1,840 homes. What is the date that was given by Judge Serpentelli to act upon the Zoning Ordinance?

MR. SANTORO: July 30, 1985.

THE MAYOR: So if this Council does not, if this Council tables the motions that are before it, Judge Serpentelli may as soon as this Friday appoint a Master who could come in and rezone the entire town?

MR. SANTORO: Subject --

THE MAYOR: Who could possibly declare our town and in fact stated in the court case of May of 1984 that that was a definite viable alternative; that the town of South Plainfield could be declared unzoned, unrestricted, and, therefore, anybody could come in and build whatever they felt like in this town.

Also, were not some of the other consequences which he stated that if that be the case, he also has the right to take away any and all authority of the Planning Board and the Board of Adjustment? Anybody coming in for a site approval would no longer have to go to them; would go to the Master Planner and the courts, and if the court saw fit and proper, they could issue the building permits, not the Borough of South Plainfield?

MR. SANTORO: No, that's not correct.

THE MAYOR: That's not correct? That is not stated in the May of 1984 transcript?

MR. SANTORO: It may have been stated somewhere in that transcript, but Mount Laurell II doesn't provide for the complete elimination of the authority and jurisdiction of Planning Boards and Boards of Adjustment.

THE MAYOR: So what you are saying, what the Judge said was invalid?

MR. SANTORO: I am saying if the Judge intended to take away the jurisdiction of the Planning Board and Board of Adjustment, he was overstepping the authority given him under Mount Laurel II.

THE MAYOR: Isn't he -- well, that's our interpretation. All right.

Wasn't it not stated in Eric Neisser's letter that he felt it appropriate and the Judge at this time said that he wasn't going to discuss that, but that it could be held for future discussions, and that would be a $5,000 fine per day for every day the Borough does not comply with this Ordinance after the date registered?

MR. SANTORO: The Court could award any kind of judgments in any kind of cases and in this particular case if he were to award a $5,000 a day fine, he would be overreaching because Mount Laurel II doesn't talk in terms of civil penalties.

THE MAYOR: Okay. If the amendments were passed tonight, would that in toto dissolve us of any right to go to the Fair Share Housing Council?

MR. SANTORO: It would make the issue moot because since we are a municipality currently

1 involved in pending litigation, such litigation being
2 of an exclusionary zoning nature, once adoption
3 takes place of a fair share housing ordinance, there
4 is no longer any need for the Court to decide whether
5 we should transfer to the Housing Council.
6 THE MAYOR: Okay. On page 10 of the
7 Legislation, line 32, "The agreement shall be entered
8 into prior to the entry of a final judgment in
9 litigation. In cases in which a final judgment was
10 entered prior to the date this Act takes effect and in
11 which an appeal is pending, a munidipality may
12 request consideration of a regional contribution
13 agreement provided that it is entered into within
14 120 days after this Act takes effect. In a case
15 in which a final judgment has been entered, the court
16 shall consider whether or not the agreement constitutes
17 an expenditious means of providing part of the
18 fair share."
19 That does not give us the right to go before
20 the Fair Housing Council and ask that we be
21 developed relative to the regional plans and the
22 regional numbers?
23 MR. SANTORO: That section talks in terms of
24 a contribution to a receiving municipality under a
25 regional plan whereby a receipt of the least cost

housing units being completely built in the giving or sending municipality, a portion in this instance if 990 were the present prospective need for 1990, some figure would be attributed to those numbers and up to 50 percent of them could be contributed to a receiving municipality.

But that section has nothing to do with the section under which a motion is filed for requesting a transfer.

THE MAYOR: In your motion before the Judge, section 5, you have stated in the motion that, "The Borough of South Plainfield shall adopt in accordance with the provisions of the aforesaid Fair Share Housing Act a Resolution of Participation and prepare and file a housing element and fair share plan within the time prescribed."

MR. SANTORO: That's correct.

THE MAYOR: Is that not stating we, therefore, are in need of low and moderate income housing?

MR. SANTORO: No.

THE MAYOR: What does that do?

MR. SANTORO: That says that we're a municipality in an exclusionary zoning suit and we are asking the Council on Affordable Housing to take a look at the criteria that they are going to

establish and determine whether or not any least cost housing can be built with the ten percent set asides from the viewpoint of South Plainfield is basically a single family residential community, it's infrastructure is completely overloaded to date, there is very little area. Those are the bases by which the Council on Affordable Housing would look and maybe decide -- I mean, anything is possible. Maybe even decide that South Plainfield should not provide any least cost housing units.

THE MAYOR: Okay. And item 6, you said that "The Borough of South Plainfield may propose to transfer up to 50 percent of its fair share."

Is that acknowledging that we have fair share housing need?

MR. SANTORO: That is in the event -- let us suppose that the Court decides, yes, you do have the right to transfer. We go to the Council on Affordable Housing. We forward to them the housing element. The Council on Affordable Housing comes back and says X is the number of units of present and prospective need.

At the same time as the Council on Affordable Housing is considering what the numbers should be, there will be municipalities contacting the Council

in terms of they would be willing to put in other least cost housing units and be a receiving municipality. Are there any municipalities interested?

We have preserved our right to then say, okay, if the Council has decided that 900 be the total number of units, we would like to enter into a regional participation and pay over to the receiving municipality the cost of --

THE MAYOR: We pay somebody else to build them in their community?

MR. SANTORO: That's correct.

THE MAYOR: The Borough of South Plainfield would pay somebody else?

MR. SANTORO: Yes. But that is not the primary intent of the motion.

THE MAYOR: I am just saying that that was stated in your motion.

MR. SANTORO: It is in there. I am asking for it, yes.

THE MAYOR: Also in the two ordinances that are in front of us this evening, is there anything included in the ordinance other than the senior citizen complex where we are stating that we would ask for a tax abatement and the land given to them? Is there any other instance where we say that the

Borough would be responsible for giving of land, for paying of sewers, for improving in any other way other than the density factor?

MR. SANTORO: No. The judgment of May 22nd from which Ordinance 1009 and 1010 were developed talks in terms only of seed money with regard to the Morris Avenue site. There is no requirement under that Judgment nor under these Ordinances for the Governing Body to look to method whereby we would contribute land to anyone else to build least cost housing.

THE MAYOR: Is there such mandatory statements, set asides, abatements, et cetera, in the Legislative Act?

MR. SANTORO: I am not sure if I understand the question.

THE MAYOR: Well --

MR. THIEL: The point of order is, Mayor --

THE MAYOR: Excuse me.

MR. THIEL: Well, can I ask a question?

THE MAYOR: Surely.

MR. THIEL: What is it? Is our attorney on trial here tonight? Are you asking questions -- what is going on? You know, Mr. Mayor, you had this all week and now you are going public and asking questions.

You know what -- who created this whole mess last year?

MS. LEVINE: Excuse me.

THE MAYOR: No. I am not letting this get any further. If we can't at a public meeting as representatives of the people ask the Borough Attorney questions about something we are going to vote on, what is the sense of having a person such as the Borough Attorney?

Now, Frank, if you will continue.

MR. SANTORO: Surely.

THE MAYOR: On page 9 of the new Legislation, certain areas which they say a town if the Fair Share Housing Council decides that we do need low and moderate income housing, some of the alternates which they could demand of a municipality: a plan for an infrastructure, expansion and rehabilitation, if necessary, to assure the achievement of the municipality's fair share of low and moderate income housing.

MR. SANTORO: Correct.

THE MAYOR: Donation or use of municipal owned land or land condemned by the municipality for providing for purposes of providing low and moderate income housing.

MR. SANTORO: That's correct.

THE MAYOR: Tax abatements for purposes of providing low and moderate income housing.

MR. SANTORO: That's correct.

THE MAYOR: Down to 8, untilization of municipally generated funds towards the construction of low and moderate income housing.

MR. SANTORO: That's correct.

THE MAYOR: So that this Council might, this Council that is being the Fair Share Council might demand of the municipality of South Plainfield that they pay for some of this low and moderate income housing?

MR. SANTORO: No. Mayor, if you look at the beginning of section 11 which is on page 8, it talks about in the adopting of its housing element, the municipality may provide for its fair share of low and moderate income housing, and then it says, "In preparing the housing element, the municipality shall consider the following techniques."

THE MAYOR: Right.

MR. SANTORO: So items 1, 2, 3 and some of the others you have just gone over through 8 are the techniques that the municipality shall consider, not that the Housing Council will mandate it.

THE MAYOR: But that all those alternatives are there if they find need for us to have, if they determine us to have a need for low and moderate income housing and we come up and say, well, we can't decide how to do it.

MR. SANTORO: Yes, except --

THE MAYOR: Those provisions are there?

MR. SANTORO: Except that each of those items may be mutually exclusive. For example, in preparing the housing element, item number 1 could be the only one need be used by the Borough of South Plainfield. Rezoning for densities necessary to assure economic viability of any exclusionary development, either through mandatory set asides -- in essence, the housing element prepared by the Governing Body would set up some kind of set asides, but they don't have to be 10 percent low and ten percent moderate. They could be something else.

Again, this is not mandated by the Housing Council, but these are the guidelines if you will, the criteria if you will that the municipality may use in developing that housing element.

THE MAYOR: Okay. Does anyone else of the Council have any questions of the Borough Attorney?

MR. ACRIN: I have a statement if I could.

THE MAYOR: Wait a minute. We haven't made the motion yet. That was just simply questions for the Borough Attorney.

If no one else has questions for the Borough Attorney, what I would like to do is you have had the Ordinance. You have heard the Resolution. What is the intention of the Council?

MR. GALLAGHER: So moved.

THE MAYOR: So moved by Councilman Gallagher.

MS. LEVINE: Second.

THE MAYOR: Seconded by Councilwoman Levine.

Now, any discussion? Councilman Acrin.

MR. ACRIN: Thank you, Mr. Mayor.

I have a prepared statement here.

On May 22nd, 1984 a summary judgment was entered by the court of Judge Eugene Serpentelli which mandated that the Borough adopt amendments to its zoning ordinance that would provide for low and moderate income housing. Where did the judgment come from? The judgment was a direct result of last year's council majority that illegally authorized the Borough Attorney to sign a stipulation agreeing to build low income housing.

At last weeks Executive Meeting, Mayor English and Councilman Gallagher stated they did not want

to transfer this case to the Housing Council because that would mean that we are agreeing in the concept of low income housing.

Well, Mr. Mayor, and Councilman Gallagher, if you're that against low income housing, why did you authorize the signing of the stipulation? Why did you approach a local developer and sell the Pomponio Avenue tract of land to that developer when knowing that Pomponio Avenue was designated for low income housing? You didn't have to sell that land.

I hope tonight sometime that both of you will respond to those questions.

As we know, the total number of low and moderate units is 990 within the next five years. Because of the builders' remedy, 4,500 total units would have to be built which is a 67 percent increase in the number of residences which will mostly be located on the south side of town. The impact is devastating. New schools would have to be built. New roads would have to be built. Municipal services such as police, fire, rescue squad would almost probably double, and this would all be funded by a major tax increase to all the Borough residents.

Does all this have to be? Do the wishes of some group called the Urban League have to control

1 the destiny of us and our children? Can a court as
2 one of the branches of our government deny the
3 Borough access to another agency of government even
4 when the two other branches of government have
5 mandated such access? The answer to these questions
6 is a resounding no.
7 Many of you here tonight have been directly
8 affected by the Judge's order which has virtually
9 shut down the town. Many of you until the order was
10 amended couldn't even get building permits to put
11 in pools, put on siding, put on roofs. Where did
12 the Judge get this power? He got it from the Mount
13 Laurel Decision of the New Jersey Supreme Court.
14 The entire constitutional basis for giving judges
15 the power to rezone, the power to shut down towns,
16 and the power to attempt to give the Urban League
17 everything and anything it wants because the
18 Legislature has failed to act. Well, that is not
19 the case anymore.
20 Our Legislature under the leadership of
21 Governor Thomas Kean has acted. It has adopted the
22 Fair Share Housing Act. That means to me that at
23 least whatever Mount Laurel II was intended to
24 originally do must now be questioned in light of
25 the Fair Housing Act.

Our Attorney has advised us of the latter. The Fair Housing Act signed into law on July 3rd of 1985 will have the Council on Affordable Housing consisting of nine citizens appointed to look into what towns like South Plainfield's needs should be and how they are going to come up with the plan.

Finally, they are giving us the ability to do this on ourselves without a judge telling us we have to do it.

Through our attorney we have asked the Court as the new law says we can to transfer the matter of low income housing to the Housing Council. This unfortunately has not been decided upon yet. For whatever reasons, the Court has refused the attorney the right to argue. Hence, tonight is literally a show down, since if we adopt Ordinance 1009 and 1010, even under protest, we will never have access to the Fair Housing Act and our future and the future of our children will be the disaster that I mentioned before.

I see no other alternative but to follow the recommendations of our Borough Attorney and table the adoption of this Ordinance until the Court rules on the request for the transfer.

Thank you, Mayor.

THE MAYOR: Anyone else?

MR. CONLON: Mayor.

THE MAYOR: Councilman Conlon.

MR. CONLON: For as long as I have been on the Council, we have been fighting Mount Laurel, Mount Laurel II. We have been saying that the Judge doesn't have any right to come in here and tell us how we should run our town. We spent a lot of money on attorneys defending our right to run our town. This man has come in. He has shut our town down. He has acted as far as I'm concerned completely illegally and unreasonable.

We had said that we were looking for legislation that would protect home rule. We now have that legislation after a fashion. It may not be the best, but it is something that will take it out of the courtroom, take it away from a judge who can be dictated by the Urban League; whatever they want they get. We have an opportunity to go into the Housing Council and ask that they look over South Plainfield and come up with a decision. The Judge has not seen fit to hear us yet or give us an answer, so we are in limbo. We don't know whether we are going to go in and be denied that right. If we are denied the right, we have a right of appeal,

and the right of appeal, nothing will happen with these ordinances. Nothing can happen as far as building is concerned until the appeal is exausted.

However, if we pass this Ordinance tonight, that's the end. We have low cost housing. We have a potential 4,500 more units in South Plainfield, taxing our school, taxing our police force, taxing everything in town.

I think we have a right to take advantage of the Legislature's wishes. I don't think that a judge has a right to take it away from us because then he is really getting out of line.

I feel tonight the only thing we can do is to table this Ordinance. If we don't table it, I have no choice but to vote against it. I voted against Mount Laurel last year. Council President Thiel and myself, and we voted against it again. It is unjust. We are taking away our right to rule ourselves.

Thank you, Mayor.

THE MAYOR: Thank you. Anyone else?

MR. THIEL: Yes.

MS. LEVINE: Yes.

THE MAYOR: Council President Thiel.

MR. THIEL: Thank you, Mr. Mayor. My fellow

citizens: it's my third year that I am on the Council and tonight I am telling you honestly from the bottom of my heart it is a very difficult and a very hard evening for me to sit here and have to make a decision which I have to live with.

Mount Laurel II, the decision or the judgment which was handed down to the Borough of South Plainfield is asking for the maximum of 4,500 units in the Borough of South Plainfield. At the moment, the Borough of South Plainfield has approximately 6,100 private homes. The population is around 20,000 plus. We have a police force of 53 men. We have a fire department, volunteer fire department of 55 men. We have a volunteer rescue squad.

We say we cannot afford to build more homes and more roads. There is no room for more roads. The Borough of South Plainfield cannot under no circumstances take up this kind of judgment or comply with this kind of judgment that Judge Serpentelli demands from us.

The Urban League is doing it. It is something unbelievable. Believe me, I came to the United States in '51 and I was used to hearing things that you have to do, you cannot do what you want to do, and now we are told again you have to do this.

My fellow citizens, I can't go along with this. I have to vote against it in the best interest of the Borough. If Judge Serpentelli decides he wants to put in a Master in the Borough of South Plainfield, maybe it is one way he will find out there is no such land that he is talking about to put those units there. The land is not there. The roads are not there. The schools are not there. The police department is not there. It is not there.

I thank you, Mr. Mayor.

THE MAYOR: Anyone else?

MS. LEVINE: Yes, Mr. Mayor.

THE MAYOR: Councilwoman Levine.

MS. LEVINE: Thank you. Nobody up here likes Mount Laurel. We all hate it, but before I tell you how I am going to vote tonight I want to just read number two of the transcript that came back to us from Judge Serpentelli, and let me -- "Should the Council not take any one of the appropriate actions by the date specified in paragraph 1 above," which is tomorrow, July 30th, "the Court on request of the plaintiffs will appoint a Master to submit forthwith a proposed compliance plan for South Plainfield for the Court's immediate consideration."

And what that means, ladies and gentlemen, is

if we don't vote this in tonight, he is coming in. He is going to send more than likely Carla Lerner in and she has been here. It is not a case of maybe she is going to come in here and she is going to see that we don't have roads or we don't have anything that Councilman Thiel was talking about. She has been through this whole town. She knows exactly what South Plainfield is all about. She was part of the planning of coming up with the tracts of land that were zoned and that we are talking about.

So, it is not that she doesn't know what South Plainfield has and doesn't have in the area of land. She will be back in here, and you can bet that the Master Planner will be Carla Lerner or anybody else he sends in here. They are going to rezone this town, and not only that, they are going to do and do some of the things you heard the Borough Attorney talk about before, and it could be anything.

I disagree with the Borough Attorney. I am not an expert in law, but he can come in and fine us $5,000 a day if he wants to. He is not fooling around with us. This has been going on for a long time, and he has called us on the carpet and told us you are either going to comply. Mount Laurel is law.

It is not we are fighting Mount Laurel law. It's already the law. And he is now doing his job and he has told us we are going to do what he has told us to do. We don't do it, nobody is going to be able to build anything and we are going to have a whole town rezoned, and as the Borough Attorney said, you can see five story buildings in this town. You can see trailers some place. There is a lot of ramifications if we don't go along with this.

So, I am going to vote to go along with these Ordinances tonight.

And another comment that I want to make. Councilman Acrin, I believe it was you and Councilman Thiel, you both alluded to last year and who brought this mess into South Plainfield. I am a little tired of it, and I want it cleared up tonight also.

Number one, the Mayor has no vote. Okay. Remember that, people. The Mayor has no vote, so when something like this comes up, illegally authorized the Borough Attorney, he doesn't have a vote, so he didn't have anything to do with that.

You are referring to a stipulation. Now, as far as the stipulation goes, Mr. DeSabato, you sat in on every meeting that we had with Mount Laurel. You were there last year when the entire Council --

there wasn't anybody on that Council that evening that voted against the Borough Attorney going in with that number. Am I correct or not?

MR. DE SABATO: Yes, you are.

MS. LEVINE: Thank you.

MR. THIEL: Point of order.

MS. LEVINE: The election is over. That was last November and a lot of garbage went on about this stipulation and a lot of lies, but it is about time it is cleared up.

Nobody had a secret meeting. Nobody. The Mayor and the Borough Attorney of last year did not go and illegally authorize or sign any stipulations. That was agreed to by every Member of the Council last year and Councilman Thiel, you were on the Council.

MR. THIEL: I never voted for it.

MS. LEVINE: You did. Excuse me.

Mr. DeSabato, did he or did he not?

MR. THIEL: Point of order.

MS. LEVINE: No, not a point of order.

MR. THIEL: Yes. Please --

MS. LEVINE: I asked this gentleman a question.

MR. THIEL: Mr. DeSabato is a Borough employee.

MS. LEVINE: He is the Borough Administrator.

Mr. DeSabato, would you answer my question, please?

MR. THIEL: You may ask for the minutes.

MS. LEVINE: No. I am asking the Borough Administrator a question. Every time you get your back against the wall, you start saying, oh, don't answer this and don't answer that.

Mr. DeSabato, did he or did he not vote along with that?

MR. DE SABATO: Addie, my recollection of the meeting that we were discussing is that Mike, the Mayor, went around the table and asked if everybody was in agreement to what Patrick had suggested, Patrick Diegnan, the Borough Attorney. My recollection is everybody went around the table and said yes.

MS. LEVINE: Thank you.

MR. GALLAGHER: Mayor?

THE MAYOR: Councilman Gallagher.

MR. GALLAGHER: If I can just correct a few misstatements that were made. I do not approach developers and suggest to sell land. As Chairman of Economic Development, Councilman Acrin should know that developers approach Land Management and the cases are brought before the Mayor and Council and the land is sold at public auction.

The stipulation once again referred to - and

I am in total agreement with Councilwoman Levine - it was brought before the entire Council. We voted for it unanimously. The former Borough Attorney, Mr. Chernin, had filed an appeal, a number of appeals, and won a case under Mount Laurel II that would require South Plainfield to construct 2,400 low income homes.

As a result of the stipulation, we reduced that to 990. The stipulation said simply we do not zone for low and moderate income. We do not have it. We find this in violation. Fine. That's a fact. We will go out with your Master. We will take a look at the land that we think is available. That's been done. The figure is 240 now and 660 in a six year need. It's 990.

If the stipulation did nothing other than reduce that amount by 50 percent, I think it did a terrif job.

Judge Serpentelli has given us an Order. We will comply by tomorrow or he will in effect close South Plainfield as he has done twice.

My disagreement with the Borough Attorney, we will not have a Planning Board. We will not have a Board of Adjustment. They will do nothing unless the Master agrees. The Master will come in and select

lots, any size.

You have heard comments such as I recommend we table this and wait for the Judge's ruling. The Judge has made a ruling. You will decide by tomorrow. I have heard a comment, I suppose we could take a one family lot and construct a high rise commercial office building on 10,000 square feet. That is not a supposition. That's a fact. Statements such as 50 percent of our need could be contributed to another community. It's got to be within your housing region. The other municipality has got to agree to accept it, and South Plainfield has got to pay for it.

Also, when you hear some of the techniques that the Fair Housing Council can impose, the statement is as such other techniques as may be published by the Council, Fair Housing Council, whatever they suggest to do.

