~~Excerpts~~ Municipalities fight COAH Transfer 10/28/85
U.L. v. Carteret, Monroe

- Notice of motion for leave to Appeal Denial of motion to Transfer to COAH ... etc.
- Letter Brief in support

Pgs. 82

CH0000 23 N

Mario Apuzzo, Esq.
Director of Law
Township fo Monroe
Municipal Complex
Perrineville Road
Jamesburg, New Jersey 08831
(201) 521-4400

Attorney for Defendant,
Township of Monroe

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL Plaintiff, vs. THE MAYOR AND COUNCIL OF CARTERET, ET AL., Defendants	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX COUNTY / OCEAN COUNTY DOCKET NO. C-4122-73 CIVIL ACTION NOTICE OF MOTION FOR LEAVE TO APPEAL DENIAL OF MOTION TO TRANSFER TO AFFORDABLE HOUSING COUNCIL, TO APPEAL DENIAL OF STAY OF TRIAL COURT PROCEEDINGS PENDING THE MOTION FOR LEAVE TO APPEAL, AND FOR CONSOLIDATION WITH OTHER APPEALS FILED OR TO BE FILED ORAL ARGUMENT REQUESTED

TO: Hon. Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Courthouse
CN-2191
Toms River, New Jersey 08753

Arnold Mytelka, Esq.
Clapp & Eisenberg
80 Park Plaza
Newark, New Jersey 07102

Stewart M. Hutt, Esq.
Hutt, Berkow, Hollander & Jankowski
459 Amboy Ave.
Woodbridge, New Jersey 07095

Carl S. Bisagaier, Esq.
510 Park Boulevard
Cherry Hill, New Jersey 08034

Carla Lerman
413 West Englewood Ave.
Teaneck, New Jersey 07666

Eric Neisser, Esq.
John Payne, Esq.
Rutgers School of Law
Constitutional Litigation Clinic
S.I. NewHouse Center for Law and Justice
15 Washington Street
Newark, New Jersey 07102

PLEASE TAKE NOTICE that on the date and time to be established by the Court, the undersigned, attorney for the defendant / appellellant, Township of Monroe ("Monroe"), will move the Court for an Order:

1. Granting Monroe leave to appeal an Interlocutory Order entered on October 11, 1985 by the Hon. Eugene D. Serpentelli, denying Monroe's motion to transfer pursuant to P.L. 1985, c.222 §§ 16 (the Act) the pending exclusionary zoning cases from the jurisdiction of the Superior Court to that of the Council on Affordable Housing;

2. Under R.2:9-5(b), reversing the trial court's denial of a stay of all trial court proceedings pending this Motion for Leave to Appeal;

3. Consolidating this Motion with all other Motions already filed or to be filed and which are of the same nature.

Regarding leave to appeal, the grounds for this Motion are:

a. This interlocutory appeal is not barred by Southern Burlington County N.A.A.C.P., et al. v. Township of Mt. Laurel, et al., 92 N.J. 158 (1983) ('Mount Laurel II") ;

b. Pursuant to R.2:2-4, it is in the interest of justice that the Court grant leave to appeal the interlocutory order of the Hon. Eugene D, Serpentelli entered on October 11, 1985 and the final judgment, decision or action in this action in this case would be appealable as of right under R. 2:2-3(a);

c. The trial court erred in its interpretation and application of the concept " manifest injustice " mentioned in Section 16 of the Act;

d. The trial court's denial of the transfer moiton is defeating the

purpose of the Act which is to get exclusionary zoning cases out of the courts and into an administrative agency which would be properly equipped to handle complex local zoning problems; and

e. The trial court's denial of the transfer motion is contrary to the State's Supreme Court's language stated in Mt. Laurel II that the Legislature is better equipped than the courts in determining the methods a municipality is to use to satisfy its constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families and that the Court has always preferred legislative action rather than judicial action in the area of low and moderate income housing.

Regarding the reversal of the trial court's denial of a stay of all trial court proceedings pending this Motion, the basis for this Motion is that the continued litigation in the trial courts will destroy or impair the subject of this appeal given the trial court's conclusion that the stage the litiagtion has reached is a relevant factor in deciding whether or not to transfer the case to the Affordable Housing Council.

Regarding the request for consolidation, the basis for the Motion is:

a. That all the Motions already filed or to be filed will involve common questions of law or fact arising out of the same transactions or series of transactions; and

b. That by allowing the consolidation, the Court will avoid multiplicity of litigation, delay, and expense.

Reliance shall be placed on the attached Letter Brief Appendix.

The Township of Monroe respectfully requests oral argument on this Motion.

The Township of Monroe also requests that because of the importance to local government of the proper resolution of the affordable housing issue,

that this Motion be decided on an expedited basis.

Respectfully submitted,

Mario Apuzzo

MARIO APUZZO
Director of Law of the Township
of Monroe

Dated: October 28, 1985

Township of Monroe
County of Middlesex
PETER P. GARIBALDI
Mayor
MARIO APUZZO
Director of Law
DEPARTMENT OF LAW: Municipal Complex
Perrineville Road
Jamesburg, N.J. 08831
(201) 521-4400

October 28, 1985

The Honorable Judges
of the Appellate Division
Hughes Justice Complex
CN-006
Trenton, NJ 08625

RE: Urban League of Greater New Brunswick et al v.
The Mayor and Council of Carteret, et al;
Docket No. C-4122-73

Dear Honorable Judges:

Please accept this Letter Brief in lieu of a more formal Brief pursuant to R. 2:6-2(6). This Letter Brief is submitted in support of the Defendant/Appellant, Monroe Township.

PROCEDURAL HISTORY

On July 23, 1974, the Plaintiff, Urban League of Greater New Brunswick and other individuals on their own behalf and on behalf of others similarly situated (a class) filed a Complaint against 23 New Jersey municipalities, one of which is the Township of Monroe ("Monroe") challenging zoning and other land use ordinances, policies, and practices of the Defendant municipalities on the basis of economic and racial discrimination. On December 2, 1983, the Plaintiff, Monroe Development Associates, filed a Complaint in lieu of prerogative writs for declaratory and injunctive relief pursuant to Southern Burlington County N.A.A.C.P.,

et al v. Township of Mt. Laurel, et al., 92 N.J. 158 (1983) ("Mt Laurel II") and seeking a judgment declaring Monroe's Land Use Ordinances invalid and unconstitutional. On April 16, 1984, the Plaintiffs, Lori Associates and HABD Associates, filed a Complaint in lieu of prerogative writs pursuant to Mount Laurel II demanding judgment against Monroe to declare its zoning ordinances to be void as a whole and as to Plaintiff's lands, enjoining Monroe in enforcing its entire zoning ordinance, appointing a special master to assist in the rezoning for affordable housing, formulating a builder's remedy, and for attorney's fees and costs of suit. Finally, on May 4, 1984, the Plaintiffs, Great Meadows Company, Monroe Greens Associates and Guaranteed Realty Associates filed a Complaint in lieu of prerogative writs also pursuant to Mount Laurel II. For an explanation of what followed in the Courts in each of these actions, please refer to the Appendix at Da 7-12 .

On July 2, 1985, the State Legislature approved P.L. 1985, c. 222, the "Fair Housing Act" ("the Act"), the Legislature's comprehensive planning and implementation response to the Mount Laurel II constitutional mandate and the Legislature's mechanism for resolving existing and future disputes involving exclusionary zoning through mediation and review provided for in the Act rather than litigation in the courts. Sections 2d. and 3 of the Act. The Act provides for a procedure allowing the trial court to transfer exclusionary zoning cases pending before it to the Affordable Housing Council ("the Council"). Section 16 of the Act provides:

> For those exclusionary zoning cases instituted more than 60 days before the effective date of this Act, any party to the litigation may file a motion with the Court to seek a transfer of the case to the Council. In determining whether or not to transfer, the Court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation.

Pursuant to this provision, Monroe filed in early September, 1985, a Motion to transfer the exclusionary zoning cases mentioned above to the Council with Honorable Eugene D. Serpentelli, sitting in Superior Court at Toms River, New Jersey. A copy of this Motion with supporting Brief are attached hereto in the Appendix at Page Da 1-5. This Motion, along with similar motions of Cranbury Township, Warren Township, Borough of South Plainfield, and Piscataway, was heard on October 2, 1985. All the motions were denied for reasons stated in Judge Serpentelli's Decision appended hereto at Page Da 24a. Judge Serpentelli also denied any stay of his ruling. (Da 61& 67) Monroe now seeks leave to appeal this transfer denial and the refusal to stay further court proceedings pending this Motion for leave to appeal and also requests that these applications be consolidated with those already filed and/or to be filed by other municipalities.

LEGAL ARGUMENT

POINT I

THIS INTERLOCUTORY APPEAL IS NOT BARRED BY THE MOUNT LAUREL II LANGUAGE WHICH DENIES THE RIGHT OF APPEAL OF THE TRIAL COURT'S DETERMINATIONS OF FAIR SHARE AND NON-COMPLIANCE, DECISIONS WHICH IT CONSIDERS INTERLOCUTORY.

The Mount Laurel II decision anticipated that there would be considerable appellate activity throughout the exclusionary zoning litigations. To give some guidance in this area, the Court stated that:

> In most cases after a determination of invalidity, and prior to final judgment and possible appeal, the municipality will be required to rezone, preserving its contention that the trial court's adjudication was incorrect. If an appeal is taken, all facets of the litigation will be considered by the appellate court including both the correctness of the lower court's determination of invalidity, the scope of remedies imposed on the municipality, and the validity of the ordinance adopted after the judgment of the invalidity. The grant or denial of a stay will depend upon the circumstances of each case... 92 N.J. 158 at 218. The municipality may elect to revise its land use regulations and implement affirmative remedies 'under protest'. If so, it may file an appeal when the trial court enters final judgment of compliance. Until that time there shall be no right of appeal, as the trial court's determination of fair share and non-compliance is interlocutory.

