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CH - Cranbury, Monroe,
Piscataway, Scotch Plains Plainfield

Appellate Brief of Urban League Respondents

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SUPREME COURT OF NEW JERSEY

Docket Numbers
A-124, A-127, A-129, A-131
September Term 1985
#24,782, 24,785, 24,788, 24,787

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs-Respondents

vs.

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

Defendants

and

TOWNSHIP OF CRANBURY, MONROE TOWNSHIP, TOWNSHIP OF PISCATAWAY and BOROUGH OF SOUTH PLAINFIELD,

Defendants-Appellants

(Cranbury)
(Monroe)
(South Plainfield)
(Piscataway)

CIVIL ACTION

On Appeal from Orders
of October 11, 1985
(Eugene D. Serpentelli, A.J.S.C.)

# BRIEF OF URBAN LEAGUE RESPONDENTS

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## PROCEDURAL HISTORY

After 11 years of litigation including an appeal to this Court, see Common Facts below, the defendant Townships of Cranbury, Monroe, Piscataway, and South Plainfield filed motions in July, August and September 1985 to transfer this action to the Council on Affordable Housing (hereafter "the Council"), created by the Fair Housing Act of 1985, P.L. 1985, c.222 ("hereafter the Act"). After extensive briefing and oral argument, the trial court (Serpentelli, A.J.S.C.) on October 2, 1985 rendered a lengthy oral ruling, including findings of fact and conclusions of law, denying all four transfer motions and denying stays of those orders. These rulings were incorporated in four parallel orders entered on October 11, 1985, from which the defendants now appeal. On November 13, 1985, this Court granted all four towns' motions for leave to appeal and granted certification before decision in the Appellate Division.

## FACTS

### A. Common Facts

The litigation sought to be transferred by the motions under appeal is the oldest Mount Laurel action still pending before the courts of this state.[1] On July 23, 1974, more than 11 years and

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1 The Mount Laurel action itself was settled on July 29, 1985. The Allan-Deane Corp. v. Bedminster litigation was concluded by decision of Judge Serpentelli entered on May 1, 1985. The appeal in the Urban League of Essex County v. Mahwah case, also before this Court in Mount Laurel II, has been withdrawn. The Oakwood at Madison v. Madison Township litigation, decided by this Court

4 months ago, the Urban League of Greater New Brunswick[2] and seven individuals sued, on behalf of themselves and others similarly situated, 23 municipalities in Middlesex County, including these four appellants. The history of the case through 1983 is extensively recited in this Court's opinion in Southern Burlington Cty. NAACP v. Mount Laurel Twp., 92 N.J. 158, 339-51 (1983) (Mount Laurel II). Affirming Judge Furman's 1976 holding of constitutional violation, this Court remanded to one of the three specially designated Mount Laurel judges not for trial on constitutional non-compliance "for that has already been amply demonstrated" but solely for "determination of region, fair share and allocation and, thereafter, revision of the land use ordinances and adoption of affirmative measures to afford the realistic opportunity for the requisite lower income housing." Id. at 350-351.

After remand, numerous builders filed suit and were consolidated with this action, most importantly in Cranbury. There were extensive pretrial proceedings, culminating in the methodology conferences described in AMG Realty Co. v. Warren

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in 1977, 72 N.J. 481, has been in limbo since shortly thereafter when the builder and township filed a settlement agreement with Judge Furman, providing for 1750 total units of which 350 would be lower income units. For the more recent history of this case, see note 42 infra.

2 Recently, the organization's name was changed to the Civic League of Greater New Brunswick, but for clarity's sake in light of the extended litigation, we will refer to the organization, the individual plaintiff/respondents in this action, and the class they represent as the Urban League respondents.

Twp., ___ N.J. Super. ___ (Law Div. 1984)(116 N.J.L.J. 1, November 21, 1985). There followed a joint 18-day trial in April-May 1984 on region, regional need, fair share methodology and allocation, and validity of revised ordinances, in which Cranbury, Monroe, and Piscataway participated. South Plainfield did not participate after the first few days of trial because it signed a Stipulation as to all relevant facts, further described in Section E below. With regard to Cranbury and Monroe, the trial court issued a letter-opinion dated July 27, 1984 and an implementing Judgment on August 13, 1984, which determined the fair share of Cranbury to be 816 and the fair share of Monroe to be 774. The Court held the zoning ordinance and land use regulations in each town unconstitutional, directed rezoning of each town within 90 days of the July 27 opinion, and appointed Masters to assist the towns in the revision process. As to Piscataway, the trial judge did not resolve the fair share issues, but ordered further proceedings set forth in Section D below.[3]

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3 There are five other towns remaining in the Urban League case. Three, East Brunswick, Plainsboro, and South Brunswick, were before this Court in Mount Laurel II, and each has settled. A consent order was signed with regard to East Brunswick in July 1984, providing for 1472-1601 units, and with regard to Plainsboro, providing for 575 units, on July 30, 1985. The South Brunswick settlement, with a fair share of 1969 units, is complete and should be signed shortly. In addition, after this Court's remand, the plaintiffs successfully moved to modify and enforce Judge Furman's 1976 Judgment against North Brunswick and Old Bridge (formerly Township of Madison, the defendant in Oakwood at Madison), which were the only other two towns that had not yet complied with that Judgment. A consent order as to North Brunswick providing a fair share of 1250 was signed on September 13, 1984, the zoning ordinance has been adopted, and the final compliance hearing is scheduled for December 9, 1985. In July 1984, Old Bridge and the plaintiffs (including two large consolidated builder-plaintiffs) agreed to a Consent Order

B. Compliance Facts As To Cranbury

Cranbury submitted its 135-page compliance program at the end of December 1984, and the Master filed an 82-page report thereon in April 1985. The Court then permitted the parties to exchange expert reports, which was completed by July 24, 1985. The Court also made a personal inspection of Cranbury on May 16, 1985. As the trial court noted in its oral opinion denying the transfer motion, the delay in the hearing since July was solely because of the Court's heavy docket. Transcript of October 2, 1985 Decision, at 23.[4] After denying the transfer motion, Judge Serpentelli scheduled the compliance hearing for December 2, 1985 and a prehearing conference for November 22. The latter conference was cancelled and on November 22 the compliance hearing was adjourned to January 6, 1986, with the consent of the parties, because of the expedited briefing schedule in this Court.

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establishing a fair share of 2135 units through 1990. A Master was appointed in November 1984 and compliance negotiations have been in progress since then. The motion of the Urban League plaintiffs for a court-ordered remedy, filed in July 1985, has been repeatedly adjourned by the trial court in anticipation of further settlement discussions, but is now set for determination on December 6.

As a result of these settlements, as well as a negotiated settlement regarding one site in Piscataway, most of which required rezoning at higher densities with set-asides of 17-20 percent, a significant amount of lower income housing is now actually in production or has received necessary Planning Board approval.

Of these five towns only Old Bridge has moved to transfer the case. That motion has not yet been heard.

4 Copies of this transcript have been provided in the appendices filed in the Appellate Division by each of the four appellants.

C. Compliance Facts As To Monroe

Monroe's compliance plan was not submitted to the Court until March 29, 1985, after seven months of meetings with the Master and Monroe's specially retained planner. Monroe's Mayor (State Senator Garibaldi) did not act on the resolution of submission, adopted 3-2 by the Council, and also refused to authorize payment to the Master, the retained planning firm, and the Township's own attorney for their services in preparing the compliance plan. Judge Serpentelli accepted the compliance plan without the Mayor's signature, but ordered that the Master and the consultants be paid, an issue which Monroe then sought to take to the Appellate Division. That Order of May 13, 1985 has not yet been complied with, although no stay was obtained. Motions to dismiss the township's appeal as interlocutory and untimely are currently pending before the Appellate Division. (Appellate Division Docket No. A-5394-84T1).

While the Township's compliance plan was under consideration by the Master, the Monroe Planning Board and Township Council voted to approve the Whittingham project, without any Mount Laurel set-aside, even though the Township's plan included 100 lower-income units from this development. As a result, on July 25, 1985, the Court provided the Township with two compliance options. First, it could rescind the Whittingham approval. Second, the Court stated that it would reduce the township's total fair share by 100 units (presumably, the amount that would be lost by the Whittingham development without a set-aside) if it would voluntarily comply. On August 2, 1985, the Township Coun-

cil informed the Court in writing that it had unanimously rejected both options; the Court accordingly found the Township's compliance plan void and directed the Master to draft her own plan by October 7.[5]

Meanwhile, on August 5, 1985, the Township Council adopted a major revision to its zoning ordinance, permitting substantial residential construction without a set-aside or development fee as an option within the general commercial zone, in response to a request by the developer of the Forsgate project. Under the ordinance amendment adopted, that project could build some 700 residential units without a set-aside. Although the Master was known to be considering recommending that the Forsgate project make some contribution to the lower income fair share obligation, the Monroe Planning Board granted overall development approval of that project on November 18, 1985.

The Master's report is due any day now. As the Court stated in its ruling on the motion to transfer:

> 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.

Transcript of Judge Serpentelli's Decision on Motions to Transfer, October 2, 1985, at 27.

D. Compliance Facts As To Piscataway

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5 These matters are embodied in the trial court's oral order of July 25, 1985, and two written orders of August 30, 1985.

During the Spring 1984 fair share trial, all parties agreed that, because of approvals granted during the eight years since Judge Furman's Judgment, Piscataway no longer had sufficient vacant developable land to accommodate the fair share of 3744 units that would have been allocated under the general fair share formula used by the Court. The Court, therefore, did not assign Piscataway a fair share number after the joint 18-day trial but rather directed the Court-appointed expert to prepare an inventory of the available land that was suitable for multi-family development. The expert's report was submitted on November 10, 1984, some discovery was had, and a supplemental Court-appointed expert report was submitted on January 18, 1985. The plaintiffs' expert endorsed these reports without exception. The Township, however, contested each and every site recommended by the Court's expert, and the Court was thus required to conduct an extended evidentiary hearing comprising most trial days in February 1985. On May 16, 1985, the Court also conducted a personal site inspection.

Meanwhile, as a result of repeated Township efforts to approve development inconsistent with the Mount Laurel obligation on the dwindling supply of vacant land, the plaintiffs were forced to bring a number of motions for temporary restraints beginning in May 1984. These resulted in several individual orders, entered June 7, September 11, and November 5, 1984, and ultimately, in the Order entered December 11, 1984, which restrained approvals on any of the sites found suitable by the Court-appointed expert in her November 10, 1984 report, pending a

full hearing on the report.

On July 23, 1985, a full year after issuing its opinion as to the fair share for Cranbury and Monroe, the Court issued a letter-opinion agreeing with virtually all of the Court-appointed expert's site suitability conclusions, setting Piscataway's fair share at 2215 units, denying requested credits against the fair share, declaring the existing ordinances invalid, appointing the expert as Master, and requiring the Township to rezone within 90 days, or October 23, and continuing the December 11, 1984 restraints. The Court noted that the Township should need less time for compliance than other towns because the extensive proceedings to that point had already resolved most site-specific issues. These rulings were embodied in a Judgment entered on September 17, 1985.

On October 23, 1985, the Appellate Division (Cohen, Petrella and Ashby, JJ.) denied Piscataway's motion for stay of its compliance submission deadline pending determination of its motion for leave to appeal. On November 8, in response to plaintiffs' motion for immediate referral to a Master for formulation of a compliance plan and defendants' cross-motion for a two-month extension, Judge Serpentelli extended the time for compliance to December 2, required weekly progress reports to the Master and, should satisfactory progress be made by then, a further extension to December 23, the date requested by the Township. On November 22, following this Court's Order of direct certification in these matters, Judge Serpentelli granted Piscataway's motion for stay of the November 8 order.

E. Compliance Facts As To South Plainfield

After the beginning of the joint fair share trial, South Plainfield and the Urban League plaintiffs signed a Stipulation on May 10, 1984, which included all facts necessary for the Court to determine fair share, ordinance invalidity, and the appropriate remedy. The Borough and plaintiffs expressly stipulated that both the Court's general formula for fair share allocation, which would have assigned South Plainfield 1725 lower income units, and the Urban League plaintffs' expert's formula, which would have assigned South Plainfield only 1523, were "reasonable." However, the parties agreed that there was "insufficient vacant developable land suitable for development of low and moderate income housing to meet the full fair share resulting from either methodology" and therefore stipulated to a fair share of 900 units.

The Stipulation identified (by block and lot number) only eight specific sites as suitable for multi-family development with a set-aside. Based on the acreage estimates provided by the Borough, the number of units that would be constructed in South Plainfield would be at most 603. One of these sites, known as Elderlodge, had been the subject of a separate lawsuit, challenging in part on Mount Laurel grounds, a Board of Adjustment denial of a senior citizen apartment project.

Based on the Stipulation, plaintiffs moved for summary judgment, which was granted on May 22, 1984, establishing October 4, 1984 as the deadline for enactment of the necessary ordinances. During the 133-day compliance period, plaintiffs reviewed

the Borough's drafts of the proposed zoning and affordable housing ordinances and provided defendants with detailed input to permit passage of compliant ordinances well within the time required by the Court. Instead, in response to a written inquiry by the Court, the South Plainfield attorney informed the Court on October 4, 1984, the compliance deadline, that no ordinance revisions would be approved until complete revision of the Master Plan. On October 2, 1984, the South Plainfield Board of Adjustment granted Elderlodge a variance to build senior citizen housing without any Mount Laurel set-aside.

Pursuant to the Urban League plaintiffs' October 1984 motion for restraints in light of these developments, the Court entered an Order on December 13, 1984 consolidating the Elderlodge and Urban League matters, preventing vesting of any rights as to the Elderlodge plaintiff, and directing adoption of compliant ordinances by January 31, 1985. South Plainfield violated that Order, as it had violated the prior Judgment. No ordinances were passed in January nor at a March 11, 1985 public hearing on second reading. On the latter date, because the plaintiffs had suggested a few minor modifications of the ordinances to conform to the Stipulation, the Council referred the ordinances back to the Planning Board as if they required complete redrafting.

In June 1985, while awaiting further Planning Board and Council action, the Urban League plaintiffs learned that the Borough had sold several municipally-owned parcels identified by block and lot number in the Judgment and the Planning Board had approved development of two-family homes on those sites, approv-

als clearly inconsistent with the required but delayed rezoning of those parcels. After a further period of defiance, and as a result of a stringent Court order restraining issuance of almost all building permits and any sale of Borough-owned land, the South Plainfield Borough Council finally adopted the ordinances under protest on August 7, 1985, more than 10 months after the deadline set in the Judgment of May 22, 1984.[6]

Even while the ban on sales of municipally-owned property remained in effect, the Borough adopted a "time of essence" resolution on August 12, 1985 requiring contract purchasers of Borough-owned land to post the full purchase price by August 22. This resolution applied to one contract purchaser of the bulk of a specified Judgment site, who had already contracted for resale of the property to an experienced Mount Laurel developer. The resolution forced him to deposit the full $1.27 million purchase price, although the Borough was barred from transferring title.

When the trial court denied the transfer motion herein appealed, the zoning and affordable housing ordinances of South Plainfield, adopted on August 7, 1985, went into effect. Order of October 11, 1985, Para. 3. On November 12, 1985, Judge Serpentelli was scheduled to hold the compliance hearing for South Plainfield. However, at the very last minute, the owner of the largest site within the Judgment, Harris Structural Steel Co.,

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6 The sorry details of South Plainfield's intransigence are set out in the Urban League respondents' Memorandum of Law in Opposition to South Plainfield's Motion to Transfer dated August 28, 1985, filed with this Court on November 25, 1985.

sought leave to intervene to object to the rezoning of its site. As a result, the hearing was adjourned to December 4, to give Harris Steel time to present appropriate data which were not in its moving papers and to negotiate its problem with the parties and, at the Court's request, for the parties to attempt settlement of the remaining compliance issues. On November 19, the Borough attorney informed the Urban League attorneys that there was no possibility of settlement. On November 22, Judge Serpentelli granted South Plainfield's motion to stay further trial court proceedings pending determination of this appeal, believing that he was bound by this Court's earlier affirmance of the Appellate Division's grant of a stay in the Bernards Township appeal.