The Judge most certainly will send in his Planner as he has done already. The Planner has finished her work. She has recommended 1,800 units in South Plainfield. We have effectively reduced that to 990 as I said.

There are no fees or fines per se in Mount Laurel, but they certainly do exist inviolation of a

1 Court Order, and is spelled out very clearly: $5,000
2 per day.
3 The Urban League has petitioned for the
4 Borough to pay all their legal fees, possibly a
5 million dollars. I have no idea.
6 They can reinstitute builders' remedies,
7 give them the land, don't tax it, bring in the
8 sewers, streets, sidewalks, curbs and any off site
9 improvements. This can be done to you.
10 As far as two branches of Government mandating
11 access to the Fair Housing Council, it has been
12 provided based on a perceived need, Yes, they did
13 act. In my opinion, they haven't done enough.
14 We have no assurance that we will get our
15 case transferred to the Fair Housing Council and we've
16 got to act by tomorrow.
17 This gentleman from the Urban League, this
18 letter from him says, "I have been informally
19 advised that several other municipalities may be
20 going this route." Absolutely nothing concrete.
21 I also heard the statement that tonight is a
22 show down. I think that's a pretty damn poor label
23 to put on something so important as this. I have
24 people calling my home who I can't reveal. They
25 can't do construction work. Contractors have hundreds

of thousands tied up. They can't sell a house. This is a very small example of what can be done to this Borough.

Voting for these two Ordinances to comply under protest will lift all those restrictions immediately, and as stated by the Judge - it is in writing and everyone has it - no low or moderate income homes will be constructed until all avenues of appeal have been exausted. All. They in themselves could take years to do.

To go to the Fair Housing Council as told to us by our Borough Attorney on July 15th is an admission, yes, we do need and want low income housing. Please tell us where to put it and how many. I don't know how in God's name we could do that to the people of South Plainfield.

Thank you, Mayor.

THE MAYOR: Any other discussion?

MR. WOSKEY: Yes, Mayor.

THE MAYOR: Councilman Woskey.

MR. WOSKEY: Yes. There have been Members on this Council, everybody talking of doom and gloom, about a czar coming in here, rezoning the town, taking away the zoning, allowing anybody to build anything haphazardly. This is not going to happen. Towns

have had Masters come in and have actually had their numbers reduced. Cranford is one town in particular and they are also at this time looking to appeal the Mount Laurel II decision and go under the Legislation Act.

Right now Judge Serpentelli has stated the reason that he is acting is because the Legislature has failed to act. Well, now, a law has been passed in New Jersey which states that any town that has not reached the final judgment or agreement will be able to go to the Housing Council and look for what they think either is their fair share or no share, depending on what their actual conditions of the town are.

We have talked in the past that the Legislature hasn't done anything. We said write your Legislature. Well, now they have finally done something. I don't see where the Court has the power any longer now that there is a law in the State of New Jersey that will allow a municipality to zone the way it should zone. If it does not need low income housing, this Council will look at it and it will come up with numbers that can be agreed upon if that is the case.

But for a court and for the Urban League to mandate that a town zoned the way they say it should

be zoned instead of the people of the town to zone it the way the residents want it, I think that's unconstitutional.

Also the fact that they can mandate you as tax payers in this town put your money, actually give your money to developers or put in roads. That is dictating a town as to how they can spend or utilize their money. That also is unconstitutional. They cannot tell us how we can use our money.

I think a lot -- not a lot, but there are several Members up here that are trying to paint a gloomy picture when, in fact, we do have an option now, and if we do not look and act on this option and we act on these Ordinances as they are tonight, that option is no longer available to us.

And for that I would have to agree with the Borough Attorney's advise and to table this until such time as Judge Serpentelli looks at this motion that was presented to him so that we can, in fact, utilize the Legislator's law which is now in effect in New Jersey.

MS. LEVINE: Mr. Mayor?

THE MAYOR: I want the opportunity --

MS. LEVINE: Just one comment?

THE MAYOR: I want the opportunity to speak.

Everyone has had their opportunity to speak. I would like to address some of the items stated tonight.

First and foremost, I hope this evening has put to bed and I would hope that lack of experience or knowledge will not continue certain actions and statements made by Members of the Council relative to the actions taken by the Council last year. Every Member of this Council knew what the stipulation was of the 1984 Council. Every Member was given a copy and there was only one paragraph left out, and that dealt with lots that were three acres or more, and in the agreement which was finalized we even come out better relative to the three acre lots because instead of them all being rezoned for Mount Laurel, it was decided that none of them would; that you would have to go before our Board of Adjustment and our Board of Adjustment would decide.

Mount Laurel II has been with us for over eleven years. It has been with every last municipality that has had a growing problem or been in the regions that are considered growth problems in the State of New Jersey.

We were originally demanded to put in 2,400 homes. Then Carla Lerner came through, Planner,

Master decided we should need around 1,800 homes. 1,800 homes, if applied with the gloom and doom not what is represented by tonight's Council, but what was represented last year for three or four months would have put into process the development and rezoning for 9,000 homes in South Plainfield.

The Borough sat down with on many occasions with the Urban League and had that number reduced to 1,800.

Now, I want something very important to be understood. We were not agreeing to a judgment. The judgment had already come down. South Plainfield was in violation of the constitutionality of not having fair and moderate income housing. What we were trying to do was lower the amount of homes that the judgment would include. That did not in any way take away our right to appeal. That's exactly why these provisions and ordinances are under protest this evening, so we still have the right to appeal.

I agree wholeheartedly with Councilman Woskey. I think the actions taken by the Court are unconstitutional, but by going and agreeing to go to the Fair Share Housing Council, the only difference is instead of a judge telling us we need 990 homes, we

will have a Fair Share Housing Council telling us we need 990 homes. Our argument has been for the last eleven years that no one tells us what to do. We should be allowed to develop ourselves, and that will only be developed in a court case where we declare that the motions of Mount Laurel I and II are unconstitutional.

The premise for this legislation is that the actions taken by the court were valid. By accepting that you go to the Fair Share Housing Council, you accept the validity that every town needs and must have fair share housing provisions in their zoning ordinances. I think every last person up here tonight has said that they consider those actions unconstitutional. Well, why are you going to agree to them? That's exactly what this Council is doing. It's saying, okay, the Legislature has acted. Here they have acted on something that the premise that we consider invalid, and we are going to go along with it? Why fight for eleven years in court? Now we are going to accept the premise, okay, then we accept that we need fair share housing. We accept that we need low and moderate income housing, and instead of going before a judge, now we go before a Council. What's the difference? There is none.

Sure they are going to say this is nine members instead of a judge. We are not -- if that judge comes in and says -- the Council says yes, you do need 900, then what are you going to do? You are going to appeal it to a higher authority. Why don't we appeal it now?

(Yelling from the audience.)

THE MAYOR: Excuse me, ladies and gentlemen.

MS. LEVINE: That's okay. I didn't vote for it.

THE MAYOR: Okay. The actions that are going to be taken tonight by this Council may have drastic lasting effects on this town. I am not talking doom and gloom. I am talking about written statements. We have seen in the last three weeks what the Judge can do. He's closed down development. He closed down all permits for a while. He could very easily on Thursday go right back and close down all permits, all of them, no matter what they are. He could bring in Carla Lerner and to set us straight, she could bring back the 1,800 homes that she originally designed for us. She could also demand that any site approvals go to her, not to the Planning Board, for approval. This Judge has stated publicly he does not appreciate all of the items of Mount Laurel II,

1 but he is acting according to the laws of the State
2 of New Jersey.
3 There is a Councilman tonight who made
4 reference to the fact that he does not particularly
5 care for the way that the Courts are treating us.
6 None of us do. That doesn't give us the right to
7 break the law. This government was founded upon the
8 premise that if there -- if someone has infringed
9 upon your priviledges, you can go to a higher court
10 and seek remedies, and that's exactly what we are
11 trying to do.
12 If this Council tonight decides to table, and
13 a Master Planner comes in, he or she can rezone every
14 last parcel of land in this Borough. This is fact.
15 I am not talking about doom and gloom. We've had
16 over a year and a half with negotiations with these
17 people. The Judge told us three weeks ago, okay, he
18 has had it. Do something. And he gave us a time
19 limitation. If we decide we are not going to do it,
20 our right to control our town is totally taken away
21 from us. And it was stated where possibly could
22 the courts continue to control us with this legislation
23 passed. Well, on page 16 of this legislation it gives
24 the courts the exclusive right to determine if a
25 municipality has been in litigation for over 60 days,

1 the Court decides whether or not we can go to the
2 Council. The Legislation gave the courts that
3 authority.
4 Stop fooling and smoke screening the people
5 of this town. Of course the Legislation gave the
6 rights to the Court to decide that. Now, if the
7 Court decides we can't go to it, we have every
8 legal right, therefore, to try to appeal the Court's
9 decision because there is an out in this, an
10 injustice performed upon the municipality.
11 But the injustice performed upon the munici-
12 pality I don't think is this Legislation. The
13 injustice performed upon this municipality is Mount
14 Laurel I and Mount Laurel II, and, and if we don't
15 file an appeal on the Judgment that was mandated to
16 us, then we're not doing what we have been fighting
17 for for the last eleven months (sic).
18 I would simply urge each and every Member of
19 this Council, if they have decided they want to table
20 this to go before the new Council, that they ask
21 themselves two questions: 1, how is the Fair Share
22 Housing Council in any way different from a judge?
23 They are both going to demand certain things of us.
24 If they don't like what we come up with, they will
25 demand we have something else. The Judge has done

the same thing. The problem is the time table. Under the rules of this Legislation, I sincerely believe that if we pass these Ordinances tonight we still have every right to go before the Fair Share Housing Council because it states specifically if a judgment is there, you have 60 days to go to the courts. All right. If the courts don't give -- to go to a judge. If the judge doesn't give you what you want, you can appeal it.

If we do not pass these zoning ordinances, who is going to suffer? The town is going to suffer. We're going to lose our right to govern ourselves, and any person here on this Council that cannot state unequivocally tonight that the Judge does not have the authority to do that, please state it in front of all these people in the audience. I don't want people in the audience leaving this courtroom believing that, okay, we tabled it. We are going to go to the Fair Share Housing Council and nothing can be done to us, because that's not true.

Lastly, this has been inferred by a Member of this Council that on a number of occasions this Mayor sought out someone to buy land, to build low income housing. As a politician and as a political figure you accept people being able to say whatever

they want to say about you. That's part of the game. I want to state publicly for the last time, no one on this Council -- excuse me. Especially the Mayor, has never sought out anyone to buy any piece of property, to conform with Mount Laurel II, and all I think that is is someone trying to sensationalize yellow journalism headlines instead of talking about the issues that are real, the issues that are written, the issues that will affect every last person in this town come tomorrow morning.

Let's start talking about, all right, Thursday. Here comes a Master Planner. What does our Building Inspector do? Is he allowed to issue permits? No. Are we allowed to build single family homes so that people can move into them? No. Might the Judge take away the permits that he has given us as far as alterations to homes? Yes. Might the Judge accept Eric Neisser's statements that he wants $5,000 a day? And what is the $5,000 a day for? Because Mr. Neisser is saying it is because of our zoning we are precluding low and moderate income families from living here. They, therefore, have to live somewhere else. They, therefore, should receive damages for them living somewhere else. He wants $5,000 a day. I am not saying he gets it, but the Judge can give it to him

until we rezone.

Can the Judge make us pay for the legal fees of the Urban League? Yes. I know and you know what the cost of this has been to the Borough of South Plainfield. It's in the hundreds of thousands of dollars. Double it because that's what we would have to pay to the Urban League.

Tabling this tonight and saying we're going to the Fair Share Housing Council in no way stops the Judge from doing what he can do. If this was last year at this time I would advise this Council to take the bet. Let's try to postpone. Let's work this as long as we can. That game is over with. This Legislation doesn't help us. This Legislation only accepts the fact that what the Supreme Court declared that zoning ordinances that don't allow for fair share housing are unconstitutional is valid and works from that premise. Not one Member of the Council has stated that yet tonight.

The time has come to stop playing, to stop postponing, and to do what is in the best interest of this Borough. We are not building any homes. This is being -- the amendments under protest are going to be appealed by this Council to higher authorities. While that is being done, not one single home will be

built in this town for low and moderate. Those are not my words. Those are the words down by Judge Serpentelli in the transcript. We were the first community to get that committment out of him. That was all part of the stipulation that people feel was illegal or not accepted by all the Council Members.

Any other comments?

MR. WOSKEY: Mr. Mayor?

THE MAYOR: Yes, Councilman Woskey.

MR. WOSKEY: Yes. You have stated that our original need for low and moderate income was 2,400 units which was reduced back to 1,800, and it is stayed at 1,800 it would mean with the ten percent set asides a total of 9,000 additional units that would be required in South Plainfield. Well, for all I care he could make that 20,000 because we are going to have a hard enough time to put the 4,500 units on the vacant land that is in town right now. To increase these numbers, the reason why they decreased it was because, in fact, they knew that this amount of units could not be built in South Plainfield. South Plainfield is just not big enough to handle nor do they have the vacant land available for that number of units.

The only way that those units could be built

is with the ten percent set asides because no builder will build it unless he is going to make a profit, and in that case that's why the ten percent set asides came about. The worse we will ever do is what we have right now. If the Judge came in with the Master, most likely if anything he would go with these two Ordinances along with the zoning that is set up right there now.

This town will not accept because of the geography additional units in this town. I think these numbers are just being put put to scare the people of the town when, in fact, it is not possible.

Thank you, Mayor.

THE MAYOR: Councilman Woskey, just for a point of information, this town can accept a lot more than the units that were called for. Don't kid yourself. We went around, Bill went around with one of the Planners, right, Mr. Administrator?

MR. DE SABATO: Yes.

THE MAYOR: And so did our Planner and large portions of certain areas like on the south side or on the north side near the lake, et cetera, we told them there were no sewers there; you can't build there. All right. We told them no, you can't build on New Brunswick Avenue. That is all a waterway.

Don't kid yourself. This town can with high density accept a lot more homes. He can go into an area such as Gary Park and say okay, I now zone this so that you can build 12 units on an acre of land. And they can be built. There are homes there. They can be torn down. People can decide to tear them down and build 12, 15 units on an acre of land. This is not just for existing vacant land. We are talking about someone coming in and rezoning all of South Plainfield. They can turn around and rezone one of the vacant factories and say, okay, let's make that an apartment complex, and put four, 500 people in it. They can do a lot more than what we were able to get them down to at 900, 200 immediate and 990 total. Believe me, Michael. If you were there and saw all the parcels that the Planner came up with, and we said, oh, this couldn't be done because there is no sewers there, this can't be done because it is wet, this can't be done because there is no roads there. All right. We snowed them down to 900. They can come back and rezone the entire town and at that point we don't have the option of snowing them anymore. We don't have the option of sitting down and talking with them. There will be a Master and a mandate.

MR. CONLON: Mayor, a question.

THE MAYOR: Yes, Councilman Conlon.

MR. CONLON: You alluded to approving this under protest and with an appeal nothing would happen. Where is the appeal?

THE MAYOR: I would direct that we immediately appeal not only this Judgment to the Federal Court System on the premise that we do not feel that the legislation that was passed is constitutional because it's based upon Mount Laurel II Judgment. It's based upon the concept that they have the right to tell a town it needs a fair share low and moderate income zoning amendments, and I say and we have all said that we don't need it.

So, we don't -- just because this legislation was passed doesn't mean that we can't challenge it also.

MR. CONLON: Wasn't it one of our reasons to go to the Federal Court the separation of powers; that we said that the Court couldn't tell us what to do? Now we do have the legislation.

THE MAYOR: But the legislation is based upon the premise that what the Supreme Court did was valid and constitutional and we are saying that that is invalid, and that would be another alternative for us to go to the Supreme Court. That just opens up

1 another avenue for us to fight this.

2 MR. CONLON: Well, I have to disagree with

3 you. As far as avenues of appeal in the Federal

4 Court, what happened at Holmdel? The Mayors' Task

5 Force? Nothing happened there, right?

6 THE MAYOR: They went to one court. They are

7 not stopped.

8 MR. CONLON: Well, they are pretty dead in the

9 water right now I think.

10 THE MAYOR: They are pretty dead in the water

11 because there has been no one willing to challenge it.

12 MR. CONLON: Nothing has been happening as

13 far as the appeals are concerned. Appealed it to

14 the Supreme Court. It said no.

15 THE MAYOR: Exactly.

16 MR. CONLON: The Federal Courts, we have

17 separation of powers. We don't have that separation

18 of powers anymore. The Legislature has acted.

19 THE MAYOR: And acted in our view in an illegal

20 and unconstitutional fashion.

21 MR. CONLON: Your view.

22 THE MAYOR: Well, the premise, therefore,

23 Councilman Conlon, is you believe that every last

24 municipality should be dictated to by the Legislature

25 and said that you must have a fair share housing plan

in your zoning ordinance.

MR. CONLON: No, I don't.

THE MAYOR: That is exactly what this says. That is exactly what, if I am not incorrect, is in a resolution in the motion.

MR. CONLON: The Legislature is saying that they will give us an opportunity to go to them and they will decide if there is a need in a municipality for fair share housing.

THE MAYOR: The motion says that the motion that was supplied by our attorney to the Court dated July 18, article 5, "The Borough of South Plainfield shall adopt in accordance with provisions of the aforesaid Fair Housing Act a Resolution of participation and prepare and file a housing element and fair share plan within the time prescribed."

This motion, therefore, states that we agree that the concept that the Legislature has the right and this Bill has the right to tell us we must have a fair share housing plan is constitutional, and we are accepting it.

MR. CONLON: We have argued that we wanted to be able to dictate our own terms, and this is just what the Housing Council is allowing us to do. If we go into the Housing Council and say we only need

100 units, they look at it, approve or disapprove it. That may be --

THE MAYOR: And what happened?

MR. CONLON: At least you have a choice, and this is what we have been arguing about right along.

THE MAYOR: And Councilman Conlon, what happens in the next month if the Judge brings in a Master and rezones this town and does not allow any building except for that which is in accordance with Mount Laurel II?

MR. CONLON: The Judge has said that the Legislature should act. Now they have acted, and now I believe that he will --

THE MAYOR: He has --

MR.CONLON: -- allow us to --

THE MAYOR: I am sorry. He has already stated in the paper. He is not going to look at this until the end of August. Why? He wants to see what we are going to do. Let's stop this. That letter by Neisser and that letter by the Judge is telling us, hey, I am not going to let you fool around with this anymore. If you don't act on this, you will suffer the consequences. He could very easily said last Tuesday, okay, come on in. I am going to listen to this and decide whether or not to let you go to

the Fair Share Housing Council. He didn't. He told us I am going to wait until -- let's not make it a short notice. We are going to make it a longer notice. I want time to look at this. The time to look at it is to see what this Council is going to do.

MR. CONLON: Well, regardless, Mayor, if we pass this Ordinance tonight, we have a Zoning Ordinance. There is no appeal. There has been no appeal prepared. We act tonight, it is acted. That's it. It is all over with. No Housing Council, no nothing.

THE MAYOR: This is not open to the public. I ask --

A VOICE: Break tradition, please.

THE MAYOR: No, no. I asked if there was any comment from the public and there was none.

A VOICE: We didn't know what you all were thinking.

THE MAYOR: No, no.

A VOICE: We would like an opportunity to speak.

THE MAYOR: There is no comment from the public.

Anyone else?

MR. CONLON: That is all, Mayor.

THE MAYOR: I have a Resolution on the floor. Motion on the floor to adopt the Resolution. I think if there is a need, there is another motion.

MR. THIEL: I have a motion to table Ordinance 1009 until we hear --

MR. CONLON: And 1010.

MR. THIEL: -- any response from Serpentelli on our request to transfer our action to the Council of Affordable Housing.

THE MAYOR: I have a motion. Is there a second?

MR. ACRIN: Second.

MR. CONLON: Second.

THE MAYOR: Seconded by Councilman Acrin. Any discussion?

Before I call for the roll, I will state here publicly, I am not in accordance with what this Council is doing tonight. I will not accept responsibility if a Master comes in and rezones this town. And I will state the same to the Judge.

All right. Bill, the roll.

MR. DE SABATO: On the motion to table. Mr. Acrin?

MR. ACRIN: Yes.

MR. DE SABATO: Mr. Conlon?

MR. CONLON: Yes.

MR. DE SABATO: Mr. Gallagher?

MR. GALLAGHER: No.

MR. DE SABATO: Mrs. Levine?

MRS. LEVINE: No.

MR. DE SABATO: Mr. Thiel?

MR. THIEL: Yes.

MR. DE SABATO: Mr. Woskey?

MR. WOSKEY: Yes.

THE MAYOR: Bill, can I have a Resolution for Ordinance 1010?

MR. DE SABATO: "Be it resolved, the Mayor and Council of the Borough of South Plainfield, New Jersey, that an Ordinance 1010 entitled Affordable Housing Ordinance of the Borough of South Plainfield be finally adopted and advertised according to law."

THE MAYOR: Someone please make a collateral motion to that?

MR. DE SABATO: A public hearing, Mayor.

THE MAYOR: I am sorry. This is an ordinance that is up for final reading and at this time I will open it up to the public.

Anyone who wishes to discuss this ordinance which deals with affordable housing may do so now.

A VOICE: Mayor?

THE MAYOR: Yes, sir. Please again state your name and your address.

A VOICE: Joseph Murray. I am an attorney from Westfield representing Mr. Don DiGiandominico who is a builder in town. I have also for the last six or seven years been involved as the attorney representing developers in Mount Laurel litigation, specifically Warren Township and other communities in this area.

I would like to ask the Attorney if Barbara Williams indicated to him whether the restraints that are now against this community would have been voluntarily lifted between tonight and the date of the return of your motion for transfer. Was there any such discussion with Barbara Williams?