The transfer motion appealed from did not raise the issues of fair share or non-compliance, and these issues were therefore not involved. Also, the above language should not be construed to mean that leave to appeal an interlocutory order should not be granted. The above language only confirms the Court Rules which state at R. 2:2-3(a)(b) and R. 2:5-6 that there is a distinction between the right to appeal and having to seek leave to appeal. What the above language is telling us is that determinations of fair share and non-compliance are interlocutory in nature and,therefore, leave to appeal would be required. The

language does not say that any interlocutory order or judgment in a Mt Laurel II type setting should not even be considered for leave to appeal. Moreover, the Mt Laurel II decision was rendered when there was no legislative remedy which is now contained in the Act, a legislative remedy for which the Supreme Court so desperately asked. Surely, the Supreme Court would not want to prevent appellate courts from deciding the meaning of that legislative remedy in this highly sensitive and controversial area. Such a result would be contrary to fulfilling the need for the higher courts to give the lower courts guidance in this very difficult area. Such a result would also be contrary to the desire of at least one State Senator, Senator John A. Lynch, who was one of the sponsors of the Fair Housing Act, to have a higher court make rules and give interpretation of the Act. (See Da 68)

POINT II

IT WILL BE IN THE INTEREST OF JUSTICE IF THIS COURT WERE TO GRANT LEAVE TO APPEAL.

R. 2:2-4 provides in pertinent part that the Appellate Division may grant leave to appeal, in the interest of justice, from an interlocutory order of a court if the final judgment, decision or action thereof is appealable as of right pursuant to R. 2:2-3(a) (which defines the situations when there is a right to appeal as opposed to having to ask for leave to appeal). We submit that justice will be served by allowing this appeal. The Mount Laurel II litigation presently before the courts involves issues of great public importance. These issues are

very complex and difficult to decide. There is a need for uniformity of interpretation and treatment to do justice to all the New Jersey municipalities involved. There is a need for upper court interpretation, especially in light of the Legislature having recently given us a long-awaited statutory mechanism which is very complex and in need of immediate judicial interpretation (the Act). As mentioned already, there is also at least one State Senator asking for upper court analysis and guidance. The trial court has been faced with having to for the first time give meaning to the concept "manifest injustice" found in Section 16 of the Act. How the trial court interprets and applies the "manifest injustice" concept in determining before what body does a case involving local governments' implementation of affordable housing projects will have an irrevocable impact on local governments and communities. Whether the resolution of the affordable housing issue is a product of a protracted courtroom war with its concomitant paper battles and in which judges, lawyers, and a court-appointed master are the only battlefield participants or a product of municipal planning and deliberations before an administrative body specially established to aid local government officials and professionals devise a sound and realistic solution to the affordable housing shortage will have an effect on the municipalities of this State for ages to come. Every facet of local government will be impacted upon, for accelerated construction of housing will require the speedy litigation of local government resources such as water, sewer facilities, police and fire protection, first aid and other health

protection, municipal court services, local government services, mass transportation, roads and bridges, recreation, education, garbage disposal, to name a few. Local taxpayers will have to bear the expense of providing these government services and the financing of such a complex scheme will require careful and well-conceived economic planning.

POINT III

THE TRIAL COURT INCORRECTLY INTERPRETED AND APPLIED THE CONCEPT "MANIFEST INJUSTICE" FOUND IN SECTION 16 OF THE FAIR HOUSING ACT.

The trial court concluded that it would be a manifest injustice to the plaintiffs to transfer the cases to the Council because to do so would cause a delay in providing for affordable housing (Da 57). We submit that to dispose of the question of whether or not to transfer on this ground alone is contrary to the intent of the Act. The Urban League case has been in the courts for over 11 years. To now argue that to keep the exclusionary zoning cases in the courts would expedite the resolution of the case without giving any consideration for allowing local government to be the centerpiece in devising a well-planned resolution of the affordable housing issue and not the courts, is contrary to the Legislature's purpose in creating the Act and to our democratic form of government. Speed is not the only factor to be considered in the manifest injustice analysis. The court must also consider whether keeping the cases in the courts will give us well-planned affordable housing. If affordable housing is not appropriately planned for, everyone will suffer, including the lower income groups for whose benefit the housing

is supposed to be built. Indeed, social chaos would produce a deleterious and irrevocable impact on municipalities and that is where the manifest injustice to the municipal defendants would be. We again submit that the administrative expertise which will be provided by the Council will better serve all the municipalities in resolving the affordable housing issue than will the court's appointed master who has been forced to resolve the planning aspects alone. In Mount Laurel II, the Supreme Court stated that the affordable housing issue is better left to the Legislature. 92 N.J. at 212, 213. We submit that the issue is too encompassing for the courts to adequately handle. Local government input must be had for an adequate resolution. The courts just simply do not have the resources or personnel to adequately handle such a complex issue. Monroe is ready, willing and able to go to the Council to resolve its affordable housing issue because it believes that that is the proper body to address and resolve the issue. It is manifestly injust to the people of Monroe and to the lower income groups to deny Monroe this opportunity.

CONCLUSION

For the foregoing reasons, Defendant, Township of Monroe, respectfully requests this Court:

1. To grant it leave to appeal the trial court's interlocutory Order dated October 11, 1985 in which it denied Monroe's Motion to transfer its exclusionary zoning cases to the Council;

2. To stay all further trial court proceedings pending resolution of this Motion for leave to appeal; and

3. Consolidating this Motion with all other Motions of the similar nature already filed or to be filed by other Defendant municipalities involved in Mt Laurel II litigation.

Respectfully submitted,

MARIO APUZZO
Director of Law
Attorney for Monroe Township

Dated: October 28, 1985

INDEX TO APPENDIX

Notice of Motion to Transfer the cases from the Jurisdiction of the Court to the Council on Affordable Housing under L. 1985 c.222,§ 16 ..... 1a

Letter Brief if support of Defendant, Monroe Township's Motion To Transfer The Cases From The Jurisdiction of The Court to The Council on Affordable Housing under L. 1985 c.222,§16 ..... 6a

Resolution authorizing the Township of Monroe to prepare and file with the Council on Affordable Housing its fair share plan and housing element under P.L. 1985, c.222 ..... 20a

Transcript of October 2, 1985 Decision of the Honorable Eugene D. Serpentelli, D.S., J.S.C. 24a

October 11, 1985 Order Denying Motion to Transfer 66a

Home News Article of October 9, 1985 ..... 68a

1a

Mario Apuzzo, Esq.
Director of Law
Township of Monroe
County of Middlesex
Department of Law
Municipal Complex
Perrineville Road
Jamesburg, NJ 08831
(201) 521-4400
Attorney for Township of Monroe

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Civil Action

URBAN LEAGUE OF GREATER NEW BRUNSWICK et al,
Plaintiff,
vs.
THE MAYOR and COUNCIL OF THE BOROUGH OF CARTERET, et al,
Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO. C-4122-73

JOSEPH MORRIS and ROBERT MORRIS,
Plaintiffs,
vs.
TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A Municipal Corporation of the State of New Jersey,
Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO. L054117-83

GARFIELD & COMPANY
Plaintiff,
vs.
MAYOR and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, a Municipal Corporation, and the members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof,
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO. L055956-83 P.W.

BROWNING-FERRIS INDUSTRIES OF SOUTH JERSEY, INC., A Corporation of the State of New Jersey, RICHCRETE CONCRETE COMPANY, a Corporation of the State of New

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO: L-058046-83 P.W.

the State of New Jersey,
Plaintiff,

vs.

CRANBURY TOWNSHIP PLANNING BOARD and TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,
Defendants.

CRANBURY DEVELOPMENT CORPORATION, A Corporation of the State of New Jersey,
Plaintiff,

vs.

CRANBURY TOWNSHIP PLANNING BOARD AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,
Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO: L-59643-83

CRANBURY LAND COMPANY, A New Jersey Limited Partnership,
Plaintiff,

vs.

CRANBURY TOWNSHIP, A Municipal Corporation of the State of New Jersey located in Middlesex County, New Jersey,
Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO: L-070841-83

MONROE DEVELOPMENT ASSOCIATES,
Plaintiff,

vs.

MONROE TOWNSHIP,
Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO. L-076030-83 PW

ZIRINSKY,
Plaintiff,

vs.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, a Municipal Corporation, and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY,
Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO. L079309-83 PW

3a

Pennsylvania Corporation,
Plaintiff,
vs.

THE TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A Municipal Corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY and the PLANNING BOARD OF THE TOWNSHIP OF CRANBURY,
Defendants.

LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO. L005652-84

LORI ASSOCIATES, A New Jersey Partnership; and HABD ASSOCIATES, a New Jersey Partnership,
Plaintiffs,
vs.

MONROE TOWNSHIP, A municipal corporation of the State of New Jersey, located in Middlesex County, New Jersey,
Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO. L-28288-84

GREAT MEADOWS COMPANY, A New Jersey Partnership; MONROE GREENS ASSOCIATES, as tenants in common; and GUARANTEED REALTY ASSOCIATES, INC., a New Jersey Corporation,
Plaintiffs.
vs.

MONROE TOWNSHIP, a municipal corporation of the State of New Jersey, located in the State of New Jersey, located in Middlesex County, New Jersey,
Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX/OCEAN COUNTIES
DOCKET NO. L-32638-84 P.W.

NOTICE OF MOTION TO TRANSFER THE CASES FROM THE JURISDICTION OF THE COURT TO THE COUNCIL ON AFFORDABLE HOUSING UNDER L. 1985, c. 222, § 16.