F. The Fair Housing Act

The provisions of the Fair Housing Act, P.L. 1985, c.222, have been thoroughly described in the opinions below of Judges Serpentelli and Skillman. See October 2, 1985 Transcript at 14-20; Morris County Fair Housing Council v. Boonton Township, No. 6001-78 P.W. (Law Div., October 28, 1985)(hereafter Morris County), at 10-11, 14-20. We have also extensively analyzed the Act in our two Memoranda of Law submitted below, which were filed with this Court on November 25, 1985. We do not repeat these matters here.[7]

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7 One point of nomenclature bears repeating. In the official print of the statute, the second subsection of Section 16 is designated "b." but the first has no designation. For clarity's sake, however, we refer throughout this brief to the first

In accordance with this Court's first Question, propounded in Mr. Townsend's letter of November 15, 1985, however, we do state our understanding of the statutory timetable. An appreciation of the extended delay that is inevitable under the Act before any transferred case can be resolved is crucial to our argument in Point I that manifest injustice will be caused by transfer. Our analysis is presented in Table A:

TABLE A

Minimum Timetable for Cases Transferred to Council on Affordable Housing under L. 1985, c. 222, §16(a)

| Date | Event |
|---|---|
| July 2, 1985 | Effective date of statute |
| November 2, 1985 | Filing by municipalities of resolution of participation |
| May 1, 1986[8] | Promulgation of procedural rules by Council (§8) |
| August 1, 1986 | Council determination of regions, estimation of need and promulgation of guidelines and criteria (§7) |
| January 1, 1987[9] | Municipality in litigation transferred to |

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subsection as "a."

8 If all members of the Council are confirmed prior to January 1, 1986, this date and all dates hereafter could be somewhat earlier. §§8, 9(a). The State Senate, however, is not due to convene again until December 9, 1985.

9 There is an inconsistency between Sections 7 and 16(a) on the one hand, which suggest that municipalities in transferred cases have until January 1, 1987 to file their housing elements with the Council and then have mediation and review commence, and Section 19, which suggests that mediation and review in cases transferred within nine months of the Act's effective date must be completed by October 2, 1986, 15 months after the Act's

Council must file housing element and fair share plan (§16)

-- Mediation[10]
Hearing before Administrative Law Judge
Initial decision by ALJ unless time extended by Director of OAL (§15(d))[11]

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effective date. This inconsistency apparently crept in at the time of the Governor's conditional veto. Because the latter time frame would give municipalities no time to draft their housing elements in light of the Council's criteria and guidelines and give the Council practically no time to conduct mediation and review after its criteria are issued, we assume that the Sections 7 and 16(a) time frame is the generally applicable one. For reasons stated in part II(B) infra, however, we think that the Section 19 time frame is appropriate for those municipalities conditionally transferred for quick resolution of compliance issues, which need not await Council criteria nor file a formal housing element under the Act.

10 It is not clear whether parties transferred under Section 16(a) may initiate a request for mediation and review. Section 15(a)(2) refers to party requests made "pursuant to section 16," but only Section 16(b) specifically provides for these requests. Cases transferred under Section 16(a), however, clearly were not meant to languish in the Council for up to six years while the town decided whether to seek substantive certification, because Sections 18 and 19 provide for reversion to the court if the Council's review and mediation is delayed. The Urban League respondents believe that Section 16(a) can be construed to allowed transferred parties to seek mediation and review. This construction is generally consistent with the mechanics of the Act, and is literally supported by the language of Section 15(a)(2), since the phrase "pursuant to section 16" refers to the paragraph that we have relabelled 16(a). See note 7 supra.

11 The Act does not specify how long mediation may take. It requires only that the ALJ hold the hearing and issue an initial decision within 90 days after the matter is referred to the OAL after mediation fails. §15(c). The Council, as the agency head, see note 12 infra must review the ALJ's initial decision within 45 days. N.J.S.A. 52:14B-10(c). The Act permits courts to relieve the parties of the administrative exhaustion requirement if "the review and mediation process" takes more than six months. § 19. For purposes of this timetable, we assume that mediation, hearing, initial ALJ decision, and final Council review may not take more than six months, absent extension by the Director of the OAL under Section 15(d) or by the trial court under Section 19.

| | |
|---|---|
| July 1, 1987 | Council issues final decision accepting, accepting with conditions, or rejecting municipal plan (N.J.S.A. 52:14B-12(c))[12] |
| August 15, 1987 | Municipality that receives Council approval adopts implementing ordinances |
| September 1, 1987 | Municipality that receives Council denial or conditional approval may submit revised plan (§14(b)) |
| Within an unspecified time thereafter[13] | Council accepts or rejects revised plan |

Although the statute is ambiguous or inconsistent in some respects,[14] it is apparent that the administrative process would consume nearly two full years for cases transferred under Section 16(a), assuming, contrary to all experience, that the Administrative Law Judge would not require an extension of the statutory 90-day period to conduct a complete hearing on all issues and

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12 The Administrative Procedures Act requires final decision by the "head of the agency." N.J.S.A. 52:14B-10(c). The Fair Housing Act does not define the Council in that way nor is it the head of a separate administrative body. But given the structure and purposes of the Act, we assume that the Council itself, rather than its Executive Director, would be treated as the "agency head."

13 The Act does not set a deadline for Council action on a municipality's submission of a revised plan after initial rejection or conditional approval. One might, however, reasonably import the 45-day limit in N.J.S.A. 52:14B-10(c) for Council review of the ALJ's initial decision.

14 See notes 9 -- 13 supra.

render a written decision.[15]

The end of the administrative process need not, however, mark the beginning of compliance by the municipality with its constitutional obligations. The Council appears to have only the power to determine whether a municipality's proposed housing element and fair share ordinances are acceptable. §14. It has no explicit statutory power to compel a municipality to take any action. Thus, even if plaintiffs or objectors prevail at every step of the administrative process and the Council determines that the municipality's proposed housing element and fair share ordinances are unacceptable, plaintiffs would still not be able to secure any affirmative remedy from the Council. The only recourse at that point would be to commence or recommence judicial proceedings.[16]

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15 In his ruling on these motions, Judge Serpentelli concluded, based on a number of statutory interpretations, that the process would take until September 1, 1987, assuming no extensions of time are granted. Transcript of October 2, 1985 Decision, at 15-20. Judge Skillman, making somewhat different assumptions, also found that the process would not end before September 1, 1987, if no extensions were granted. Morris County, supra, at 15-18. Respondents here assume that it would take until August 15, 1987 for those municipalities receiving initial Council approval and until at least October 15, 1987 for those receiving a Council denial or conditional approval, again assuming no extensions. For purposes of the argument which follows in Point I, the precise date is less important than that extensive delay is involved.

16 The statute is somewhat unclear as to what judicial proceedings would occur after proceedings before the Council. Ordinarily, final administrative decisions under the Administrative Procedures Act are appealable to the Appellate Division . N.J.S.A. 52:14B-14; Rule Governing Appellate Practice 2:2-3(a)(2). However, the implicit premise of Sections 16(b), 17, 18 and 19 is that disputes will go to the trial court. Section 18 clearly indicates that towns may not appeal to the

# ARGUMENT

## INTRODUCTION AND SUMMARY

In many respects, the Fair Housing Act now under review constitutes the positive, vigorous response to New Jersey's housing crisis that this Court called for in both of its Mount Laurel opinions. The Urban League respondents are pleased that the Legislature has at last seen fit to act, and we seek to have the Act positively and vigorously implemented.

The Act is long and complex, and it was forged in the heat of intense political controversy. It is not surprising, therefore, that errors and anomalies have crept into the final text, which require attention in this Court in order to save its constitutionality. We accept on its face the Legislature's statment that the Act seeks to implement Mount Laurel II rather

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Appellate Division if their housing element is rejected by the Council or they refuse to accept the terms of a conditional approval. This approach is entirely consistent with this Court's admonition in Mount Laurel II, that towns not be allowed to appeal until they have a compliance ordinance. 92 N.J. at 214, 290. It is unclear, however, to which court parties objecting to a substantive certification, before or after conditional approval, should go. Sections 16(b) and 17's insistence on plenary trial contradicts the ordinary rules of appellate review and the virtually conclusive effect of a certification suggest that objectors may first have the right to Appellate Division review of Council action before returning to the trial court. In any case, after either an approved or a rejected municipal petition for certification, there will be substantial additional court proceedings before a final judgment of compliance issues.

than to challenge it, and we submit that this gives this Court generous latitude to make saving constructions. Indeed, the Attorney General, in his brief below, has acknowledged that some "judicial surgery" on the Act is necessary.

Point I sets forth the Urban League respondents' most basic and critical position, that the "manifest injustice" standard specified by the Legislature prevents the transfer of any of the four Urban League cases now before this Court. We do not view this position as flaunting the legislative will; rather, we believe that the Legislature understood the special position of very old cases such as ours, where all substantive matters have been adjudicated and compliance is well advanced, and intended to create a special transitional mechanism for them based on individual judicial consideration of their circumstances. We reiterate that affirmance of Judge Serpentelli's orders denying transfer is our primary position.

In response to one of the central concerns of the manifest injustice standard, the delay inherent in transferring these cases to the Council, Point II suggests two forms of "conditional transfer" that would mitigate the problem. We suggest either that this Court require expedited proceedings before the Council with binding law of the case or that it require immediate partial court-ordered compliance simultaneous with transfer. Either of these conditions would allow this Court to accommodate the obvious legislative preference for administrative proceedings with its recognition of the potential for injustice when the oldest cases are caught in the transition. Absent bold action to condi-

tion transfer in one of these ways, we conclude that manifest injustice cannot be avoided and all the cases must remain in the trial court.

Point III then addresses three areas of specific constitutional infirmity in the Act -- its failure to provide for a builder's remedy, its failure to provide for interim restraints, and its overbroad credit provision. We believe that no case may be transferred to the Affordable Housing Council until these defects are cured, because the Act as it stands is unconstitutional in these respects.

Point IV addresses this Court's question about the moratorium provision of Section 28 of the Act. We believe that it is not applicable, on grounds of statutory interpretation, and that it would otherwise be unconstitutional because the purpose of the moratorium has nothing to do with cases that are retained in the trial court.

Finally, in Point V, we briefly apply the preceding points to our four cases, concluding that Monroe, South Plainfield and Piscataway cannot be transferred under any circumstances, but that Cranbury could be transferred if all of the constitutional problems were attended to and transfers were adequately conditioned on techniques to mitigate the delays involved.

I. THE FOUR URBAN LEAGUE MUNICIPALITIES WERE PROPERLY DENIED TRANSFER TO THE AFFORDABLE HOUSING COUNCIL BECAUSE IT WOULD BE MANIFESTLY UNJUST TO DENY A SPEEDY REMEDY IN THE TRIAL COURT IN THIS, THE OLDEST MOUNT LAUREL CASE, IN WHICH ALL ESSENTIAL SUBSTANTIVE DETERMINATIONS HAVE BEEN MADE, COMPLIANCE PROCEEDINGS ARE WELL ADVANCED, AND THE COURT IS FAR MORE EXPERT ON THE REMAINING ISSUES.

Appellants speak repeatedly of the need for judicial deference to legislative action. We wholeheartedly agree that this Court, in Mount Laurel II, urged legislative action and anticipated deference to any constitutionally adequate legislative solution. We also agree that over the long haul a carefully crafted administrative process can accommodate both affordable housing goals and sound planning concerns. Having accepted these propositions, however, this Court should not rush to the simplistic conclusion, posited by appellants, that the four Urban League towns now before this Court must be transferred to the Affordable Housing Council in order to square with the legislative intent. On the contrary, absent extensive judicial refinement of the statute, allowing these cases to remain in the special Mount Laurel court is the only solution consistent with the legislation.

A. The Language and Structure of the Fair Housing Act Demonstrate That The Legislature Intended A Continuing Judicial Role For Cases Such As These.

It should be clearly understood that the Fair Housing Act does not preclude a substantial judicial role in the resolution of affordable housing disputes. On the contrary, the Act explicitly provides decisionmaking roles for both the Council and the courts. Even as to newly-filed cases, which are intended to be brought first before the Council, exhaustion of administrative remedies is not required if the municipality has not taken the first, voluntary step by submitting a fair housing plan to the Council; in this situation, the dispute may begin in

the Superior Court. § 16(b). Moreover, cases that do begin in the Council may revert to the court should the municipality fail to pursue its administrative remedies vigorously or in a timely manner, §§ 18, 19, and all disputes that cannot be resolved satisfactorily within the administrative system are ultimately subject to judicial review at either the trial or appellate level.

Against this backdrop of judicial involvement in future cases, it is not at all surprising that the Legislature also provided that some existing cases might stay in the courts rather than be transferred to start over again in the Council. § 16(a). Nothing in the Fair Housing Act suggests that the courts are an incompetent forum for resolution of affordable housing disputes, even though the Legislature and this Court could each reasonably conclude that an administrative forum was preferable under many circumstances.

The key to a full understanding of the legislative intent is to recognize that the Legislature sought to solve two problems simultaneously. First, it sought to create a permanent mechanism for resolving fair housing disputes, one that would be applicable long after any existing cases had been resolved. Second, it sought to provide a fair transitional mechanism for reviewing those disputes already in the judicial system and accommodating them where possible to the newly created permanent mechanisms.

It bears noting that Mount Laurel II's oft-quoted language about deference to the Legislature, 92 N.J. at 212, does

not deal one way or the other with the problems of transition created and resolved by this legislation. At the time that the Chief Justice wrote for a unanimous Court in 1983, the Legislature had ignored for almost eight years the constitutional mandate of Mount Laurel I, which had also urged the desirability of legislative action. Mount Laurel II thus could extol, but not reasonably predict, a legislative response. Certainly, there is nothing in the opinion that justifies a crude, mechanical approach to transition that rides roughshod over the interests of lower income housing advocates in existing cases; indeed, there would be a substantial constitutional cloud over any such approach.

Happily, the Legislature did not fashion a crude approach. Instead, it recognized three distinct classes of fair housing disputes, and treated each of them separately in terms of their transitional impact. Most importantly, it distinguished between disputes arising before and after the Act, thus recognizing that transitional problems needed careful attention. As to disputes arising after the effective date of the Act, which by definition pose no transitional problems, it logically required full application of the new mechanisms created by the Act, beginning with initial exhaustion of administrative remedies. §16(b). But it then drew a further distinction between cases filed within sixty days of the effective date of the Act and those that were filed before then. As to the recently filed cases, the Legislature has required transfer, in effect conclusively presuming that there would be no significant transition problems involved. Sec.

16(b).[17] This is a reasonable presumption, because in that sixty-day period it would be a miracle if anything more than the filing of an answer had occurred, and there obviously could not have been detrimental reliance on the old rules. This aspect of Section 16(b) has already been applied to require transfer of newly-filed cases involving Roseland Borough, see Morris County, supra, at 59-62, and Cherry Hill.

Finally, there are the "older" cases, those filed more than sixty days before the Act, which the Legislature obviously thought could create serious transitional inequities. The Urban League cases now before this Court are in this category. Here, and only here, the Legislature provides for application of a "manifest injustice" standard to determine which cases would be transferred and which would not. § 16(a). Unlike the new cases and the "sixty-day" cases covered by Sec. 16(b), the Legislature did not sanction a mechanical rule for the older cases. Such a mechanical rule was proposed by the Assembly minority, which suggested that all pending cases should be transferred to the Council.[18] Read against this unsuccessful attempt to impose a mech-

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17 As Judge Skillman noted, Morris County, supra, at 19, it is probably correct to assume that even in recently filed cases covered by Section 16(b), transfer/exhaustion is not automatic, but rather the factors enumerated by this Court in Abbott v. Burke, 100 N.J. 269 (1985), should be considered and might excuse transfer in the extraordinary case.

18 See Minority Statement to Assembly Municipal Government Committee, Statement to Senate Committee Substitute for Senate Bills 2046 and 2334, at 2 (Feb. 28, 1985).

anical rule, the manifest injustice standard ultimately chosen by the Legislature can only rationally mean that the Legislature intended that some of the cases known to exist in June 1985, when the Legislature adopted the Act, would remain in the courts. And since the manifest injustice standard is placed by the Legislature in a section that classifies the cases by age, it must have contemplated that the oldest cases, those well along towards resolution, would be those in which manifest injustice could most plausibly be shown.