MR. SANTORO: The discussion with Barbara Williams concerned what she hoped to be the adoption process this evening. In that discussion she said that tomorrow her and I could get on a conference call to Judge Serpentelli and get the restraints removed as to non-Mount Laurel land.

MR. MURRAY: Assuming that you are tabling --

MR. SANTORO: Assuming that the Ordinance 1010 and 1009 were adopted this evening.

1 MR. MURRAY: I have discussed with Barbara
2 Williams the prospect of what I have indicated in
3 my correspondence to Council, that is a suit on
4 behalf of my client which is another element of
5 prospective damage against this Township, against
6 the Borough under Section 1983 of the Civil Rights
7 Act which also includes a claim for counsel fees.
8 Under Section 1983 of the Civil Rights Act
9 any governing body, municipality, such as this,
10 acting under the color of law whereby deprives
11 somebody of their property rights, my client's right
12 to build, you are subject to the expenses of the loss
13 of that client's profits, his expenses in carrying
14 the properties which he cannot now develop, for
15 example, mortgage, interest, et cetera, loss of
16 contracts that have time limits, and I am only
17 speaking for my client. I don't know how many others
18 in this community are faced with the same economic
19 problem.
20 There is a false premise that was evidenced
21 by Ed Conlon tonight in that he has indicated that
22 once you pass this ordinance we can't appeal. That's
23 baloney. You can take both routes. You can stay
24 with Judge Serpentelli, you can go to the Fair
25 Housing Council. One doesn't bar the other. You can

1 take appeals from Judge Serpentelli's orders and
2 final judgment while you are before the Fair Housing
3 Council.
4 Make a decision at some point where you have
5 one of two to choose from. You are not doing that.
6 You are just cutting your tie lines to Judge
7 Serpentelli if it hasn't already been cut because I
8 am sure he is going to enter some additional judgment
9 from which you have no appeal until you have a final
10 judgment, and you get no final judgment until you
11 have an ordinance in place.
12 The Mayor is right. Don't fool around anymore.
13 I have been before Judge Serpentelli for the past four,
14 five years. He is not a person who is vindictive.
15 He is not a person who doesn't understand the
16 municipalities' fears and hopes, et cetera. But he
17 is also a person as the Mayor pointed out who has a
18 job to do.
19 Mount Laurel II is not the source of your
20 problems. The New Jersey Constitution is. That is
21 the source of Mount Laurel II.
22 Now, let's stop fooling around with the
23 Federal case because how many dollars have been poured
24 into the New York lawfirm and where have they gone
25 with the Federal case? Right from the beginning, the

1 defenders' attorneys knew that that would most
2 likely be a waste of time.
3 What you have done tonight is really provided
4 fodder for the prospective 1983 claim. I don't know
5 what you are going to do on the next ordinance, and
6 I don't know how much that has of the bearing upon
7 what we are going to do tomorrow. But the Judge is
8 going to do something later this month, and I have
9 indicated in my correspondence what we have to do.
10 We do it by choice. I think the Judge has to do it
11 out of necessity because he has been directed under
12 his oath of office to do so.
13 You have an oath of office and you are not
14 following it.
15 (Whereupon, a short recess was taken.)
16 THE MAYOR: We will resume if people will
17 please take their places.
18 We are again in the public portion of the
19 hearing dealing with Ordinance 1010.
20 If anyone else would like to speak, please
21 raise your hand. All right. I would ask you again
22 to state your name. Mr. George.
23 A VOICE: Good evening, your Honor. Phillip
24 George.
25 Your Honor, I would like to direct questions

through you to the Borough Attorney and ask whether I may have an older copy of the Bill, but whether Section 8 of the Act of the Fair Housing Act or that section as it may have been changed requires the housing element be submitted with the Council, the Fair Housing Council, as a prerequisite to being considered by the Fair Housing Council.

THE MAYOR: Well, I will ask my Borough Attorney to answer that, but I think they give us within a four month period.

MR. SANTORO: Yes.

THE MAYOR: To supply them with the information that they need.

MR. GEORGE: I would like to know further then, your Honor, whether that housing element as a mandatory requirement requires proof that the municipality has revised the Land Use Ordinances in order to incorporate provision for low and moderate income housing, and whether if that change has not been deleted whether that, in fact, requires the Borough to adopt an ordinance if not identical to this one or substantially similar to even be considered by the Fair Housing Council.

THE MAYOR: Borough Attorney?

MR. SANTORO: Mr. George, the latter section

of Section 8 on page 7 of the Legislation I have in front of me indicates that the Fair Share Housing Ordinance, i.e. the housing element, should be introduced and given first and second reading in a hearing pursuant to RS40:40-2, and that's exactly what's happened tonight. We are giving first reading and second reading. It does not indicate adoption unless your copy does. Mine does not. This came right from Trenton.

MR. GEORGE: Well, Mr. Attorney, what I am considering is that is my question. Since the final Act is bearly getting circulation now, whether my copy is inaccurate in stating that the municipality shall establish that the Land Use Ordinances have, in fact, been revised to incorporate the provisions for low and moderate income housing contained in the housing element, and isn't that, therefore, a pre-condition to even approaching the Housing Commission?

MR. SANTORO: Before we get a chance to go to the Council on Affordable Housing, Judge Serpentelli must decide as the Mayor indicates, the Judge has the discretion, the Court has the discretion of exclusionary zoning suits such as this to decide whether or not we even have a right under the Legislation to go to the Council on Affordable Housing,

and I think a point should be made, and everybody who leaves here tonight is going home with a lot of other points, so go home with this point as well. The Judge cannot forestall a determination of our request. Eventually, and eventually means to me in accordance if the Urban League continues to get what they want, the oral argument will be heard on the first Friday of September or shortly after August 30th. If the Judge at that time determines based upon certification submitted as I am sure by the Urban League that manifest injustice would occur to any party to the litigation and accordingly denies the Borough of South Plainfield access to the Council on Affordable Housing, my advisement to the Governing Body will be to set down on the usual notice another public hearing for the adoption of Ordinances 1009 and 1010, because at that point the adoption will take place simultaneously with the filing of a Notice of Appeal to the Appellate Division of Judge Serpentelli's refusal to allow us access to the Council on Affordable Housing.

We are not tonight -- we are not tonight forestalling ever adopting the two ordinances. We are merely awaiting the Judge deciding whether we have a chance to go to the Housing Council. If we

go to the Housing Council, there is no need to adopt that ordinance or ordinances until after the Housing Council has looked at it and gotten back to us and said these are your numbers.

MR. GEORGE: Well, that is not my question. My question is whether we have to file a housing element in order to qualify for treatment under the Fair Housing Act regardless of what happens in Superior Court in Toms River.

MR. SANTORO: First Superior Court in Toms River must say yes, you can go to the Housing Council. Then we file a housing element.

MR. GEORGE: That's correct. But doesn't the Act require the housing element to require the municipality to establish that it has revised its ordinances to accommodate low and moderate income housing?

MR. SANTORO: Other than to have introduced and first and second readings as that section provides. It does not say adoption. We have done that.

MR. GEORGE: My question, though, is should you get that far, to even be considered before they recommend --

MR. SANTORO: Considered by whom? By Judge Serpentelli?

MR. GEORGE: By the Council. Is it not necessary that we enact an ordinance substantially similar or identical to tonight's ordinances?

MR. SANTORO: Certainly an ordinance that would include some least cost housing, yes. Certainly. That is what the Legislation says.

MR. GEORGE: So the Fair Housing Council --

MR. SANTORO: But not similar in numbers.

MR. GEORGE: That was only my question is whether we would have to be forced to adopt an ordinance in order to be considered by the Housing Council.

MR. SANTORO: The answer to that is yes.

MR. GEORGE: Thank you.

THE MAYOR: Yes?

A VOICE: Joann Graf. I live at 1012 Maple Avenue.

That being the case, why are you stalling tonight? If voting tonight under protest allows us number one to appeal to a higher court and, number two, I would think put us in a more favorable light with Judge Serpentelli as not being obnoxious, superior people, why not pass, untable if you may, if you can, your first ordinance, pass it under protest, go to Judge Serpentelli and say, okay, we

we have done what you have asked. Please lift the ban on our town, number one, and please look favorably on our request to go over to the Housing Council for their consideration.

If he looks favorably on your request whether you vote yes tonight or you table, you are going to go over there. But if I were the Judge, I would look at the track record of this town. You have ignored Judge Serpentelli for the past year and a half. You have been and I have been -- I was on the Council last year. We have butted heads with him every chance we have had. We have said no, this is unconstitutional. We don't want to do it.

He has through his transcripts on several occasions given us loopholes to save ourselves. Perhaps we are too blind to see the loopholes and the kindness that he has shown. As this gentleman said, he is not a vindictive man. He has stated I know to the Mayor that he is not thrilled about Mount Laurel, but he has a job to do and he is going to do it.

So, I beg you, do not sign a death certificate for this town. The Building Department -- the Judge has proven it. He shut us down already. You think he is going to be nicer tomorrow? Do you think he

is going to say well, they table it. They are probably going to vote for it eventually? Let's lift the ban. Carla, stay where you are and let's wait and see what's going to happen. No. He is going to say I've had it with South Plainfield. Who do you think you are? Are you the only town in the State of New Jersey who doesn't have to comply with the Order?

You will get what you are asking for. You are playing a gamethat you have no way of winning. Mount Laurel is not going away. You are not ultimately going to be blessed with no low and moderate income housing.

Do what you should do for the people in this room and the people in this town. I don't think there are too many people in this room and in this town who are going to be thrilled with what you have done tonight. My comments didn't get a boo. Okay.

Tomorrow it is going to be in the press what you have done. Fortunately, four of you aren't up for re-election. You better thank God that you aren't up for re-election this year. You would all be gone.

A VOICE: Try impeachment.

MS. GRAF: I beg of you, if there is a way,

that you can call another -- advertise two days. If you can, untable that Resolution and change your minds for the good of this town. Forget your politics. Forget whoever told you how to vote tonight, and vote the way you know in your heart you should. Protect this town because Carla Lerner will be here, no doubt about it.

Thank you.

THE MAYOR: Anyone else? Is there anyone else in the public portion? Walter?

A VOICE: Walter Kalman, 232 Merchants Avenue.

I have one question. You said that there is no building going on at all or there is no building allowed at this time or any time?

THE MAYOR: No.

MR. KALMAN: None at all, even outside --

THE MAYOR: No, Walter. You may build additions, alterations up to $25,000. There have also been certain individual cases where individual people have gone and gotten special permission from the Judge to build.

Basically, what he has stated, the Order is that we can't have any new construction of any kind.

MR. KALMAN: As of what date?

THE MAYOR: Three weeks ago.

MR. KALMAN: Okay. Two houses being built down my street. That is why I was wondering.

THE MAYOR: They must have already had received the permits before the Order took effect.

MR.KALMAN: So they have permission to go ahead and build?

THE MAYOR: Yes.

MR. KALMAN: The only question I have is the type of houses. I was just curious because I know they have almost two the same type of houses. I didn't understand that. But I think -- thought we have different housing permits.

THE MAYOR: Walter, do me a favor. Come to us at a regular agenda meeting and discuss that, but right now we are talking about this.

MR. KALMAN: They will be finished by then.

THE MAYOR: Okay. Anyone else?

A VOICE: Larry Massaro, 3122 Woodland Avenue, South Plainfield.

There was a statement made tonight by Councilman Acrin that I would like to refute. You said that the Mayor and/or Council approached a certain developer in town to purchase a piece of land that is in question with regard to this Mount

1 Laurel Legislation.

2 I would like to state and I am sure the record

3 will show that the Land Management Committee

4 received a letter from me, I guess, two and a half

5 years ago requesting purchase of this land, and I

6 think this is long before the word Mount Laurel ever

7 came on the lips of anyone in South Plainfield.

8 So, I would like to state that, and I would

9 like Councilman Acrin to please get his facts straight

10 before he makes any statements.

11 THE MAYOR: Anyone else?

12 A VOICE: Yes.

13 THE MAYOR: Yes, Ma'am?

14 A VOICE: Jackie Weaver, 327 Norwood Avenue.

15 Am I to understand that this Council is going to

16 subject the people of this Township to undue

17 hardships because of their decision tonight, meaning

18 restriction of permits to any additions whatsoever

19 is going to be banned as of tomorrow?

20 THE MAYOR: We cannot say that that is going

21 to happen at all. It may, by the actions taken

22 tonight, the Judge has a prerogative to do what he

23 has threatened to do in both May of 1984 and as late

24 as I think that case was June 11 -- June 24th.

25 MR. SANTORO: June 24th.

THE MAYOR: The June 24th appearance. He may.

MS. WEAVER: He has done it in the past as past performance shows. He probably is going to do it again tomorrow. Where does that leave the people of the Township? In a hole. I mean, this is ridiculous. You are supposed to be representing us, but what you are doing is representing themselves, and what the hell are you guys going to? What about us? You are leaving us nowhere and with no recourse. What are these people going to do that have bought houses that can't be built? They have no place to live.

Are you people going to pay for that, too? As well as I am supposed to be doing some building to my own home. What am I supposed to do? This is ridiculous. We voted you people to represent us, not for what you want but what we want. Why don't you listen to us for a change?

THE MAYOR: Yes, sir?

A VOICE: John Putrico. Mr. Acrin, Mr. Woskey, the four people that turned this down tonight, I just sold my house and purchasing a new house. Are you going to pay my bills on my apartment that I have to move in the 29th of August? Who is going to pay my bills? My wife is pregnant. Are you going to pay

my bills? Are you? Are you? Are you? Then let's get this straight tonight.

THE MAYOR: Anyone else in the audience?

A VOICE: Yes.

THE MAYOR: Yes, Ma'am?

A VOICE: Diane O'Connor. I live at 1301 Walnut Street. I lived in the town for more than seven years. I am a little embarrassed to say this is my very first meeting and I am very disappointed.

It wasn't -- it was a point of order, I realize that -- that we were not allowed to express our views once all the discussion happened. Everybody on the Council made up their minds before they even heard what we, the town's people, had to say.

I am in the same boat. I am not going to have a place to live. I don't appreciate it because we are either going to have to file a suit against the town or something. I don't know what we can do. Or we are going to have to look elsewhere for housing. I like living in South Plainfield. But what option is there?

A VOICE: I lived 34 years.

THE MAYOR: One at a time.

MS. O'CONNOR: Are you going to have emergency housing for those of us who have sold our

houses? Where are we going to live? Do you have any answers for us? You voted without even knowing what we felt, and I don't appreciate it. I would just like to go on record saying that.

THE MAYOR: Anyone else in the audience? Seeing no one else, I will close the public portion.

Bill, I will call for the Resolution.

MR. DE SABATO: "Be it resolved, the Mayor and Council of the Borough of South Plainfield, New Jersey, that Ordinance 1010 entitled Affordable Housing of the Borough of South Plainfield, be finally adopted under protest and advertised according to law."

THE MAYOR: Lady and gentlemen of the Council, you have heard the Resolution. What is your intention?

MR. GALLAGHER: So moved.

THE MAYOR: So moved by Councilman Gallagher.

MS. LEVINE: Second.

THE MAYOR: Seconded by Councilwoman Levine. Yes, Councilman Acrin?

MR. ACRIN: Thank you, Mayor. Yes, I would like to make a motion to table Ordinance 1010, Affordable Housing.

THE MAYOR: There has been a motion to table.

Is there a second?

MR. CONLON: Second.

MR. WOSKEY: Second.

THE MAYOR: Any discussion? Seeing none, roll call, please, Bill.

MR. DE SABATO: On the motion to table. Mr. Acrin?

MR. ACRIN: Yes.

MR. DE SABATO: Mr. Conlon?

MR. CONLON: Yes.

MR. DE SABATO: Mr. Gallagher?

MR. GALLAGHER: No.

MR. DE SABATO: Mrs. Levine?

MS. LEVINE: No.

MR. DE SABATO: Mr. Thiel?

MR. THIEL: Yes.

MR. DE SABATO: Mr. Woskey?

MR. WOSKEY: Yes.

MR. DE SABATO: Motion carried, Mayor. Before we go any further --

THE MAYOR: Excuse me. We are still in session.

MR. DE SABATO: Before we go any further, let me read into the record a letter from the Middlesex County Planning Board, addressed to me.

"The professional staff of the Middlesex County Planning Board has reviewed the proposed amendment number 1009 and Ordinance 1010 regarding Affordable Housing and the establishment of an Affordable Housing Agency and has no additional comment.

"Thank you for your considerations. Sincerely yours, Robert G. Emerson, Principal Planner."

THE MAYOR: All right. Seeing that that is the end of business, I will call for a motion of adjournment.

So moved and seconded. We are out. Unanimous.

(Whereupon the meeting was adjourned at 9:53 P.M.)

* * * * * *

I HEREBY CERTIFY that the foregoing is a true and accurate transcript of the proceedings taken in the afore-entitled matters, reported by me at the place and date hereinbefore set forth.

Janice M. Smith 8-1-85

JANICE M. SMITH, C.S.R.
N.J. License #X100569

EXHIBITS B through H TO NEISSER AFFIDAVIT OF AUGUST 28, 1985

STIP ¶	JUDGMENT ¶	SITE	ACREAGE	DENSITY	TOTAL UNITS	LOWER INCOME UNITS
12	3(A)	Harris Steel	84.8	12/a	1018	204
13	3(B)	Coppola Farm	27	12/a	324	65
14	3(C)	Pomponio Avenue	25 (32)	15/a	375 (480)	75 (96)
15	3(D)	Universal Avenue	18	12/a	216	43
16	3(E)	Frederick Avenue	12.25	12/a	147	29
17	3(F)	Morris Avenue	6.15	--	100-150	100-150
18	3(G)	Tompkins Avenue	7.25	12/a	87	17
19	3(H)	Elderlodge	1.46	--	100	20
					2367-2417 (2472-2522)	553-603 (574-624)

The range noted for the Morris Avenue site is specified in the Stipulation and Judgment because of the uncertainty as to how many senior citizen units could realistically be constructed on that site given the limited land and available financing. As a result of plaintiffs' discovery in June 1985 that the Pomponio Avenue site, which the Stipulation and Judgment state have only approximately 25 acres, actually encompassed 32 acres within the specified block and lot numbers, see Neisser Affidavit of June 21, 1985, Paras. 6-9 and Williams Affidavit of June 21, 1985, Paras. 11-18, the total units in that development should be increased to 480 and the total lower income units to 75, which would yield an overall total of 2472-2522 new units, of which 574-624 would be lower income units.

EXHIBIT B

7/15 Santoro

He has trans. from hearing
p. 4

He doesn't get contacted; on mots

in the interim restr. for now
any permits will go to TL
intent to issue on

he also mod. J. wld write as rel 2 modifs

alter permit (+ demolition) — to upgrade existing facil —
make kitchen
screen
roof
addition → pool
+ misc → no permits where cost addition or other work cost ~~or expanded bldg~~
~~type~~ shall not $25,000

no conditions permits for any at all

copy of this only

Consent order —

EXHIBIT C

zoning ords → will send map

PRD1 – 12/acre

PRD2 – 15/acre – 0.15

he still sees as ready to adopt on 7/2

will talk in exec session tonite re legis

he likes bowling settlem – have dev p

9 at 200 – 250 low/mod – 150 acre [illegible] S/C only

50 400 in hidden

max 200

he was on council in 78

he favored 1/4 zone which

exp no welfare Mothers

vacancies / poles

25 mile

Morris Ave site -

enough on bulldozer till ends

concerned re sled $ →

doesn't know if planner

Edenbridge

Sales Inventory -

for other reasons -

in Ap. 85 - Council imposed mind on ~~other~~ any sales -

looking at effect of sales on cap

artificial upper

cash vs sales $ use - cap left

vendors.

land prices out of site

Bon Dr. - keep $ in land

Sales →
before Teron Hwy → he rep'd Cal-Ken

Sanford Chemin →
sales to Cal-Ken not completed
south of Christopher

Block 427 + lot → any new lots - will sell

Does Cal-Ken sales in Block 427 + 428

Buccellato → doesn't know if any regist

Will look acreage →

Annie atty gets land off land sales →
only after Jan - when gets used.

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ATTORNEYS FOR PLAINTIFFS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-MIDDLESEX COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	]	Docket No. C 4122-73
Plaintiffs,	]	
vs.	]	Civil Action
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	]	
Defendants.	]	STIPULATION

Plaintiffs and the Borough of South Plainfield, by their attorneys, hereby stipulate as follows:

1. The fair share methodologies set forth in the Fair Share Report of Carla L. Lerman, the Court-appointed expert in this action, dated April 2, 1984, and in the Expert Report on Mount Laurel II Issues prepared by Alan Mallach, plaintiffs' retained expert, dated December 1983, are both generally reasonable approaches to the fair share issues remanded to this Court by the Supreme Court.

EXHIBIT D

2. The total present and prospective fair share allocation for South Plainfield through 1990 resulting from the Lerman methodology is 1725 units affordable by low and moderate income households and the fair share for South Plainfield resulting from the Mallach methodology is 1523 units. There is, however, insufficient vacant developable land suitable for development of low and moderate income housing to meet the full fair share resulting from either methodology. As of February 1984, there were only 641 vacant acres remaining in the Borough, of which a significant proportion were in floodplains, in an environmentally sensitive swampland, or in the midst of substantial existing industrial or commercial development. In addition, much of the remaining developable land is in small lots of less than 3 acres. In light of the remaining land, the fair share obligation of South Plainfield should be reduced to 1000 units.

3. The zoning ordinance of South Plainfield does not now have, and has not at any time since July 9, 1976, had, a zone for multi-family housing.

4. The only proposal for rezoning to permit more than two-family construction, which is set forth in the South Plainfield Planning Board's 1978 Review of the Master Plan, was rescinded by the Planning Board in its January 1980 Addendum No. 1 to the 1978 Review.