4a

TO : The Honorable Judge Eugene D. Serpentelli A.J.S.C.
Superior Court of New Jersey
Law Division
Ocean County Courthouse
Toms River, New Jersey 08754

Arnold Mytelka, Esq.
Clapp & Eisenberg
80 Park Plaza
Newark, New Jersey 07102

Stewart M. Hutt, Esq.
Hutt, Berkow, Hollander & Jankowski
459 Amboy Avenue
Woodbridge, New Jersey 07095

Carl S. Bisgaier, Esq.
510 Park Boulevard
Cherry Hill, New Jersey 07666

Carla Lerman
413 West Englewood Avenue
Teaneck, New Jersey 07666

Frederick Kessler, Esq.
Clapp & Eisenberg
80 Park Plaza
Newark, New Jersey 07102

Eric Neisser, Esq.
Barbara Williams, Esq.
John Payne, Esq.
Rutgers School of Law
Constitutional Litigation Clinic
S.I. Newhouse Center for Law and Justice
15 Washington Street
Newark, New Jersey 07102

Carl D. Silverman, Esq.
Wilf & Silverman
1640 Vauxhall Rd.
Union, New Jersey 07083

5a

PLEASE TAKE NOTICE that on Friday, September 27, 1985 at 9:00 a.m. in the forenoon, or as soon thereafter as counsel may be heard, the undersigned shall apply to the Superior Court of New Jersey, Law Division at Toms River, New Jersey for an Order granting Motion To Transfer The Cases from the Jurisdiction of the Court to the Council on Affordable Housing Under L. 1985 c. 222, § 16.

On this Motion, we will rely on the Letter Brief attached hereto.

Mario Apuzzo

Mario Apuzzo, Esq.
Attorney for Township of Monroe

Dated: September 4, 1985

CERTIFICATE OF SERVICE

I hereby certify that an original and copy of the foregoing Notice of Motion to Transfer the Cases From the Jurisdiction of The Court To The Council On Affordable Housing Under L. 1985 c. 222, § 16 and original and one copy of Letter Brief and Order have been filed with the Clerk of the Superior Court, in Trenton, New Jersey; that copies of these papers have been mailed to the Clerk, [illegible] Ocean County and that copies of these same papers have been mailed by regular mail to the attorneys on the attached Mailing List and also to the Honorable Eugene D. Serpentelli.

Mario Apuzzo

Mario Apuzzo
Attorney for Township of Monroe

6a

Township of Monroe
County of Middlesex
DEPARTMENT OF LAW: Municipal Complex
Perrineville Road
Jamesburg, N.J. 08831
(201) 521-4400

PETER P. GARIBALDI
Mayor

MARIO APUZZO
Director of Law

September 5, 1985

Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Law Division
Ocean County Courthouse
Toms River, New Jersey

Re: Urban League of Greater New Brunswick et al v. Borough of Carteret, et al, Docket #C-4122-73; Monroe Development Associates v. Monroe Township, Docket #L-076036-83; Lori Associates and HABD Associates v. Monroe Township, Docket #L-28288-84; Great Meadows, Monroe Greens Associates & Guaranteed Realty Associates v. Monroe Township, Docket #L-32638-84

Dear Judge Serpentelli:

Please accept this Letter Brief in support of Defendant, Monroe Township's Motion To Transfer The Cases From The Jurisdiction Of The Court To The Council On Affordable Housing Under L. 1985 c. 222 § 16.

PROCEDURAL HISTORY

Urban League of Greater New Brunswick et al v. Borough of Carteret, et al

On July 23, 1974, the Plaintiff, Urban League of Greater New Brunswick and other individuals on their own behalf and on behalf of others similarily situated (a class) filed a Complaint

against 23 New Jersey municipalities, one of which is the Township of Monroe, (hereinafter referred to as "the Township") challenging zoning and other land use ordinances, policies, and practices of the defendant municipalities on basis of economic and racial discrimination. Claims for relief are based upon N.J.S.A. 40:55-32; Article 1, Paragraphs 1, 5 and 8 of the New Jersey Constitution, 42 U.S.C. A. 1981, 1982 and 3601; and the Thirteenth and Fourteenth Amendments to the United States Constitution. Judgment was rendered in Plaintiffs' favor. There followed an appeal to the Supreme Court which remanded the case back to the SuperiorCourt as part of the resolution of Southern Burlington County, NAACP v. Township of Mount Laurel, 92 N.J. 158 (1983) (hereinafter referred to as("Mount Laurel II"). After an eighteen day trial in April and May, 1984, this court on July 27, 1984 found the Township to be in violation of Mount Laurel II and ordered it to submit a compliance plan within ninety days. Ms. Carla Lerman was appointed by the court as Master to assist the Township in its compliance effort. The Township Council, after some delays, on March 29, 1985, submitted a complaince plan with the assistance of a professional planner, Hintz-Nelessen Associates, P.C. That plan has been reviewed by Ms. Lerman in her report dated July 1, 1985.

Monroe Development Associates
v. Monroe Township

On December 2, 1983, the Plaintiff, Monroe Development Associates filed a Complaint in lieu of prerogative writs for declaratory and injunctive relief. The action is brought pursuant to

Mount Laurel II. The Plaintiff is seeking a judgment declaring the Township's land use ordinances invalid and unconstitutional in their entirety and/or in relevant part. The Plaintiff is also seeking the appointment of a special master to recommend the revision of said ordinances and effectuation of municipal action in compliance with the Constitution and laws of the State of New Jersey and to supervise the implementation of a builder's remedy to insure the prompt production of needed housing units. The Defendant Township filed its Answer on January 5, 1984, asking that the Complaint be dismissed and for an award of attorney's fees and costs of suit. Thomas R. Farino, Jr., Esq. was the defendant's Township Attorney at this time. This case was consolidated by an Order of Honorable Eugene D. Serpentelli with the Urban League case. Mario Apuzzo, Esq., subsequently took over the representation of this case for the Township on April 1, 1985.

Lori Associates and HABD Associates v. Monroe Township

On April 16, 1984, the Plaintiffs, Lori Associates and HABD Associates, filed a Complaint in lieu of prerogative writs pursuant to Mount Laurel II. The plaintiffs are demanding judgment against the Defendant Township declaring the Township's zoning ordinances to be void as a whole and as to Plaintiffs' lands, enjoining the Township to cease and desist in enforcing its entire zoning ordinance, appointing a special master to assist in the rezoning for affordable housing, formulating a builder's remedy, and for attorney's fees and costs of suit. The Defendant Township through its then Township Attorney, Thomas R. Farino, Jr., filed its Answer on May 7, 1984 demanding that the Complaint be dismissed

and asking for counsel fees and costs of suit. This suit was consolidated with the Urban League case by Order of Judge Serpentelli dated and filed on May 3, 1984 but only in the following ways: (1) in the event the Court determines that Monroe Township's land use regulations do not comply with Mount Laurel II, Lori Associates and HABD Associates shall have the right to participate in the ordinance revision process before the Master and before the Court, including the right to assert a builder's remedy with respect to their property and shall have the right to prosecute and/or defend any appeal arising in this case; (2) such consolidation is conditioned upon there being no discovery between Lori Associates and HABD Associates, Plaintiffs, and Monroe Township, Defendant, prior to the completion of the trial segments on region, fair share and Monroe Township's compliance or lack of compliance with Mount Laurel II, except that all documents, deposition transcripts, expert reports or other discovery respecting Monroe Township in the consolidated Urban League cases shall be made available to Lori Associates and HABD Associates for inspection; and (3) such consolidation is further conditioned upon the agreement by Lori Associates and HABD Associates to be bound by the court's determination of fair share, region and compliance in the other actions pending before the court which have been consolidated with Urban League.

Mario Apuzzo, Esq., subsequently took over the representation of this case for the Township on April 1, 1985.

Great Meadows, Monroe Greens Associates &
Guaranteed Realty Associates v. Monroe Township

On May 4, 1984, the plaintiffs, Great Meadows Company, Monroe Greens Associates and Guaranteed Realty Associates, filed a Complaint in lieu of prerogative writs pursuant to Mount Laurel II. The Plaintiffs are demanding a judgment:

(1) Declaring the MONROE TOWNSHIP LAND DEVELOPMENT ORDINANCE invalid in its entirety;

(2) Enjoining Monroe Township to cease and desist in enforcing its entire zoning ordinance;

(3) Appointing a special master to revise the MONROE TOWNSHIP LAND DEVELOPMENT ORDINANCE and to supervise the TOWNSHIP with respect to the implementation of any builder's remedy in order to insure prompt and bona-fide review by defendants of all applications by Plaintiffs for development approvals;

(4) Ordering the revision of the MONROE TOWNSHIP LAND DEVELOPMENT ORDINANCE in order to bring it into compliance with the MOUNT LAUREL II mandate;

(5) Ordering a builder's remedy for Plaintiffs in the form of a Court approval of a Concept Plan application to be submitted by Plaintiffs conditioned upon the provisions of a substantial amount of dwelling units as housing affordable to lower income people;

(6) Formulating a "builder's remedy", directing the Township to re-zone Plaintiffs' property to permit 16 to 22 units per acre or such other average gross density, consistent with principles of sound planning, sufficient to provide a reasonable return to the plaintiffs and to assure feasibility of construction of a sub-

stantial amount of low and moderate income housing;

(7) In the alternative, if it is determined that the Mount Laurel obligation cannot otherwise be satisfied, then directing the court appointed master to assist in developing zoning and land use regulations which provide a realistic opportunity for the construction of least cost housing in the Township generally, and on Plaintiffs' property, specifically;

(8) Ordering that all development applications for development which includes a substantial amount of lower income housing be "fast tracked", that is, approved within shorter time periods than provided for in the Municipal Land Use Law and that Environmental Impact Assessments or Statements and Community Impact Statements or Fiscal Impact Reports not be required for such developments;

(9) Ordering that all fees, including but not limited to application fees, inspection fees, engineering fees, building permit and certificate of occupancy fees be waived for a sufficient and appropriate amount of housing within developments which include a substantial amount of lower housing;

(10) Ordering that only performance and maintenance guarantees essential to protect public health and safety be required for on-tract or off-tract improvements associated with developments which include a substantial amount of lower income housing;

(11) Ordering MONROE to plan and provide for, out of municipal tax revenues, reimbursement to developers for the construction of sewer, water, roads, other utilities and open space facilities required for developments which include a substantial amount of lower income housing;

(12) Ordering MONROE to accept all open space, recreational facilities, raods and other infrastructure which may be dedicated in connection with development which includes a substantial amount of lower income housing;

(13) Ordering MONROE to establish and fund an agency to:

a. Subsidize land, site improvement, construction and financing costs for lower income housing, particularly Mt. Laurel II housing.

b. apply for all available governmental subsidies for lower income housing; and

c. screen applications for and sponsor and maintain lower income housing, particularly Mt. Laurel II housing in MONROE TOWNSHIP.