Thus, the Legislature provided for individualized judicial evaluation of the circumstances under which transfer would be appropriate in the oldest cases. Self-evidently, the Legislature recognized that some of these cases would be so far advanced that it would be pointless, grossly inefficient, or just plain unfair to require them to start over before a new agency.[19] Just as evidently, it recognized that there would be cases more than sixty days old that could reasonably and efficiently be transferred to the new forum. Individualized attention assures that cases appropriate for transfer will be transferred without doing unnecessary damage to cases inappropriate to transfer.

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19 The statute does not address whether the Council would reconsider all issues previously litigated in a transferred case or accept all prior decisions as law of the case and merely determine the remaining issues of compliance. We believe the statute does not address the question quite simply because the Legislature did not intend that cases in which substantive determinations had already been made would be transferred. An alternate analysis, which would allow transfer in some older cases, is set forth in Point II(A), infra.

It is important to describe some examples of how the manifest injustice standard can work in these older cases. First, there will be cases filed a few months before the Act's effectiveness which were no further along than those filed within 60 days and thus automatically transferred under Section 16(b)'s rationale. These clearly should be treated the same as 16(b) cases.

Second would be cases that were filed 6, 8 or 10 months, or even a year before the Act, in which substantial discovery activity may have occurred, but no trial has been held and no substantive determinations of fair share or ordinance invalidity have been made. Arguably a court could find that such cases should be transferred, because the discovery would not be wasted but rather could be used before the Council and Administrative Law Judge, and no substantive determinations had yet been made. Thus no formal rights would have vested or significant expectations have been raised.[20]

Third, there might be some even older cases, which were originally brought as arbitrary and capricious challenges to particular Planning Board or Board of Adjustment decisions, but which were remanded by the court for reconsideration in light of Mount Laurel II and only recently returned to court for full Mount Laurel scrutiny.[21] Although substantially older than those

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20 The Tewksbury case, now before this Court, was transferred by Judge Skillman on this ground. See Morris County, supra, at 57-59.

21 The Elderlodge case against South Plainfield , filed in

in the first two categories, these cases, too, might well be thought appropriate for transfer, even if their filing predated Mount Laurel II, because no court determinations of Mount Laurel issues had yet occurred.

Finally, there are cases such as the Urban League action, in which a complete trial has been held, or summary judgment granted, in which constitutional determinations of region, regional need, fair share allocation, fair share obligation, and ordinance invalidity have been made, and compliance proceedings have begun. These cases in which substantive determinations have already been made, we submit, are the ones that the Legislature intended not be transferred to a new forum. The Legislature understood that transfer in these situations would risk either wasteful re-litigation of all issues before the Council, impermissible retroactive intrusion on vested rights, or needless delay in the completion by an experienced judicial forum of almost entirely adjudicated actions.

B. By Virtue Of Their Age, Their State Of Completion Relative To The Extensive Delays Inherent In Transfer, The Settled Nature Of The Constitutional Obligation, The Relative Lack of Expertise In The Affordable Housing Council As Compared To The Trial Court, And The Continued Need for Development Restraints, The Four Urban League Towns Should Not Be Transferred

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December 1982 and consolidated with the Urban League action in October 1984 was originally of this nature. As a result both of consolidation and of the case having gone to judgment and virtually through compliance, Elderlodge itself, of course, is no longer appropriate for transfer.

Under the Caselaw Standards Of Manifest Injustice Incorporated Into The Fair Housing Act.

The civil law in New Jersey,[22] of which the Legislature must have had cognizance when it incorporated the "manifest injustice" standard, has previously utilized the concept of "manifest injustice" in three relevant areas: retroactivity of new statutes, exhaustion of administrative remedies in prerogative writ actions (and the parallel doctrine of primary jurisdiction), and relief from the limitations of pretrial orders. As described below, these sources indicate that the standard provides discretionary authority to courts to consider a wide variety of factors weighing on inequity, wastefulness, and the irreparability of disrupting established rulings, procedures, or fora. The burden of this caselaw is that once substantive determinations have been made in a proceeding, the Court should be particularly alert to the possibility of manifest injustice in reopening the substantive issues. This, we submit, is the standard intended by the Legislature and the Fair Housing Act.

This Court has repeatedly ruled that retroactivity is, subject to constitutional constraints, a matter of legislative intent but that, absent a clear legislative expression, statutes

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22 The term is also used in Rule 3:21-1, concerning withdrawal of guilty pleas, and in caselaw construing 3:22-1 relating to petitions for post-conviction relief. See, e.g., State v. Cummins, 168 N.J. Super. 429, 433 (Law. Div. 1979). Because of the substantially different policies and consequences applicable in the criminal context, we do not believe that the use of the term in that context has much significance for the issues before this Court.

providing new substantive rules should not be applied retroactively. Gibbons v. Gibbons, 86 N.J. 515, 521-22 (1981). However, even when there is indication of legislative intent to apply new substantive laws retrospectively, this Court has mandated an additional inquiry:

> [E]ven if a statute may be subject to retroactive application, a final inquiry must be made. That is, will retroactive application result in "manifest injustice" to a party adversely affected by such an application of the statute? The essence of this inquiry is whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively?

Id. at 523-24.

In Gibbons, this Court found that there was no manifest injustice in application of a change in the equitable distribution law to a divorce case pending on appeal. There, however, the objecting party sought to take inequitable financial advantage of a statutory ambiguity that the new legislation cured. Here, the Urban League respondents seek to vindicate an extremely broad public interest in access to affordable housing, an interest that the Fair Housing Act does not question. We have now come to the verge of compliance after 11 1/2 years but, if transferred, face an extended delay that may dissipate the present value of a strong housing market and make an eventual judgment in 1987 or 1988 essentially meaningless. In Gibbons, moreover, the new statute could be applied without delay because it required only mathematical adjustments to a set of assets already established by trial court findings. The Fair Housing

Act, by contrast, creates an entirely new forum and explicitly mandates extensive delays. We submit that the present situation is the type that this Court had in mind when it restated the manifest injustice standard in Gibbons.[23]

Additional guidance as to what factors should be considered in determining whether the equities warrant or judicial integrity renders application of new law or procedure unjust is provided by the extensive caselaw on exhaustion of administrative remedies. That caselaw is especially pertinent here because this Court, pursuant to our Constitution's grant of plenary judicial authority over prerogative writ actions, N.J. CONST., Art.VI, has expressly directed that claimants in such actions need not follow the ordinary obligation of administrative exhaustion "where it is manifest that the interest of justice requires otherwise." R.4:69-5.

This Court has only recently canvassed again the many factors relevant to such a determination. Abbott v. Burke, 100 N.J. 269 (1985). The primary purposes of an exhaustion rule are to have matters preliminarily reviewed by the expert agency, to create a factual record necessary for meaningful appellate

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23 This point is underlined by Kruvant v. Cedar Grove, 82 N.J. 435 (1980), a land use dispute relied upon by Justice Pashman in Gibbons. In Kruvant, this Court declined on equitable grounds to apply the "time of decision" rule where the municipality sought additional delay after eight years, four trials, and three ordinance amendments, in order to submit yet another amendment. To complete the circle, Kruvant relied in part on Oakwood at Madison, supra, which has now essentially merged with the Urban League case. See note 46 infra.

review, and to prevent needless resort to courts. Id at 297-98. When these purposes are not advanced, however, exhaustion is excused in a wide variety of circumstances -- when only legal questions require resolution, when exhaustion would be futile, when irreparable harm would result, when agency jurisdiction is doubtful, or "when an overriding public interest calls for a prompt judicial decision." Id. at 298.

As with Gibbons, the contrast between the instant case and Abbott demonstrates what "manifest injustice" means. In Abbott, there had been extensive pretrial discovery but no trial proceedings. Given that, and given the well-established expertise of the Department of Education in the matters at issue, this Court found that exhaustion was appropriate, but it also noted that the considerations for and against transfer were virtually in "equipoise." Id. at 298. Here, of course, the new Council can have absolutely no expertise at this point, and these cases have gone well beyond the pretrial stage, some, such as South Plainfield and Cranbury, being ready for final hearings on compliance and repose. If Abbott v. Burke demonstrates equipose, the Urban League cases demonstrate about the maximum imbalance against transfer that can be imagined.

Likewise, the parallel doctrine of primary jurisdiction calls for such broad discretionary consideration of time, equity, expertise, need, and public interest. See Boss v. Rockland Electric Co., 95 N.J. 33 (1983). The Boss case affords a striking parallel to the cases now before the Court because it addresses circumstances, such as here, where a matter is

initiated properly in court but then is transferred to an administrative agency for resolution of some issues during the course of the litigation. The concern, again, is with the proper distribution of judicial and administrative responsibilities. The agency may "not enlarge or contract the legal rights of the parties. When the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their rights." Id. at 40.

In Boss, some trial proceedings had occurred, but no final resolution of issues, and the transfer was to a well-established agency with a considerable backlog of expertise. In the Urban League cases, the legal rights have already been fixed by this Court in Mount Laurel II, and the implementing expertise lies wholly with the special Mount Laurel trial judges who were charged by this Court with the task of developing a methodology. Under Boss, these cases cannot be transferred.

A final instance of the manifest injustice standard in the civil law is this Court's rule on the modification or addition of issues after the pretrial order is established, R.4:25-1(b).[24] The concern is with the unfairness of adjudicating new issues once the litigation's scope is fixed. Indeed, there the burden is on the party seeking revision of the order to show that exclusion

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24 "When entered, the pretrial order becomes part of the record, supercedes the pleadings where inconsistent therewith, and controls the subsequent course of action unless modified at or before trial or pursuant to R. 4:9-2 to prevent manifest injustice...." Rule 4:25-1(b).

of the proposed new issues is manifestly unfair.

In summary, every consideration presented by the foregoing caselaw indicates that transfer of the four towns before this Court in the Urban League case is manifestly unjust and thus barred. The case is the oldest, largest, most complex, and overall most advanced of the remaining Mount Laurel cases. Substantial substantive determinations -- of region, regional need, fair share, and ordinance invalidity-- have been made as to each of these four towns (and all the others). Substantial determinations regarding compliance, including in several instances site specific suitability determinations, have been made at least by the Master or court-appointed expert, or in one case stipulated by the parties. Equitable restraints are in effect as to two towns, to prevent loss of remaining suitable land. Many of the remaining issues are legal and equitable, such as the adequacy of ordinances and the entitlement of builders. The residual factual inquiries are site specific and the court has accumulated substantial expertise on each town's planning needs and even on the specific sites involved.

The Council, in contrast, is just starting out, will be immediately heavily backlogged because of the 120 resolutions of participation so far filed, and will not address compliance issues for a long time, perhaps not at all in the initial criteria and guidelines. As written, the statutory process will extend at least one year longer than the administrative process in these cases, and in some instances a full 18 months longer. Finally, several towns, such as Monroe and South Plainfield, are

before this Court only because they have extended the process through repeated violations of court orders. Indeed, had South Plainfield complied even in twice the 120 days permitted by the May 22, 1984 Judgment, it would not have even been able to file this transfer motion.

As an equitable concept, the caselaw also confirms that manifest injustice cannot be frozen into a mechanical test, but must adapt to the various situations to which it applies. As applied here, the Urban League respondents believe that both Judge Skillman and Judge Serpentelli properly considered the relative delay that would accrue with and without transfer.[25] In the abstract, these cases could perhaps be brought to a satisfactory conclusion before the Council (depending upon details of statutory construction and administrative interpretation to be discussed in Points II and III below). But these cases are not abstract. They have 11 1/2 years of

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25 In his oral opinion, Judge Serpentelli also noted that a prior draft of the Act contained language that would have denied transfer unless the case could have been adjudicated more expeditiously in the Council than the court. Since this language was later eliminated, it cannot govern what the Legislature meant by "manifest injustice." We believe, however, that Judge Serpentelli ultimately applied the correct standard of "relative delay" as discussed in this Point. We also note, in response to this Court's Question I(a)(i), see Mr. Townsend's letter of Nov. 13, 1985, that "relative delay" is not a mechanical balancing test in which greater and lesser weights can be assigned to specific factors. As an equitable concept, manifest injustice ultimately turns on the totality of the circumstances. For this reason, we also believe that the trial judges, who are intimately familiar with these complex cases, should be affirmed in decisions involving transfer unless there is a clear abuse of discretion. See id., Question I(a)(ii).

extremely concrete history behind them, and they can be brought to demonstrably satisfactory conclusions within a matter of weeks or months. In the abstract, a statutory delay of a year or two may not be remarkable. But when measured against what has taken place already, the years of studied opposition to the Mount Laurel doctrine, the short time to completion, and the predictably cyclical nature of the housing industry, even this delay becomes too much.

To start over, to delay substantially compliance in towns virtually at the end of the process, to defer to a far less expert agency, to ignore the risk of irreparable injury, is manifest injustice if the term means anything. Clearly, if the Legislature intended that any case not be transferred, it was the Urban League case.

## II. THE EXTENDED PERIOD NECESSARY UNDER THE STATUTE TO RESOLVE THIS ELEVEN-YEAR-OLD CASE WILL CONSTITUTE BOTH MANIFEST INJUSTICE AND A DEPRIVATION OF CONSTITUTIONAL RIGHTS UNLESS THIS COURT CONDITIONS TRANSFER UPON VESTING OF SUBSTANTIVE DETERMINATIONS ALREADY MADE IN THE TRIAL COURT AND PROVIDES FOR AN EXPEDITED HEARING SCHEDULE OR, IN THE ALTERNATIVE, CONDITIONS TRANSFER UPON IMMEDIATE IMPLEMENTATION OF AN APPROPRIATE PORTION OF THE PROBABLE FAIR SHARE

### A. The Policy Against Retroactive Application of Substantive Rules, as Well as the Structure of the Act Itself, Demonstrate that This Court Can Condition Transfer Upon Recognition of Law of the Case and Collateral Estoppel in Any Further Administrative Proceedings

As already recited, this Court has long favored prospective application of new statutes. This policy is at its strongest when new statutes relate to substantive, as compared to procedural, rights:

> Ordinarily, statutes relating to substantive rights are construed to operate only prospectively, in the absence of a clear expression of opposite intent. . . [C]ourts are reluctant to give a statute restrospective operation where to do so would work an injustice [regarding a matter] of substantive rights.

Neel v. Ball, 6 N.J. 546, 551, (1951). See also Bennett v. New Jersey, 105 S.Ct. 1555, 1559-60 (1985). Thus, for example, our courts have refused to apply retroactively new statutes authorizing cities to void conveyances executed without a proper subdivision approval, City of Newark v. Padula, 26 N.J. Super. 251 (App. Div. 1953); abolishing the rights of dower and curtesy, Girard Acceptance Corp. v. Stoop, 177 N.J. Super. 193 (Ch. Div. 1980), and granting a spouse a share of a decedent's will unless her exclusion was expressly stated in the will, Eyre v. Bloomfield Savings Bank, 177 N.J. Super. 125 (Ch. Div. 1980). In contrast, they have approved the restrospective application of procedural rules, such as the court rule permitting suit initially against a fictitiously named defendant, Farrell v. Violator Division of Chemtron Corp. 62 N.J. 111 (1973), and the court rule permitting substitute service of process, Feuchtbaum v. Constantini, 59 N.J. 167 (1971).

Generally, decisions on whether to apply statutes retroactively turn on whether they would disrupt "vested rights." Concededly, however, the term has far from a fixed and firm meaning. 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 41.06, at 268

(4th ed. 1973). Vesting is clearly not limited to formal ownership interests in real or personal property, perhaps its original definition. Rather, it has been applied to a wide range of claims of entitlement or even mere expectation. Id. at 269. In our own state, perhaps most telling is the example of Terraciona v. Magee, 53 N.J. Super. 557, 569 (Law Div. 1959), where a pending tort suit was found to be vested as against a partial charitable immunity defense enacted while the case was pending.