5. The zoning ordinance of South Plainfield does not provide, and has not at any time since July 9, 1976, provided, any mandatory set-aside, density bonus, waiver of zoning requirements, or affirmative municipal assistance for construction of housing affordable by persons of low or moderate income.

6. No multi-family housing has been constructed in South Plainfield since 1976.

7. The only proposal for multi-family housing in South Plainfield since 1976, a proposed six-story, 100-unit senior citizen housing project, was rejected by the Board of Adjustment on May 4, 1982. That decision of the Board of Adjustment was remanded to the Board of Adjustment for amplification and supplementation of the record in light of the decision in South Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II), in an order of this Court filed December 23, 1983 in Elderlodge, Inc. v. South Plainfield Board of Adjustment, No. L-56349-81 (Law Div., Middlesex County).

8. The only proposal for ~~high density~~ attached single family development in South Plainfield, a proposal by Bayberry Construction to construct 70 townhouses on 6.9 acres, was denied a variance by the South Plainfield Board of Adjustment on January 3, 1984, in part because "the price range indicated is not within the 'low-income' as is required by recent Court decision."

9. It is likely that ~~None~~ of the single family and two-family homes approved or constructed in the Borough since 1976 is affordable by persons of low or moderate income.

10. The Borough has ~~never~~ not since 1976 provided for construction of any subsidized low or moderate income housing under any government subsidy program.

11. The Borough has obtained Middlesex County Community Development funds for rehabilitation of ~~only~~ 33 housing units since 1976.

12. The 84.8 acre site on New Brunswick Avenue, known as the Harris Steel site and designated as Block 459 Lot 1, Block 460 Lot 1, Block 461 Lots 1-3; Block 462 Lot 2, Block 465 Lot 1, Block 466 Lot 1, Block 467 Lots 1,3,4,5 and 21, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent

low income and 10 percent moderate income units.

13. The 27 acre site on New Durham Road, known as the Coppola farm and designated as Block 528 Lot 44, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

14. The municipally owned site of approximately 25 acres at the northern tip of Kennedy Road, known as the Pomponio Avenue site and designated as Block 448 Lots 2.01 and 4.01 and Block 427 Lot 1.01, is appropriate for multi-family development at a density of 15 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units, if the Borough constructs Pomponio Avenue from the northern tip of Kennedy Road west to Clinton Avenue.

15. The 18+ acre site near Universal Avenue, known as the Universal Avenue site and designated as Block 255, Lots 14, 33 and 34, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units, ~~if the Borough constructs the necessary road extension to provide appropriate access to the developed site.~~

16. ~~All portions of~~ the municipally owned site of approx 10 acres ~~and the~~ privately owned ~~site of 6.4~~ acres to the north ~~and west~~ of Frederick Avenue, known as the Frederick Avenue site and designated as ~~Block 300, Lots 38.01 and~~ Block 310 Lots 1.01 + 4.01, 5, 6, 7, 9, 11, 13-15, 17, and 34, ~~which are wider than 100 feet~~ are appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units; ~~if the Borough extends Sylvania Place and Frederick Avenue until they connect and donates the Borough-owned land without cost to an~~

Block 311, Lots 16-36

~~appropriate developer.~~

17. The municipally owned site of 10 acres on Morris Avenue, known as the Morris Avenue site and designated as Block 111, Lots 1-4, Block 112, Lots 1, 2.01, Block 113, Lots 1.01, 2,4, 5.01, and Block 115, Lots 1,2, 2.01 and 3, is appropriate for development as a senior citizens housing project at a density of 15 units per acre of which all would be affordable by low or moderate income households, if the Borough would contribute the land and provide necessary financial support, including seed money and tax abatement.

18. The 6.9 acre site at the northern tip of Rush Street, known as the Bayberry site, and designated as Block 315 Lot 7, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

19. The 7½ acre site south of Tompkins Avenue, currently owned by the Archdiocese of Metuchen and placing the land for church purpose, designated as Block 12, Lots 9, 16 and 17, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units. See Otherlay.

20. The 2+ acre site on Hamilton Boulevard, known as the Elderlodge site and designated as Block 259, Lots 5, 6A, 6B, 7, and 12, is appropriate for development of a 100-unit multi-family development, with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

21. The Borough permits use of modular or manufactured housing meeting state building code requirements and zoning requirements for residential development.

22. The Borough will adopt a policy in its zoning ordinance requiring that of all future development on vacant sites other than those listed in paragraphs 12-20 above, on sites on which existing structures are destroyed or demolished by act of God or otherwise, or on sites that are proposed to be redeveloped, at least 10 percent of new units constructed will be affordable by low income families and at least 10 percent will be affordable by moderate income families. This policy will govern all actions of the South Plainfield Planning Board and Board of Adjustment in passing on applications for site and subdivision approvals and variances.

23. The Borough will apply for all federal, state, and county funds that become available between the present and 1990 for rehabilitation of existing deficient housing units and for all funding that becomes available for subsidization of the construction or rent of new housing units.

24. Low income households are those earning less than 50 percent of the median household income in the 11-county region designated in the Lerman Report of April 2, 1984. Moderate income households are those earning between 50 and 80 percent of the median household income in that 11-county region.

25. To be affordable by low income households, units for sale may require the expenditure of no more than 28 percent of the household income for principal, interest, taxes, insurance, and condominium fees, and units for rent may require the expenditure of no more than 30 percent of the household income for rent and utilities.

26. All units affordable by low and moderate income households must be affirmatively marketed by the developer throughout the 11-county

region and all marketing practices must comply with federal and state laws against discrimination.

27. All units for sale affordable by low and moderate income households must contain deed restrictions limiting resale for a 30-year period to households of similar qualifications and these restrictions must be enforced by an appropriate ~~independent~~ agency indep of developer

28. If, for any reason, the Court fails or refuses to enter Judgment promptly an Order of Compl. to the mtgs w/ an accep. directing appropriate rezoning and ~~assuring~~ six-year repose upon appropriate ordinance amendments, within 30 days of the signing of this Stipulation, either party is free to withdraw from this Stipulation and to proceed to trial on the issues herein, at which trial this Stipulation will not be admissible in evidence.

Plaintiffs Urban League, et al.

By _____
Eric Neisser

Date _____

Defendant Borough of South Plainfield

By _____
Patrick Diegnan

Date _____

ERIC NEISSER
JOHN PAYNE
Constitutional Litigataion Clinic
Rutgers Law School
15 Washington Street
Newark, N.J. 07102

BRUCE GELBER
JANET LABELLA
National Committee Against
Discrimination in Housing
733 Fifteenth Street N.W.
Washington, D.C. 20005

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION/MIDDLESEX COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs

Plaintiffs

v.

DOCKET NO. C-4122-73

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al. a

Defendants..

STIPULATION

Plaintiffs and the Borough of South Plainfield, by their attorneys, hereby stipulate as follows:

1. The fair share methodologies set forth in the Fair Share Report of Carla L. Lerman, the Court-appointed expert in this action, dated April 2, 1984, and in the Expert Report on Mount Lauret II Issues prepared by Alan Mallach, plaintiffs' retained expert, dated December 1983 are both generally reasonable approaches to the fair share issues remanded to this Court by the Supreme Court.

EXHIBIT E

2. The total present and prospective fair share allocation for South Plainfield through 1990 resulting from the Lerman methodology is 1725 units affordable by low and moderate income households and the fair share resulting from the Mallach methodology is 1523. There is, however, insufficient vacant developable land suitable for development of low and moderate income housing to meet the full fair share resulting from either methodology. In light of the remaining land, the fair share obligation of South Plainfield should be reduced to 900 units, to be allocated as 250 units present need by 1990 and 650 units prospective need.

3. The zoning ordinance of South Plainfield does not now have, and has not at any time since July 9, 1976, had, a zone for multi-family housing.

4. The only proposal for rezoning to permit more than two-family construction, which is set forth in the South Plainfield Planning Board's 1978 Review of the Master Plan, was rescinded by the Planning Board in its January 1980 Addendum No. 1 to the 1978 Review.

5. The zoning ordinance of South Plainfield does not provide, and has not at any time since July 9, 1976, provided, any mandatory set-aside, density bonus, waiver of zoning requirements, or affirmative municipal assistance for construction of housing affordable by persons of low or moderate income.

6. No multi-family housing (~~in excess of~~ other than two-family units) has been constructed in South Plainfield since 1976.

7. The only proposal for multi-family housing in the Borough of South

Plainfield since 1980 was rejected by the Board of Adjustment in April 1982. That decision of the Board of Adjustment has now been remanded to the Board of Adjustment for amplification and supplementation of the record in light of the decision in South Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II), in an order of this Court filed December 21, 1983 in Elderlodge, Inc. v. South Plainfield Board of Adjustment, No. L-56349-81 (Law Div., Middlesex County).

8. The Borough has obtained Middlesex County Community Development funds for rehabilitation of 33 housing units since 1976.

9. The municipally owned site of approximately 25 acres at the northern tip of Kennedy Road, known as the "Pomponio Avenue site", and designated as Block 448, Lots 2.01 and 4.01 and Block 427, Lot 1.01, is appropriate for multi-family development at a density of 15 units per acre with a mandatory set-aside 10 percent low income and 10 percent moderate income units, said 15 units include a density bonus of 3 units per acre by the Borough of South Plainfield to encourage construction of 'Mt. Laurel' housing and as such shall be considered a "municipal contribution" to the "Pomponio Avenue Site".

10. The municipally owned site of 4 acres and the privately owned site of 6.4 acres to the north and west of Frederick Avenue, known as the Frederick Avenue site, and designated as Block 308, Lots 30.01 and 34, is appropriate for multifamily development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income units.

11. The 7 1/4 acre site south of Tompkins Avenue, designated Block 12, Lots 9, 16, and 17, owned by the Archdiocese of Metuchen is currently planned to be used for Church purposes. ~~However, if no application for use of the site for a convent or related church use is filed within 2 years, said property should in the future become available for non-church related development, it shall at that time be considered~~ appropriate for multi-family development with a mandatory set-aside of 10 percent low income and 10 percent moderate income family units. INSERT

12. The municipally owned site of 10 acres on Morris Avenue, known as the Morris Avenue site and designated Block 111, Lots 1-4, Block 112, Lots 1, 2.01, Block 13, Lots 1.01, 2.4, 5.01, and Block 115, Lots 1, 2, 2.01 and 3 is appropriate for development as a senior citizens housing project at a density of 15 units per acre of which all would be affordable by low or moderate income households, if the Borough would contribute the land and provide necessary financial support, including seed money and tax abatement.

13. The 18+ acre site near Universal Avenue, known as the Universal Avenue site and designated as Block 255, Lots 14, 33, and 34, is appropriate for multi-family development at a density of 12 units per acre with a mandatory set-aside of 10 percent low income and 10 percent moderate income.

14. The 2+ acre site known as the Elderlodge site and designated as Block 259, Lots 5, 6A, 6B, 7, and 12 is appropriate for development of a 100-unit multi-family development with a mandatory set aside of 10 percent low income and 10 percent moderate income units subject to reasonable conditions to be

imposed by the Board of Adjustment.

16. The 27 acre site on New Durham Road, known as the Coppola farm and designated as Block 528, Lot 44 is appropirate for multi-family development at a density of 12 units per acre with a mandatory set-aside of ~~of which~~ 10 percent ~~would be affordable by~~ low income ~~persons families~~ and 10 percent ~~by~~ moderate income ~~families~~ units.

17. The 84.8 acre site on New Brunswick Avenue, known as the Harris Steel site and designated as Block 459, Lot 1, Block 460 Lot 1; Block 461, Lots 1-3; Block 462, Lot 2, Block 465 Lot 1; Block 466 Lot 1; Block 467 Lots 1,3,4,5 and 21 is appropriate for multi-familydevelopment at a density of 12 units per acre with a mandatory set-aside of ~~of which~~ 10 percent ~~would be affordable by~~ low income ~~families~~ and 10 percent ~~by~~ moderate income ~~families~~ unit

18. The Borough permits use of modular or manufactured housing meeting state building code requirements and zoning requirements for residential development.

19. The Borough will adopt a policy in its zoning ordinance re~~quiring that~~ permitting of all future residential development on involving 4 or more acres vacant sites other than those listed in paragraphs 11-17 above, or on sites of 4 acres or more on which existing structures are destroyed or demolished by act of God or otherwise, or on sites that are proposed to be redeveloped, at least 10 percent of new units constructed will be affordable by low income families and at least 10 percent will be affordable by moderate income families.

20. The Borough will apply for all ~~available~~ federal, state, and county funds ~~for~~ that become available between the present and 1990 for rehabilit~~ies~~ation of existing deficient housing units and for all funding that becomes available for subsidization of the construction or rent of new housing units.

~~xc21xxxxRexhexeonxiderxdxaffordablexhyxlexxinxomexparxamxx~~

21. Low income households are those earning less than 50 percent of the median household income in the 11-county region designated in the Lerman Report. Moderate income households are those earning between 50 and 80 percent of the median household income inthe 11-county region.

22. To be affordable by low income households, units for sale ~~must~~ may require the expenditure of no more than 28 percent of the household income for principal, interest, taxes, insurance and condominium fees and units for rent ~~must~~ may require the expenditure of no more than 30 percent of the household income for rent and utilites.

23. All units ~~xffirmakix~~ affordable by low and moderate income households must be affirmatively marketed by the developer throughout the 11-county region.

24. All units for sale affordable by low and moderate income households must contain deed restrictions limiting resale for a 30-year period to households of similar qualifications and these restrictions ~~will~~ must be enforced by an appropriate ~~independent~~ agency.

25. If, for any reason, the Court fails or refuses to enter Judgment directing appropriate rezoning and providing an Order of Compliance to the municipality with an accompanying six-year repose upon appropriate ordinance amendments, within ~~30~~ 90 days of the signing of this Stipulation, either party is free to withdraw fromthe Stipulation and proceed to trial on the issues herein, at which trial this Stipulation will not be admissible in evidence.

Plaintiffs, by Eric Neisser

Deft. South Plainfield, byP. Dic

Law Offices
FRANK A. SANTORO
1500 PARK AVENUE, SUITE ONE
P. O. BOX 272
SOUTH PLAINFIELD, NEW JERSEY 07080

MEMBER
NEW JERSEY BAR
U.S. PATENT BAR

AREA CODE 201
561-6868

June 26, 1985

Eric Neisser, Esq.
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102

Re: Urban League v. Carteret (South Plainfield)
No. C-4122-73

Dear Mr. Neisser:

Under separate cover you received a copy of my letter to Judge Serpentelli regarding my objections to the form of the Order. This letter is in regard to your letter to me of June 25, 1985, which I received June 26, concerning the lot and block on Morris Avenue and owned by Buccellato.

By copy of this letter, I am requesting that the Chairman of the Economic Development Committee, Councilman Donald Acrin, contact forthwith the Chairman of the Land Management Advisory Committee and have them supply me with information that you have requested concerning the Morris Avenue site.

In regard to the sales and approval information requested by Judge Serpentelli, I enclose herewith a copy of the property sales inventory sheet showing all property sales occurring from January, 1984, through the present, with the notations of the Borough Clerk/ Administrator as to lot, block, amount of consideration and the notation as to whether the consideration has been paid. Please be advised that notations as to where the consideration has been paid is an indication that closing of title has taken place and the lands have been transferred.

Hopefully, this information will be of assistance to you in regard to your inquiries concerning the "Mount Laurel Inventoried Lands".

EXHIBIT F

If you have any questions, please advise.

Very truly yours,

FRANK A. SANTORO

FAS:sr
Enclosure
cc: Honorable Eugene D. Serpentelli
Mayor and Council, Borough of South Plainfield
Councilman Donald Acrin
Chairman John Shaw, Economic Development Committee

PROPERTY SALES

2,097,642

1984		1 LOT	2 BLOCK	3 BORO RECEIVED	4 BORO CONVEYED	5
9	GEO. DENKER	1	438			181250 00
23	TOMMASO GRASSO	1	379			100000 00
27	P.J. PANZARELLA	Ord 978		L2 B 113	L3, B-394	25000 00
12	PHILIP CAMPAGNA	9	427			125000 00
12	DOMINGO LAURIA	7	329			6450 00
26	GALLO-RINKER	1.01	427			375000 00
9	A.A. & G. BLDRS	10.01	352			210000 00
23	J.M. WHITE	6	29			30000 00
13	PATRICK ENGLISH	14.01	365			161500 00
11	R. BENGIVENGA	1.01 & 2	397			125000 00
11	D. DiGIANTSON	P/O 1.01	427			213250 00
11	RINKER & GALLO	P/O 1.01	427			250000 00
11	D. DiGIANTSON	P/O 4.01	448			250000 00
11	R. BENGIVENGA	P/O 2	397			49962 00
11	L. MASSARO	P/O 6 P/O 26	438 310			159625 00
11	JOSEPH SAISSO	2	366			75000 00
11	E. SIKANOWICZ	Ord 990		L 33, B 318 L 21, B 310	L 1.06 BLK 320	248500 00
11	WM. MACELLARA	Ord 991		L 37, B 311 L 22, B 310	L 12.01 BLK 365	270350 00
11	D. DiGIAN	Ord 992		L 3, B 111 L 51, B 396	L 1, BLK 431	27275 00
25	FRANK BENAK	Ord 993		L3, BLK 335	P/O 4, BLK 380	6250 00
9	VINCENTO RAZI	P/O 2.01	398			25000 00
9	ATTILIO GRASSO	8.01 & 9	353			46000 00
9	DiGIANTSON	Ord. 994		Lots A, B, C, D.	4, BL 307-24, 354 10, BL 524, LT-540	131250 00
9	CHAS. ERRICKSON	4	449			20100 00
13	L. MASSARO	P/O 4.01 P/O 1.01	448 427			1270318 50
13	ALAN CESARE	24	110			14000 00
10	PAT CONNOLLY	P/O 13	405			112425 00
10	FRANK ESICK	ORD 997	CANCELLED	LOT 6, B-341	P/O 6-399	NONE
9	A. MONDORO	ORD 1002				75000 00
13	D. DiGIAN	5	396			70000 00
13	D. DiGIAN	P/O 4.01	448			62500 00
13	TOTH-DABRIO	21	128			122350 00

PROPERTY SALES

1985		1 LOT #	2 BLOCK #	3 BOROUGH RECEIVED	4 BOROUGH CONVEYED	5 AMOUNT
JAN 14	RINKER	13	345			147,700.00
28	RINKER	P/O 6	399			125000.00
28	JAMES CARDAMONE	P/O 6	315			230000.00
FEB 11	ZENA MEADOR	30	404			425000.00
11	ROBERT BENGUENGA	P/O 28.01 (A)	404			320000.00
11	" "	P/O 28.01 (B)	404			22586.00
MAR 25	JOS. DEANREA	P/O 8.01	347			150000.00
25	RALPH PASTORE	1.01	525			140000.00
25	ZENA MEADOR	P/O 3.01	363			22000.00
25	RALPH PASTORE	P/O 2	367			297500.00
25	RALPH PASTORE	P/O 6.01	525			110000.00
25	PAUL DI DARIO	1/2 2	108			150000
25	HAROLD WILSON	1/2 2	108		117,106	150000
APR 8	D. DIGIA & SON CONT	ORD #	1017	L1-524 L5-333 L1-524	P/O 28.01-404 P/O 28.01-404	1445500
22	ZENA MEADOR	P/O 3.01	363			310000.00
22	PATRICK FANULARO	P/O 3.01	347			125000.00
22	ZENA MEADOR	P/O 3.01	363			600000.00
22	WALTER KURILEW	9	330		726,131	1[illegible]

THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS
Campus at Newark

School of Law-Newark • Constitutional Litigation Clinic
S.I. Newhouse Center For Law and Justice
15 Washington Street • Newark • New Jersey 07102-3192 • 201/648-5687

June 28, 1985

Frank Santoro, Esq.
1500 Park Avenue, Suite One
P.O. Box 272
South Plainfield, N.J. 07080

RE: Urban League v. Carteret
(South Plainfield)

Dear Mr. Santoro,

I am in receipt of your letter of June 26 to the Judge concerning the Order and my response is enclosed. Please note that I called you on Wednesday afternoon to inform you, among other things, that we do not agree with your interpretation of the Order, specifically your instruction to John Allen, the Assistant to Building Inspector John Graf, that the Order does not apply to addition and alteration building permits, but only to new construction permits. I never received a response to that call and when I called yesterday at 5 P.M. there was no answer at your office. Hence my letters of today. I note that your letter to the Judge does not incorporate the interpretation of the Order that you gave Mr. Allen, which is understandable since the Judge never discussed and you never sought clarification on the point. Indeed, the only clarification you sought in Court led to an unequivocal statement by the Judge that all building permits were restrained. Your letter also does not include a motion for reconsideration, the appropriate form for seeking such a change.

Second, I have received your letter of June 26 concerning the Buccellato site and appreciate your prompt and thorough response. With regard to the inventory of property sales, I note that it confirms our allegation that six, not just three, sales of land within Block 448 Lot 4.01 and Block 427 Lot 1.01 have occurred between April 26, 1984 and November 13, 1984. We would appreciate receipt of all documentation concerning those sales, including Council ordinances, resolutions of acceptance, notices of auction, newspaper advertisements, bids received, etc. We will review the remaining listed sites to determine if

EXHIBIT G

Counsel: Frank Askin-Jonathan M. Hyman (Administrative Director) - Eric Neisser-Barbara J. Williams

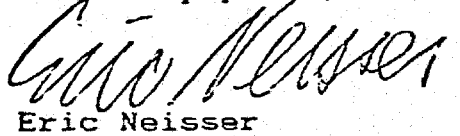
any others are on land within the Judgment. Further, we note that the list ends on April 22, 1985. I understand that at some point the Borough imposed a moratorium on sale of Borough-owned land. Please let me know when and why this moratorium was imposed, and attach copies of all resolutions or other official acts with regard to it. Please also inform me in writing whether the Borough represents that it has not sold or contracted to sell any land to any persons since April 22, 1985.