(14) Ordering MONROE to adopt a resolution of need or grant tax abatement where necessary;

(15) Ordering Defendant MONROE TOWNSHIP to pay Plaintiff's counsel fees and costs of suit; and

(16) Granting Plaintiffs such further relief as the Court deems just and proper.

The Defendant Township, through its then attorney, Thomas R. Farino, filed its Answer on May 25, 1984 demanding that the Complaint be dismissed and asking for counsel fees and costs of suit. This suit was eventually consolidated with the Urban League case but only solely as follows: (1) in the event the Court determines that Monroe Township's land use regulations do not comply with Mount Laurel II, Great Meadows Company, Monroe Greens Associates and Guaranteed Realty Associates, Inc. shall have the

right to participate in the ordinance revision process before the Master and before the court, including the right to assert a builder's remedy with respect to the Plaintiffs' properties, and shall have the right to prosecute and/or defend any appeal arising in this case; and (2) such consolidation is conditioned upon there being no discovery between Great Meadows Company, Monroe Greens Associates and Guaranteed Realty Associates, Inc., Plaintiffs, and Monroe Township, Defendant, prior to the completion of the trial segments on region, fair share and Monroe Township's compliance or lack of compliance with Mount Laurel II, except that all documents, deposition transcripts, expert reports or other discovery respecting Monroe Township in the consolidated Urban League cases shall be made available to Great Meadows Company, Monroe Greens Associates and Guaranteed Realty Associates for inspection and copying.

Mario Apuzzo, Esq., subsequently assumed the responsibilities of representing the Township in this case on April 1, 1985.

ARGUMENT

UNDER P.L. 1985, c. 222, § 16, AN ACT CONCERNING HOUSING, THE COURT SHOULD TRANSFER THE EXCLUSIONARY ZONING CASES IN WHICH THE TOWNSHIP OF MONROE IS NAMED A DEFENDANT AND WHICH ARE PRESENTLY UNDER ITS JURISDICTION TO THE NEWLY CREATED COUNCIL ON AFFORDABLE HOUSING.

A. The court's transferring these cases to the Council on Affordable Housing will not be a manifest injustice to any party to the litigations.

P.L 1985, c. 222, § 16 (hereinafter referred to as "the Act") provides:

> For those exclusionary zoning cases instituted more than 60 days before the effective date of this act, . . . any party to the litigation may file a motion with the court to seek a transfer of the case to the council. In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation.

The pending cases are all exclusionary zoning cases, for they challenge the Township's zoning and land use regulations on the basis that the regulations do not make realistically possible the opportunity for an appropriate variety and choice of housing for people of low and moderate income. All four of these cases have been instituted more than 60 days before the effective date of the Act July 2, 1985. Urban League was filed on July 23, 1974, Monroe Development Associates on December 2, 1983, Lori Associates on April 16, 1984 and Great Meadows on May 4, 1984. The "council" referred to in the Act is the newly established Council on Affordable Housing (hereinafter referred to as "the council"), which shall have primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in the State of New Jersey. The Act at § 4. a.

We submit that the court's transferring these cases to the council will cause no manifest injustice to any party to these litigations. There has been no change of position by the plaintiffs based on any reliance that they might have placed on the court's rulings to date which they will have to forego if the court were to allow the transfer. If the court grants the transfer, the plaintiffs will still have an opportunity to plead their cases to the council when the Township petitions the council for a substantive certification of its housing element and ordinances by filing with the council their objections, if any, to the Township's petition for substantive certification. See the Act at §§ 13-15. There is no reason to believe that the council would not treat the plaintiffs as fairly as would the court.

B. The court's denial of the Township's request for the court to transfer these cases to the council would cause a manifest injustice to the people in need of low and moderate income housing in the Township.

We submit that a transfer of these cases to the council would facilitate and expedite the Township's providing a realistic opportunity for low and moderate income housing in the Township. Given the contentious political environment surrounding these cases, we contend that the court would significantly slow down the Township's efforts to provide for its fair share of low and moderate income housing if it were to retain jurisdiction of these cases. It is no secret that the Mount Laurel litigation cases, as they have in virtually every other affected municipality in the State of New Jersey, have caused protracted political debate in the Township. For example, the Urban League case, filed in 1974 has

income housing have gone and continue to go without needed housing during this debate. The Township's Mayor and Council have not been opposed to the idea of providing for a realistic opportunity for low and moderate income housing in the Township. Instead, the Mayor and Council have maintained that the State Legislature and Executive rather than the courts are the more appropriate branches of government for dealing with the issue of providing housing for people of low and moderate income.

This Honorable Court should focus on what will allow for the quickest and best planned construction of low and moderate income housing in the Township. It is the interests of the people in need of such housing which should be served and not the needs of the personalities involved in representing these cases before the court. The court should not be moved by the desire for courtroom victory. The Mayor and Council are very anxious to start working with the newly created council in their effort to provide for the Township's fair share of low and moderate income housing. They are looking at the council with great enthusiasm and desire to participate in its housing programs. They are expecting the Township to benefit from the comprehensive planning and implementation which will be provided by the council in its effort to assist municipalities meet citizens' needs for affordable housing. See the Act at § 1. c 7 d. The Township Council has even already adopted a resolution of participation as called for by Section 9. a. of the Act (attached as Exhibit A) and will notify the council of its intent to submit to the council its fair share housing plan. See the Act at § 9. a. For the Court not to trans-

these cases to the council would also deprive the Township of available grants and loans to be used for low and moderate housing programs under Sections 20 & 21 in the Act and other new legislative protections afforded by the Act.

C. The Legislative branch with its administrative agencies is better equipped than the Judicial branch in dealing with the issue of affordable housing.

In the Mount Laurel II decision, this State's Supreme Court stated that the Legislature is better equipped than the courts in determining the methods a municipality is to use to satisfy its constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families. South Burlington County NAACP v. Mount Laurel, 92 N.J. 158 (1983). The Court added that it has always preferred legislative action rather than judicial action in the area of low and moderate income housing. The Court also said that with legislative and executive action in this area, the judicial role in upholding the Mount Laurel doctrine could decrease. This State's Legislature has also declared that

> the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this Act [the Act] and not litigation and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

The Act at § 3. The Legislature and Executive have indeed acted. We now have the Act which provides a mechanism for aiding municipalities in developing affordable housing. The Act has established the Council on Affordable Housing. The Township is now

requesting the court that it be allowed to transfer its exclusionary zoning cases to this council for resolution in keeping with the newly established delineated guidelines in the Act.

CONCLUSION

For the foregoing reasons, it is respectfully requested of this Honorable Court that it transfer the pending four exclusionary zoning cases before it - Urban League, Monroe Development Associates, Lori Associates, and Great Meadows - to the Council on Affordable Housing.

Respectfully submitted,

Mario Apuzzo

MARIO APUZZO
Director of Law of the
Township of Monroe

MA:ap
Encls.

cc: As per Monroe Mailing List
Peter P. Garibaldi, Mayor
Mary Carroll for Members of Monroe Township Council
Joseph Scranton, Business Administrator

"EXHIBIT A"

RESOLUTION OF THE MONROE TOWNSHIP COUNCIL

RESOLUTION AUTHORIZING THE TOWNSHIP OF MONROE TO PREPARE AND FILE WITH THE COUNCIL ON AFFORDABLE HOUSING ITS FAIR SHARE PLAN AND HOUSING ELEMENT UNDER P.L. 1985, C. 222.

WHEREAS, there is presently pending in the Superior Court of New Jersey several exclusionary zoning suits in which the Township of Monroe has been named a defendant along with other defendants; and

WHEREAS, the Supreme Court of New Jersey, this State's highest court, has stated in the Mt. Laurel II decision that the determination of the methods for satisfying a municipality's constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families is better left to the Legislature, that the Court has always preferred legislative to judicial action in this field, and that the judicial role in upholding the Mount Laurel doctrine could decrease as a result of legislative and executive action; and

WHEREAS, the Mayor and Council have expressed from the beginning of the Mt. Laurel II litigation that they also felt that the issue of low and moderate income housing is an issue which should be resolved by the legislative and executive branches of our government and not by our courts; and

WHEREAS, the Mayor and Council have always recognized and continue to recognize that the Township of Monroe has to bear its fair share of low and moderate income housing, but under a plan devised by our legislative and executive branches which are better equipped to deal with such a very complex problem; and

WHEREAS, the Mayor and Council have anxiously awaited the Legislature and Executive of the State of New Jersey to act by passing appropriate legislation to address the many problems arising in this very troubling area; and

WHEREAS, the Legislature enacted and approved on July 2, 1985 P.L. 1985, C. 222, otherwise known as the Fair Housing Act, legislation which has long been awaited by the Mayor and Council; and

WHEREAS, the Legislature states in Section 3 of this Act that

> The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing.