Indeed, recognizing that the inquiry as to vestedness is more an assessment of the substantiality of the affected interest and the equities weighing for and against disruption, one commentator has summarized the rule as one that "settled expectations honestly arrived at with respect to substantial interests would not be defeated." 2 SUTHERLAND, supra, at 261. Justice Holmes more directly remarked that "[p]erhaps the reasoning of the cases has not always been as sound as the instinct which directed [them]" and the criteria are "the prevailing views of justice." Danforth v. Groton Water Co., 178 Mass. 472, 476, 477, 59 N.E. 1033, 1034 (1901).[26]

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26 The instinctive reluctance towards retroactivity is not borne of mere charity. Common law courts, applying well-established statutory construction doctrines to preclude retroactivity, have regularly noted that the doctrine springs from constitutional doubts. Although the ex post facto bar is applicable only to criminal sanctions, the due process clauses have been read to preclude retrospective civil legislation where the consequences are particularly "harsh and oppressive." United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.13 (1977); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). As a result our Appellate Division recently refused on constitutional grounds to permit increased economic penalties enacted while administrative

This Court must approach the Fair Housing Act's retroactivity in light of this historical and constitutional sensitivity. The Legislature clearly intended procedural retroactivity in some pending cases. For example, all cases under Section 16(b), brought within 60 days of the Act's effectiveness, must be transferred to the Council, and thus are subjected to the newly created procedures of the Act. There is no indication, however, that the Legislature wanted the Fair Housing Act applied retroactively as to substantive determinations already reached, such as the fair share obligation and the invalidity of existing zoning ordinances.

The statute does not directly determine regions, regional need, municipal fair share, or the adequacy of compliance plans. Rather, it creates a procedure, with a few basic guidelines, and directs the Council to come up with criteria to be used to gauge municipal determinations. It does not reject any particular court ruling or definition of fair share. It does not purport to impose a new one. It does not require all pending cases to be sent to the Council for such a determination, but only those brought on the eve of legislation, in which almost certainly no substantive

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proceedings were still pending against a suspended and convicted Medicaid provider, because he might have paid and not appealed the lesser penalties had he known of the potential increased liability. In re Kaplan, 178 N.J. Super. 487 (App. Div. 1981). Again the concerns are with substantiality of interest, reasonableness and degree of reliance, and inequitable impact of subsequent disruption. NOWAK, ROTUNDA, YOUNG, CONSTITUTIONAL LAW 471-77 (2d ed. 1983); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 HARV. L. REV. 692 (1960).

rulings will have been made. Rather, it clearly leaves jurisdiction in the court to exercise discretion as to which of the older cases are to be transferred. These older cases obviously include those that have already been partially adjudicated by the Court. In exercising its statutory discretion respecting transfer, courts should look to the long-standing rule that statutes are generally not to be applied retroactively and especially not to disrupt vested rights to the prejudice of parties who have reasonably relied on existing law. Likewise, under the doctrine of primary jurisdiction "[w]hen the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their rights." Boss, supra, 95 N.J. at 40.

Thus, plaintiffs submit that Section 16(a) must be construed to bar transfer of any case in which a judicial determination of litigants' rights has been made, i.e. factual determinations made and law of the case created, as to any of the key issues -- region, regional need, fair share allocation methodology, municipal fair share, invalidity of existing zoning ordinance, site suitability, or overall remedy.

This conclusion is bolstered by the structure of the Fair Housing Act. The Act, as noted, does not directly discuss the applicability of fair share determinations to pending cases. In contrast, it has a number of explicit provisions directing how various compliance standards should be applied in pending cases. The statute expressly permits towns with pending cases to reach regional contribution agreements under Section 12 and to seek the

funding provided by Sections 20 and 21 as part of its compliance efforts. §§12(b), 20(c), 21(b). It defines the period of repose upon settlement of a case. §22. It expressly authorizes a court to grant a phasing order in cases not yet completed. §23(a). And finally, it attempts to regulate courts granting builder's remedies for a period of time. §28.

Every one of these provisions involves the final compliance stage -- when and how the town must implement its fair share obligation. The express and detailed provision for court-ordered remedies and remedies in pending court cases counterposed against the jarring silence as to the fair share or liability issues in pending court cases leads to only one logical conclusion: the Legislature intended that cases that had already reached the compliance stage in court would remain in court, subject to the statutory modifications just noted, and only those without judicial determination of fair share liability would be transferred and subjected to the new administrative process. This view is supported not only by the structure of the Act and the strong policy against retrospective application of substantive rules, but also by two other pieces of prexisting law, of which the Legislature must be presumed to have been aware. The rule on pretrial orders, R.4:25-1(b), which uses a manifest injustice standard to fix the terms of trial, has already been noted.[27] In addition, the Legislature has expressly

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27 See note 24 supra.

considered the appropriate course of action when one governmental agency takes over the work of another. The State Agency Transfer Act, N.J.S.A. 52:14D-1 et seq., which provides for inter-agency transfers, specifies that a transfer does not undo previous actions of the original decisionmaker:

> The transfer shall not affect any order . . . made . . . by the agency prior to the effective date of the transfer; but such orders . . . shall continue with full force and effect until amended or repealed pursuant to law; . . . nor shall the transfer affect any order or recommendation made by, or other matters or proceedings before the agency.

N.J.S.A. 52:14D-6,7. Although the transfer here is from court to agency, there is little reason to impute a different interpretation.

The law abhors both waste and unfairness. Starting over again when one agency has concluded the matter would violate both instincts. The Transfer Act forbids it, the pretrial order rule forbids it, the established retroactivity doctrine forbids it -- and the Legislature wrote the Fair Housing Act on the assumption that it would not occur.

Manifest injustice, therefore, could be avoided only if collateral estoppel and law of the case were made applicable to transfers of pending court cases in which hearings and trials have been held and substantive determinations made. Then, the parties would not be subjected to deleterious disruption of reasonably relied upon determinations, burdened with cumbersome new administrative procedures to vindicate clearly established rights, or deprived of the reasonable reliance upon the pretrial order's determination of issues to be adjudicated. Moreover, the

new agency, certain to be immediately overburdened with a massive backlog of cases and not yet expert in any aspect of this complex area of law, would not be required to utilize its limited resources needlessly to duplicate fully adjudicated matters.

The law of the case doctrine is one of the law's major bulwarks against wasteful relitigation. Although a discretionary rule of practice, "[i]t is addressed to the good sense of the court as a cautionary admonition against relitigation." Ayers v. Jackson Twp., 202 N.J. Super. 106, 128 (App. Div. 1985). See also State v. Ortiz, 202 N.J. Super. 233, 243 (App. Div. 1985). "Prior orders in a case are, of course, normally considered 'the law of the case' and are not lightly modified or set aside." Valle v. North Jersey Automobile Club, 125 N.J. Super. 302, 306 (Ch. Div. 1973), modified and aff'd, 74 N.J. 109 (1977). Tellingly, one of the classic formulations of the doctrine, only recently relied upon by the Appellate Division in Ayers, explains:

> Though the power exists to reopen the points of law already decided, it is a power which will necessarily be exercised sparingly, and only in a clear instance of previous error, to prevent a manifest injustice.

In re Allied Electric Products, Inc., 194 F. Supp. 26, 29 (D.N.J. 1961)(emphasis added). See also State v. Reldan, 100 N.J. 187 (1985); Commercial Trust Co. of N.J. v. Kohl, 140 N.J. Eq. 294 (Ch. 1947); United States v. Wessel Duval & Co., Inc., 123 F. Supp. 318 (S.D.N.Y. 1954). Similarly, collateral estoppel -- which bars relitigation of resolved factual disputes -- is designed to protect the law from wasteful duplication and the

parties from unfair reopening. Wunschel v. City of Jersey City, 96 N.J. 651, 664 (1984).

Within the administrative realm, the law also admits that there is authority to reconsider prior action, but articulates a strong reluctance where a matter has been once fully considered. Administrative agencies are not "free to disregard completely issues that were fully and fairly resolved prior thereto." Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 110 (App. Div. 1975), aff'd, 69 N.J. 599 (1976). The existence of authority to reconsider "does not mean that a relitigation of previously resolved issues is fair, appropriate or necessary." Id. at 110. See also Ruvoldt v. Nolan, 63 N.J. 171 (1973).

This Court has already noted that:

> it is consistent with this constitutional philosophy to apply to administrative agencies, in appropriate situations, judicial rules conducive to the ends of intergovernmental compatibility and harmony, such as res judicata, collateral estoppel, the single-controversy doctrine and the like. Decisions have stressed that the policy considerations which support these judicial doctrines -- namely, finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness -- have an important place in the administrative field. . . . It seems evident that such principles, while basically judicial in origin, have especial relevance for administrative adjudications.

City of Hackensack v. Winner, 82 N.J. 1, 32-33 (1980). The Court recognized that differences in the functions of administrative agencies and courts preclude mechanical or complete application of all judicial doctrines. Id. at 29. Moreover, Hackensack involved conflict between two administrative bodies and not, as here, between a court and a new agency. In our case, the

rationale for applying court doctrines of collateral estoppel and law of the case is even stronger here.

Initially, we note that the Act expressly requires the Council in carrying out its duties to "give appropriate weight to . . . decisions of other branches of government." Section 7. This is consistent with existing law. Moreover, it is clear that the amount of weight must vary, as this Court has noted, with the circumstances. Here, all of the policies articulated by this Court in Hackensack are fully applicable and require that existing court determinations be given binding effect by the Council. Precluding relitigation of region, regional need, fair share, and ordinance invalidity upon transfer to the administrative agency would insure finality and repose and prevent needless litigation, duplication, and unnecessary delays and expense -- factors that weighed heavily upon this Court in Mount Laurel II. It would also avoid confusion and uncertainty -- and assure basic fairness, so that those who reasonably relied upon previous rulings and spent 11 years reaching the verge of closure not be forced to start all over again.[28]

Application of collateral estoppel and law of the case would minimize, although admittedly not entirely eliminate, conflict,

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28 Quite apart from the fairness factor determining the applicability of collateral estoppel, it seems evident that the doctrine of equitable estoppel, see, e.g., 405 Monroe Corp. v. City of Asbury Park, 40 N.J. 457 (1963), barring municipalities from avoiding their own voluntary stipulations based on alleged procedural defects, would apply to towns like South Plainfield which stipulated as to all facts necessary to all legal determinations.

the last factor of importance. Conflicting rulings between the courts and the Council are, however, as already noted, built into this statute -- for it is clear that some pending cases will remain in the courts while disputes involving other, perhaps even neighboring municipalities, will go to a new agency governed by new guidelines. A transfer to the Council with binding law of the case and collateral estoppel would, however, minimize conflicts. The Council could not reconsider fair share and ordinance invalidity, but could develop compliance plans and remedies in a manner consistent with how it is handling compliance in other cases in which it also has responsibility for the initial determinations. Thus, a transfer to complete cases with substantial compliance issues remaining, with binding law of the case and collateral estoppel, might, subject to other considerations discussed herein, eliminate the manifest injustice that would otherwise result.

B. Section 19 of the Act Permits This Court to Order an Expedited Mediation and Review Schedule for Cases at the Compliance Stage So That Final Administrative Action Could Occur by October 2, 1986.

Even if there were provision for binding law of the case and collateral estoppel and further provisions for an effective remedy for the builder-litigant, interim restraints, and a constitutional interpretation of credits against existing fair share, matters to be discussed below, transfer of this ancient case on the verge of conclusion to a new administrative agency

would be manifestly unjust, because the extended, deliberate timeframe established by the statute is grossly excessive in relation to what needs to be done.

We do not contend, as appellants have regularly accused us of doing, that the administrative timeframe is per se unconstitutionally unjust. What leads to injustice is relative delay. The administrative process would take nearly two years from the date of the trial court's initial transfer decision, while the court made detailed findings that it could complete all four of the Urban League towns within six months, and some of them in significantly less time. Indeed, the administrative process would probably take longer than the statutory time frame because of the agency's lack of existing expertise on compliance issues, compared to the court's and masters' intimate familiarity with the specific sites and problems. As this Court noted in a comparable context, involving two courts, one of an administrative nature:

> Law does not serve abstract goals. It serves the needs of parties to resolve disputes....Analogous principles of law are designed to assure that a controversy, or its most critical facets, will be resolved by the forum or body which, on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter.

Wunschel v. City of Jersey City, 96 N.J. 651, 664 (1984) (citations omitted).

As noted earlier, it would be manifestly unjust to delay completion of this, the oldest pending Mount Laurel action, by 18 months. On its face, the Act appears to require full extended

processing for all transferred cases. For that reason, a transfer without modification of the time schedule would be unjust and violative of the legislative intent.

If the Court were to contemplate transfer of these cases, in which fair share and ordinance invalidity have been fully adjudicated and only compliance issues remain, under the conditions suggested in this Point, then it clearly could order expedition of the administrative process to fit their unusual circumstances, which the statutory scheme probably did not anticipate would arise before the agency. We suggest that it do so. This Court has frequently noted its authority, pursuant to its plenary prerogative writ power, to mandate appropriate administrative procedures to guarantee fairness, even beyond the strict minimum required by constitutional due process. See, e.g., Cunningham v. Department of Civil Service, 69 N.J. 13 (1975); Avant v. Clifford, 67 N.J. 496, 520 (1975).

Expedited review actually helps to reconcile two otherwise inconsistent provisions of the Act. Section 19 provides that if the Council has not completed its review and mediation process within six months of receipt of a request by a party who has instituted litigation, a party may file a motion to be relieved of the exhaustion requirement. The six-month period begins to run nine months after the effective date of the Act, for mediation requests filed within that initial nine-month period. This provision would require completion of the entire review and mediation process by October 2, 1986, a mere 61 days after the Council is obligated to promulgate its criteria and guidelines

pursuant to § 7. The § 19 timetable, moreover, is wholly inconsistent with the timetable set forth in §§ 7 and 16, which gives municipalities until January 1, 1987 to file their housing elements. Normally, of course, one would anticipate that mediation and review concerns the housing element, and could not take place until the housing element was filed. We submit, however, that the Court could make sense of these two time frames by applying the shorter time frame to transferred litigation involving only compliance issues and the longer one to cases in which fair share has not yet been determined.

Under the approach already suggested, law of the case and collateral estoppel would be applied to transferred cases with liability adjudications. As to these cases, only compliance issues remain. On those issues, the law is already clear and would bind the agency. For example, as to South Plainfield, the only issue is whether the Borough has taken the steps necessary to comply with the Judgment of May 22, 1984; as to Piscataway, whether its compliance plan satisfies the opinion of July 23, 1985 and Judgment of September 17, 1985; as to Monroe, any plaintiff objections based on claims of builder-remedy entitlement or lack of "realistic opportunity" of any proposals in the Master's report, which is about to be filed; and as to Cranbury, whether the Township can establish the lack of planning or environmental suitability of Cranbury Land's and Zirinsky's sites and of the sufficiency of its proposed density for the Garfield site. On all points there exists either ample law of the case or existing court precedent, or else the matter involves

exercise of equitable discretion, common sense, and sound planning.

As to all towns, there may be a question of phasing, but the Act already provides standards for that issue without need of implementing regulations. § 23. As to some towns, there may be a question as to whether a regional contribution agreement could be used to satisfy part of the obligation. Again, the Act provides ample standards. § 12. If funding proposals are part of compliance, the Act indicates the applicable standards, §§ 20, 21, and the Housing and Mortgage Finance Agency will evaluate the applications, like all others it receives, under its own implementing guidelines. Quite simply, then, there is no reason to await the Council's promulgation of criteria and guidelines in substantially adjudicated cases transferred with law of the case for completion of compliance determinations.

Similarly, there is no reason to await the municipality's submission of a housing element, with one minor exception. Because law of the case must govern, and the trial court has already resolved the fair share issues, such towns need not submit the fair share portion of the housing element required by the Act. In addition, Cranbury, Monroe and South Plainfield, like so many other towns in this category, have already submitted, albeit under protest, their compliance plans. Piscataway has not yet submitted such a plan, having received an extension from Judge Serpentelli. Under the November 22 Order, which he then stayed, the Township had at most until December 23, however. Thus, Piscataway is at most 31 days from submission of the

equivalent of the compliance portion of its housing element. Thus, all relevant portions of the housing elements are, or very shortly would be, available if transfer of any of these towns were ordered.

If there is no reason to await the Council's guidelines and the towns do not need the five months for submission of housing elements afforded by the Act in ordinary circumstances, then deviation from the Sections 7 and 16 timetable for promulgation of guidelines (August 1, 1986) and submission of housing elements (January 1, 1987), is both reasonable, fair to all parties, and consistent with the statutory intent. Adherence to the six-month period for review and mediation set forth in Section 19 is also reasonable. However, given the extremely advanced stage of this litigation and the extraordinary nature of the conditional transfer, the Court should direct that no extension of the six month period is permissible and that jurisdiction over the towns would automatically revert to the trial court if the process were not completed within six months.