Third, we have received a number of calls since Monday from Borough officials, such as Mr. Graf and Mr. Allen, seeking, for example, clarification from us as to the scope of the Order. We do not feel comfortable advising employees of an opposing party who is represented by counsel. Moreover, we believe that it is your obligation to advise them. Hence, we will not accept such calls in the future and will refer them to you. If you have any questions on any aspect of this litigation as a result of your consultation with Borough officials, you should then personally contact Barbara Williams, who remains the attorney primarily responsible for the South Plainfield litigation.

Finally, we have been told that the Council will introduce the ordinances on first reading at its upcoming meeting on Monday, July 1. We would appreciate receiving a copy of the ordinances so introduced, including the zoning map that accompanies the zoning ordinance, as well as a copy of the Planning Board's action on these ordinances, which we understand took place on June 18.

We look forward, as you hope you do, to a prompt resolution of these matters.

Sincerely yours,



Eric Neisser
Co-Counsel for Plaintiffs

CC: Judge Serpentelli
South Plainfield Service List

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July 10, 1985

Frank A. Santoro, Esq.
1500 Park Avenue
South Plainfield, N.J. 07080

Re: Urban League v. Carteret, No. C 4122-73

Dear Mr. Santoro:

I have reviewed the listing of "Property Sales" which you provided.

The July 9, 1984 sale to D. DiGian in the amount of $131,250.00 is illegible as to the Lot and Blocks involved. A similar problem exists as to the D. DiGian purchase for $144,525.00 on March 25, 1985. Also, with respect to the $75,000 sale to A. Mondaro neither the date nor the Lot and Block are specified.

I would appreciate your providing me with clarification regarding the foregoing at your earliest convenience.

Very truly yours,

Barbara J. Williams

EXHIBIT H

Counsel: Frank Askin-Jonathan M. Hyman (Administrative Director) – Eric Neisser-Barbara J. Williams

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JOHN M. PAYNE, ESQ.
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Newark, N.J. 07102
(201) 648-5687
ATTORNEYS FOR URBAN LEAGUE PLAINTIFFS
On Behalf of the American Civil
Liberties Union of New Jersey

SUPERIOR COURT
OF NEW JERSEY

CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

NO. C-4122-73

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, et al.,

Plaintiffs,

v.

THE MAYOR AND COUNCIL OF THE
BOROUGH OF CARTERET, et al.,

Defendants.

URBAN LEAGUE PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO SOUTH PLAINFIELD'S MOTION TO TRANSFER THIS CASE TO THE COUNCIL ON AFFORDABLE HOUSING

This is the first motion to transfer a pending case to the Council on Affordable Housing under Section 16 of the Fair Housing Act, L. 1985, c. 222, to be heard in the state. The task is made awkward by the fact that courts are asked to evaluate and possibly limit their own jurisdiction in an important constitutional area that until now has been solely within their province. The Urban League, moreover, is well aware that a decision not to transfer could easily be misunderstood by the Legislature, and the public at large, as a defiance of clear legislative policy to concentrate future fair housing decisionmaking in the Council rather than the courts. It is, therefore, vital that this Court have before it a careful analysis of the structure of the statute and the consequences of a transfer in beginning to develop standards to clarify the meaning of "manifest injustice", which precludes transfer under Section 16.[1]

As will be demonstrated below, existing caselaw on retroactivity and exhaustion, which employs the "manifest injustice" language, makes numerous factors relevant to this determination -- the age, complexity, and advanced stage of the litigation, the number and nature of previous determinations of

****

[1] Under the view of the statute presented here and in light of the facts relating to South Plainfield, plaintiffs believe it is unnecessary for the Court to consider the constitutionality of the transfer section, any other specific provision, or the Act as a whole. For this reason, we have not send notice to the Attorney General pursuant to Rule 4:28-4(a). Should the Court believe it necessary to address any constitutional issues, however, plaintiffs would request an opportunity to brief such points.

substantive issues, including whether they were based upon adjudication or voluntary stipulation of parties, the relative degree of administrative and judicial expertise on the remaining issues, the need for development of a substantial evidentiary record, the prior conduct of the defendant, the likelihood that agency determinations would differ from judicial determinations, the irreparable harm that might be occasioned by the inevitable delay attendant upon any new administrative process and by the absence of restraints on development of limited land resources, and, finally, the public interest in prompt resolution of litigation. Denial of South Plainfield's motion to transfer is not only consistent with the legislative intent, but necessary if it is to be given effect, for every one of the relevant factors confirms that transfer would be manifestly unjust to the plaintiffs and the lower income population it represents. The Legislature clearly intended that cases such as this should remain in the courts for prompt resolution of the very few remaining issues.

FACTS

The Court is thoroughly familiar with most of the sad history of the South Plainfield litigation. We will, therefore, only briefly sketch the key historical facts, emphasizing those added to the formal record through the affidavits submitted with these opposition papers.[2]

On July 23, 1974, 11 years and 45 days before the return date of this transfer motion, the Urban League of Greater New Brunswick and seven individuals (hereafter referred to as the Urban League or the Urban League plaintiffs, although the organization has since been renamed the Civic League) sued South Plainfield and 22 other Middlesex County towns on behalf of all low and moderate income families challenging the municipalities' zoning ordinances as unconstitutionally exclusionary. Judge

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[2] Plaintiffs rely upon the entire record of this proceeding. The essential facts and documents are provided in the Williams Affidavit of October 26, 1984, the Neisser and Williams Affidavits of June 21, 1985, the Williams Affidavit of July 30, 1985, the Neisser Affidavit of August 28, 1985, the Mallach Affidavit and Massaro Certification of August 27, 1985 and the exhibits attached to and incorporated into each of those affidavits. As noted in the Neisser Affidavit of August 28, the Borough has still not provided all the necessary information as to Borough land sales, subdivision of lots enumerated in the May 22, 1984 Judgment, and ownership status of the Morris Avenue site. Plaintiffs believe that these materials will further substantiate the Borough's bad faith, which is one of the factors relevant to a determination of "manifest injustice." Therefore, should the Court have any hesitance about denying the transfer motion on the record presented to date, plaintiffs reserve the right to supplement the record with those materials when provided by the defendant.

Furman certified the class and, after an evidentiary hearing, denied defendants' motion for a severance. Early in 1976, Judge Furman held an extended trial, in which South Plainfield participated, and in May 1976 issued an extensive ruling, finding, inter alia, that South Plainfield's zoning ordinance was unconstitutional. Among other deficiencies, the Court noted that South Plainfield and only one other town (Cranbury) prohibited any new multi-family housing. Urban League of Greater New Brunswick v. Mayor and Council of Carteret, et al., 142 N.J. Super. 11, 28, 35 (Ch. Div. 1976). The Court assigned South Plainfield a fair share obligation of 1,749 units, of which 45 percent were to be affordable to low income households and 55 percent to moderate income households. Id. at 37. The Court found that: "[e]ach municipality has vacant suitable land far in excess of its fair share requirement without impairing the established residential character of neighborhoods. Land to be protected for environmental considerations has been subtracted from vacant acreage totals." Id. Specifically as to South Plainfield, the Court found that: "[t]he borough is overzoned for industry by about 400 acres." Id. at 35.

Judgment requiring rezoning within 90 days to effect the necessary changes was entered on July 9, 1976, 9 years and 59 days before this transfer motion is to be heard. No zoning revision occurred, among other reasons, because in November 1976, the Appellate Division stayed the Judgment pending appeal in response to the motion of the appellants, South Plainfield and

six other towns, and in 1979 the Appellate Division reversed the Judgment in its entirety. On January 20, 1983, the Supreme Court reversed the Appellate Division and remanded to this Court not for trial on constitutional non-compliance "for that has already been amply demonstrated" but solely for "determination of region, fair share and allocation and, thereafter, revision of the land use ordinances and adoption of affirmative measures to afford the realistic opportunity for the requisite lower income housing." South Burlington Cty. NAACP v. Mount Laurel Twp., 92 N.J. 158, 350-51, 456 A.2d 390, 488-89 (1983)(hereafter Mount Laurel II).

South Plainfield fully participated in the remand proceedings, although it failed to meet the Court's deadline for responding to plaintiffs' discovery requests, most crucially those describing remaining vacant land in the Borough. Neisser Affidavit of June 21, 1985, Para. 3 and Exhibits A and C. Eventually substantial discovery was had, including depositions of the Borough's planning consultants and Zoning Officer. As a result of their own careful review of the tax assessment rolls, plaintiffs identified two major sites -- the Harris Steel site of 84.8 acres and the Coppola farm of 27 acres -- not originally mentioned in the allegedly "complete" vacant land inventory provided by defendant in response to the Court discovery order. Neisser Affidavit of August 28, 1985, Para. 8. After extensive negotiations between the Urban League attorney, Eric Neisser, its housing and development expert, Alan Mallach, the Borough's Attorney, Patrick Diegnan, and the Borough's planning

consultants, Robert Rosa and James Higgins, the Borough and the Urban League voluntarily entered into a formal signed Stipulation designed to resolve all outstanding issues on May 10, 1984, 1 year, 3 months and 27 days before this motion. Neisser Affidavit of June 21, 1985, Para. 2-4,9 and Exhibits B, E, F.

In that Stipulation, approved unanimously by the Borough Council, see Transcript of July 29, 1985 South Plainfield Council Meeting, Exhibit A to Neisser Affidavit of August 28, 1985, at 37-39 and 46, the Borough expressly stipulated that the so-called Lerman methodology, which would have given South Plainfield a fair share of 1725 lower income units, and Mr. Mallach's methodology, which would have resulted in a fair share of 1523 units, "are both generally reasonable approaches to the fair share issues remanded to this Court by the Supreme Court." Stipulation, Exhibit F to Neisser Affidavit of June 21, 1985, Paras. 1,2. However, the parties agreed that there is "insufficient vacant developable land suitable for development of low and moderate income housing to meet the full fair share resulting from either methodology," specifically incorporating the defendant's position as provided in discovery that "[a]s of February 1984, there were only 641 vacant acres remaining in the Borough, of which a significant proportion were in floodplains, in an environmentally sensitive swampland, or in the midst of substantial existing industrial or commercial development [and] much of the remaining developable land is in small lots of less than 3 acres." The parties then agreed that "[i]n light of the

remaining land, the fair share obligation of South Plainfield should be reduced to 900 units, to be allocated as 280 units of present need by 1990 and 620 units of prospective need by 1990." Stipulation, Para. 2.

There is no question that the fair share number of 900 was a compromise, of benefit to both parties primarily because it would avoid an extended and costly trial that could lead to a less favorable ruling for either party. As Mr. Neisser explains, the plaintiffs at the very end reduced their original demand for 1000 units to 900, in part because of their conclusion that only the 553-603 lower units that could be accommodated on the eight specified sites[3] were actually likely to be produced. An additional fair share obligation was required only to insure a maximum Mount Laurel effort in the relatively speculative event that redevelopment were to occur, substantial new land were to become available through demolition or fire, or substantial subsidy funds were to become available. Neisser Affidavit of August 28, 1985, Para. 6. It appears, however, that the

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[3] Mr. Neisser's Affidavit of August 28, 1985 shows that the eight sites specified in the Stipulation could yield a maximum of 553-603 units, depending on the size of the Morris Avenue site development. Para. 5 and Exhibit B. The plaintiffs discovered in June 1985 that the Borough had initially misrepresented the acreage in the Pomponio Avenue site as being only 25 acres when it is in fact 32 acres. See Neisser Affidavit of June 21, 1985, Paras. 6-9. When that adjustment is made, the maximum possible units would be either 574 or 624. Neisser Affidavit of August 28, 1985, Exhibit B. The fair share "cushion" in the Stipulation described in text readily allows accommodation of this "new-found" fair share capacity.

plaintiffs may have, in fact, underestimated the Borough's capacity for further development. As the Mayor of South Plainfield recently explained at a public meeting of the Council:

> THE MAYOR: Councilman Woskey, just for a point of information, this town can accept a lot more than the units that were called for. Don't kid yourself. we went around, Bill went around with one of the Planners, right, Mr. Administrator?
>
> MR. DE SABATO: Yes.
>
> THE MAYOR: And so did our Planner and large portions of certain areas like on the south side or on the north side near the lake, et cetera, we told them that there were no sewers there; you can't build there. All right. We told them no, you can't build on New Brunswick Avenue. That is all a waterway. Don't kid yourself. This town can with high density accept a lot more homes. He can go into an area such as Gary Park and say okay, I now zone this so that you can build 12 units on an acre of land. And they can be built. There are homes there. They can be torn down. People can decide to tear them down and build 12, 15 units on an acre of land. This is not just for existing vacant land. We are talking about someone coming in and rezoning all of South Plainfield. They can turn around and rezone one of the vacant factories and say, okay, let's make that an apartment complex, and put four, 500 people in it. They can do a lot more than what we were able to get them down to at 900, 200 immediate and 990 total. Believe me, Michael. If you were there and saw all the parcels that the Planner came up with, and we said, oh, this couldn't be done because there is no sewers there, this can't be done because it is wet, this can't be done because there is no roads there. All right. We snowed them down to 900.[4]

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[4] At present, plaintiffs will treat this statement merely as political puffery. However, because of the accumulating evidence of bad faith and misrepresentation -- including the already documented original misrepresentation as to the acreage of the Pomponio Avenue site and the ownership of the Morris Avenue site, the Borough's failure to identify the 85 acre Harris Steel site and the 27 acre Coppola farm in original discovery which was stated to be complete, the six sales of Borough owned land within lots expressly identified in the Judgment and Planning Board approval of nonconforming development on such land, the Board of Adjustment's attempted approval of the Elderlodge project in October 1984 without the set-aside required by the May 22 Judgment, and the intentional violation of all deadlines for compliance in this Court's Judgment of May 22, 1984, and Orders of December 13, 1984 and July 3 and 19, 1985 -- the plaintiffs

Transcript of July 29, 1985 South Plainfield Council Meeting, Exhibit A to Neisser Affidavit of August 28, 1985, at 56-57.

In addition, the specification of sites for inclusionary developments and the nature of municipal contributions to lower income housing were also the subject of compromise. Plaintiffs expressly gave up their claim for rezoning of several entirely suitable sites, which defendants strenuously asserted were unacceptable for political purposes and would make stipulation of the facts impossible. Neisser Affidavit of August 28, 1985, Para. 10 and Exhibit D, Para. 18. Plaintiffs also gave up their request for municipal contribution of the land for the Pomponio Avenue and Frederick Avenue sites, and construction of necessary roads at the Pomponio Avenue, Universal Avenue and Frederick Avenue sites. Neisser Affidavit of June 21, 1985, Paras. 4,8 and Exhibit B, at 3; Neisser Affidavit of August 28, 1985, Para. 10 and Exhibit D, Paras. 14-16. Plaintiffs also modified their position as to the nature of the rezoning requirement for vacant lots over three acres. Neisser Affidavit of June 21, 1985, Para. 8 and Exhibit B; Transcript of July 29, 1985 Borough Council Meeting, at 46; Neisser Affidavit of August 28, 1985, Para. 10.

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reserve the right to seek further discovery and to move to modify the Judgment, if appropriate, based upon fraud in the inducement for the Stipulation and violations of the Rules of Professional Conduct and the previous Disciplinary Rules and court interpretations, including RPC 3.3 -- Candor Toward the Tribunal, RPC 4.1 -- Truthfulness in Statements to Others, and their predecessor Rules.

The Stipulation provided for rezoning of only eight specific sites. Based on the acreage estimates provided by the Borough, one of which has since been shown to be incorrect, the number of units that would be constructed in South Plainfield would be at most 2367-2417, of which only 553-603 would be low and moderate income. Thus, the statement by Mr. Santoro in his Certification in Support of Motion to Transfer Action to Council on Affordable Housing, that under the Stipulation and Judgment "the Borough of South Plainfield shall be required to allow for the construction of up to 4500 new residential housing units", Para. 3, which figure was repeatedly referred to throughout the discussion of this matter at the Borough Council meeting on July 29, 1985, Transcript, e.g., at 29,33,34,55, is clearly incorrect. Indeed, in a telephone conversation on July 15, 1985, Mr. Neisser told Mr. Santoro that the Stipulation and Judgment would only produce, and the parties were aware at the time of the Stipulation that it would only produce, approximately 500 or 550 lower income units, that 100-150 of those would be in the senior citizens project and thus only some 400 would be in higher density inclusionary projects, which would therefore have a total of approximately 2000 units. Mr. Neisser suggested to Mr. Santoro that he call Mr. Diegnan, the prior Borough Attorney, to confirm these facts and the reason for the 900 number, if not satisfied by doing the mathematical calculation. Neisser Affidavit of August 28, 1985, Para. 7. Although plaintiffs believe that the Court can determine the falsity of Mr. Santoro's statement simply by mathematical

calculations from the Stipulation and Judgment, we are prepared to present appropriate testimony as to this one disputed issue of fact should the Court deem it necessary to decision of this motion because "the conduct of defendant" is a factor to be considered in determining "manifest injustice".[5]

Based on the Stipulation, plaintiffs moved for summary judgment. The Judgment in all critical aspects tracks the language of the Stipulation. On a number of contested points, however, the Judgment was amended to reflect the defendant's objections, most importantly by extending the time for enactment of the necessary ordinances and resolutions from 90 to 120 days,

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[5] Mr. Santoro's knowledge of the falsity of the statement may also be relevant to this factor. Cf. RPC 3.3(a)(1),(4). Mr. Santoro's Certification, sworn on July 18, states that he is "fully familiar with the litigation of this matter." Id., Para. 1. Because he was not personally involved in the negotiation and execution of the Stipulation and proceedings leading to the entry of the Judgment, this must mean that he has reviewed all the documents in the file and either consulted with Mr. Diegnan and members of the Council, who were personally involved, or relied upon my statements on July 15. To the degree he consulted with others, it is possible that his statement is a good faith repetition of hearsay from another. However, he was put on notice as to the possible falsity of the statement by his conversation with Mr. Neisser on July 15th.

We note in passing that the Santoro Certification contains two other, more minor inaccuracies -- it claims that the Judgment requires zoning for "900 'least cost' housing units by 1990 and designates seven sites in the Borough to accommodate such zoning." Para. 3. At no point does the Judgment, or the underlying Stipulation, refer to "least cost" housing and at no time was that concept discussed. Moreover, the Judgment and Stipulation expressly set forth eight sites to be rezoned. For the same reason noted here, the references to "least cost" housing in the August 9, 1985 Order drafted by Mr. Santoro, are incorrect, although we assume not affecting our substantive rights.

because of the "summer schedule" (of 1984) of the Council. See Neisser Affidavit of August 28, 1985, Para. 11. Ms. Lerman reported to the Court on May 30, 1984, and thus the Judgment's deadlines began to run from June 4, 1984. Passage of the necessary ordinances was therefore required by October 4, 1984, over 11 months before the return date of this transfer motion.

In July 1984, Mr. Rosa, the Borough's planning consultant, provided Mr. Neisser with drafts of the proposed zoning and affordable housing ordinances. Although he was about to leave on vacation, Mr. Neisser immediately consulted extensively with Mr. Mallach and had a long telephone conversation with Mr. Rosa on the evening of July 26, 1984, providing him with details of the plaintiffs' concerns and objections and the reasons for them. A new draft was provided on August 22, 1984. The remaining objections of the plaintiffs were conveyed to defendants in Mr. Neisser's September 5, 1984 letter to Mr. Rosa. Neisser Affidavit of August 28, 1985, Paras. 12; Williams Affidavit of October 26, 1984, Para. 11 and Exhibits G-1, G-2. Thus, the defendant had all necessary input from the plaintiffs to permit passage of compliant ordinances well within the time required by the Judgment.

On September 25, this Court wrote Mr. Diegnan, the Borough Attorney, asking him to inform the Court of the expected completion date of the Court-ordered revision of the zoning ordinances. By letter dated October 4, the Judgment's deadline for compliance, Mr. Diegnan informed the Court that no zoning

ordinances revisions would be approved until complete revision of the Master Plan. On October 8, Angelo Dalto, attorney for Elderlodge, informed the Court that on October 2nd the South Plainfield Board of Adjustment had granted Elderlodge's original application for a variance to build senior citizne housing without any set-aside, and accordingly requested dismissal of the Elderlodge action. On October 11, this Court again wrote Mr. Diegnan reiterating the September 25 request for a specific time limit and noting that the Judgment's deadline had already passed, and on October 15, this Court wrote Mr. Dalto refusing to dismiss the Elderlodge action as requested and instructing municipal officials to take no action to authorize construction of the Elderlodge project pending resolution of the issue. On October 22, Mr. Diegnan responded by saying that the next scheduled meeting of the Mayor and Council was November 12, 1984. Williams Affidavit of October 26, 1984, Paras. 7,9,11 and Exhibits E,F,H,I,J,M.