WHEREAS, this Act establishes the Council on Affordable Housing, which shall have the primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this State; and

WHEREAS, Section 9. a. of the Act provides that within four months after the effective date of this act, each municipality which so elects shall, by a duly adopted resolution of participation, notify the Council on Affordable Housing of its intent to submit to the Council its fair share housing plan and housing element; and

WHEREAS, the Mayor and Council intend to submit to the Council on Affordable Housing such housing plan and housing element and to participate in the housing programs which will be established by the housing council because they believe that the housing council will give due consideration to the following factors which the Mayor and Council see to be important for the proper development of the Township of Monroe:

1. What the municipality believes to be its present and prospective fair share of housing in a given region;

2. The availability of vacant and developable land;

3. Infrastructure considerations;

4. Environmental preservation factors;

5. Historic preservation factors;

6. Phasing of present and prospective fair share housing requirements;

7. Population and household projections for the State and housing regions;

8. Whether the housing council should limit, based on a percentage of existing housing stock in the municipality and any other criteria including employment opportunities which the housing council deems appropriate, the aggregate number of units which may be allocated to the Township as its fair share of the region's present and prospective need for low and moderate income housing;

9. Research studies;

10. Government reports;

11. Decisions of other branches of government;

12. Implementation of the State Development and Redevelopment Plan prepared pursuant to P.L. . . . . ., C. . . . . (Now pending before the Legislature as Senate Bill No. 1464 of 1984);

13. Public comment; and

14. Grants or loans from the newly established Neighborhood Nonlapsing Revolving Fund to appropriate municipalities; and

WHEREAS, the Mayor and Council also intend to have filed on behalf of the Township of Monroe under Section 16 of the Act a motion with the Superior Court to seek a transfer of all exclusionary zoning cases now pending in that court to the housing council.

NOW, THEREFORE, BE IT RESOLVED by the Council of the Township of Monroe, County of Middlesex, State of New Jersey, that it is the intent of the Township of Monroe that it will submit to the Council on Affordable Housing its fair share housing plan and housing element, all in accordance with P.L. 1985, C. 222; and

BE IT FURTHER RESOLVED that a certified copy of this Resolution immediately be submitted to the Council on Affordable Housing so that it may be notified of this action and that under no circumstance shall such notification be later than November 2, 1985.

William R. Tipper

WILLIAM R. TIPPER, PRESIDENT

I hereby certify the above to be a true copy of a resolution adopted by the Monroe Township Council at a meeting held on August 5, 1985.

Mary A. Carroll

MARY A. CARROLL, TOWNSHIP CLERK

47a

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. C-4122-73, et als

X - - - - - - - - - - - - - - - - - - - X

URBAN LEAGUE OF GREATER NEW BRUNSWICK,

Plaintiff,

vs.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET,

Defendant.

X - - - - - - - - - - - - - - - - - - - X

TRANSCRIPT OF

JUDGE'S DECISION

October 2, 1985
Toms River, New Jersey

B E F O R E :

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

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

ERIC NEISSER, ESQUIRE
and
J. M. PAYNE, ESQUIRE
For Urban League

ARNOLD K. MYTELKA, ESQUIRE
For Lori Associates and Habd Associates

JOSEPH MURRAY, ESQUIRE
For AMG Realty, Inc. and Skytop

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

APPEARANCES (Cont.) :

WILLIAM WARREN, ESQUIRE
For Garfield & Co.

CARL BISGAIER, ESQUIRE
For Monroe Development Association and
Cranbury Land Co.

STEWART M. HUTT, ESQUIRE
For Zirinsky

STEPHEN EISDORFER, ESQUIRE
Assistant Deputy Public Advocate
Amicus Curiae

CARMEN CAMPANILE, ESQUIRE
For Peter Saker

J. ALBERT MASTRO, ESQUIRE
Warren Township Sewerage Authority

JOHN COLEY, ESQUIRE
For Warren Township

WILLIAM LANE, ESQUIRE
For South Plainfield Board of Adjustment

MARIO APUZZO, ESQUIRE
For Monroe Township

RAY TROMBADORE, ESQUIRE
For Timber Properties

PHILIP PALEY, ESQUIRE
For Piscataway Township

EUGENE JACOBS, ESQUIRE
For Warren Township Planning Board

FRANK SANTORO, ESQUIRE
For Borough of South Plainfield

* * * *

THE COURT: First I want to thank you all for coming today, and don't come back in a group like this again.

Secondly, I want to tell you that one of my law clerks commented upon the fact that the clerk was amazed at the youth of all of the attorneys involved in this case. And I think that's marvelous. Such young men involved in the case, except for the man at the end of the table, assured that he was a contemporary of mine, as a matter of fact. But that is true. That says something for the Bar.

Just so the record is amply clear, I don't intend to decide anything today other than the motions for transfer. I don't intend to deal with any collateral issues, and certainly with none of the constitutional issues involved in the Legislation.

And I want to make it amply clear as well that the findings in the five cases before the Court are fact-specific. They are not intended to establish an exhaustive definition of the meaning of manifest injustice. And I stress that because I know that other municipalities are waiting to hear the results of these first five cases here, as they are in matters pending before the other Mount Laurel

judges.

I think it is worthy to place the transfer provisions in a proper perspective. Counsel have, as one might expect, argued at both extremes, from the proposition that any transfer is manifestly unjust in these cases because of a host of reasons, including some vested rights, delay and so forth; and on the other side, there is the most extreme argument that no transfer should be denied because of the need for statewide uniformity, the alleged greater speed in the executive-legislative process, and the Supreme Court's preference for a legislative solution.

It seems clear that the legislation itself evidences through Section 16, which provides for these motions, and elsewhere, including Section 19, which deals with remands, Section 23, which deals with Court supervision of phasing, Section 12B, which relates to the interplay between the Court and the Council concerning regional contribution agreements, that the Legislature did not intend to exclude totally the Court from the process.

The legislation evidences an effort to strike a balance between the desire to place the housing issue squarely in the legislative-executive arena,

and the need to recognize that, in some cases, because of fact-specific circumstances, it would be inappropriate, if not unlawful, to subject these cases to the Council on Affordable Housing Process.

And finally, as part of placing the issue in a proper perspective, something should be said about the emphasis by defendants on the oft-stated preference by the Court, our Supreme Court, and this Court, for whatever that is worth, that these matters, the housing matters, be left to the Legislature.

First, it is obviously clear that that's what Mount Laurel says, and that's what the Supreme Court wishes. That's what Mount Laurel I said, and that's what Mount Laurel II said. Ten years later, it still is the desire of the Court, and it should in fact motivate all appropriate deference to the legislation.

However, it must be noted that the Court's patience and the legislative default has created some circumstances in which it would no longer be viable to vindicate the constitutional obligation by a total abdication of the legislative-executive process; and indeed, Section 16 of the Act recognizes that.

Now, preference for a legislative-executive

solution cannot in all cases be translated to a circumstance where the constitutional imperative of Mount Laurel would be violated. At a minimum, the manifest injustice exception must contemplate that we avoid the situation in which a transfer would seriously undermine the constitutional imperative which the legislation itself must satisfy if the legislation is not to experience a constitutional infirmity.

To that extent, the term, "manifest injustice," must be interpreted in such a manner as to support the fundamental goal of the Act, which I perceive to be the satisfaction of a constitutional mandate in a reasonable manner.

Next, I would like to turn briefly to the wording of Section 16 itself, and make some comments with respect thereto. I need not repeat the provisions of Section 16, except for the fact that there is a lot of reference in the briefs as to Section 16A and 16B; and, of course, there is no Section 16A in the statute. There is only a Section 16B.

So just so it is entirely clear what we are talking about, we are talking about that section which precedes Section 16B and reads: For those

exclusionary zoning cases instituted more than sixty days before the effective date of this Act, any party to the litigation may file a motion with the Court to seek a transfer to the Council.

In determining whether or not to transfer, the Court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation.

Now, it is to be noted that the pertinent section does not define transfer, it obviously doesn't define manifest injustice, and it doesn't define party.

The language I have quoted starting with the words, quote, "Any party to the litigation may file a motion with the Court to seek transfer," unquote, replaced a different standard in the prior draft of the Act which reads in part, and I quote: "No exhaustion of the review and mediation procedures established in Section 14 and 15 of this Act shall be required unless the Court determines that a transfer of the case to the Council is likely to facilitate and expedite the provisions of a realistic opportunity for low and moderate income housing."

Now, it is by no means clear what the

Legislature intended to accomplish by the change from a standard of facilitating and expediting the provision of low-cost housing to a standard of manifest injustice to any party. The briefs argue in all directions on that issue as well, and I don't have to summarize them.

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

One cannot assume that the change in wording did not intend a change in meaning. Beyond that, however, absent some clear legislative history, which seems absent, it is extremely difficult to discern whether the Legislature sought to limit or broaden the Court's discretion, or whether it sought to limit or broaden the potential for transfer of cases which are more than sixty days old. And I would submit that strong interpretive arguments can be made on both sides.

I do not intend by this oral opinion to either reconcile the language or to give a complete definition to the term, "manifest injustice." If I did intend to do that, it wouldn't be an oral

opinion, and I certainly would take a great deal of detail in selling that issue out.

That term, to me, tends to be fact-specific, and I therefore deem it more appropriate to define it in the context of each of the cases that appear before me today, and those which are scheduled for the next several weeks.

In that process, I believe that its full meaning will evolve as those motions are heard and as the motions now pending before the other Mount Laurel judges are heard and decided.

In cases at what I have referred to as the factual extremes, the term will be relatively easy to interpret. Like obscenity, to paraphrase Justice Stewart, you should be able to know it when you see it.

And finally, in terms of definition, as noted above, the statute does not define what is meant by the term, "transfer," or the term, "party."

Now, as to transfer, the issue might be relevant to the question of manifest injustice to the extent that if a case is transferred in its present posture, with the full record, and the Council being bound by issues decided, so to speak, the law of the case, the potential for delay and the

possible cost of relitigation might be reduced.

The procedural scheme which the statute reveals to me will be discussed shortly. But I must say that on an initial reading, without emphasizing this issue, I do not believe that it discloses an intent to bind the Council with what has happened in this court, seems to me to be contrary to the legislative purpose in enactment of the statute, and it certainly is not refuted by the clear language of the statute.

The defendant municipalities stress that the statute has established the potential for a fresh, new and comprehensive approach. And if there is a failure to agree on a housing element, mediation replaces litigation, pursuant to Section 17.

At least the Urban League plaintiff and some of the other plaintiffs argue that the record and the decided issues must follow the case, although it's not clear how that would fit into the legislative scheme created by the Act.

In any event, the cases before me today do not require me to decide that specific issue.