This Court must also specify what steps are to be concluded within the six month period. We submit that the "review and mediation process" includes, at least, mediation, administrative law judge hearing and initial decision, and Council review of this decision. The ALJ is afforded 90 days by this Act and the Council is given 45 days thereafter to review this decision by the Administrative Procedures Act, N.J.S.A. 52:14B-10(c). This leaves 45 days for mediation. That period is ample in these cases because the matters are most certainly beyond voluntary

settlement; the parties have already had over two and one-half years overall, and between several months and 18 months in the compliance stage, to achieve compromise. Although 90 days might appear insufficient for full ALJ consideration of all issues, the time seems reasonable for the few remaining compliance issues. The longest of these four matters -- Cranbury -- has been estimated by all parties to require at most a 10-day hearing. The others range from a few hours (South Plainfield) to at most a few days (Monroe and Piscataway). Finally, because the issues will be confined and the applicable standards are clear, 45 days seem realistic for Council review.

Thus, within six months of this Court's determination, the administrative process could be completed. Whether certification is granted, denied or conditioned, the rest of the Act's procedure could then be followed. This approach would provide full deference to the legislative intent and the administrative process, while meeting roughly the trial Court's anticipated six-month completion date, thus avoiding the manifestly unjust and needless delay imposed by the standard timetable of §§ 7 and 16, which was written for cases to be tried from the beginning. We emphasize, however, that this expedited schedule is not in and of itself a cure-all to manifest injustice. It can work only if transfer is conditioned on law of the case, and if the remaining statutory problems now to be discussed are also attended to.

C. In the Alternative, This Court Could Avoid Manifest Injustice by Conditioning Transfer Upon the Municipality's Agree-

ment to Immediately Implement One-Third of the Fair Share Obligation Previously Determined by the Trial Court, With Provision for Adjustment Upon the Outcome of the Administrative Proceedings.

Another way to accomplish transfer to the Council, without exposing the class of lower income families represented by the Urban League respondents to further unconstitutional delay, would be to focus on what could remain in the trial court rather than what could be transferred. If this approach were taken, we would propose that transfer be conditioned upon the municipality commencing immediate compliance as to one-third of the fair share number previously adjudicated at trial. If this were done, it would be acceptable to transfer the case for plenary consideration by the Council, free of prior adjudications and without expedited consideration as suggested in Points IIA and B above. The part of compliance begun immediately would be credited against the fair share obligation ultimately given substantive certification by the Council.

None of the towns seeking transfer contends that it has no fair share. Even under the most modest calculation of fair share that could conceivably pass constitutional muster, each town will have to make realistic provision for some significant number of affordable units. Indeed, experience to date suggests that no responsible methodology can be devised which guarantees lower fair shares across the board than those found by Judge Serpentelli using the AMG methodology. We therefore think it unobjectionable to peg partial interim compliance to the AMG formula, so long as it is heavily discounted to create a margin for error. The AMG methodology, whether it ultimately prevails

in the Council, is carefully thought out, neutral in its premises, and readily available without elaborate factfinding proceedings. Its use for the limited purpose proposed here creates no presumptive or binding effect once a case is transferred to the Council under this proposal.[29]

Any fraction of the AMG methodology that is selected is somewhat arbitrary, but one-third is plausible because it represents the two years of the current six-year fair share cycle that probably will be consumed in proceedings before the Council. One-third also allows a very substantial margin for error should the ultimate fair share prove to be lower.[30] The trial court might set a higher figure in the case of some very small fair shares, if it appeared that the larger number represented the minimum scale at which a builder could economically undertake a project.[31]

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29 The Council, of course, would be required in any event to give the existing fair share determination "appropriate weight" under Section 7 of the Act.

30 Cranbury, for instance, conceded through the testimony of its expert at trial that its fair share was 600 units, approximately 75% of the 816 units later found by Judge Serpentelli. Cranbury has also made provision for more than 3000 new housing units in its current master plan (adequate to accommodate four market rate units for each of 600 affordable units, if the customary 4:1 ratio is used), although none of those units would be affordable to lower income households, of course. South Plainfield stipulated to a fair share of 900 units, approximately 150% of the number eventually ordered to be provided in the compliance plan.

31 In the unlikely event that a final fair share determination exceeded the portion put into compliance immediately, the excess could be credited towards compliance in the next six-year fair

Once an interim fair share number was established, the municipality would be required to develop an immediate compliance plan. In most instances, this would involve no more than identifying a portion of the overall compliance plan previously submitted to the Court and reviewed by the Master. If there were builder-remedy claimants, these issues would be resolved, using the Franklin Township priorities if necessary, or any other suitable system. If the interim fair share number was high enough to implicate considerations of phasing (an unlikely possibility), this issue would also be resolved.

The plaintiffs, in other words, would be entitled to bring the trial proceedings to a conclusion just as if there were no transfer, but these proceedings would be vastly simplified because they would deal only with the small, interim fair share. The trial judge's conclusions, moreover, would be embodied in a final order that would be appealable. Thus, the defendants would lose no defenses or appellate rights they presently enjoy. The plaintiffs, on the other hand, would still have to contend with the delays necessary to bring the cases to conclusion, but thereafter would be assured of some immediate housing construction.

All parties, moreover, would be required to pursue the overall case before the Council, pursuant to whatever procedures the Council develops. Since plaintiffs' concern about delay would be satisfied by the interim fair share determination, there would be

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share period.

no need for judicial controls on the substance or timing of the Council proceedings, other than those arising from independent constitutional or statutory considerations.[32] The Council, of course, would include the interim fair share compliance in the overall plan that was given substantive certification.

This proposal is essentially sui generis, and without direct precedent in our caselaw and statutes. However, as a way to accommodate both the legislative preference for administrative decisionmaking and the Mount Laurel imperative that housing construction get underway without unnecessary delay, we believe that it is well within the equitable powers of this Court.

Carefully implemented, either this approach to conditional transfer or our prior suggestion of conditional transfer with law of the case and expedited review would go a long way towards solving the problem of delay that contributes so heavily to the problem of manifest injustice. Even if one of these suggestions finds favor with the Court, however, there are other constitutional problems which exist in the Act. These problems must also be solved before transfer could be appropriate. We turn to these additional problems in Point III.

III. TRANSFER TO THE COUNCIL WOULD BE UNCONSTITUTIONAL AS WELL AS MANIFESTLY UNJUST UNLESS THE ACT IS CONSTRUED TO PERMIT ADMINISTRATIVE AWARD OF A BUILDER'S REMEDY, IMPOSITION OF INTERIM
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32 Some such constitutional considerations that require immediate attention are discussed in Point III, infra.

RESTRAINTS TO PRESERVE THE STATUS QUO, AND PROPER CREDIT FOR EXISTING AFFORDABLE HOUSING.

A. Voluntary Implementation of the Fair Share Obligation Through the Affordable Housing Council is Illusory and Unconstitutional Unless a Builder's Remedy can be Awarded Because Otherwise There is No Incentive to Seek Substantive Certification

The Fair Housing Act pays scant attention to the builder's remedy. Yet, because it is a central aspect of Mount Laurel II, assessment of the facial constitutionality of the Act requires an inquiry into whether the Act sufficiently incorporates or substitutes for the builder's remedy. We submit that the Act would be constitutionally deficient in this regard unless substantial clarification is added through a combination of judicial construction and administrative implementation.

The Act contains only two explicit references to the builder's remedy, both of which are essentially negative. Section 3(a) provides 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." "Builder's remedy" is not included in the definition section of the Act, § 4, but it is defined in Section 28, which provides for a moratorium on awards of the builder's remedy until early 1987.[33] The Section 28 definition is:

> For the purpose of this section "builder's remedy" shall mean a court imposed remedy for a litigant who is an individual or a profit-making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonuses which provide

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33 The constitutionality of the Section 28 moratorium will be considered separately infra, Point IV.

> for the economic viability of a residential development by including housing which is not for low and moderate income households.

A matter of terminology is important here. The term "builder's remedy" has come to acquire two distinct meanings in Mount Laurel litigation. As used by politicians, newspaper reporters and angry citizens in municipalities faced with a Mount Laurel obligation, "builder's remedy" is often meant to describe the mandatory set aside technique which this Court approved for use in Mount Laurel II. It is, of course, hostility to the overbuilding that results from the 4:1 ratio of a 20% setaside in a development with higher than normal density, which generated much of the pressure for passage of the Fair Housing Act and, specifically, the Section 28 moratorium provision.

Despite the obvious legislative hostility to the mandatory set aside (or "builder's remedy," as some would call it)[34], a fair reading of the Act is that it permits (although it does not require) use of the mandatory set aside technique to achieve compliance. Section 11(a), for instance, requires a municipality to "consider" in preparing its housing element for submission to the Council:

> [r]ezoning for densities necessary to assure the economic viability of any inclusionary developments, either through mandatory set asides or density bonuses, as may be necessary to meet all or part of the municipality's fair share.

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34 Throughout this brief, we use the term "mandatory set aside" when referring to required ratios of Mount Laurel to market rate housing in an inclusionary development. Correct use of the term "builder's remedy" will be explained in the next paragraph.

In this respect the Act is facially constitutional.[35]

There is a different, more correct use of the term "builder's remedy," one which this Court explicitly used in Mount Laurel II and which is crucial to the analysis of the constitutionality of the Act. Mount Laurel II recognized that the ability of public interest plaintiffs to vindicate the Constitution was severely limited. It therefore sought to provide sufficient incentive to private parties -- builders -- to insure that the necessary constitutional litigation would be brought. Without such an incentive, it was found, the teaching of Mount Laurel I would remain a hollow abstraction.

The incentive provided was not the mandatory set aside as

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35 It may be argued that the Act, unlike Mount Laurel II, seeks to de-emphasize the use of the mandatory set aside and thus reduces the likelihood that housing elements submitted to the Council will provide the constitutionally required "realistic opportunity." Although the significant appropriation of housing subsidies also contained in the Act somewhat mitigates this objection, the money appropriated to date is clearly insufficient to meet fully the housing need covered by the Mount Laurel doctrine.

Housing elements that do not contain a mandatory set aside nevertheless can be realistic if carefully crafted. The Urban League respondents achieved a model settlement with Plainsboro Township, which like many of the appellants here sought to avoid excessive growth. The settlement will provide 575 units of low and moderate income housing with only 60 units of related market-rate housing, by placing primary emphasis on tax sheltered financing and use of a housing trust fund. Because a "realistic opportunity" standard can be satisfied without a mandatory set aside, and the Fair Housing Act does not prohibit use of the set asides generally (deferring for the moment the moratorium question), it cannot be said that the Act is facially unconstitutional by attempting to discourage use of the mandatory set aside. Any constitutional problems in this area will arise on an as-applied basis.

such, because such a zoning technique applies with equal force to builders or landowners who have had nothing to do with Mount Laurel litigation. Rather the carrot was the promise that a successful builder-plaintiff who offered to provide a significant amount of lower income housing, on a site and in a manner that was not inconsistent with environmental and other general planning suitability criteria, would be entitled to build on that site, even if the town might prefer compliance on a different site and even if some alternative sites might in other circumstances be regarded as "more suitable." 92 N.J. at 279-80.

Properly understood, therefore, the builder's remedy is the builder-plaintiff's right to a personal and concrete remedy. Absent this specific entitlement, the defendant municipality could easily rely on the inherent interchangeability of many developable sites to come up with a compliance plan that excludes (spitefully, or on more legitimate grounds of planning preference) the winning builder-plaintiff. No economically motivated entity will undertake expensive and complex litigation, such as Mount Laurel cases, without assurance that "winning" will include tangible reward as well as the nobler satisfaction of having done the right thing. The builder's remedy acquires constitutional status as a result -- not because builders have a constitutional right to build, but because lower income households have a constitutional right to have a realistic opportunity to have the housing built and have no other way to

insure that this will occur. The situation is comparable to the well recognized conjunction of principle and profit that allows booksellers and movie theatre owners to pursue the first amendment rights of their patrons. See, e.g., Paris Adult Theatre v. Slaton, 413 U.S. 43 (1973). As a technique to encourage litigation that would vindicate the Constitution, there can be no doubt but that the builder's remedy technique has succeeded spectacularly well, judging by the number of private suits - well over 100 - filed since January 20, 1983.

Nowhere in the Act is there an explicit authorization for the award of a site specific remedy as an incentive to a builder to bring a municipality to constitutional compliance. There is, however, in Section 10(f), a requirement that the municipality's housing element include "a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing." This provision, we submit, is sufficiently broad that it can be construed to permit a form of builder's remedy incentive adequate to save the Act from facial invalidation.

The central concept of the Act is voluntary compliance. Municipalities initiate the process by filing a notice of participation and thereafter a housing element. § 9(a). In support of its housing element, the municipality makes its own fair share study, which is then reviewed by the Council against Council-promulgated criteria that may be quite non-specific. Finally, "at any time during a six year period following the filing of the housing element," § 13, the

municipality may, but need not, move for substantive certification which, if granted, will immunize it from litigation for six years unless a heavy presumption of validity can be overcome by "clear and convincing" evidence to the contrary. § 17(a).

On the face of the Act, the inducement to voluntary compliance is the effective immunity from Mount Laurel litigation achieved through substantive certification. This inducement is illusory, however, because of the way the key sequence of statutory events intersects with the Act's provision for exhaustion of administrative remedies. Once a housing element has been filed pursuant to section 9(a), no matter how inadequate it may be, a private litigant is required to exhaust review and mediation before the Council and an Administrative Law Judge before it can bring or pursue an exclusionary zoning suit in the Superior Court. § 16(b).

Although the municipality has six years to seek substantive certification, § 13, it will have an incentive to do so once suit is filed or threatened by a builder, because the mediation and review process obligation prevents the litigation from going forward, § 16 and certification effectively kills it. § 17. Section 14, moreover, even gives the municipality sixty days to refile for substantive certification should it initially be rejected by the Council. It will be a rare municipality indeed that cannot come up with a substantive certification for its housing element after the second try, and thus gain effective immunity from the

litigation which has been foreclosed while this administrative process has been unfurling.

The apparent result of this process -- housing elements that afford a "realistic opportunity" for the construction of lower income housing -- would hardly be unsatisfactory (assuming, as the Urban League respondents do at this stage, that the Council will develop constitutionally adequate standards for passing on substantive certification) but for one catch. Because the outcome of the process will almost certainly be substantive certification for all but the dullest of municipalities, effectively barring litigation, there is in fact very little incentive for a private, profit-motivated builder to trigger the process by bringing or threatening suit in the first place.[36] And if the builder suit is not brought, then there is neither statutory nor real-world incentive for the municipality to seek the protection that substantive certification will confer. The legislation, in other words, is circular, and the inducement that it offers to constitutional compliance is illusory.[37]

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36 There is a continuing incentive for public interest groups to trigger the process. As this Court correctly recognized in Mount Laurel II, however, neither lower income individuals nor groups speaking for them have the resources to pursue this kind of litigation on a broad scale. That the Mount Laurel doctrine is not self-executing was the lesson of Mount Laurel I, and there must, therefore, be some additional mechanism for vindicating the constitutional rights involved.

37 There is one technical loophole in this analysis. Section 18 provides that the obligation to exhaust ceases "if the council rejects the municipality's request for substantive certification or conditions its certification upon changes which are not made

The circle can only be broken by assuring the builder that his involvement in the process will be effective. For the last 2 1/2 years, defendant municipalities have for the most part subverted Mount Laurel II by refusing to acknowledge its clear warning that municipalities not in compliance would be subject to the onerous requirement of the builder suits and the builder's remedy. Notwithstanding these consequences, few municipalities did undertake voluntary compliance, and few that were sued took any effective steps to reduce their reliance on the mandatory set aside as Plainsboro did.[38] They apparently gambled that the pressure would build to the point that the Legislature would take them off the hook. The pressure is real, and the Legislature has attempted to respond to it by authorizing "various alternatives" to the builder's remedy. § 3. But the legislative response must stay within

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within the period established in this act . . ." Read in comparison to Section 14, which flatly permits refiling even if there is outright rejection by the council rather than a conditional rejection, Section 18 seems to mean that exhaustion would cease immediately upon flat rejection, and that litigation in the Superior Court could thereafter proceed, even if the municipality decided to refile under Section 14(b). If this construction is correct, then there is some slight incentive to the builder to trigger the process by bringing the initial action -- the possibility that the Council will issue an outright rejection. It stretches belief, however, to think that the Council will do so very often. The overriding statutory purpose is to encourage voluntary compliance, and the Council will almost certainly respond to this by conditioning approvals and allowing the municipality an opportunity to rewrite non-compliant plans unless the initial submission has been so defective as to imply bad faith.