Pursuant to the plaintiffs' October 1984 motion for restraints in light of these developments, the Court entered an Order on December 13, 1984 consolidating the Elderlodge and Urban League matters, preventing vesting of any rights as to the Elderlodge plaintiff, and directing adoption of compliant ordinances by January 31, 1985. South Plainfield violated that Order, as it had violated the prior Judgment. No ordinances were passed in January. After the matter was recommended by the Planning Board in January, Council consideration was set for

March 11, 1985. By letter dated March 8 and communicated by phone on March 11, plaintiffs reminded the defendant of a few minor deviations in the proposed ordinances from those agreed to by Mr. Rosa at a meeting with plaintiffs in November 1984. The Borough needlessly referred the matter back to the Planning Board, which favorably recommended all but two changes, and did so again in May when the plaintiffs brought a technical error to the Borough Attorney's attention. No further action occurred until the plaintiffs learned of the defendant's sale of municipally owned parcels within the Judgment and attempted Planning Board approval of development on those lands inconsistent with the required rezoning. Pursuant to plaintiffs' further motion for restraints, this Court entered its Order of July 3, later modified on July 19, requiring final adoption of the zoning and affordable housing ordinances by July 30, 1985. Plaintiffs informed defendant that it considered the versions of the ordinances transmitted to us by letter dated July 9 to be acceptable and in compliance with the Judgment. On July 22, 1985, South Plainfield filed this motion to transfer, seeking hearing on short notice which this Court denied. Upon the express advice of counsel, Transcript of July 29, 1985 Borough Council meeting, at 14, the Council then intentionally violated Paragraph 1 of the July 3 and July 19 Orders by not adopting any form of zoning or affordable housing ordinances, but instead tabling the ordinances pending this Court's consideration of this transfer motion.[6] After the Court,

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[6] Mr. Santoro's recommendation to the Council at the July 29

at its August 2nd hearing on plaintiffs' motion for immediate appointment of a Master, reiterated its willingness to stay the effectiveness of the ordinances until decision of the transfer motion, the South Plainfield Borough Council finally adopted the ordinances under protest on August 7, 1985, 10 months and 3 days after the deadline set in this Court's Judgment of May 22, 1984.

Although the July 3rd Order's ban on sales of municipally owned property remains in effect, see Order of August 9, the Borough issued a "time of essence" notice to Larry Massaro, the contract purchaser of a substantial part (24 acres) of the Pomponio Avenue site, who has already contracted for re-sale of the property to an experienced Mount Laurel developer. Massaro Certification, Paras.3,5,7. Mr. Massaro delivered the entire $1,270,318 purchase price to the Borough on August 23, 1985, and he and the residential developer stand ready, as they have since May 15, 1985, to proceed with all necessary applications for construction of the Mount Laurel project specified in Paragraph

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meeting to table the ordinances was "based upon the fact that the motion is still pending and that the Court has not deemed it convenient or whatever to hear that motion before tonight." Transcript at 14. Although he had accurately informed the Council earlier that the Court had refused to hear the motion on short notice, id. at 9, he failed to inform the Council that he had only served and filed the motion on July 22, even though the Legislature passed the Act on June 27 in precisely the form requested by the Governor on April 22, and the Governor had signed it, thereby putting it into effect, on July 2, and that he could have set down a motion for hearing without Court permission upon providing the adversary with the regular 14 days' notice set forth in the Court rules. Rule 1:6-3. Denville, for example, filed its motion to transfer on July 8.

3(C) of the Judgment. Massaro Certification, Paras. 3,6,9. As the Affidavits of both Alan Mallach and Larry Massaro confirm, the present time is an unusually favorable time for residential construction in New Jersey and the delays necessarily attendant upon a transfer to the Affordable Housing Council might well jeopardize the likelihood of this or any other Mount Laurel developments within the remaining 5 years of South Plainfield's current fair share cycle.

The only actions remaining for full compliance with the Judgment and issuance of an order of repose for South Plainfield are: a) modification of the zoning ordinance to specify the block and lot numbers affected by the new provisions; b) review of the adopted zoning and affordable housing ordinances by the Court-appointed expert; c) Council adoption of the resolution required by Paragraph 6 of the Judgment committing the Borough to apply for, and to encourage and assist private developers to apply for, any available funding for rehabilitation or subsidization of new construction or rental of housing units; d) a report to the Court and plaintiffs, pursuant to Paragraph 9 of the Judgment, describing action taken by the Borough with regard to development of the senior citizens housing project on the Morris Avenue site as set forth in Paragraphs 3(F) and 4 of the Judgment; and e) appropriate modification of the Judgment to require rezoning or municipal contributions: i) to compensate for any low income units lost through those municipal land sales and development approvals inconsistent with the Judgment that the Court

determines it would be inequitable to undo, and ii) in light of the likelihood of development of the Morris Avenue site, given private ownership of some of the parcels, or otherwise.

ARGUMENT

To assist the Court in the determination of this first transfer motion, plaintiffs will initially outline how the statute intends the administrative process to work and the relationships established between that process and the litigation process. Then we will seek to explicate the consequences of a "transfer" under Section 16(a) and as a result the meaning of the "manifest injustice" standard. Finally, we will argue why transfer of the litigation concerning South Plainfield would be manifestly unjust to the Urban League plaintiffs and the class of lower income persons they represent under either possible view of the consequences of a transfer.

THE STATUTORY SCHEME

The Administrative Process

The Fair Housing Act was enacted as "a comprehensive planning and implementation response" to the "constitutional obligation to provide a realistic opportunity for a fair share of the region's present and prospective needs for housing for low and moderate income families." Secs. 2(a),(c),(d). It calls for a centralized state-wide administrative process to determine housing regions and state and regional housing needs and the adequacy of local authorities' fair share determinations and zoning policies to

meet that obligation. The Act is intended to be a "mechanism... which satisfies the constitutional obligation enunciated by the Supreme Court." Sec. 3.

To accomplish these goals, the statute creates a Council on Affordable Housing (hereafter Council), which is obligated to determine housing regions, estimate the present and prospective need for lower income housing on the state and regional level, adopt "criteria and guidelines" for determination of the municipal fair share of the regional need, and then review the adequacy of municipal "housing elements" proposed to meet the local fair share obligation. Secs. 7(a),(b),(c), 10, 14. The Council has no power to mandate municipal participation in the process. Rather, a municipality must first adopt a "resolution of participation." Sec. 9(a). It must then file a "housing element" and a "fair share housing ordinance ...which implements the housing element". Id. The housing element and ordinance may employ a number of techniques to satisfy the fair share obligation including high densities to support mandatory set-asides, donation of municipally owned or condemned land, tax abatements, use of state or federal subsidies, and a regional contribution agreement, by which the obligated township subsidizes the development of lower income units in another township in the region to satisfy up to one-half of the sending township's fair share. Secs. 11(a),(c),12.

Even after the township files a housing element, however, no action need be taken by the township or the Council. If the

municipality chooses, however, it may, at any time during the six-year period that a housing element is in existence, "petition the council for a substantive certification of its element and ordinances." Sec. 13. The Council has no power to require submission of such a petition. If no objection to substantive certification is filed by any person within 45 days of public notice of the petition, the Council must issue substantive certification if it finds that the fair share plan "is consistent with the rules and criteria adopted by the council and not inconsistent with achievement" of the regional low income housing need. Sec. 14(a). If the Council does not consider the plan satisfactory, it may deny the petition or approve it on conditions, in which case the municipality can refile its petition within 60 days and still obtain substantive certification. Sec. 14(b). Once certification is granted, the municipality has 45 days to adopt its fair share housing ordinance. Id.

If an objection is made to certification, the council shall engage in a "mediation and review process". Sec. 15(a). If mediation is unsuccessful, the matter is transferred to the Office of Administrative Law as a contested case. Sec. 15(c). The evidentiary hearing and the administrative law judge's initial decision area to be made within 90 days, unless the time is extended by the Director of Administrative Law for "good cause shown." Sec. 15(c). Thereafter, pursuant to the Administrative Procedure Act, objections to the initial decision may be

presented to the Council,[7] which must "adopt, reject or modify" the initial decision within 45 days or the initial decision automatically becomes the final decision of the agency. N.J.S.A. 52:14B-10(c).

Relation of Administrative Process to Litigation

The legislation recognizes both that the new administrative process will affect pending litigation and that administrative decisions will be appealed to the courts for review. It thus contains a complex series of provisions defining the interrelationship between this new administrative procedure and the existing judicial framework for resolving exclusionary zoning disputes.

1. If no litigation is pending.

If no case is pending, the town may choose either to adopt a resolution of participation or not, therafter to file a housing element or not, and finally to petition for certification or not, as it wishes. If it goes through the entire process and receives substantive certification, then in any subsequent court

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[7] Under the Administrative Procedure Act, such an appeal goes to "the head of the agency." N.J.S.A. 52:14B-10(c). It is unclear whether under this statutory scheme that would be the Council itself or the Executive Director of the Council. The statute indicates that a multi-person body could be the "head" because it refers to decisions by "the head of the agency or a majority thereof." Id.

proceeding the certification has a presumption of validity, and the complainant has the burden of proof by clear and convincing evidence that the local plan does not in fact provide the required realistic opportunity for the fair share, and the Council is joined as a party with power to present to the court its reasons for granting certification. Secs. 18(a) and (c). If the town has not completed the process but has, before suit is instituted, adopted a resolution of participation in a timely fasion, i.e., within 4 months of the effective date of the Act, Sec. 9(a), or November 2, 1985, then a plaintiff must exhaust the review and mediation process of the Council. Sec. 16(b).

Although Section 16(b) says exhaustion is required before a litigant is "entitled to a trial on his complaint", in fact the proper avenue for judicial review of a final administrative determination is by appeal to the Appellate Division. N.J.S.A. 52:14B-14; Rule Governing Appellate Practice 2:2-3(a)(2). Trial will occur in court, then, only if the municipality or Council fail to meet deadlines for completion of the administrative process. For example, if the municipality does not adopt a resolution of participation on time, no exhaustion is required. Sec. 16(b). If the municipality has timely adopted a resolution of participation but fails to file the required housing element and fair share ordinance in a timely fashion, the exhaustion requirement automatically expires. Sec. 18. If the muncipality has filed on time both the resolution of participation and the housing element, but the Council has not completed its review and

mediation process within six months of receipt of a request by a party who has instituted litigation, the party may file a motion in court to be relieved of the exhaustion requirement. Sec. 19.[8] In cases where review and mediation requests are filed within nine months after the Act takes effect, i.e. before April 2, 1986, the six-month completion date does not begin to run until that date. Id. Finally, trial would occur in court if the Council denies substantive certification or grants it upon conditions that the municipality does not accept. Sec. 18.[9]

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[8] It is not clear from Section 19 what parts of the process are included in the six month limit. There are four steps in the statute's administrative process. First, Section 15(b) requires a meeting of the Council, municipality and any objectors to mediate the dispute. If that fails, Section 15(c) requires transfer to the Office of Administrative Law as a contested case, and hearing and initial decision within 90 days unless extended by the Director of Administrative Law for unspecified "good cause." Third, the Administrative Procedure Act sets a 45 day limit, again subject to extension, for "head of agency" review of the initial decision. N.J.S.A. 52:14B-10(c). See note 7 supra. Finally, Section 13(b) provides that "[i]n conducting its review" the Council may deny a petition for certification or condition it upon changes in the housing element or ordinances, and then the town has 60 days to refile its petition with the necessary changes in which case the Council may still grant substantive certification. It is unclear whether the six-month limit in Section 19 on the "review and mediation process for a municipality" refers only to the first step -- mediation; to the first three steps, in which case 45 days would be available for mediation; or to all four steps, which literally could not occur within 180 days.

We believe that the second interpretation is likeliest because "review and mediation" is more than simple mediation, the Administrative Procedure Act specifically directs the head of the agency to "review...the record submitted by the administrative law judge," N.J.S.A. 52:14B-10(c), 45 days seems a sufficient time to determine if mediation will be successful, town re-filing is optional and not part of the initial review process, and in any case the statute should not be construed to provide an unworkable or meaningless time schedule.

[9] The normal method for judicial review of a final

Clearly these provisions are designed primarily as a threat -- of a court trial leading to a judicial ruling without a presumption of validity as to the local determinations -- to insure that appropriate steps are in fact taken in a timely fashion to resolve the dispute in the administrative forum. Indeed, the legislation expressly states a "preference" for resolution of both present and future disputes through the mediation and review process in the Act, rather than litigation. Sec. 3.

2. <u>If litigation was pending less than 60 days before the effective date of the statute.</u>

The Act treats very recently filed litigation the same as litigation filed after the Act. Quite simply if the municipality adopts a resolution of participation within four months of the

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administrative decision is, as noted in text, by appeal to the Appellate Division and normally both parties to a proceeding have the same right. However, it appears that the Fair Housing Act denies municipalities the opportunity to go to the Appellate Division if certification is denied or conditioned, and instead requires reversion of the case to the trial court. Section 16 requires exhaustion of the review and mediation process before "being entitled to a trial on his[sic] complaint." Section 18 specifies two situations when the exhaustion requirement imposed by Section 16 automatically expires. The second is "if the council rejects the municipality's request for substantive certification or conditions its certification upon changes which are not made within the period established in this act." Sec. 18. Thus if exhaustion is not required, the litigant gets a trial on the complaint. This provision is in accord with the direction in <u>Mount Laurel II</u> that only fully adjudicated and compliant ordinances are appealable. 92 N.J. at 214, 290, 456 A.2d at 418, 458.

Act's effectiveness, the recent litigant must exhaust the review and mediation process. Section 9(a). No exceptions are stated in the Act, although presumably the usual exceptions to the exhaustion requirement would be applicable in an appropriate situation. See the most recent discussion of exceptions to the exhaustion requirement in the Supreme Court opinion in Abbott v. Burke, 100 N.J. ___ (S.Ct. July 23, 1985)(slip op. at 31-36).

The rationale for this provision is, obviously, that litigation that was commenced because of the impending passage of the legislation, anticipated by all after the April 22, 1985 conditional veto message of the Governor, should not, thereby avoid the intended administrative exhaustion requirement. This provision makes perfect sense because in no case would any determination of substance -- e.g., region, regional need, fair share allocation, invalidity of current zoning ordinances, site suitability or remedy -- have been made within 60 days of filing. Indeed, it would be an advanced case if the Answer had been filed or initial discovery requests had been served within that time period.

3. If litigation was pending more than 60 days before the effective date of the statute.

This brings us to the type of case before the Court now -- one in which the litigation was commenced prior to the eve of legislation. As to these cases, the statute simply states that:

> any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation.

Section 16(a).[10]

The Act does not state precisely what is transferred (existing pleadings and record, prior rulings of court, power of court to issue interim relief, etc.) nor does it identify the procedural consequences of a transfer. Unfortunately, the provisions that do exist only tend to cloud and confuse the question.

The Act does not require the municipality to petition for certification, but simply states that if the municipality fails to file its housing element and fair share plan with the Council within five months of transfer or of promulgulation of the Council's criteria and guidelines under Section 7, whichever occurs later, "jurisdiction shall revert to the Court." Sec. 16(a). Unlike Section 16(b), the Act does not specify that a party may or must file a notice to request review and mediation under Sections 14 and 15. Thus, it is unclear even whether the provision in Section 19, permitting a party to move for relief from the exhaustion requirement within 6 months of "receipt of a request of a party," is applicable. Thus as literally written,

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[10] Although the printed version of the statute refers to this subsection simply as "16," the following subsection is labelled "(b)" and thus plaintiffs assume that the omission of and "(a)" was inadvertent. We shall refer to this subsection as 16(a) for clarity's sake.

the statute only provides that by August 1, 1986,[11] 11 months from now, the Council must adopt its criteria and guidelines and that the muncipality must file a document with the Council by January 1, 1987, containing the matters specified in Section 10.[12]

If the statute is read literally: a) nothing further happens unless within the next six years the municipality determines that it is in its best interest to petition for substantive certification; or b) the litigant files a new lawsuit as to which the right to request review and mediation under Section 16(b) and

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[11] The statute literally provides that the Council must adopt criteria and guidelines within seven months after the confirmation of the last appointee or January 1, 1986 which is earlier. Sec. 7. However, because the Governor has already failed to meet the first deadline in the statute, to nominate the members within 30 days of effectiveness, which was August 1, 1985, and as it is anticipated that the Legislature will have only a brief special session on August 28 to consider teacher salaries and an environmental bill and another brief one starting on September 9 or 12, Star Ledger, August 23, 1985, at 1. col.5, it is unlikely that all members will be confirmed by the end of the calendar year. Thus, we proceed on the assumption that the Council's obligation will date from January 1, 1986.

[12] It is not clear whether a litigant would be allowed to challenge in court the procedural adequacy of the submission in order to invoke the reversion provision of Section 16(a). For example, could a court decide that a 2-page municipal submission entitled "housing element" with single sentences under each heading called for by Section 10 and a fair share plan that simply states that no zoning ordinance revisions are necessary to achieve the fair share is a "failure to file a housing element and fair share plan" within the meaning of Section 16(b)? Some court review might be necessary to preserve the court's own jurisdiction, especially if the statute is construed not to require a town that gets a transfer to petition for substantive certification and not to permit a litigant to request review and mediation with the attendant time limit and avenue for relief under Section 19.

the right to move in court under Section 19 for relief from exhaustion if the administrative process is delayed clearly attach. It is hard to imagine that the Legislature intended that, after transfer and timely filing of a housing element and fair share plan, either nothing would happen or the litigant would be forced to file a brand new lawsuit with the attendant filing costs and service delays, not to mention possible loss of vested law-of-the-case adjudications.

The only possible ways out of this apparently inadvertent lacuna are:

1) for the Court to construe a municipality's motion to transfer under Section 16(a) as a commitment to petition the Council promptly for substantive certification if transfer is granted or, more directly, as rendering the timely filing of its housing element and fair share plan the effective equivalent of such a petition; or

2) to construe Section 16(a) as conferring upon the plaintiff in a transferred action the same right to request review and mediation as is explicitly afforded plaintiffs in Section 16(b).

The former approach seems less plausible because nowhere else does the Act mandate filing of a petition for certification or provide a penalty for not filing. The second approach makes more sense because the statute already explicitly grants a litigant who is forced to exhaust administrative remedies under Section 16(b) a right to request mediation -- indeed the Section

requires such a request -- and provides a remedy if the mediation process is not completed in a timely manner. Sec. 19. Moreover, this interpretation has some textual support. Section 15(a) specifies that the Council must engage in the mediation and review process either if an objection is filed to a petition for certification or "(2)if a request for mediation and review is made pursuant to section 16 of this act." (Emphasis added.) The failure to limit the citation to 16(b) suggests that the Legislature may simply have inadvertently omitted recitation in 16(a) of the right to seek mediation that is expresssly stated in 16(b). The Legislature's ability to make precise subsection citations is shown by the Assembly amendment to Section 16(b) itself. In addition, as noted earlier,[13] Section 16(a) is in fact listed simply as 16 in the enacted version of the statute.

Although the second approach -- reading Sections 15(a)(2) and 16(a) to give litigants in transferred cases the right to request mediation and review -- seems more logical, it would create a further interpretation problem. Under Section 7 and 16, the Council has seven months from the date of the last appointee's confirmation or January 1, 1986, whichever is later, to promulgate its criteria and guidelines and a municipality allowed to transfer a case must file its housing element and fair share plan within five months from that promulgation. Most likely, these dates would be August 1, 1986 for promulgation and

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13 See note 10 supra.

January 1, 1987 for town filing.[14] If a request for mediation and review could then be immediately filed,[15] the Council would have at least six months, or until July 1, 1987, to complete that process. See note 8 supra for the question of what parts of the administrative process are within the "review and mediation process" to which the six-month limit applies. On the other hand, if Section 15(a)(2 and 16(a) were read to permit plaintiffs in transferred cases to seek mediation and review and then invoke Section 19 relief in case of delayed administrative processing, it would appear that the provision in Section 19, which permits the six-month period for Section 19 relief for cases in which the request is filed within nine months of enactment of the Act to begin running at the end of those nine months, would apply. If that is the case, a transferred plaintiff's motion for Section 19 relief from exhaustion could be filed by October 2, 1986, 15 months from the effective date, which would be almost a full 3 months before the town's housing element is even due to be filed under Section 16(a) and 9 months before the motion could be brought under that approach.

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14 See note 11 supra.

15 Normally a town must provide public notice when filing a petition for certification and the Council must allow 45 days for objections to be filed. Sec.14. It is unclear whether this additional 45 day delay would be required when formal petition is not required and the Council already has an objector in the form of the transferred litigant.

Whatever the resolution of this quandary, one thing is quite clear -- the absolute minimum time that would be expended before any action is required is October 2, 1986, almost 13 months from when this transfer motion is to be heard. Even under that scenario, however,the court hearing the Section 19 motion would have discretion to deny relief from the exhaustion requirement, simply allowing more extended mediation and review proceedings, or, indeed, resolving the above quandary in the municipality's favor by allowing until July 1, 1987, 22 months from now, when the motion for Section 19 relief could be brought under the alternative timetable of Section 16(a). Even if the administrative process were completed October 1986, but the Council denied or conditionally approved certification, the municipality would have another 60 days to refile and then the Council would have some unspecified additional time to review the new filing. Sec. 14(b). Thus,under any realistic view of this statute, a transfer now would mean a delay at least until some time in the first half of 1987.

THE CONSEQUENCES OF TRANSFER AND THE MEANING OF MANIFEST INJUSTICE

Even if it were clear what procedural steps could or would occur upon transfer, and under what time limits, it is important to consider what substantive proceedings would occur after transfer to determine whether the transfer would be manifestly unjust. Clearly, in a case brought within 60 days of the Act's effectiveness, in which exhaustion is always required and no substantive determinations will have occurred, the entire case with all issues will be before the Council. But in older cases, where substantive determinations may already have occurred and substantial evidentiary records already compiled, one needs to determine what issues and materials would be before the Council upon transfer.[16]

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[16] We note that in a technical sense transfer is not literally possible at this time, because there is no Council, the Governor not having nominated and the Senate therefore not having considered any members, and there are no offices available nor employees empowered to take custody of the materials not to mention process the case. The motion to transfer the case is thus literally premature. If the Court had not granted South Plainfield a stay of its compliance ordinances' effectiveness pending determination of this motion, we would have urged the Court to deny the motion as premature and continue with proceedings in court until a Council that could accept a transferred case exists. Under the special circumstances, we agree that prompt determination of the motion is crucial. Should the Court be inclined to grant transfer, we would argue that transfer could not take effect until, at a minimum, the Council's members are all confirmed, employees appointed and offices established, and thus that the Court would have continuing jurisdiction and an obligation to move forward with the normal proceedings until such time as a transfer to the Council is literally feasible, for it would be manifestly unjust to refer plaintiffs, especially ones on the verge of obtaining a final judgment after 11 years of litigation, to a nonexistent remedy.