Now, as to the term, "party," I should note that both -- some of the plaintiff builders and the defendant municipalities have dealt rather

gingerly and, in the case of some of the defendants, almost cavalierly, with the interests of lower income households in Mount Laurel litigation.

Some of the builders have stressed the manifest injustice of a transfer in part on the grounds that they have a vested right, in effect, to build homes for the poor. I think to that extent, they inadequately assert their representation of the poor in this litigation if they don't go beyond saying that.

The defendant municipalities have followed suit even to the extent that one brief concedes that the Court should take into account the interest of all of the parties, including, quote, "the hidden beneficiaries."

Now, it should have long since been clear that the status of lower income households rises far above the category of hidden or third-party beneficiaries in Mount Laurel actions. Even where an Urban League or a Civic League, if that's the name now, or a civic group or another non-builder plaintiff is not involved, the lower income class must be considered a full party to this action. The prospect of the builder's remedy is offered as a

quid pro quo to sue on behalf of those persons whom the remedy will benefit.

Our Supreme Court has described Mount Laurel actions as institutional or public law litigation. It is at page 288 and 289 of the Decision and in Footnote 43. They are brought to vindicate resistance to a constitutional obligation to the affected group. In that sense, they are class actions, and the class is very much a party.

Judge Skillman has said it well in Morris County Fair Housing Council vs. Boonton Township, 197 New Jersey 359, at pages 365 and '66, where he says, and I quote:

"A Mount Laurel case may appropriately viewed as a representative action which is binding on non-parties. The constitutional right protected by the Mount Laurel doctrine is the right of lower income persons to seek housing without being subject to economic discrimination caused by exclusionary zoning.

"The public advocate and such organizations as the Fair Housing Council and the N.A.A.C.P. have standing to pursue Mount Laurel litigation on behalf of lower income persons.

Developers and property owners are also

conferred standing to pursue Mount Laurel litigation. In fact, the Supreme Court has held that any individual demonstrating an interest in or any organization that has the objective of securing lower income housing opportunities in a municipality will have standing to sue such municipality on Mount Laurel grounds."

And he is quoting from Mount Laurel at that point, at page 337, where the Court says that, in referring to lower income people, that they are the group that has the, quote, "greatest interest," unquote, in ending exclusionary zoning.

Continuing from Judge Skillman's opinion, and I quote: However, such litigants are granted standing not to pursue their own interests but, rather, as representatives of lower income persons whose constitutional rights are allegedly being violated by the exclusionary zoning.

Therefore, it is amply clear to me that the Court must look at lower income persons as at least an equal party to the litigation, even if I choose to ignore the Supreme Court suggestion that they have the greatest interest in the litigation, and that is so doing, I have to consider their interests from many standpoints, including but not limited to

the delays which were involved in the vindication of their rights, the fact that every day in which this Court delays resolution of these cases, that they remain in substandard housing, and that they will continue there until these issues are resolved.

We have to consider the absence or diminished availability of the remedies to enforce compliance where cases are near completion or housing is imminent. We have to consider whether housing is imminent. We have to consider to what extent a transfer would relegate low and moderate income persons to reliance upon voluntary compliance by municipalities for any extended period.

And those are just some of the factors that the Court would take into account.

Now, before turning to the actual factual analysis of each case here today, something should be said about the consequences of a transfer as it relates to the potential for delay or expedition of the process which leads to the production of lower income housing.

This issue has been heavily briefed and, notwithstanding the difference in conclusions, the parties seem to agree that speed in the resolution of the issues and expediting lower income housing

is at least one very important element involved in the definition of manifest injustice.

As a practical matter, then, the language of the prior draft of Section 16 becomes involved in the analysis. Will the transfer facilitate and expedite the provision of a realistic opportunity?

I am not suggesting that I have read that section back into the act, but only that the analysis of plaintiffs, indeed the defendants, have in fact read it back into the Act, and I think properly so.

I should also point out that it is not back into the Act as the exclusive definition, but rather, as I have indicated, an important element of manifest injustice. Presumably in the context of manifest injustice to the parties, we are asking whether or not the transfer will aid the lower income people by speeding a day when the realistic opportunity for housing will arrive.

And it is at this point that the arguments of the parties diverge, the parties claiming the transfer -- the plaintiffs claim the transfer will cause delay; and, of course, the municipalities claim it will cause expedition.

Part of that rests upon what reasonable time span we can assume will be involved under the

Act. As we know, it became effective on July 2nd, 1985; that Section 5A creates the Council, and 5D requires the governor to nominate the members within thirty days.

The nominations have been made, and I don't suppose it matters a great deal that they were a little late. But they have not yet been confirmed, unless there's some late action of which I am not aware.

Section 8 requires the Council to propose procedural rules within four months after the confirmation of its last member initially appointed, or by January 1, 1986, whichever is earlier.

Given that the Council members have not been confirmed, it is likely that that confirmation will occur late in this year, and that procedural rules can be expected by May 1, 1986. I have reached that conclusion given the fact that the Legislature is not in session during another important time span during the month of October, in anticipation of November 5th.

Now, Section 9A requires any municipality which elects to submit a housing plan to the Council to notify the Council of its intent to participate within four months of the effective date of the

Act.

Section 7 requires the Council to adopt criteria and guidelines for the housing plan within seven months of the confirmation of the last member initially appointed, or January 1, 1986. Assuming confirmation of membership is accomplished near the end of this year, the Council will have until approximately August 1, '86 to adopt guidelines and criteria.

Section 9A gives the municipality five months from the date of adoption of the criteria to file its housing element. If the criteria were not adopted until August 1, 1986, the municipality would then have until January 1, 1987.

Section 13 provides that a municipality may file for substantive certification of its plan at any time within a six-year period from the filing of the housing element.

Nothing seems to expressly require expeditious filing for a substantive approval, assuming it is requested. The township has to give notice within an unspecified period of the requested certification. Once public notice is given, the forty-five day objection period begins to run. And it is not clear from the Act that there is a time limitation on the

Council to act on the requested certification.

Thus, though the objection period is forty-five days, the review could be longer, and it might be expected, in fact, it would normally make common sense, not to commence the review until after the objection period expires.

I am going to assume, however, that the town petitions for substantive certification on January 1, 1987; that it simultaneously gives notice on that day; and that the Council doesn't wait for the objection period to expire to start the review process.

None of those assumptions comport with the Court's experience of usual procedure; but, nonetheless, I think it is best to assume the best-case alternative. And the procedure would, nonetheless, consume forty-five days, because that's the objection period. And that would take the processing to approximately February 15th, 1987.

Now we have got the end of the forty-five day period, the Council is prepared to grant substantive certification on the theory that it has already reviewed the plan. The town must adopt its ordinance in forty-five days, or by April 1, 1987, under the assumptions which I have made.

If at the end of the initial forty-five day period the Council denies certification or conditionally approves it, the municipality has sixty days to refile. That would be until April 15th, 1987, and the Council then has another unspecified period to review.

Assume that the Council reviews it on the same day that it is filed, which again flies in the face of human experience, and grants substantive certification. The municipality then has an additional forty-five days to adopt its implementing ordinance; and thus, the procedure might extend to June 1, 1987.

On the other hand, if an objection is filed, it must be done within forty-five days of the public notice. And assuming that that notice date expires on March 15th, 1987, mediation and review is commenced, no time limit is set on that process.

I will assume for the purposes of developing a reasonable scenario that a minimum of sixty days is required. That would take us, then, to April 15th, 1987. If mediation is unsuccessful, the matter is then referred to the Administrative Law Judge, who has ninety days to issue a decision unless the period is extended for good cause.

I will assume that it is not extended, and that the procedure could thus be completed by July 15th, 1987. The Administrative Law Judge findings are then forwarded to the Housing Council pursuant to Section 15, with his record.

The Act becomes silent as to what happens at that point, but the Administrative Procedure Act would then take over, I assume, and Section 1:1-16.5 would allow the Council forty-five days to act on the decision by accepting, rejecting, modifying, or remanding the initial decision to the Administrative Law Judge.

Absent a remand, this then could extend the time involved to September 1, 1987.

Now finally, before reaching a conclusion with respect to these motions, it would be useful to briefly summarize the status of each of the cases before the Court today.

With respect to Warren, the AMG complaint was filed on December 31, 1980. Skytop was permitted to intervene in May of 1981, and Timber filed a complaint in July of 1981.

Judge Meredith rendered a decision after trial dated May 27th, 1982, invalidating the zoning ordinance and directing rezoning.

The township adopted a new ordinance in December of '82. The plaintiff -- the plaintiffs AMG and Skytop were granted leave to appeal -- I'm sorry -- granted leave to file a supplementary complaint challenging the new ordinance, and they did so on January 17th, 1983, in apparent anticipation of Mount Laurel II, I guess, three days before.

There was a consolidation of several actions by this Court in July of 1983, and the first Mount Laurel trial to commence was started in January of 1984, and it lasted for twenty-one days. We not only consumed vast quantities of time, but vast quantities of coffee and danish.

The AMG opinion then was issued on July 16th, 1984, and interim judgment was entered on August 1, 1984, which set the fair share, ordered rezoning within ninety days, found the plaintiffs entitled to a builder's remedy subject to the issue of suitability.

An ordinance was submitted in December of 1984, and being reviewed by the Court Master, who has suspended his review pending determination of this transfer motion.

What's left to be done in Warren Township is, of course, the Master's completion of the review;

a compliance hearing, if necessary; the preparation of a revised ordinance; an ordinance adoption, if not already accomplished.

I would estimate that that procedure could be accomplished in approximately four months.

The Cranbury Township timetable is similar in some of its respects to the other cases; and to that extent, I will not repeat.

The Urban League filed suit against Cranbury and the other three defendants here today in July of 1974. Judge Furman signed an implementing judgment, or a judgment implementing his opinion, on July 9, 1976. The Appellate Division reversed -- I have the date right here -- on January 20th, 1979. That's ironic. Three years to the date, if I have that correctly.