38 See note 35 supra.

constitutional bounds,[39] and the question thus becomes whether any of these alternatives can satisfactorily replace the builder's remedy.

We submit that they cannot. As noted above, the phrase "builder's remedy" connotes two different aspects of the Mount Laurel doctrine. The Legislature has responded to the overbuilding aspect by encouraging use of alternate mechanisms such as public subsidies, rehabilitation, rent control, regional contribution agreements, and the like, see §§ 14, 20-21, to produce the needed lower income housing. These alternatives are generally satisfactory to the Urban League respondents, which have never contended that a municipality's Mount Laurel obligation must be met through a mandatory set a-side on a 4:1 ratio.

Nowhere in the Fair Housing Act, however, does the Legislature respond to the more important aspect of the builder's remedy -- its function as a stimulus to a compliance process, either judicial or administrative, which will lead a

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39 As previously noted, see pp. 58 - 59 supra, the builder's remedy has constitutional status as a necessary means of implementing the Mount Laurel doctrine. This Court has not had an occasion to state explicitly that the constitutional obligation runs to the state as well as to local governments; in In Re Egg Harbor Associates, 94 N.J. 358 (1983), the Court went to some lengths to rest its decision on grounds of statutory interpretation rather than constitutional command. However, whether based specifically on the zoning clause, N.J. CONST. art. 4, § 6, par. 2 or on "inherent" concepts of the general welfare, see 92 N.J. at 208-09, it is inconceivable that the Legislature could authorize municipalities to violate their constitutional mandate simply by creating a state administrative forum within which to do so.

municipality to the point where it will actually choose from the available methods of compliance. The essence of the Act is voluntarism, and the sorry eight year history from Mount Laurel I to II taught this Court that voluntarism alone will not satisfy the constitutional mandate.

This is not to say that only the builder's remedy can satisfy the constitutional mandate that there be an effective method for policing the constitutional obligation. A properly financed and administered state enforcement agency, for instance, would be at least facially adequate. The enforcement contemplated by Executive Order 35, a priority of state aid for municipalities in compliance with fair share goals, see Markert v. Byrne, 154 N.J. Super. 410 (App. Div. 1977), offers similar possibilities. We do not specifically endorse either of these possibilities, but mention them only to demonstrate that other enforcement mechanisms are feasible.

Such mechanisms, however, are subject to executive or legislative discretion and not within the power of this Court to compel. For this reason, the builder's remedy remains the only viable enforcement mechanism available to the Court until the political branches choose to act equally effectively. Either the Fair Housing Act must be construed so as to find authority to award a form of builder's remedy under appropriate circumstances, or it must be found to be facially unconstitutional. We believe that the Act can be construed to preserve its constitutionality in this regard.

The Act does not prohibit award of a builder's remedy.[40]

Moreover, in Section 10(f), it specifically recognizes the relevance of ready, willing and able builders as an important component in evaluating the "realistic opportunity" afforded by a housing element submitted to the Council for substantive certification. Finally, the Act states that its purpose is to "satisf[y] the constitutional obligation enunciated by the Supreme Court," § 3, accord § 2(c), of which one major component is the builder's remedy incentive. Given what might be called a grudging acceptance by the Legislature of the builder's remedy as a necessary evil on occasion, and given the general precept that constructions sustaining constitutionality are favored, we believe that an adequate form of builder's remedy can be read into the Act to provide the necessary stimulus to compliance.

Our construction is consistent with the structure and purpose of the statute. The Act envisions the continued threat of builder-remedy suits in court. It seeks to induce compliance by offering presumptive immunity from such remedies through administrative certification of compliance. Where certification is denied or its conditions rejected, the builder is free to preceed in court, towards a site-specific personal remedy. Offering such a remedy to a builder who establishes noncompliance in the administrative process defers

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40 We emphasize again the dual nature of the builder's remedy. As explained above, the Act focuses on alternatives to the builder's remedy as a compliance mechanism, and totally ignores the problem of providing enforcement incentives.

to the legislatively preferred mechanism while assuring enforcement of the constitutional mandate for which the mechanism was created.

In essence then, we suggest that this Court construe Section 10(f) to mean two things. First, it means, as it states, that a municipality in developing its housing element and fair share ordinances must consider the land of developers interested in providing lower income housing. If, however, no objector appears and the plan is reviewed by the Council and its staff alone, the municipality need not incorporate such land in its fair share plan, provided that the plan is otherwise "consistent with the rules and criteria adopted by the council" and "make[s] the achievement of the municipality's fair share of low and moderate income housing realistically possible," §§ 14(a) and (b). Second, Section 10(f) must mean that if an objector establishes through the review process that the plan, which does not incorporate its site, is substantially inadequate, then the Council must condition substantive certification on an appropriate rezoning of that objector's site. Thus, the Section 10(f) "consideration," which is permissive if the voluntary plan is adequate, becomes mandatory if the plan proves substantially inadequate.

We say "substantially inadequate" because we see no reason for mandating inclusion of a site inconsistent with the town's master plan simply because of technical noncompliance with some administrative regulation or lack of realism in some

minor portion of the housing element.[41] Failure to cross every bureaucratic "t" in the drafting of the zoning or affordable housing ordinance for example, should not condemn a municipality to Mount Laurel purgatory. Likewise, if a housing element fairly assures development of 95% of the properly determined fair share, but unrealistically estimates rehabilitation, subsidization, or exercise of a density option to achieve the last 5%, the conditional certification should mandate correction but not necessarily import a mandatory builder remedy. Where, however, the plan is fundamentally flawed -- falling far short in rezoning or realism -- the Council should condition certification upon rezoning the land of the objector who has exposed the flaws.

A real problem will develop, as in the past, where the plan is fundamentally flawed but includes the potential builder-participant's site. Presumably a builder who gets the desired higher density rezoning with a set-aside will not object to such a plan, even if its development will produce only half of the town's fair share and the town proposes

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41 Until now, noncompliance has been almost a foregone conclusion because few towns had taken Mount Laurel I seriously and thus the number of zoning ordinances likely to produce more than a nominal amount of lower income housing was infinitesimal. The rigorous enforcement of Mount Laurel II, the growing stock of compliant ordinances, the establishment of a state-wide administrative mechanism expressly designed to satisfy the constitutional mandate, the promulgation and then interpretation of criteria and guidelines, and the statutory offer of virtual immunity from suit for voluntary compliance make it likely that many housing elements from here on will be serious efforts.

nothing else.[42] The situation should be different now because the Council is obligated to scrutinize the adequacy of a plan even when there is no objector, § 14, a situation called which could not occur in court since there is no jurisdiction without a complaint. We must assume that the Council will conscientiously exercise its functions, even if the Public Advocate, some public interest group or conscientious residents do not intervene. In any event, as in Old Bridge, such drastic flaws will almost certainly attract another landowner/developer who then would be entitled to mandatory inclusion. If not, perhaps the Council would consider, or be required by this Court to undertake, appointment of a master or designated objector.

There is a further problem, however. Sections 18 and 19

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42 A far more notorious example of municipal-developer coziness arose in the Urban League case itself where the celebrated builder-plaintiff in Oakwood at Madison pursued its builder's remedy to this Court in 1977 and prevailed. 72 N.J. 481 (1977). Six years later, the Urban League respondents found it necessary to revive compliance proceedings against the defendant township, Old Bridge, because nothing of substance had been done, either as to Oakwood's site or any other developments in the municipality. Indeed, Oakwood was about to begin construction in early 1985 under a site plan approval permitting construction of 1200 market units without requiring construction of any lower income units. This after the express guaranteed to this Court in 1977 of 20% lower income units. 72 N.J. at 549-50. The trial court stayed issuance of more than 120 building permits until an appropriate plan for phasing in lower income units is produced. Intervention by more recent builder's remedy plaintiffs has assured attention to provision of additional affordable housing, but it has continued to be the experience of the Urban League respondents that independent review, by a public interest party or by a master, is necessary to assure that the full scope of the Mount Laurel guarantee is being met. Indeed, as of this date, the Oakwood plaintiffs, now defendants in the Old Bridge portion of the Urban League case, have not submitted a plan for phasing its lower income units and thus the trial court's injunction against the development remains in effect.

provide for a number of circumstances under which the obligation to exhaust administrative remedies terminates, including failure to file a timely housing element, denial of substantive certification, and refusal to make the changes required by a conditional certification. Nowhere does the statute specify, however, what happens when a municipality fails to move for substantive certification after a timely filing of its housing element.[43] It is plausible to read Section 18 to require that the obligation to exhaust continues unless and until there has been a denial of a petition for substantive certification.

If this is so, however, a clever municipality could virtually guarantee itself a way to avoid any Mount Laurel obligation by filing a very adequate housing element and never moving for substantive certification. No builder will seek mediation and review under Section 15(a), which apparently will trigger a petition for substantive certification,[44]

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43 A municipality's housing element can be the basis of a petition for substantive certification for up to six years, but the statute nowhere requires petitioning during this period. § 13.

44 There is a further statutory lacuna here. Section 15(a) provides for mediation and review in two circumstances -- upon objection to a petition for substantive certification, § 15(a)(1), and when sought by a litigant required to exhaust, § 15(a)(2). The remainder of the section then describes what happens upon objection to a petition for substantive certification, without ever again mentioning a Section 15(a)(2) request. There must be something to mediate and review, however, and it does not make much sense to ignore a housing element already filed with the Council. In addition, the review and mediation process must produce and certification or its denial is all that the Council is empowered to order. Thus, Section 15(a)(2) should be

because there is no likelihood of a builder's remedy resulting if the plan is, so hypothesized, very adequate. And the town need not actually adopt ordinances implementing its very adequate proposed housing element until it receives substantive certification. § 14(b).

To avoid this apparently inadvertent result, this Court should contrue the statute to terminate the obligation to exhaust between the time that the housing element is filed and the time that the municipality petitions for substantive certification. During this period, a builder could proceed directly to suit in the Superior Court, challenge the underlying ordinance (not the unenacted housing element), and be awarded a builder's remeldy under appropriate circumstances.

Presumably to avoid this consequence, any municipality serious about complying with Mount Laurel and the Act will move immediately for substantive certification, when filing its housing element, as it should. The interested builder would then decide whether to object or not, depending on an assessment of whether the housing element is adequate. But even if there is no objection forthcoming, and hence only the Council's nonadversarial review, the purposes of Mount Laurel and of the Act will have been furthered by moving the housing element along towards substantive certification, enactment,

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construed to trigger a request for substantive certification automatically.

and eventual implementation.[45]

However arrived at, the remedy before the Council need not be identical to the builder's remedy implemented by Mount Laurel II. Indeed, this Court should take note of the experience that has accrued since January 1983, particularly as explored in Field v. Franklin, ___ N.J. Super. ___ (Law Div. 1984) (116 N.J.L.J. 1) (Nov. 21, 1985) and Allan-Deane Corp. v. Bedminister, ____ N.J. Super. ___ (Law Div. 1984).

Three major revisions seem plausible. First, some system of limiting or ordering multiple remedies is appropriate. The trial court has already attempted that in its priority decision in Field v. Franklin, where it grappled with 11 builder-remedy plaintiffs whose proposals would have clearly exceeded the municipality's fair share. In general, we believe that limitation to only one builder remedy before the Council would be reasonable. Of course, more than one objector may appear because a later filing objector might choose to gamble that the first objector's site will be found inadequate and thus that s/he will be the one receiving the 10(f) consideration/remedy. The objecting builder will, of course, be primarily concerned with establishing the suitability of its site -- but under this scheme, must also be

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45 This proposed construction squares with Section 13, which allows six years for substantive certification, because a municipality which has no significant development pressure may still choose to take a chance that no suits will be brought, a situation that existed before the Act with many municipalities which ignored Mount Laurel II with impunity.

concerned with establishing the inadequacy of the town's entire plan, just as builder-plaintiffs now must show that a town's overall land use regulation is not in compliance with the Constitution in order to be awarded a remedy.

Second, the winning builder-objector's remedy might be limited, despite the actual size of the land held, to a certain proportion of the town's total fair share. We propose a limit of one-half, for two reasons. First, the Act encourages the use of alternatives to high-density at the 4:1 ration of market to lower income housing. A builder's remedy, however, is almost always at this ratio. If the builder-remedy were to consume most of the fair share, the municipality would have been deprived of the legislative preference for alternatives.[46] In addition, the Act as revised by the Governor permits a town to transfer, through carefully controlled regional contribution agreements, up to half its fair share to another municipality, if it is willing to pay the price. § 12. This provision suggests one-half as a reasonable benchmark for the alternatives to mandatory set-asides.[47]

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46 That of course, would not be entirely unfair since the premise of a remedy is that the plan submitted by the municipality was substantially inadequate. Nevertheless, both interests can be accommodated through a formula that limits the objector's remedy to something like half of the total.

47 The one-half limitation may have to be relaxed in the case of some municipalities with very small fair shares, so that the single builder-remedy is large enough to permit an economically-feasible scale of construction.

This last point brings us to the third, and most drastic, possible revision of the remedy available to an objector before the Council. Increasingly, in settlements, Mount Laurel builder-plaintiffs are offering to build the traditional low-density single-family developments permitted under normal zoning while making a cash contribution towards lower income housing. This has the benefit of minimizing the number of market units built while increasing flexibility in meeting the fair share. One of the great disappointments for the Urban League respondents has been that almost all Mount Laurel compliance has been in the form of rezoning for construction of new units that will be offered for sale rather than rental. New units require time to build, often years, and sales units require mortgage company clearance and a substantial down-payment quite clearly not available to most truly low-income families. Cash contributions offer the possibility of immediate rent subsidization in existing units, and of reaching further down in the plaintiff class than is possible when family income alone must carry the entire housing cost.[48]

Although a cash contribution approach has been used sparingly to date in Mount Laurel compliance plaus, we propose

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48 In most orders and settlements, builders have been required to ensure only that the Mount Laurel units are affordable to households earning 90 percent of the applicable ceiling -- or 45 percent of median income for low income units and 72 percent of median for moderate income units.

that it could be made mandatory in the builder's remedy awarded by the Council as opposed to the courts. This approach would satisfy a municipality's goal of lower densities, the Urban League's goal of immediate housing, and the builder's goal of profitable development. The municipality would retain the initial discretion to propose, in its revised submission under Section 14, how best to use that money towards the fair share. Indeed, if the Township were interested, and a receiving municipality were available, the revised housing element could suggest using the successful objector's contribution to fund transfer of some units. The Council clearly would have to issue criteria to determine how much of a contribution is appropriate for each kind of low-density development and what limits would be placed on the municipal discretion to use those funds.

In offering this analysis of the builder's remedy problem in the Fair Housing Act, the Urban League respondents have stressed, as we believe it is incumbent upon a public interest plaintiff to do, the long-term perspective on the public interest. We believe that the Act can and should be construed in a manner to save its constitutionality, because the ultimate value of the Mount Laurel cases will prove to be that they stimulated an effective legislative solution to an otherwise ignorable problem. At the same time, however, we cannot lose sight of the particular circumstances of the Urban League case now before the Court.

In this case, a number of builder-plaintiffs have relied

heavily on the promise given them by Mount Laurel II that their builder's remedy claims would be cognizable in the court, and these parties have contributed substantially to the development of the Mount Laurel remedial process (including such cases as AMG, Field, and Allan-Deane). It would be a manifest injustice to them to allow their legitimate claims to be washed out in a transfer to the Council under rules that did not fully preserve their builder-plaintiff status. We therefore submit than any attention which this Court gives to the question of the builder's remedy before the Council should explicitly except existing claims.[49]

B. The Act Must be Construed to Permit Either the Court or the Council to Enter Interim Restraints to Preserve the Status Quo With Respect to Infrastructure and Developable Land So That the Constitutional Proceedings do not Become a Nullity

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49 This is not a major problem insofar as the four Urban League cases now before the Court are involved. Two -- Piscataway and South Plainfield -- do not involve any builder's remedy claims and a third -- Monroe Township -- involves only a single builder's remedy on a site that the municipality has already conceded to be suitable for Mount Laurel housing. Only Cranbury Township presents a potential problem and even there it may be mooted out by subsequent trial proceedings (adjourned since July 23, 1985, because of the pendency of these transfer motions). In Cranbury, the township challenges the suitability of two of the three builder-plaintiffs' sites, and the trial judge has indicated that he will allow plenary trial on the suitability issue set out in Mount Laurel II, see 92 N.J. at 279-80, before awarding a builder's remedy to any of the plaintiffs. A fourth builder's remedy claimant has taken a voluntary dismissal with prejudice after its site was found unsuitable by both the township, the Master and the Urban League respondents' planning consultant.