Two major options exist: either the Council starts over and the Council redetermines everything without regard to the prior court record and the rulings that constitute the law of the case, or the Council is empowered only to deal with those issues in the case that remain unresolved at the time of transfer and to do so in light of the existing record and prior rulings. Plaintiffs do not think it crucial for the Court to resolve this important statutory construction issue in this case because, as argued below, it is clear that a transfer of the litigation as to South Plainfield would under either view of the subsequent proceeding be manifestly unjust to the plaintiffs and the class of lower income households they represent. Nevertheless, we believe that the history, structure and language of the Act, when read against existing law, indicate that, if a case with prior substantive rulings can be transferred at all, the Council could determine only the issues remaining at the time of transfer. Indeed, this appears to be the view held by South Plainfield, which in its notice of motion to transfer and proposed order requests only that "the defendant, Borough of South Plainfield, be...permitted to transfer the matter of the adoption of defendant's proposed Ordinances 1009 and 1010 to the Council on Affordable Housing." Proposed Order, Para. 1; Notice of Motion, Para. 1.[17]

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[17] In contrast, Washington Township, in the transfer motion to be heard by Judge Skillman on September 9, has specifically requested that he order "that all previous Orders and Judgments of this Court inconsistent with the transfer of this matter to the Council on Affordable Housing, shall be declared superceded by this Court."

The issues of what happens after transfer and what is manifest injustice precluding a transfer are obviously interwined. Plaintiffs believe that the caselaw compels the conclusion that it would be unlawful and manifestly unjust to require a litigant who has through extended and expensive litigation produced a substantial evidentiary record and secured settled rights through adjudication of key issues on liability or remedy to begin anew before a newly created administrative tribunal. From this one could conclude either: a) that the statute bars transfer of any case in which adjudication of a key issue of liability or remedy, such as municipal fair share or ordinance invalidity, has been completed; or b) that transfer is not totally barred in such cases but upon transfer those rulings may not be reopened and the earlier record is controlling. If one takes the latter view, then one must consider whether it would be manifestly unjust to transfer such an extensively litigated case even though the administrative agency would address only unresolved disputes in light of the existing record and law of the case.

Resolution of these related issues depends upon the interaction and impact of two strands of existing law that employ the "manifest injustice" standard -- the law on when new statutes may be applied retroactively and the law on exhaustion of administrative remedies in prerogative writ actions -- as well as

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the related law concerning primary jurisdiction.[18]

Retroactivity law

"The courts of this State have long followed a general rule of statutory construction that favors prospective application of statutes." Gibbons v. Gibbons, 86 N.J. 515, 521 (1981). There are, of course, exceptions where the Legislature has stated an intent to apply it retroactively expressly, or where it has done so implicitly because "retroactive acpplication may be necessary to make the statute workable or to give it the most sensible interpretation." Id. at 522. Likewise, retroactive effect is given to a statute that is ameliorative or curative, for example, in reducing the maximum period of detention, or because of the reasonable expectation of the parties. Id. at 522-23. Finally:

> [E]ven if a statute may be subject to retroactive application, a final inquiry must be made. That is, will retroactive application result in "manifest injustice" to a party adversely affected by such an application of the statute? 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 523-24. Because of the preference for prospective application and the likelihood that retroactive application would

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[18] Although the law of primary jurisdiction does not directly use the language "manifest injustice," it is essential to consider it both because of its close relationship to the exhaustion requirement and because it is directly applicable to the situation before the court in a transfer motion, as explained below.

prejudice settled expectations reasonably relied upon, courts generally apply procedural rules retroactively, but rarely apply substantive changes retroactively to disrupt vested rights. See, e.g., Farrell v. Violator Division of Chemetron Corp., 62 N.J. 111, 299 A.2d 394 (1973); Feuchtbaum v. Constantini, 59 N.J. 167, 280 A.2d 161 (1971); Townsend v. Great Adventure, 178 N.J. Super. 508, 429 A.2d 601 (App. Div. 1981); Newark v. Padula, 26 N.J. Super. 251, 97 A.2d 735 (App. Div. 1953); 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION Secs. 41.04, 41.06 (4th ed. 1973).

Exhaustion of Administrative Remedies

The Supreme Court has also clearly ruled that "the preference for exhaustion of administrative remedies is one of convenience, not an indispensable pre-condition.' ... In any case amenable to administrative review, however, upon a defendant's timely petition, the trial court should consider whether exhaustion of remedies will serve the interests of justice." Abbott v. Burke, 100 N.J._ __,___ (Sup.Ct. July 23, 1985)(slip op. at 32). The interests furthered by an exhaustion requirement are:

> (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts.

Id. at ___(slip op. at 32-33). However, as the Court in Abbott and earlier exhaustion cases explained:

> [t]he exhaustion doctrine is not an absolute. Exceptions exist when only a question of law need be resolved ... when the administrative remedies would be futile ... when irreparable harm would result... when jurisdiction of the agency is doubtful... or when an overriding public interest calls for a prompt judicial decision.

Id. at ___ (slip op. at 33).

The Supreme Court has summarized this set of doctrines concerning administrative exhaustion in a court rule regarding exhaustion in actions in lieu of prerogative writs, the form of action in which almost all Mount Laurel lawsuits have been brought:[19]

> Except when manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be undertaken as long as there is available a right of review before an administrative agency which has not been exhausted.

R. 4:69-5.

Primary Jurisdiction

Probably even more pertinent to the present situation than the caselaw on exhaustion of administrative remedies is the related doctrine of primary jurisdiction:

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[19] By a fluke of history, this action, Urban League v. Carteret, was actually brought as an equity action in Chancery, rather than as an action in lieu of prerogative writ. Nevertheless, because almost every case since Mount Laurel II, and most before it, have been brought in the latter mode, it is reasonable to assume that the Legislature was thinking about the rules relevant to that mode in adopting the "manifest injustice" language. Of course, whatever interpretation of the "transfer" and "manifest injustice" provisions prevails, clearly it must apply to all pending actions without regard to the form in which they were brought.

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial intereference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.'
>
> ... We do not imply that the agency may enlarge or contract the legal rights of the parties. When the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their rights. New Jersey Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); cf. Farmingdale Realty Co. v. Borough of Farmingdale, 55 N.J. 103, 112-13 (1969)(taxpayer whose building had been taxed twice could recover refund without exhausting administrative remedies); Nolan v. Fitzpatrick, 9 N.J. 477 (1952)(exhaustion of administrative remedies not required when sole issue is county's legal duty to appropriate funds for commission). But when the determination of the legal issue must be preceded by the taking of the necessary evidence and the making of the necessary factual findings,' it is best done by the administrative agency specifically equipped to inquire into the facts.

Boss v. Rockland Elec. Co., 95 N.J. 33, 40-41 (1983).

In Boss, the Court found that the Board of Public Utility Commissioners had a direct statutory mandate and substantial administrative expertise on the very factual issue before the Court and this issue required development of a substantial evidentiary record before determination. The Court thus directed the trial court to refer those factual issues to the Board, leaving undisturbed pending final disposition the trial court's previous preliminary injunction to preserve the status quo.

The approach taken in Boss is also, consistent with the State Agency Transfer Act, N.J.S.A. 52:14D-1 et seq., which provides for inter-agency transfers. Indeed, the Act specifies that a transfer does not undo previous actions of the original decisionmaker: "The transfer shall not affect any order... made ...by the agency prior to the effective date of the transfer; but such orders... shall continue with full force and effect until amended or repealed pursuant to law; ... nor shall the transfer affect any order or recommendation made by, or other matters or proceedings before the agency." N.J.S.A. 52:14D-6,7.

The doctrine of primary jurisdiction is more directly applicable here than that of exhaustion of administrative remedies for the simple reason that Section 16(a) expressly contemplates transfer of an existing, older action from a court, which the Act does not deny has had primary jurisdiction until now, to an administrative agency, and for reversion of jurisdiction to the court should the administrative process not be pursued or completed in a timely fashion. Section 16(b), in contrast, expressly refers to exhaustion of administrative remeides because it addresses cases not yet filed, or only filed in anticipation of the requirement's imposition. Indeed, as initially written, Section 16(a) required "no exhaustion of the review and mediation procedures" unless the specified determination was made, but the language was changed pursuant to the Governor's conditional veto message to eliminate all references to "exhaustion" and the subsection now speaks only of

"transfer".

It is against this substantial background of well-established law that one must view the statutory language barring "transfer" of a "case" that would cause "manifest injustice."

First, it seems clear that the Legislature did not intend retroactive impairment of vested substantive rights. The statute does not directly determine regions, regional need, municipal fair share, or the adequacy of compliance plans. Rather, it creates a procedure, with a few basic guidelines, and directs the Council to come up with criteria to be used to gauge municipal determinations. It does not reject any particular court ruling or definition of fair share. It does not purport to impose a new one. It does not require all pending cases to be sent to the Council for such a determination, but only those brought on the eve of legislation -- in which almost certainly no substantive rulings will have been made. Rather, it clearly leaves jurisdiction in the court to exercise discretion as to which cases that are older, including those that have already been partially adjudicated by the Court, are to be transferred. In exercising this discretion, courts should look to the long-standing rule that statutes are generally not to be applied retroactively and especially not to disrupt vested rights to the prejudice of parties who have reasonably relied on existing law. Likewise, under the doctrine of primary jurisdiction "when the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their

rights." Boss, supra, 95 N.J. at 40. Thus, plaintiffs submit that Section 16(a) must be construed to bar transfer of any case in which judicial determination of litigants' rights have been made -- i.e. law of the case created -- as to any of the key issues -- region, regional need, fair share allocation methodology, municipal fair share, invalidity of existing zoning ordinance, site suitability, or overall remedy. In the alternative, if transfer is permitted even though substantive determinations have been made, any transfer must, to prevent impairment of vested rights, be expressly limited to determination of the issues remaining unresolved at the time of transfer, in light of the existing record and prior court rulings.[20]

If one adopts the latter approach -- that the transfer of cases with substantive adjudications is permitted by Section 16(b), although limited to the resolution of the outstanding issues in light of the existing record -- the Court would still have to consider whether it would be manifestly unjust to apply the new administrative procedure to the remaining issues in old and partially adjudicated cases.

The Gibbons standard of manifest injustice used by the Fair Housing Act explicitly contemplates that injustice and unfairness

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[20] This interpretation coincides with the common sense meaning of transfer. When referring to transference of a case, one does not normally think of merely transferring an empty file folder but rather of transmitting all documents in the record. See also N.J.S.A. 52:14D-8("All files, books, papers, records... are transferred to the agency to which such transfer is made.")

can flow from procedural delay as well as substantive changes in the rules. One of the prominent cases relied upon by Justice Pashman in Gibbons to describe manifest injustice in the setting of retroactivity was Kruvant v. Cedar Grove, 82 N.J. 435 (1980), a land use case very similar to the South Plainfield litigation in a number of significant respects. In Kruvant, a variance had been sought for a multiple family development in a single family zone which the court found to be unsuitable for single family development. After eight years, four trials, and three ordinance amendments that the trial court characterized as "repeated improper zoning," id. at 444, 414 A.2d at 13, the Supreme Court concluded that the municipality simply did not want this multi-family housing and that the trial court properly ignored yet another zoning amendment, which had been adopted after the expiration of a 90-day deadline set by the trial court for final municipal action. The Court noted that normally the time of decision rule requires courts to apply the law in effect at the time of decision if the legislature indicated that the modification was to be applied retroactively to pending cases. Id. at 440. But the Court explained:

> However, the principle is not inexorable. . . . Where a court has set a reasonable time limitation within which a municipality must act and that condition has not been met, a municipality may not simply ignore a court order and interfere with the judicial process. . . . In view of the extended proceedings, the unquestioned propriety of the trial court's 90-day restriction, and the property owner's satisfaction of the requirements for a variance, the equities warrant and judicial integrity justifies the inapplicability of the time of decision rule. Cf. Oakwood at Madison v. Madison Tp., 72 N.J. 481, 549, 550 (1977).

Id. at 442, 445, 414 A.2d at 12-13, 14.

Thus, it is clear that the defendant's conduct in the period preceding the transfer motion, including particularly delays needlessly incurred and court orders improperly ignored, must be considered by the court in determining whether the equities and judicial integrity justify imposition of a newly enacted procedure upon a protracted and nearly completed action.

Similarly, in deciding whether transfer would be manifestly unjust in a particular case, the court must consider the various other factors addressed in determining whether to excuse exhaustion or avoid transfer to an administrative agency with primary jurisdiction: whether the administrative agency has particular expertise concerning the issues to be resolved, whether the agency decision may satisfy the parties and thus obviate resort to the courts, whether only questions of law remain to be resolved, whether there is a need to create a substantial evidentiary record and make extensive findings of fact for appellate review, whether the administrative remedies would be futile under the circumstances, whether jurisdiction of the agency is doubtful,[21] whether an overriding public interest calls for a prompt judicial decision, and whether irreparable harm would result.

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[21] See pp. 32-41 supra for discussion of whether the Council has any jurisdiction over court cases in which substantive rulings have already been made.

Before seeking to apply these factors to South Plainfield, it is important to explicate one aspect of the last factor -- the risk of irreparable harm during the administrative process. Mount Laurel courts have recognized that, at times, the dwindling supply of vacant land or of sewerage capacity requires interim restraints to insure that the municipality will be able to implement the compliance remedy ultimately ordered by the Court, that is, to prevent irreparable injury to plaintiff's probable right to rezoning of sufficient land to insure a realistic opportunity for construction of lower income housing. In this very action, for example, this Court has entered such restraints in Piscataway and South Plainfield, to a lesser degree in Old Bridge. Should the Court conclude that transfer of this or any similar litigation were appropriate in general under the standards set forth by the retroactivity and exhaustion caselaw, it would still have to determine whether the court still had jurisdiction to continue its restraining order pending final administrative determination.

Courts hearing appeals from final administrative determinations clearly have power to provide interim relief pending the conclusion of the judicial review process. Rule 2:9-7 specifically grants such power to the Appellate Division both in appeals as of right from final agency decisions, governed by Rule 2:2-3(a)(2), and in cases in which permission is sought to appeal interlocutory administrative decisions under Rules 2:2-4 and 2:5-6. See also Sampson v. Murray, 415 U.S. 61, 73-74 (1974);

Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942). In addition, in extraordinary cases, a court may enjoin an administrative proceeding directly. Rule 4:52-6 and Mutual Home Dealers Corp. v. Comm'r of Banking and Ins., 104 N.J. Super. 25 (Ch. Div. 1968). The rules do not directly address, however, whether courts may enjoin defendants to maintain the status quo pending completion of an administrative remedy.

Both logic and caselaw indicate that they do. If a reviewing court can grant interim relief pending its review of a final or interlocutory administrative decision, to insure that its final decision will be effective and meaningful to the prevailing party, then it would appear logical that it should also have power to grant such relief pending completion of the administrative process. If the municipality does not file its housing element and fair share plan on time or the review and mediation process takes too long or if the Council denies or conditions certification, a transferred case will revert to the trial court.[22] Thus, it would appear logical that the trial court should have authority to issue temporary restraints to prevent irreparable harm to the plaintiff obligated to exhaust the new administrative remedy.

In Boss v. Rockland Electric Co., supra, the New Jersey Supreme Court expressly left in effect, pending completion of administrative factual determination of the scope of an electric

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22 See discussion at pp. 24-30 supra.

utility's easement, a trial court's preliminary injunction against the removal of trees from the affected property that had been issued 3 1/2 years before the Supreme Court's opinion. 95 N.J. at 33, 37, 42-43. Likewise, the federal Supreme Court, in FTC v. Dean Foods Co., 384 U.S. 597, 599-601 (1966), held that the court with ultimate jurisdiction to review the agency's orders had power to grant a temporary injunction to prevent disappearance of one of the entities whose merger the agency sought to challenge, because the disappearance would have rendered the agency and the court "incapable of implementing their statutory duties by fashioning effective relief." Sampson v. Murray, 415 U.S. 61, 76-77, 84 (1974).

The Fair Housing Act does not directly address the point and it appears to have intended that transfer divest a court of all jurisdiction.[23] But the fact that the administrative process was designed as "a comprehensive planning and implementation response to this constitutional obligation," Sec. 2(c), suggests that the statute could be read to permit such court restraints if transfer were imposed.

However, court restraints against any construction on most vacant sites pending conclusion of a two-year administrative process could raise significant "taking" questions. The landowners would be unable to take advantage either of permitted

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[23] Section 16(a) states that if the municipality fails to file its housing element on time, "jurisdiction shall revert to the court."

uses under the existing zoning or of the proposed rezoning to comply with the constitutional obligation. Having no economically meaningful option for the land, they would be able to argue that the regulatory process had amounted to a taking of their land. See, e.g., Golden v. Planning Bd. of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), and Orleans Builders & Developers v. Byrne, 180 N.J. Super. 432, 453 A.2d 200 (App. Div. 1982), and cases cited therein, for discussion of when a moratorium on construction amounts to a compensable taking. Yet a court injunction creating a compensable taking would appear inconsistent with the direct legislative mandate that "Nothing in this act shall require a municipality to raise or expend municipal revenues in order to provde low and moderate income housing." Sec. 11(d).

To avoid the risk either of irreparable harm to the plaintiff and nullification of the agency's mandate or of creating a compensable taking through an extended moratorium on construction, the court should rule that transfer is always barred if a temporary restraint against development is in effect or would be required pending completion of the administrative process.

TRANSFER OF THE FEW REMAINING LEGAL ISSUES CONCERNING SOUTH PLAINFIELD, WHICH DO NOT REQUIRE DEVELOPMENT OF AN EVIDENTIARY RECORD, WOULD BE MANIFESTLY UNJUST TO THE LOWER INCOME POPULATION REPRESENTED BY PLAINTIFFS DURING THE PAST 11 YEARS OF LITIGATION, BECAUSE THE SUPREME COURT HAS ALREADY AFFIRMED THE RULING OF LIABILITY, THE DEFENDANT HAS STIPULATED TO ALL FACTS NECESSARY TO ADJUDCATION OF THE REMAINING DETERMINATIONS BUT THEN HAS VIOLATED THREE COURT-ORDERED DEADLINES, THEREBY STRETCHING ITS NONCOMPLIANCE UNTIL THE STATUTE WAS ENACTED, THE DEFENDANT HAS ALREADY ADOPTED ALL NECESSARY ORDINANCES AND THUS THE ONLY EFFECT OF TRANSFER WOULD BE TO DELAY THE IMPLEMENTATION OF PLAINTIFFS' VESTED RIGHTS FOR NEARLY TWO YEARS, THEREBY RISKING LOSS OF THE SUBSTANTIAL CURRENT OPPORTUNITIES FOR DEVELOPMENT.

Based upon the interpretation of the statute set forth above, the Court should deny South Plainfield's motion outright for two separate reasons. As argued above, no case in which judicial adjudications of liability or remedy have already been made and no case in which interim restraints against development must be continued or imposed pending the extended administrative process may be transferred under Section 16(a) of the Fair Housing Act. Here, based on a voluntary Stipulation, the Court has already adjudicated plaintiffs' rights as to region, fair share, ordinance invalidity, site suitability for rezoning and the necessary remedial measures. Moreover, because of the limited vacant land remaining in light of defendant's actions since the July 1976 Judgment, the Court has already found it necessary to restrain development in South Plainfield and given the Borough's bad faith in selling land and approving developments inconsistent with the Judgment, continuation of such restraints would be essential to preserve any Mount Laurel opportunity.

There is, moreover, a third reason peculiar to this litigation. The "case" in which the litigation concerning South Plainfield has occurred, Urban League, et al. v. Mayor and Council of Carteret, et al., No. C4122-73, is a single judicial action involving originally 23 municipal defendants and at present eight, including South Plainfield, as to which no final judgment has been entered. Although the statute expressly permits "any party to the litigation" to file a motion, the transfer is of "the case," not just some part of, or a few litigants in, the case. The Legislature, in drafting that language, clearly was contemplating litigation against a single town, even if involving more than one builder, a form common to all post-Mount Laurel II litigation. Thus, the court should rule that transfer of a multi-municipality Mount Laurel action is not possible under 16(a).[24]

If it were considered possible, then the Court would have to consider, and allow the plaintiffs to address, the manifest injustice factors as to all eight remaining townships, including those that are not seeking or planning to seek transfer, some of whom might consider it a manifest injustice to themselves.[25] Alternatively, the Court would have to construe the statute to

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[24] It is possible that this case is the only remaining multi-defendant Mount Laurel action. We understand that only Denville is still an active defendant in the Public Advocate's Morris County suit which originally included some 27 municipalities.

[25] To date, only Cranbury and South Plainfield have sought transfer; some town councils have already affirmatively decided not to seek transfer.

allow transfer of the portion of a litigation relating to one of several municipalities if the Court considers severance appropriate at the time of the transfer motion. Judge Furman, after an evidentiary hearing, already denied defendants' motion for severance before the first trial in this case. This Court had given no consideration to severance, and no defendant had sought it, prior to this motion, presumably because of the accumulated familiarity and expertise that this Court has developed concerning this case and because of the potential interrelationship of compliance plans in neighboring towns.[26] In any case, we believe severance of South Plainfield is inappropriate for all the reasons set forth below, which establish that transferring the litigation as to South Plainfield would be a "manifest injustice."