And the Supreme Court, the Supreme Court did whatever you'd like to describe it did with the case, but it certainly remanded it here. I read part of it as an affirmance of Judge Furman's findings and a reversal of the Appellate Division, but certainly a remand for a consideration in terms of Mount Laurel II. It found expressly that certain issues had been demonstrated by the plaintiff.

We then engaged in an eighteen-day trial. I

did not go back to the minutes to check, but I believe it is clear that South Plainfield didn't engage in all of it. At some point, it left the scene, and at some point, Monroe chose not to participate, and I don't mean settled, but chose not to participate.

I issued an opinion in July of 1984, invalidating the Cranbury ordinance. I determined region, regional need and fair share. We set about compliance. We are at the stage where all experts' reports are in, we are awaiting the compliance hearing principally as to the issues of site suitability in the broadest sense.

And I mean that as it relates to builder's remedy, as it relates to the issues of preservation, agricultural preservation, historic preservation, phasing.

But there are no apparent significant issues with respect to other aspects of compliance, at least that I am aware of.

What is left to be done there is a compliance hearing, which I have indicated earlier has only not moved forward because of the Court's schedule; a Master's revision of the ordinance if it isn't approved in its present form.

I can indicate for the record that if the matter were retained here, it would be the first compliance hearing of any length to be scheduled. It would be started in October and should be completed in November, and any necessary revision could be accomplished in sixty days. Ordinance adoption, if not already accomplished, could then be accomplished in another thirty days.

It appears to me that the case can be completed before year's end, or certainly by January.

The South Plainfield timetable with regard to the early part of the litigation tracks that of Cranbury. Ultimately, a voluntary stipulation was presented to the Court with the purpose of having the Court enter an order, on May 10th, 1984.

A fair share was reduced dramatically, and a fair share can be considered either six hundred or nine hundred. But even at the nine hundred figure, it was reduced almost by fifty percent over the prior figure. Realistically, I think it's a fair share of six hundred, so that, of course, the reduction is even greater.

The Plaintiff received a summary judgment based on the voluntary stipulation. An ordinance was adopted under protest. The plaintiff Urban

League, to the best of my knowledge, approves the ordinance except for some technical problem concerning the specificity of the parcels involved in rezoning. And to the best of my knowledge, the review by Ms. Lerman has not raised any problem, either. The ordinance is in a form, according to her communications, acceptable to her.

And what is left to be done in that case is a very short compliance hearing, since everybody agrees; and that could certainly be accomplished within the next thirty days.

In the case of Monroe, again, the early status of that case tracks the other two. That also was governed by my letter opinion of July 27th. There was an implementing judgment in that one in August of 1984.

The opinion was July 27th, 1984. It set a fair share. It ordered rezoning. After some difficulties, the township retained a planning expert, and the township submitted a compliance package on March 28th, 1985.

That one could have been moved as well, except before the Court got to it, it got diverted into collateral issues, including the failure of the township, the refusal of the township to pay the

Court-appointed Master, putting aside its refusal to pay its counsel.

Furthermore, while the plan was being considered by the Court, the township approved a land parcel originally designated for Mount Laurel purposes to be used without set-asides; and therefore, a hearing had to be held on that issue. And what appears to be, in this interpretation of the Court's order, then occurred, as a I read it from the township, it appears as though the Court was bargaining with the municipality.

The Court ordered that the town had two options, that it could, if it wished to avoid non-compliance, reduce its fair share by the number of units lost in the unlawful approval; or it could reinstate that tract and vacate the approval.

Of course, if the town chose to reduce its fair share, the Court expected voluntary compliance.

The township informed the Court in writing that it would do neither, on August 2nd, 1985. And in an order dated August 30th, 1985, the Court confirmed what it had said at the hearing of July 25th, that the compliance ordinance would automatically become non-compliant, because by the township -- its admission, one of the parcels

necessary to satisfy their fair share had been utilized for other purposes.

The Court order directed that the Master provide a compliance plan by October -- by October 7th. It chose a rather short time frame because of the fact that there was a plan in existence which the Master had worked very closely with, and that it was really only necessary for the Master to select another parcel and clean up any other defects, if any, in the ordinance.

What is left to be done in Monroe is for the Master to file a report. And I might mention that she, too, is withholding further action pending today's motion and, therefore, that the report might not be filed by next Monday.

The Court would have to hold a relatively short compliance hearing thereafter, since the town found at least one of the parcels compliant, and the issues would be those raised by the plaintiffs to the extent that they felt improperly omitted.

If necessary, any Court-ordered revisions would follow, and I would anticipate that this procedure could be accomplished in three to four months.

Finally, the Piscataway timetable again

51a

tracks the other three cases, except that at the end of the eighteen-day trial, the Court did not issue an opinion, because it felt that the methodology did not adequately reflect the capacity of Piscataway to absorb lower income housing.

And instead, the Court ordered the Master to inventory the suitable land. That report took a substantial period of time and was not received until the fall, and the township contested the report in November of 1984.

Restraints on approval of all sites found suitable by the Court-appointed expert were entered because of the limited amount of the land available. A supplemental report was received by the Court based upon additional issues raised by the parties on January 18th, 1985.

An evidentiary hearing on suitability, a site-by-site review, was held in February of '85, and a very time-consuming one at that.

At the end of that hearing, the Court felt that it would be appropriate and fair to the municipality to permit a site inspection; and at the same time, it took the opportunity to also inspect the Cranbury issues, and both inspections were summarized in a very brief transcription given to

52a

counsel.

Thereafter, a letter opinion was sent forth, and rezoning was ordered within ninety days of July 23rd. The order incorporating that letter was dated September 17th, 1985, and directed rezoning by October 23rd, 1985.

What is left in Piscataway is somewhat more substantial than the other municipalities. A compliance hearing has to be held; and at that time, the Court has indicated that it will allow Piscataway -- did I say Cranbury? -- Piscataway to introduce additional evidence as to the unsuitability of parcels which have been found least facially suitable, if I can use that term. And that will consume some time.

Conversely, however, there are no substantial objections indicated with respect to builder remedy claims in Piscataway, so that there should not be any substantial time on that issue. The possible need for a Master revision, of course, exists at the completion of the hearing. It would appear that this procedure will take approximately five months, perhaps less, and perhaps a month more.

Now finally -- and I am almost finished -- with the overview of the statute's meaning, with a detailed review of the procedures and time frames

counsel. 53a

Thereafter, a letter opinion was sent forth, and rezoning was ordered within ninety days of July 23rd. The order incorporating that letter was dated September 17th, 1985, and directed rezoning by October 23rd, 1985.

What is left in Piscataway is somewhat more substantial than the other municipalities. A compliance hearing has to be held; and at that time, the Court has indicated that it will allow Piscataway -- did I say Cranbury? -- Piscataway to introduce additional evidence as to the unsuitability of parcels which have been found least facially suitable, if I can use that term. And that will consume some time.

Conversely, however, there are no substantial objections indicated with respect to builder remedy claims in Piscataway, so that there should not be any substantial time on that issue. The possible need for a Master revision, of course, exists at the completion of the hearing. It would appear that this procedure will take approximately five months, perhaps less, and perhaps a month more.

Now finally -- and I am almost finished -- with the overview of the statute's meaning, with a detailed review of the procedures and time frames

under the Act, and an analysis as to the progress, if I can use that term, and status of each case before the Court, there remains only the issue of whether the case should be transferred.

The parties have suggested a host of criteria by which the application to transfer should be judged. I believe it would be useful to list them, not necessarily in order of preference, and clearly with no intention to imply approval of each factor.

I list them to preserve them for consideration in future matters. Clearly in this -- in the cases before the Court, certain factors predominate and others have little relevance. Indeed, in some cases, I am not sure that I share the fact that they have any relevance, at least with respect to these cases.

The factors suggested include the age of the case; the complexity of the issue; the stage of the litigation, that is, whether it's at discovery, pre-trial, trial, compliance; the number and nature of previous determinations of substantive issues.

The relative degree of judicial and administrative expertise on the issues involved; the need for the development of an evidentiary record; conduct of the parties; the likelihood that the

Council determinations would differ from the Court's; the likelihood that the Council's determinations would have a basis in broader statewide policy.

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

Whether the Council process, absent the ability to impose restraint, would cause the irreparable loss of vacant developable land for Mount Laurel construction.

Would the transfer tend to facilitate or expedite the realistic opportunity for lower income housing? The possibility of a change in the housing market, which could occur if venue, that is, the Council or the Court, causes a delay.

Now, I am sure there are other issues that were mentioned. They may be encompassed or hidden within what I have listed, but there are none that I did not mention which are relevant to my decision. As I noted, I see no need to dwell upon each of the factors.

The case before the Court, or the cases before the Court today, are at the one extreme of the transfer spectrum. If manifest injustice is to be found in any transfer motions before this

Court, it must include all five here today.

Again, without definition, you can tell manifest injustice when you see it. The mere recitation of the procedural history of these cases compels that conclusion.

Without repeating the facts of each case, all of them have certain things in common. They have been in the system a long time, particularly, of course, the four Urban League cases, which are nearly teenagers. They have been arduous, they have been complex, they have taxed the resources of all of the parties involved.

To repeat even a portion of the process before the Council seems unnecessarily burdensome and unfair to all of the parties, even if the municipalities are rarely desirous of doing that.

In South Plainfield and in Piscataway there are restraints pending which serve to preserve the scarce available municipal land for lower income housing. In my view, these restraints will be the less by transfer; and in the interim period, further development will occur. Whether they could be reinstated is a very, very questionable issue under the Act.

Most importantly, and indeed of predominant

importance in these cases, is the status of each case -- and that's why I took the time I did to review it -- and the inevitable delay which must be caused by the transfer.

As the facts which I have recited show, each of the cases before this Court are near completion. The Court's best estimate is that they could be done in anywhere from a month to six months. And even if that estimate is overly-optimistic, the time span is significantly shorter than the approximate nearly two-year process through the Council.