An administrative scheme that is so structured that its invocation would preclude effective relief on a constitutional claim is clearly unconstitutional. Likewise, under any definition, transfer to a process that would permit dissipation of the resources essential to meaningful relief at its conclusion is manifestly unjust. It is, thus, crucial for this Court to determine whether either the courts or the Council would have authority to issue restaints against development approvals or construction in instances where the limited remaining vacant land, sewerage, water or road capacity might preclude effective relief by the time the administrative process is concluded.

Council authority to issue interim restraints is questionable. In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982), invalidated the administrative regulation authorizing such emergency relief because it appeared to give the administrative law judges, rather than the heads of the agencies, binding authority in that regard. The revised rule -- N.J.A.C. 1:1-9.6 (1985) -- clearly places binding authority in the agency head and provides detailed procedures governing the grant of emergency relief "where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case." 1:1-9.6(a). However, this power is expressly conditioned by the introductory clause "[w]here authorized by law." Id. It is, therefore, likely that the procedures of the rule may be invoked and relief granted only when the underlying law

establishing the agency authorizes such relief.

This view of the administrative rules is consistent with this Court's longstanding position that where the coruts are in doubt as to what the Legislature intended, "in situations where such an important public policy matter is involved the proper course for the judicial branch of the government to follow is to deny the power and to assume that if the legislative branch desires [the agency] to have the authority, it will bestow it in unmistakable terms." Burlington County Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 579, 599 (1970); see also A.A. Mastrangelo v. Commissioner of Dep't of Environ. Protection, 90 N.J. 666, 684 (1982). Compare Fair Housing Act, L. 1985, c. 222, § 14 with New Jersey Law Against Discrimination, N.J.S.A. 10:5-4 et seq., and with Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. It is well established that agencies cannot exercise remedial powers not expressly delegated to them by the Legislature. A.A. Mastrangelo, Inc., supra, 90 N.J. at 684; In re Jamesburg High School Closing, 83 N.J. 540, 549 (1980).

There is substantial doubt that the Legislature intended the Council to have the authority to issue restraints. No mention is made in the statute. The Council has no affirmative powers to do anything -- it can only approve or reject a substantive certification petition. The matter reverts to court either if the process fails or if certification is granted. It thus appears that the Council is powerless to issue necessary development restraints when a municipality has

limited remaining land or infrastructure.

The matter is different with regard to the courts. Courts hearing appeals from final administrative determinations clearly have power to provide interim relief pending the conclusion of the judicial review process. Rule 2:9-7 specifically grants such power to the Appellate Division both in appeals as of right from final agency decisions, governed by Rule 2:2-3(a)(2), and in cases in which permission is sought to appeal interlocutory administrative decisions under Rules 2:2-4 and 2:5-6. See also Sampson v. Murray, 415 U.S. 61, 73-74 (1974); Scripps-Howard Radio, Inc v. FCC, 316 U.S. 4 (1942). In addition, in extraordinary cases, a court may enjoin an administrative proceeding. Rule 4:52-6 and Mutual Home Dealers Corp. v. Commissioner of Banking and Ins., 104 N.J. Super. 25 (Ch. Div. 1968). The rules do not directly address, however, whether courts may enjoin defendants to maintain the status quo pending completion of an administrative process.

Both logic and caselaw indicate that courts should have the power to do so. If a reviewing court can grant interim relief pending its review of a final or interlocutory administrative decision, to insure that its final decision will be effective and meaningful to the prevailing party, then it would appear logical that it should also have power to grant such relief pending completion of the administrative process that will later be subject to such review.[50] If the

municipality does not file its housing element and fair share plan on time or the review and mediation process takes too long or if the Council denies or conditions certification, a transferred case will revert to the trial court.[51] Thus, it would appear logical that the trial court should have authority to issue temporary restraints to prevent irreparable harm to the plaintiff obligated to exhaust the new administrative remedy.

In Boss v. Rockland Electric Co., supra, this Court expressly left in effect, pending completion of administrative factual determination of the scope of an electric utility's easement, a trial court's preliminary injunction against the removal of trees from the affected property that had been issued 3 1/2 years before the Court's opinion. 95 N.J. at 33, 37, 42-43. Likewise, the federal Supreme Court, in FTC v. Dean Foods Co., 384 U.S. 597, 599-601 (1966), held that the court with ultimate jurisdiction to review the agency's orders had power to grant a temporary injunction to prevent disappearance of one of the entities whose merger the agency sought to challenge, because the disappearance would have

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50 Of course, it is possible that the matter would be resolved before the agency and never appealed to court. In cases in which emergency relief is sought, it is likely that appellate review would be invoked. In any case, it is perfectly clear from the 11-year history of this action that the Council's decision here would be appealed to the appropriate court.

51 See note 16 supra.

rendered the agency and the court "incapable of implementing their statutory duties by fashioning effective relief." Sampson v. Murray, supra, 415 U.S. at 76-77, 84 (1974).

The Fair Housing Act does not directly address the issue, although there are some relevant indicators. On the one hand, it appears that transfer was intended to divest a court of jurisdiction.[52] Yet the administrative process was designed as "a comprehensive planning and implementation response to this constitutional obligation," § 2(c), and there are a number of instances, already noted, in which jurisdiction "reverts" to the court. Moreover, Section 23(d), which involves court jurisdiction to order phasing provides:

> In entering the phase-in order, the court shall consider whether or not it is necessary to condition the phase-in order upon a phase-in schedule for the construction of other development in the municipality to minimize an imbalance between available housing units and available jobs, or to prevent the sites which are the most appropriate or the only possible sites for the construction of low and moderate income housing from being used for other purposes, or to prevent limited public infrastructure capacities from being entirely utilized for other purposes. (Emphasis added.)

It would seem odd at best if the Legislature expected the courts to address this issue when considering a phase-in order, even in the context of a municipal petition for declaratory judgment on its fair share plan, pursuant to Section 13, but not in the context of Council consideration of such a plan.

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

C. The Act's Overbroad Provision for Credits of Existing, Affordable Housing is Illogical When Set Against the Fair Share Calculation of Housing Needed to Supplement the Existing Stock, and Must be Given a Limiting Construction.

One fundamental problem that would be posed by transfer to the Council with authority to re-determine fair share is the statutory provision for "credits" against the fair share. Section 7(c)(1) of the Act provides:

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

Because the number of credits directly affects the size of the fair share that a municipality must still satisfy, careful construction of this provision is crucial to insure vindication of the constitutional mandate.

At least four plausible interpretations present themselves. The first is a literal reading -- that all units currently in existence that meet the statute's definition of low and moderate income housing can be credited against the fair share. The definitions, found in Sections 4(c) and (d), specify that units qualify if they are "affordable...and occupied or reserved for occupancy" by the relevant households. Because of the use of the disjunctive, it would appear that, literally read, Section 7(c)(1) permits credit for every existing unit that is affordable to and currently occupied by a qualified household, even if there are no legal controls, for example on sale price or rent level, to insure its reservation exclusively for such households should

the present occupant leave.

In affidavits filed with the trial court as part of respondents' opposition to these transfer motions, Alan Mallach, the Urban League's planning and housing development expert, analyzed the effect of such a literal reading. He explained that the provision's fatal flaw is that it allows existing housing to count toward meeting the current unmet need for more housing, which by definition is the need that remains after all existing housing has been acccounted for. He concluded that the total number of credits state-wide under a literal interpretation of Section 7(c)(1) -- 295,020 units, would exceed the total present and prospective need for lower income housing -- 278,808, 254,081, or 217,727 under the three most widely used methodologies. Similarly, the potential credits under 7(c)(1) would exceed the regional need relevant to Middlesex County (using a four-county region based on PMSA rather than the 11-county region utilized by the trial court in determining the fair share in this case). Mallach Affidavits of August 27, 1985 and September 18, 1985, Para. 5-9, and Appendix A, 3-7. The defendants/appellants did not present any contrary evidence. Clearly, a literal construction would render the provision unconstitutional, for the Legislature certainly cannot eliminate a constitutional obligation by mathematical sleight-of-hand.

The second interpretation, suggested by Judge Skillman after concluding that a literal reading would almost certainly be unconstitutional, Morris County, supra, at 34-35, is that credits can only be provided for units that are both affordable to and

legally reserved for occupancy solely by qualified households. Id. at 36. This approach would, of course, require judicial surgery on the statute, by modifying two key definitions in the Act. This would be accomplished by dropping "occupied or" from the parallel definitions of low and moderate income in Section 4, thus leaving an express requirement that units be affordable to and reserved for occupancy only by qualified households.[53] But even after such surgery, this interpretation would only minimize but not eliminate the illogic of comparing previously met with currently unmet need.

The third and fourth interpretations would eliminate that basic error. The third, again suggested by Judge Skillman's opinion, is that the definition of need, against which credits would be applied, could be expanded beyond that previously used in determining fair share. Judge Skillman suggested, Morris County, supra, at 36, expanding present need to include not only households presently occupying substandard housing, but also those paying a disproportionate percentage of their income for standard housing, generally referred to as "financial need." See, e.g. AMG, supra, at 39-41. Judge Skillman also suggested that

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53 Because the definitions of lower income housing in Section 4 fail to require legal reservation of the units for qualified households through sale and rental controls or otherwise, they indicate a fundamental, facial constitutional defect affecting the entire statute. Thus, judicial surgery, dropping the words "occupied or" from the two definitions, will almost certainly be necessary to save the entire Act, quite apart from the credit problem posed in Section 7(c)(1).

present need might be defined as of an earlier date. Thus, for example, if all existing standard units occupied by lower income households were to be counted as credits, then the base need against which these units are to be credited might be the need since the year in which the first of those credited units was built or occupied by qualified households. Calculating financial need households and/or need as of the date of the first eligible occupant would be extremely difficult, if not impossible, given the inadequacy of reliable statistical data state-wide or on a regional and municipal basis for such calculations. Thus the broadened need interpretation eliminates the conceptual illogic of the first two approaches but poses almost insuperable practical problems.

The fourth interpretation, urged by the Urban League respondents, is that "current" units which must be credited under 7(c)(1) are not all those currently in existence, but only those that were currently developed, meaning developed during the fair share period being considered. It is clear from Section 13 of this Act, providing for six-year repose, and the requirement that a fair share housing element be part of the master plan, which must be revised every six years under the Municipal Land Use Law, that the Legislature has essentially adopted this Court's concept of six-year fair shares.[54] In light of this, it seems logical to

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54 The provision in Section 23 for phasing of a large municipal fair share is not inconsistent with this view. This Court discussed the need for phasing in Mount Laurel II in appropriate cases and Section 23 explicitly provides a 6-year phase in for municipalities with fair shares of under 1000, which will clearly be the bulk of municipalities state-wide, including

conclude that "current" means during the current six-year fair share period. Also the second clause of 7(c)(1), which expressly refers to construction and acquisition of housing units, strongly suggests that "current" units were meant to refer to those currently developed -- by construction, acquisition, or subsidization -- not simply those currently in existence. Moreover, the Legislature can reasonably be expected to have known that lower courts were construing this Court's decision to provide credits against municipal fair shares only where the units were developed during the period used for defining present need. Of course, to insure a constitutional meaning for "credits," the definitions of low and moderate income in Section 4 must, as noted above,[55] be read to require legal controls to reserve the units exclusively for qualified households. When limited to controlled and currently developed units, the "credit" provision is entirely reasonable and consistent with the constitutional mandate, as already interpreted by the lower courts.

## IV. THE PURPORTED MORATORIUM ON BUILDER'S REMEDIES CONTAINED IN THE ACT IS INAPPLICABLE TO THE URBAN LEAGUE CASES.

Section 28 of the Act imposes a moratorium on the award of

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Cranbury, Monroe, and South Plainfield in this litigation.

55 See page 83 and note 53 supra.

builder's remedies that will last until approximately January 1, 1987.[56] The moratorium provision does not directly apply to the Urban League respondents for two distinct reasons. First, the section expressly defines the affected "builder's remedy" as a court imposed remedy "for a litigant who is an individual or a profit-making entity," and the Urban League is neither. Second, the section only affects plaintiffs in exclusionary zoning litigation "filed on or after January 20, 1983." This provision was added by the Governor in his conditional veto to prevent "an unconstitutional intrusion into the Judiciary's powers." Conditional Veto Message, at 2. The Urban League case was filed 7 1/2 years before the statutory cutoff date.

Although Section 28 does not directly affect the Urban League respondents, we nevertheless have a strong interest in its applicability to builders involved in this litigation. As explained above[57] the builder's remedy is an important component of the process by which the constitutional requirements of Mount Laurel are vindicated. If the moratorium is allowed to stand, it is probable that some builder-plaintiffs, ready and able now to

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56 See pp. 13-15 supra for an analysis of the time frame established by the Act. The moratorium lasts until the date for filing a housing element pursuant to Section 9(a). That date, in turn, is five months after the Council's guidelines are due. § 9(a). The guidelines must be filed seven months after the last council member is informed or January 1, 1986, whichever is earlier. § 7.

57 See pp. 55 - 75 supra.

build affordable housing, will either depart from the field because of economic uncertainty [58] or be passed over in favor of non-plaintiff builders whose capacity to build immediately and reliably is less certain.[59] In either event, the moratorium will have made it more difficult for the Urban League respondents to obtain the effective remedy to which they are entitled.[60]

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58 See Affidavits of Alan Mallach submitted in opposition to these transfer motions.

59 Cranbury Township affords an example of this problem. Two of the three builder's remedy plaintiffs there control sites that are problematic in terms of planning suitability, although the Urban League respondents believe that each can be designed to keep it within the suitability limitations imposed by Mount Laurel II and thus qualify for a builder's remedy. Each has already been site-planned by the owner and could be brought to the Planning Board quite promptly once the litigation is concluded. The Township, however, prefers to achieve compliance by rezoning other sites, which are concededly suitable, but which are not ready for prompt development, although they probably would develop eventually.

Under Judge Serpentelli's opinion in Allan-Deane, supra, a municipality may come into compliance in the absence of a builder's remedy by rezoning any suitable sites, even if alternate sites might be superior in some respect, so long as the selected sites afford a "realistic opportunity." Thus, if the builder's remedy parties are barred from immediate participation in a compliance plan by virtue of Section 28, the Urban League respondents would have to accept a materially less realistic compliance plan than otherwise. For the reasons to be set forth in the text, we should not have to accept this lesser remedy in consequence of a moratorium provision that is neither statutorily required nor constitutionally permitted.

60 We focus our argument here on Cranbury Township, which has three consolidated builder-plaintiffs. The only other Urban League municipality now before this Court with a builder-plaintiff is Monroe Township. There, however, the builder (Monroe Development Corporation) controls a site that has been conceded to be suitable by the Township and was included for rezoning in the Township's now- defunct compliance plan. It therefore will almost certainly be included in the Master's compliance plan and hence in the site specific rezoning granted

The Urban League respondents submit that Section 28 was simply not intended to apply to our case, but if it were to be applied, it would be unconstitutional.

A. The Moratorium Does Not Apply to a Consolidated Action in Which the First Complaint was Filed Prior to January 20, 1983.

Our first statutory argument turns on the fact that this is a consolidated case. On its face, Section 28 clearly permits the Urban League respondents to proceed to a final remedy and our remedy may include site-specific rezoning if necessary to achieve compliance. We submit that it also permits the award of builder's remedies to any builders whose actions have been consolidated with our case, whether their complaints were filed before or after January, 1983.