Although there are, as noted before, many factors relevant to a determination of "manifest injustice", almost all of which are applicable in the South Plainfield context, because of their complexity and interrelationship, we will focus the discussion around four key points:

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[26] For example, neighboring towns may have concerns with the impact of high density developments along common roads or adjoining neighborhoods. If litigation concerning two such towns were severed through transference of one to the Council, either the other town would be prejudiced by judicial inability to consider such factors, or the transferred town would have to seek intervention in the litigation or the litigating party would have to seek intervention before the Council, thereby needlessly burdening the two decisionmaking forums and defeating the purpose of severance/transfer.

1. The case is 11 years old, extremely complex in substance and procedural history, and it is now virtually complete through the final remedial stage.
2. The terms of the Judgment were expressly bargained for and voluntarily accepted by South Plainfield more than a year ago.
3. The Borough has, for the past year, unconscionably delayed the process of remediation after its initial cooperation, and it now seeks to take advantage of its own improper conduct by transferring that could and should have been over before the end of 1984.
4. The fair share obligation imposed on South Plainfield is so modest, and so reasonable, that the Affordable Housing Council would be hard put to alter it, so that the <u>only</u> consequence of transfer is yet another delay, with severe impact on the likelihood of any low income construction in this fair share period.

These four aspects of manifest injustice are discussed in greater detail below. They must be considered, however, against the background of extensive delay that would face any case transferred now, for delay is an inherent part of the new system, as detailed above. Moreover, the Affordable Housing Council will likely be confronted with a large initial docket of cases, both transferred and new, which will create an instant backlog and make even further delays all but inevitable. It must be remembered that the Urban League has been in litigation for 11

years, not eight as in Kruvant, but against a municipality at least as intransigent as Cedar Grove. South Plainfield has ignored not one (as in Kruvant), but multiple deadlines set by the Court for final action which, if taken in a timely fashion, would have rendered transfer moot. The rezoning ordered in South Plainfield is every bit as appropriate as the variance granted in Kruvant, and it has the additional distinction of having been agreed to voluntarily by the Mayor and Council more than a year ago, when the stipulation was presented to the Court. As in Kruvant, this case has "been tried to the point of exhaustion." 414 A.2d at 3. No point would be served by transfer other than the illegitimate goal of pointless delay, an affront, as in Kruvant, both to the equities and to judicial integrity. Id. at at 14.

1. The Case Is So Complex, Has Taken So Long To Try And Is So Near Completion, That There Would Be Manifest Injustice In Transferring And Starting Over.

South Plainfield is part of the much larger Urban League case, which is now the longest-running piece of Mount Laurel litigation in New Jersey, having been filed on July 23, 1974.[27] South Plainfield was found to be in violation of the Constitution

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[27] The Mount Laurel case itself finally settled in July, 1985. It is worth noting that Mount Laurel Township, after years of bitter defense of its position, concluded that settlement was preferable to seeking transfer to the Affordable Housing Council.

by Judge Furman on May 4, 1976, and this ruling was vigorously affirmed by the Supreme Court as part of the Mount Laurel II decision in January, 1983.[28]

It should be noted that during the period between the first judgment against it in 1976 and the decision of the Supreme Court in 1983, South Plainfield assiduously pursued a development strategy that brought it ratables without poor people, and used up a substantial amount of vacant land that could have been devoted to housing. Indeed, in May 1976 Judge Furman found that the Borough had sufficient vacant land to accommodate a fair share of over 1700 units and that it was overzoned for industrial use by 400 acres but by 1984 all parties agreed there was insufficient land for anywhere near that number. Thus, by taking advantage of the unenforceability of Judge Furman's Order during the incredibly lengthy appellate proceedings, South Plainfield has already reaped the unconstitutional "benefit" of exclusionary zoning well beyond any rational entitlement to further delay.

Upon remand to this Court in 1983, for reconsideration of both compliance and remedy in light of the passage of time since the first trial, the parties engaged in a further year of extensive pre-trial discovery, and their planning experts participated in the unique "consensus" process that resulted in

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[28] The only time the Borough has won at all during eleven years of litigation was at the Appellate Division stage, 170 N.J. Super. 461 (1979), a decision eventually reversed in its entirety by the Supreme Court.

the fair share methodology formula now generally used in the Mount Laurel courts. See AMG Realty Co. v. Township of Warren, No. L-23277-80 P.W.(July 16, 1984).

In comparison to cases more recently filed, therefore, the Urban League litigation has been at the leading edge of every legal development in the field of exclusionary zoning, both before and after Mount Laurel II, and it has been concomitantly complex, time-consuming and expensive. In Kruvant, supra, the Supreme Court recognized that after eight years of intransigent resistance to implementation of an altogether reasonable trial judgment, further delay would in effect defeat plaintiff's meritorious claim. The Urban League litigation has involved much more difficult legal issues than Kruvant, and its extended history has allowed South Plainfield much greater opportunity to "win" by irretrievably altering its land use patterns to perpetuate exclusion. A fortiori, there would be manifest injustice in allowing the 11 years of Urban League litigation against South Plainfield, which can come to an end shortly, to stretch for years more in the Affordable Housing Council.

2. South Plainfield's Motion To Transfer Is Inconsistent With Its Voluntary Acceptance of The Mount Laurel Remedy More Than A Year Ago.

On the eve of trial, South Plainfield and the Urban League entered into a voluntary Stipulation of facts that amounted to a complete resolution of the issues between them. For its own

political reasons, South Plainfield chose to stipulate rather than execute a formal settlement, but it was understood that the Urban League would immediately move for summary judgment based on the Stipulation. Neisser Affidavit of June 21, 1985, Exhibit B, at 5. Accordingly, on May 22, 1984, the Court ruled that South Plainfield was in continuing violation of the Constitution, had a fair share number of 900 housing units (the derivation of this number is explained elsewhere), and could come into compliance by taking a number of legislative steps specified in the Stipulation, including adoption of an affordable housing ordinance, site specific rezoning, and assembly and donation of municipally owned land to help reduce the costs of specific development proposals. As of May 30, 1984, when the Court-appointed expert approved the Stipulation and Judgment, all that remained for South Plainfield to do was to enact formally the remedial steps that it had already agreed to. The Court allowed it 120 days for this essentially ministerial process.

It is important to note what South Plainfield did not have to do as a result of its voluntary decision to stipulate the basis for the summary judgment. It did not have to participate with the other Urban League defendants in the 18-day methodology trial in May, 1984. It did not have a fair share number calculated for it by the "consensus" formula, which would have resulted in a much higher fair share number (1725). It did not have to make all its appropriate vacant land available for Mount Laurel development (Neisser Affidavit of August 28, 1985, Para.

10. It did not have to surrender any of its autonomy to a master appointed by the Court to supervise a 90-day remedial process. (To date, no Master has ever been appointed for South Plainfield.) The Borough was treated, in other words, as if it had settled the matter amicably and in good faith, on the premise that what remained to be done could be done without controversy. Effectively South Plainfield was allowed to develop its own housing element anf fair share plan through discussion, control of discovery, and negotiation, just as it would through submission to the Council and mediation under the statute.

Unfortunately, the case soon became more controversial, rather than less, in the aftermath of the Judgment of May 22, 1984. At the time of its motion for transfer, 14 months later, South Plainfield had not adopted complying ordinances or received a judgment of repose from the Court. Instead, at the very time it moved for transfer, it was near the end of the third court-imposed deadline to adopt the ordinances, and the Borough Council, on advice of counsel, subsequently defied the Court's deadline by tabling the compliance ordinances on July 29. Only after a further hearing before the Court on August 2, 1985, did the Council remove the ordinances from the table and adopt them "under protest" on August 7, 1985.

There is practically nothing left to be done. The Court-appointed expert needs to review the ordinances to determine their adequacy for compliance, but given her familiarity with the Judgment from her prior review and the plaintiffs' acceptance of

the ordinances, except for a technical amendment to specify precisely the affected lands, this should take a short time and require little or no testimony. The only evidentiary matters that remain concern the impact of Borough land sales and development approvals inconsistent with the Judgment upon compliance with the Judgment. These should also be quite simple and the facts might even be agreed to by the parties. In any case, the need for this evidentiary development arises solely because of the defendant's misconduct. The defendant should not allowed to claim that transfer to an administrative body is necessary to hear evidence and find facts that would not have been necessary if it had not intentionally violated a series of direct court orders before the agency existed.

Moreover, there is currently no administrative expertise in these matters. The Council does not yet exist, the Governor having failed to meet the statute's first deadline. Even after the Council is formed and staff hired, it will be a considerable period of time before the Council gets down to the business of evaluating municipal compliance plans, as its first seven months of existence will be spent preparing general criteria and guidelines. Moreover, much of its initial work will relate to fair share determinations, not compliance plans. Thus, it will be a long time before one can honestly say that the Council has some special expertise in evaluating compliance plans under the statute that would warrant transfer under the requirements of the primary jurisdiction doctrine. Boss, supra.

It is true that South Plainfield has retained a technical right to appeal the summary judgment against it, and the case is therefore not final in this technical sense. It is difficult, however, to perceive any colorable issues that South Plainfield can hope to raise on appeal, because the Judgment simply repeats verbatim the comprehensive Stipulation as to facts and remedies that the Borough Council agreed to voluntarily, on advice of its counsel and after full debate. South Plainfield admitted that its ordinances were unconstitutional, it admitted the appropriateness of the compliance remedies, and it specified a fair share number that is not dependent in any way on the arguably appealable "consensus" formula set forth in AMG. Appeal, then, is nothing but another frustrating source of delay, which the Borough has no legal, let alone moral, basis to pursue. Although the Urban League plaintiffs cannot directly prevent South Plainfield from exercising its technical right of appeal,[29] the prospect of that appeal certainly does nothing to alter the fact that the South Plainfield litigation is over for all practical purposes.

Manifest injustice has to be evaluated against this recent procedural history. The substantive work of the case was over more than a year ago, when the issues were voluntarily resolved by compromise between the parties. If "manifest" injustice means that the injustice is obvious, that it does not require elaborate parsing to understand, then the injustice is manifest in

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29 But see note 4 supra.

permitting South Plainfield to go back on its word by transferring a case that it had agreed to conclude. More than a year ago, South Plainfield freely struck a bargain that gave it the best deal obtainable, securing substantive concessions from the Urban League as well as relief from the expense of the May 1984 methodology trial. There is absolutely no equity in its present contention that it ought to be able to try for an even better deal, with years more of delay, while needed lower-income housing goes unbuilt in South Plainfield.

3. In addition to the manifest injustice in allowing further delay, there is manifest injustice in allowing South Plainfield to take advantage of its own prior unconscionable conduct, without which it would not be in a position to seek transfer.

Simply put, if South Plainfield had not stalled unconscionably beyond the generous 120-day period allowed it by the Court to implement its Stipulation, there would be no case to transfer. With Mount Laurel legislation under active consideration during much of this period, South Plainfield had every incentive to stall, and its tactics have had the effect, if not the provable design, of keeping the case "alive" until transfer could be sought. Its behavior has been so severe in recent months that the Urban League was moved to seek punitive sanctions, in an effort to get the agreed-to local ordinances adopted. It should not now be rewarded for its improper behavior, by receiving a transfer that will artificially prevent the case

from coming to a prompt and just conclusion.

South Plainfield's tactics have had two parts. First, it has moved with inordinate slowness to adopt compliant ordinances. The key zoning revisions were fully agreed to in the 1984 Stipulation, and the affordable housing ordinance, which did require further drafting, could easily be built on standardized models that have been acceptable to the Court and the parties in other towns. The 120-day period allowed by the Court to do this should have been more than ample (the Urban League, in fact, had asked the Court initially for a 90-day deadline). Indeed, Mr. Neisser first provided the Borough planning consultant with detailed comments on the first draft of the ordinances on July 26, and then gave detailed written comments on the next draft on September 5. Thus, defendant had complete drafts with plaintiffs' comments a month before the first deadline. After the plaintiffs' first restraint motion, brought in late October 1984, there was a direct meeting of the parties' experts to iron out remaining differences. By January, the Planning Board had recommended complete drafts for approval by the Council. Neisser Affidavit of August 28, 1985, Para. 12. Yet, the deliberate foot-dragging continued. When the Urban League on two occasions noted minor deviations in the texts of the ordinances proposed by South Plainfield from those agreed to at the November meeting, the Borough in each case sent the ordinance back to the Planning Board for reconsideration and recommendations although clearly the Council could have directly made the amendments before

adoption.

Compounding delays of this sort has been the Borough's spectacular bad faith in trying to subvert parts of the Stipulation and Judgment before the ordinances were adopted. In October 1984, the Urban League found it necessary to seek the aid of the Court to prevent the Borough from approving the Elderlodge development without a lower-income set-aside, in contravention of the voluntary Stipulation and Judgment. Again in June, 1985, it was necessary to obtain further restraints when the Urban League discovered that the Borough had, and was continuing, to sell off municipally owned land specifically committed in the Stipulation to Mount Laurel purposes. It was this action that led the Court to impose a strict timetable for South Plainfield to complete action on adoption of the ordinances.

For the last year and more, the Borough has acted virtually as if there were no judgment outstanding against it, let alone a judgment based on its own voluntary stipulation. Its bad faith is manifest. Its bad faith, moreover, explains why it has taken over a year to complete a straightforward drafting process. The Borough does not want to comply, and it has taken advantage of every opportunity it could find or manufacture to avoid complying. In retrospect, it is clear that it has also taken advantage of the Urban League, whose policy has been not to enforce deadlines too strictly, in the belief that Mount Laurel values are better served by encouraging defendant municipalities to come into compliance by autonomous choice, rather than through

judicial intervention and supervision. The Urban League's forbearance should not now be turned against it for inequitable purposes, as South Plainfield seeks to do. Indeed, as noted above, the fact that bad faith conduct should now have created some need for evidentiary determinations can hardly be turned into an argument for deferral to administrative fact-finding.

It should not be forgotten that the Affordable Housing Council is a mechanism to effectuate the constitutional purposes of Mount Laurel I and Mount Laurel II, not to frustrate them. Moreover, the essence of the statutory procedure is the submission of a voluntary plan of compliance, which is to be approved by the Council if it meets the general guidelines that have been promulgated for such plans. It seems self-evident that there would be manifest injustice in tranferring to a voluntary compliance process a case in which the municipality has already had that opportunity but then pulled away from its own plan and unmistakably signalled its lack of interest in voluntary compliance.

It would grossly weaken the legitimacy and the authority of the Affordable Housing Council for it to become a repository for intransigent cases such as South Plainfield's that are completed in all meaningful respects, and whose transfer to the Council can only be for the purpose of frustrating Mount Laurel compliance through delay, as happened in the years between Mount Laurel I and Mount Laurel II. This case has been delayed for 11 years; it can be fully resolved in the trial court within weeks and in the

the appellate courts within months. Transfer will delay matters for at least 18 months to two years, and to utterly no useful purpose. Transfer would be manifestly unjust.

4. South Plainfield can gain nothing from transfer except the illegitimate value of delay, which would seriously jeopardize the likelihood of lower income housing construction given the cyclical nature of the construction industry and the costs of delay.

That transfer will serve no useful purpose is clear, because it is virtually impossible that the substantive outcome of South Plainfield's Mount Laurel obligation could be altered by the Affordable Housing Council in a manner that would satisfy both South Plainfield and the Constitution.

First, it is absolutely impossible to know what outcome will prevail in the Council. The Legislation itself contains few substantive rules. It merely states guidelines, many of a common sense variety already incorporated into the Urban League proceedings[30] and leaves the more detailed rule-making to the Council. In this, the Act parallels the decision of the Supreme Court in Mount Laurel II to give wide latitude to the three Mount Laurel judges.

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30 For example, the statute mandates consideration of historic preservation, limited vacant developable land, and phasing of large fair shares, Secs. 7(c)(2), 23, all of which have already been considered by this Court in the Cranbury, Piscataway, South Plainfield, and Old Bridge litigation.

Even speculative gain is unlikely, however, if the Council could, contrary to the interpretation presented earlier, redetermine a previously adjudicated or stipulated fair share . Using the AMG methodology, South Plainfield's fair share would have been 1725 units of low and moderate income housing. Judgment, Para. 2. The voluntary Stipulation provides a fair share of only 900 units, which the Mayor has stated is well below the Borough's actual capacity, Transcript of July 29, 1985 Council Meeting, at 57, and, as explained in Eric Neisser's affidavit, the remedial portions of the Stipulation and Judgment contemplate that no more than 603 lower income units will actually be built. Neisser Affidavit of August 28, 1985, Para. 5 and Exhibit B. Thus, the parties have already, through negotiation, adapted the formulaic fair share process to the reality of South Plainfield's specific situation, just as the Affordable Housing Council would be required to do under the statute.

Given that there is some need for affordable housing in South Plainfield that is not presently being met (a point conceded by the Borough through the Stipulation), it is extremely difficult to see how the Borough's ultimate fair share obligation could be reduced below the terms of the Stipulation negotiated last year. Mr. Mallach's affidavit indicates that even a literal application of the credit provision in Section 7(c)(1), which would wipe out almost all fair share obligations throughout the state, would reduce the South Plainfield obligation by 749 units.

Thus, even if the Council were to start with a number lower even than the 1523 units that Mr. Mallach had projected for South Plainfield last year, Judgment, Para. 2, even one as low as 1350, for example, and applied the credit provision in the quite absurd manner suggested by its literal language, the resulting fair share would be in the neighborhood of the 600 units anticipated from the Judgment.[31] If, on the other hand, the Council were to limit the credit provision to a more rational meaning,[32] the statutory provision for downward adjustment of the fair share in light of limited vacant, developable land, Sec. 7 (c)(2)(f), could not possibly reduce the number below 900, for the Mayor has already publicly stated that capacity for that level still exists. As for Mr. Santoro's suggestion that the Borough might wish to seek a regional contribution agreement under the statute,

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31 Obviously if the credits under Section 7(c)(1) reduce the fair share to a number that is attainable given available land, the Borough could not also seek an adjustment under Section 7(c)(2)(f) for lack of vacant developable land.

32 It is inconceivable that the Legislature intended the absurd result of eliminating fair shares throughout the state because of the current existence of adequate lower income housing for some portion of the population. The provision must, therefore, be interpreted in a manner consistent with both its language and the constitutional obligation to satisfy <u>unmet</u> housing <u>needs</u>. We believe that the proper interpretation of the credit for "each current unit of low and moderate income housing" is that it applies only to those units constructed or made affordable to the designated population during the current fair share period. Thus, it credits not all such units currently in existence but only those that were currently developed. As the Stipulation makes clear, there are practically no such units in South Plainfield, as only 33 units were rehabilitated for lower income households in the eight years between the first Judgment by Judge Furman in July 1976 and the Stipulation in May 1984.

plaintiffs note that there is ample room for that between the 603 units to be build on the eight sites and the 900 unit Borough obligation.

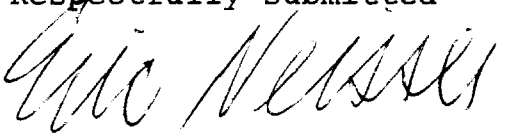
The only "benefit" South Plainfield can realistically hope to gain from transfer, then, is further delay, of which it has already had more than enough. Delay would, however, have a devastating effect on the plaintiffs' rights. Delay always imposes significant carrying costs in the construction industry. But there is much more at stake here. The affidavit of Alan Mallach confirms that we are currently in one of the most favorable times for housing construction in New Jersey. It is unlikely that these exceptional market conditions will continue indefinitely -- indeed in all likelihood the market two or three years from now will change for the worse. Mallach Affidavit, Paras. 15-16. The Affidavit of Lawrence Massaro brings the point home vividly with regard to South Plainfield. He has just delivered $1 1/4 million to the Borough to purchase 24 acres in the Pomponio Avenue site, which has been rezoned for 15 units per acre, and has a contract to sell the land, once conveyed and approvals received, to a major, experienced developer of low income housing. He states that even the minimum 13 month delay that would be caused by transfer, under the tightest interpretation of the Act: "would expose the development to substantial risks due to possible changes in the economic climate, employment situation and demographics and that adverse changes could jeopardize the fiscal viability of the project thus

completely defeating the objective of actually having lower income homes built in South Plainfield." Massaro Certification of August 27, 1985, Para. 17. Thus, delay occasioned by transfer might well undermine the very relief that the Court has awarded plaintiffs, whether or not temporary restraints were imposed on development during transfer.

By pressing ahead with the transfer motion in the face of these realities, South Plainfield suggests (as its actions over the last year have also suggested) that it prefers no-share to fair-share, and that the Stipulation voluntarily signed in May 1984 was signed with the proverbial crossed fingers behind the municipal back. To transfer this matter now to the Affordable Housing Council, as if South Plainfield had never voluntarily stipulated to a compliance plan, as if it had not tried to subvert that plan for more than a year now, and as if the existing Judgment were oppressively unrealistic, would be to make a travesty of the constitutional obligation that the Fair Housing Act of 1985 seeks to implement. If "manifest injustice" means anything -- as it must -- then it must mean that there would be manifest injustice in transferring the South Plainfield portion of this case.

DATED: August 28, 1985

Respectfully submitted



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AFFIDAVIT OF SERVICE

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

ELIZABETH URBANOWICZ, of full age, being duly sworn, deposes and says:

I am a secretary at the Constitutional Litigation Clinic, Rutgers Law School in Newark.

On Thursday, August 29, 1985, I placed in the U.S. Mail Depository, Washington Street, Newark, postage prepaid, the original and one copy of Plaintiffs' Memorandum of Law in Opposition, together with the supporting affidavits of Alan Mallach, Lawrence J. Massaro and Eric Neisser regarding the matter of Urban League of Greater New Brunswick v. The Mayor and Council of the Borough of Carteret (South Plainfield), No. C 4122-73, addressed to

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SWORN TO and SUBSCRIBED
before me this 29th day
of August, 1985.

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