Delay equates to postponing the day that the realistic opportunity is afforded and housing is built. In each of these cases, we have builders ready to proceed, just as builders have promptly moved to get construction underway in other towns where compliance has already occurred.

Now, avoidance of delay at all costs should never be the goal. No one has demonstrated that the Court does not have the expertise to handle these matters and to meet the special issues involved.

It is not an issue of whether another body has that expertise in this setting. There is, rather, an issue of whether the Court lacks it. If

it did, that might override all of the other considerations involved in this case. I don't believe it does.

In Cranbury, the Court has and will make every effort to evaluate Cranbury's claim of environmental and agricultural preservation. The site inspection was aimed at that goal in part, and the Master's report was sensitive to it. And it is simply incorrect to suggest that the Court cannot or will not deal adequately with the issue.

I will state for the record clearly that I was most impressed by the character of the community, by its prevailing rural character, and that it is incumbent upon this Court to take that into account when it reaches that posture.

In Piscataway's case, the Court has gone through a time-consuming and painstaking process, through an individual site inventory, a personal inspection, a prolonged case -- site-by-site hearing, in order to ensure a fair treatment in the town, and will extend that into the next compliance hearing.

I can't guess how a housing council would handle the Piscataway problem. I can only feel relatively assured that it is going to be handled

fairly and sensitively before this Court. Piscataway has the opportunity given to it expressly, in the opinion of the Court, to refine its capacity to handle its fair share.

It should be evident, finally, that all of the municipalities who have been before this Court have been evaluated on statewide criteria which have been carefully developed and which have been challenged and rechallenged and retested through the adversary process of various cases.

The fact of the matter is that no one has come forward with any comprehensive alternative methodology. The methodology which is utilized leaves room for adjustments based upon absence of vacant land, environmental constraints, need for the preservation of agriculture, historical preservation, recreational preservation, and other categories of land uses, prior land use patterns, prior efforts at providing a variety of housing, and many other practical and equitable considerations which would or could affect the fair share which is produced by a literal application of the methodology.

That flexibility has already resulted in a reduction of the Plainfield and Piscataway fair

share by approximately fifty and forty percent respectively, and in Monroe by a Court offer to reduce the fair share based upon the special equities involved there. It will soon be addressed in both Cranbury and Warren.

Thus, I can comfortably conclude that in these cases not only is it manifestly unjust to the plaintiffs to transfer these cases, but it would not be and will not be unjust to the municipalities to retain them.

That, of course, is not the express test of the statute. The statute talks in terms of manifest injustice to a party, not the absence of injustice to another party.

But in reaching the conclusion, one must go through a balancing process in any event, since there may be some injustice in given cases to both sides.

In this case, I don't find that. I see only injustice to the plaintiffs. In this case, the balance tips dramatically one-sidedly in favor of a denial of motions to transfer.

The statutory test, as I said, is manifest injustice to any party. The defendants have proved -- have failed to prove the slightest

injustice to them, whereas the injustice to the lower income households and the plaintiffs is manifest.

Based upon those findings, I will accept the order from Mr. Neisser as to the four Urban League cases, from Mr. Murray as to the Warren case; and I deny the applications for transfer.

Any other issues will not be addressed today. If there is to be an application for a stay of the Court's ruling for the purposes of appeal, it is denied for the reasons expressed in this opinion.

One at a time. Let's just . . . . Mr. Coley.

MR. COLEY: What's -- I am not asking the Court to give me a legal opinion on this, but do you believe that this motion as it was made is under the aspects of the Mount Laurel case where there's no interim appeals made in a case?

THE COURT: I can't give you a legal opinion. That's why I said if there's an application for a stay, I wouldn't deal with it. And I assumed you would first make that application. I think if there is any stay, the Appellate Division should consider it in light of the issue as to whether you have a

right to appeal in the first place and, secondly, in light of the issue of whether a stay is appropriate, given the status of these cases as I have set them forth.

Was there another defendant's counsel? Mr. Paley?

MR. PALEY: Your Honor, I have another issue that I'd like --

THE COURT: All right. Mr. Neisser.

MR. NEISSER: Yes. I would request the lifting of the prior -- of the Court's prior stay in its August 9th order as to South Plainfield, which stayed the effectiveness of their ordinances, zoning and affordable housing ordinances, pending decision of the transfer motion.

Now that that's been decided, I would request that the stay be vacated.

THE COURT: I thought that was automatically in the order. I thought it said it will remain in effect until this -- until it is heard, stay the vacated --

MR. NEISSER: I would request Your Honor could set a date for hearing of the other motion of Cranbury, which is the builder's remedy moratorium, so that we can move forward towards compliance

63a

hearing.

THE COURT: I will do my best. In all candor, I'm swamped, and I do intend, as I have indicated today, to set a date for the Cranbury hearing. And that should be, and please get ready, toward the end of October.

I intend to set a very short date for the Plainfield hearing, South Plainfield hearing. And I have another eight transfer motions which I have to deal with, three more on Friday. So just be patient with me. I'll do my best.

If I may say, off the record . . . .

(Whereupon a brief discussion was held off the record.)

MR. SANTORO: Your Honor, when will Your Honor decide the other issue of the restraints that are currently on South Plainfield as far as the non-Mount Laurel lands, so that when the phone calls start coming in, I can advise them accordingly? This is the borough property that's not in the inventory, that's --

THE COURT: Do you have any objection to that, Mr. Neisser, as to the sales by the borough?

MR. NEISSER: Oh, yes, I certainly do.

THE COURT: Not the sales.

MR. NEISSER: The stay.

THE COURT: Any non-municipal lands not included in the compliance package can be removed from the stay.

MR. NEISSER: I thought they -- that stay was lifted by Your Honor on August 9th.

MR. SANTORO: Bidding permits were. We are talking now about the completion of transactions of land sales involving borough land that was not included in the Mount Laurel inventory.

MR. PALEY: Your Honor, I had a motion which was addressed to the blanket restraints on Piscataway, which I understand Your Honor has not decided and will reserve for another day. Mr. Salsburg's partner was here earlier this morning, and left when you indicated that you would not address any other motions.

On his behalf, I would ask that at least his application, which he by letter had renewed for that particular parcel, be disposed of relatively expeditiously.

THE COURT: Do my best, although I have a tough time with removing any restraints in Piscataway, but I will do my best. You can pass that dicta on to him.

MR. PALEY: Thank you, Your Honor.

THE COURT: Okay. Anything further, gentlemen? Thank you for your patience and for your interesting arguments.

(End of proceedings.)

* * * *

C E R T I F I C A T E

I, GAYLE GARRABRANDT, a Certified Shorthand Reporter of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the proceedings as taken by me stenographically on the date hereinbefore mentioned.

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

Date: 10-18-85

66a

ERIC NEISSER, ESQ.
JOHN M. PAYNE, ESQ.
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
ATTORNEYS FOR PLAINTIFFS
On Behalf of the ACLU of NJ

SUPERIOR COURT OF NEW JERSEY
MIDDLESEX/OCEAN COUNTY
NO. C 4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

vs.

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

Defendants.

(Monroe)

ORDER

Monroe Township having moved to transfer this case to the Council on Affordable Housing pursuant to Section 16 of the Fair Housing Act, Laws of 1985, c.222, and having filed in support thereof a Letter Brief, and the Urban League plaintiffs having filed an Affidavit of Alan Mallach and a Memorandum of Law in Opposition, Monroe Development Associates having filed a Brief and Appendix in Opposition, Lori Associates and HABD Associates having filed a letter-brief in opposition, and Great Meadows, et al., having filed a Letter Brief in opposition, and the Court having heard oral argument in open court on October 2, 1985 from Mario Apuzzo, Esq. for Monroe Township, Eric Neisser, Esq. for the Urban League plaintiffs, Carl Bisgaier, Esq. for Monroe

679

Development Associates, Stewart Hutt, Esq. for Great Meadows, et al., and Arnold Mytelka, Esq. for Lori Associates and HABD Associates, and the Court having rendered an oral decision on October 2, 1985, with findings of fact and conclusions of law,

IT IS HEREBY ORDERED THIS 11 DAY OF OCTOBER 1985:

1. Monroe Township's motion to transfer is denied.

2. Stay of this Order pending any possible appeal is denied.

Eugene D. Serpentelli

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

THE HOME NEWS 10/9/85 682

Court guides sought for housing cases

By SUSAN TODD
Home News staff writer

Sen. John A. Lynch, who sponsored legislation that created the Affordable Housing Council, urged the Supreme Court to set guidelines for lower-court judges to follow when deciding whether municipalities should be transferred to the new council.

Lynch represents Piscataway and South Plainfield, two municipalities that attempted to have their Mount Laurel II cases transferred from the courts to the council, which was created under the Fair Housing Act. The nine-member council was created to help municipalities determine their "fair share" of low- and moderate-income housing.

Last week, Superior Court Judge Eugene Serpentelli denied the requests of both municipalities, as well as similar transfer motions made by Monroe, Cranbury and Warren Township. Monroe officials have said they will appeal the decision.

"contrary to intent"

Lynch called Serpentelli's ruling "contrary to the intent of the governor and the Legislature."

In its Mount Laurel II decision, the Supreme Court urged the Legislature to act, Lynch said. "Now with Judge Serpentelli's ruling, it appears the courts want to keep jurisdiction over affordable-housing matters," he said.

Lynch said the court's jurisdiction is contrary to the intent of the Legislature, which sought to get communities out of the courts while addressing their affordable-housing needs.

"I'm not challenging Judge Serpentelli, but if the procedure set forth is going to work, the court is going to have to make rules," the senator said. "What we need is for the Supreme Court to make an interpretation so the judges will have something to base their rulings on."

According to the Fair Housing Act, the court can transfer a case to the council, unless the transfer represents a "manifest injustice" to developers or civic groups.

Lynch said the state's highest court also should clarify what creates a "manifest injustice."

In his ruling last week, Serpentelli said the time it would take to resolve the housing issue before the council would create a "manifest injustice" against the developers and the low-income people the Mount Laurel II decision was intended to help.