Consolidation results in a legal "fusion" of previously independent actions and bestows substantive rights that would not otherwise have been available to an independent party. Rule 4:38-1(c), concerning further proceedings in consolidated cases, expressly provides:

> Unless otherwise ordered by the court, the action first instituted shall determine which party shall have the privilege to open and close and in other respects shall govern the conduct of subsequent proceedings. Upon a consolidation the court may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay. [emphasis added]

Caselaw confirms the fusion principle. For example, in Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 477-79 (1969),

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to the Urban League respondents alone, without having to rely on its special status as a builder's remedy site.

this Court allowed the defendant in one of two consolidated cases to appeal a judgment N.O.V. granted to the defendant in the second of the two actions, although the first defendant would clearly not have had a right to do so had the two cases been tried separately. Likewise, in R.L. Mulliken, Inc. v. City of Englewood, 59 N.J. 1 (1971), the Court permitted the plaintiff to amend a complaint originally brought in county district court to seek damages in excess of that court's jurisdiction after consolidation with a Superior Court action, even though the statute of limitations had run on the claim filed in county district court. See also Lawlor v. Cloverleaf Memorial Park, Inc., 56 N.J. 326 (1970). Thus, this Court has regularly used the fusion concept to extend rights to litigants in consolidated litigation that would not have been available otherwise.[61] Presumably the Legislature and the Governor wrote the carefully drafted Section 28 with this established law of consolidation in mind.

The text of the Act expressly supports consolidated multiple actions against a single town being treated as one for moratorium purposes. Section 28 defines "exclusionary zoning

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61 Rule 4:38-1 (c) says that the first case governs "[u]nless otherwise ordered by the Court." Although such an order might otherwise be permissible, it clearly cannot be where the Legislature has directly addressed the issue. Moreover, the subsequent sentence clarifies that such court orders are only designed to avoid unnecessary costs or delay. Here an order departing from the rule that the first case governs would only increase costs and delay, to the point of potentially undermining vested rights already in existence. See Point I, supra.

litigation" as "lawsuits filed in courts of competent jurisdiction in this State challenging a municipality's zoning and land use regulations . . ."[emphasis added]. The separate use of the singular "litigation" and the plural "lawsuits" must have some meaning; the only practical meaning is that "litigation" encompasses consolidated actions against the same town, a situation certainly brought to the Legislature's attention during its consideration of this bill. The moratorium only purports to delay builder's remedies in "exclusionary zoning litigation . . . filed after January 20, 1983." But this "litigation," that is this set of "lawsuits" challenging "a municipality's" zoning and land use regulations, was filed on July 23, 1974. Thus Section 28 by its own terms does not prevent the award of a builder's remedy to any of the builder-plaintiffs consolidated with the Urban League action.

These straightforward applications of caselaw and textual analysis are further buttressed by broader considerations of equity, which must infuse these technical subjects if they are to work properly. This is the oldest extant Mount Laurel case and the only one to have been previously before the Court as part of Mount Laurel II. By virtue of being consolidated with the oldest Mount Laurel case, the builder-plaintiffs have shared with the Urban League respondents the responsibility of being first to develop many of the most important post-Mount Laurel II compliance mechanisms, most notably the fair share methodology reported in the AMG opinion, supra. The builders and the Urban League respondents have not always agreed -- indeed we all

recognize that our distinct constituencies necessitate differences on occasion -- but there can be no doubt that all of the consolidated plaintiffs have served the public interest by persevering in these Mount Laurel claims. To sever what has become in reality and well as contemplation of law a single case, against the clear teaching of caselaw, court rule and even the construction of Section 28, would be inequitable in the extreme.

B. The Legislature Did Not Intend the Moratorium to Apply to Cases in Which a Transfer Motion has been Denied and the Court will Adjudicate the Remainder of the Action, Because the Sole Permissible Purpose of the Moratorium is to Allow the Council Time to Develop Its Administrative Mechanisms.

Even if this Court were to consider Section 28 applicable to complaints filed after the deadline that had been consolidated with an older case, its moratorium would be inapplicable even to those later filed complaints once the Court denies the transfer motion. As with the consolidation argument presented above, this follows as a matter of statutory construction rather than depending upon a constitutional challenge.[62]

The language, history, and purpose of Section 28 confirm that it is intended to have applicability only in a narrow band of situations. At one extreme, the moratorium is obviously unnecessary as to cases transferred to the Council, because the moratorium terminates on the deadline for submission of housing

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62 We respond here to the Court's Question 1(b) contained in Mr. Townsend's letter of November 15, 1985.

elements to the Council. Until the housing element is filed there is no dispute before the Council which would provide a basis for its awarding a builder's remedy and no need for a separately stated moratorium. Indeed, Section 28 recognizes this point by defining a builder's remedy in Section 28 as "a court imposed remedy . . ." [emphasis added]. The moratorium does not apply at all to cases pending before the Council.[63]

Similarly, Section 28 is not intended to apply to cases that remain in the courts, either because no motion for transfer is made or because such a motion has been denied. As just noted, the moratorium's term is defined by the time frame established for the Council to begin work. Clearly that time frame has no meaning for a municipality that will never be filing a housing element with the Council because it has been denied transfer. In contrast, when originally adopted by the Assembly in February 1985, Section 28 specifically said that a moratorium would be in

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63 If any of the cases now before this Court are transferred to the Council with the additional ruling that the Council is obligated to award some form of a builder's remedy under appropriate circumstances, see Point III(A) infra, the Council will, of course, legitimately require some time to develop and apply rules to implement that ruling. That is not a moratorium problem, however, because, as noted, Section 28 applies to court-ordered remedies, not Council ones. Moreover, as argued in Point II (B) below, if cases as old and as far advanced towards compliance as the Urban League case can be transferred, expedited procedures within the timetables provided by the Act will be required to avoid manifest injustice. Since the essence of the builder's remedy issue is "planning suitability," See 92 N.J. at 279-80, and planning suitability is a factual inquiry to be guided by individualized expert testimony rather than by detailed administrative rules, we believe that the Council could be directed to act promptly on cases with builder's remedy issues.

effect "[f]or a period of 12 months following the effective date of this act." The Governor consciously reworked that language to avoid constitutional problems. Conditional Veto Message at 2.

Clearly the purpose of this section, as revised, is to permit an orderly development by the Council of its procedures, criteria, and guidelines and sufficient time for the affected municipalities to make a comprehensive and meaningful submission under a new and complex statute. In his veto message explaining his revision, the Governor stated:

> It is essential that the temporary moratorium on the builder's remedy be constitutionally sustainable in order to enable municipalities to take advantage of the procedures in this bill....A moratorium for the planning period in this bill is needed.

Id. at 2. Likewise in its defense of the constitutionality of this provision before Judge Skillman, the state, through the Attorney General explained:

> The "freeze" is clearly related to a rational legislative purpose: the orderly implementation of an administrative mechanism to enable municipalities to meet their constitutional obligation under the Mt. Laurel cases.... the Legislature here sought to afford municipalities an adequate opportunity to undertake such action as may be necessary to achieve voluntary compliance with their constitutional obligations under the Council's organizational period.

Brief on Behalf of Intervenor State of New Jersey in Morris Cty. Fair Housing Council v. Boonton Twp., at 23, 27.

Although the moratorium cannot logically or textually apply either to cases before the Council or to cases that have been denied transfer, it is not without a legitimate role. What the Legislature seems to have intended in Section 28 is to stay a court's hand in cases already in litigation, to permit the towns

to decide whether to make a transfer motion and then to allow time for the motion to be considered. As matters have worked out, a number of these motions were brought and decided quite promptly after the passage of the Act, but the Legislature might reasonably have anticipated that other towns would prefer to wait until the Council had been established and its guidelines promulgated.[64] It has also been true that nothing of substance has occurred since July in any of the Urban League cases now seeking transfer in this Court, except consideration of the transfer issues. In this respect, the trial court has honored a moratorium even broader than that required by the statute.[65]

In any event, there is no sense in, nor legislative intent for, a stay on court action once the court decides that a particular town will not be allowed to use the new administrative mechanism but will have its compliance obligations determined by

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64 Indeed, one other Urban League town, Old Bridge, has only recently filed a transfer motion and has not yet requested a specific return day.

65 The lengthening period of delay attributable to these transfer motions becomes of increasing concern. If, as we believe will be the case, the denial of the transfer motions is affirmed by this Court, at least a third and possibly much more of the moratorium period will have been gained by defendants who are not entitled either to moratorium or transfer. The continuing inability to bring this 11 1/2 year old case to a just conclusion risks a return to the situation prior to Mount Laurel II when clearly established constitutional entitlements could not escape the grasp of endless litigation. If delay persists, it will soon become unimportant what the law of exclusionary zoning is, or how the statute is interpreted, because at least the private litigants needed to make the doctrines work will have given up.

the court. There is no need for the town to develop a housing element and certainly no need to wait for the Council's criteria and guidelines if the Court is to resolve the matter anyway. Indeed, one of the major reasons for denying transfer is that the extended delay which the administrative process would impose is prejudicial and unjust to a party already long delayed in obtaining its remedy. Not only would it be ironic, it would blatantly ignore the legislative policy that some cases should remain in court for resolution, to rule that parties as to whom the administrative delay is manifestly unjust may be asked to wait out completion of the administrative process anyway. Indeed, as set forth below, such an interpretation would clearly render the provision unconstitutional.

C. If Section 28 Were Construed to Apply to this Case after Transfer is Denied, the Provision Would be Unconstitutional Because It Serves No Useful Purpose.

Constitutional law follows the same logic suggested above for statutory construction -- any suspension of individual rights must be carefully tailored to meet reasonable and achievable objectives. In the typical setting of local ordinances suspending development rights, a moratorium that fails to do so risks violation of the takings clauses of the state and federal constitutions.[66] Thus, the courts have sustained moratoria where

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66 The Section 28 moratorium is somewhat different from those usually encountered in the caselaw, since it suspends judicial enforcement of development, rather than development itself. Where the moratorium is directly imposed by a legislative body, however, the courts must enforce it, and the difference is there-

the purpose was to permit development of new permanent regulations, so long as there was a showing of a need for the regulations, good faith progress towards developing them, their nearness to completion and the likelihood of their ultimate passage. See Orleans Builders and Developers v. Byrne, 186 N.J. Super. 432, 448 (App. Div. 1982); Toms River Affiliates v. Department of Environmental Protection, 140 N.J. Super. 135, 152 (App. Div. 1976)(CAFRA "freeze" to permit development of regulations); Cappture Realty Corp. v. Board of Adjustment of Elmwood Park, 133 N.J. Super. 216 (App.Div. 1975)(flood plain zoning); Meadowlands Regional Development Agency v. Hackensack Meadowlands Development Comm.,119 N.J. Super. 572 (App.Div.), certif. denied, 62 N.J. 72 (1972)(integrated regional development plan).

In contrast, where it appeared that good faith progress could or would not take place towards resolution of the problem that justified the moratorium in the first place, this Court has not hesitated to hold that the moratorium could be invalidated on

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fore unimportant. At base, it is the impact on private property rights which is of constitutional concern.

The Urban League respondents also recognize that the constitutional provision for judicial control of actions in lieu of prerogative writs may be violated by Section 28. See Morris County, supra. We do not address this serious question because, through a quirk of pleading, the Urban League case was not brought as an action in lieu of prerogative writ, although it could have been. Should this Court decide that Section 28 is unconstitutional on this ground, however, we believe that equity would require that the holding apply to us as well, since this case is otherwise indistinguishable from the Mount Laurel actions filed in prerogative writ form.

takings grounds. See Deal Gardens, Inc. v. Board of Trustees of Loch Arbour, 48 N.J. 492, 500 (1967); cf. Schiavone Construction Company v. Hackensack Meadowlands Development Commission, 98 N.J. 258 (1985)(possibility that 19-month moratorium could constitute a taking). And in Mount Laurel I, the Supreme Court recognized explicitly that a moratorium, even if otherwise permissible, should be evaluated with particular care in instances where it would operate to delay or deny construction of low and moderate income housing. 67 N.J. at 188n.20.

As explained above, none of the time-consuming preparation for the future administration of the Mount Laurel doctrine in New Jersey by the Council has anything to do whatsoever with the resolution of cases that remain in the courts. Once this is established, the essential rationale for allowing any moratorium disappears.[67]

## V. APPLICATION OF THE POSITIONS ADVOCATED TO THE FOUR URBAN LEAGUE CASES.

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67 Before the trial court on these transfer motions, we also suggested case management techniques that could be used by the courts to permit consideration of builder's remedy issues during the period of a moratorium, should such a moratorium be found to be both applicable and constitutional. See Urban League Plaintiffs Memorandum of Law in Opposition to Motions of Cranbury, Monroe and Piscataway to Transfer this Case to the Council on Affordable Housing and in Opposition to Cranbury's Motion to Impose a Moratorium on Builder's Remedies, September 18, 1985, at 72-76, filed with this Court on November 25, 1985. Since those issues were not ruled on below, we do not address them here, but invite this Court's consideration of our suggestions should interim management of the builder's remedy during a moratorium prove to be relevant.

A. The Trial Court Properly Denied Transfer as to All Four Towns Because There Would Be Manifest Injustice in Applying the Fair Housing Act in its Present Form.

The Legislature did not intend, and could not constitutionally have intended, that old and nearly completely adjudicated Mount Laurel cases be started over before a new, backlogged, and inexperienced agency, using an extended, voluntary, and as yet undefined procedure the results of which might be moot. To the contrary, the Legislature stated several times that the Fair Housing Act was intended as a comprehensive mechanism to satisfy and implement, not disrupt or undermine, the settled constitutional obligation of making lower income housing possible.

Under the standard established by the Legislature, the manifest injustice standard, the trial court properly denied transfer of all four of the Urban League towns now before this Court. The decisions below should be affirmed.

B. If the Act is Carefully Construed to Cure Constitutional Defects, and If Transfer is Carefully Conditioned to Mitigate the Problem of Delay, Cranbury Township's Motion to Transfer Could be Granted, But Equitable Considerations of the Bad Faith Exhibited by the Other Towns Require That Their Motions Be Denied.

As the Urban League respondents have demonstrated, the Act permits and the Constitution compels careful definition by this Court of the circumstances that might eliminate the manifest injustice of transferring older cases in which substantive determinations have been made and only compliance issues remain. First, if there are to be any transfers, they must be conditioned upon use of the techniques discussed in Point II to minimize the

consequences of delay. Equally important, however, this Court must also construe the Act to remove its constitutional impediments, as discussed in Points III and IV.

If all of these conclusions are reached, then the motion of Cranbury Township could be granted without either manifest injustice or constitutional infirmity. As to Monroe Township and the Borough of South Plainfield, however, an additional consideration, not directly addressed above, requires that their cases be retained by the trial court. Piscataway Township presents a closer case but it, too, should not be transferred.

Manifest injustice is essentially an equitable concept, and municipalities should not be allowed to sully the Chancellor's hands with a motion to transfer when their own inequitable conduct is all that makes transfer technically possible. By refusing to obey court orders and by repudiating their own compliance plans, both Monroe and South Plainfield have clearly forfeited the right to transfer. By admittedly doing nothing during the three month allowed by the trial court to prepare a compliance plan, and instead gambling that transfer would be granted, Piscataway comes to this Court with hands that are dingy, if not downright unclean, and it too should be denied transfer.

South Plainfield's is the most outrageous conduct. There, the Borough entered into a voluntary stipulation amounting to a complete settlement of all issues between the parties in May 1984. By doing so, it avoided participation in the lengthy methodology trial, yet thereafter ignored three separate court imposed deadlines for submission of implementing ordinances, and

began the process of allowing conventional development on land clearly reserved in the stipulation for Mount Laurel compliance purposes. The Urban League respondents have spent untold hours over the last eighteen months trying to compel the simplest of compliance tasks. Had South Plainfield complied with its own voluntary stipulation in even three times the period initially allowed it by the trial court, it would now be in compliance and could not have moved for transfer. It should have absolutely no benefit of the Fair Housing Act.

Monroe's objections to Mount Laurel compliance have been well publicized. Unfortunately, through inaction, it has substantially delivered on those objections. It missed the first compliance deadline completely, and much later a majority of the council informally submitted a semblance of a compliance plan over the mayor's veto only after a personal lecture by Judge Serpentelli on the consequences of non-compliance. The Township thereafter reneged on its financial commitments to its own attorney, planner, and the Court-appointed Master involved in submitting this plan, resulting in a court-ordered payment that is now on appeal in the Appellate Division.[68] Monroe finally abrogated its own compliance plan by approving inconsistent development applications, necessitating an order to the Master to prepare her own plan in July, 1985. Like South Plainfield, Monroe

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68 Docket No. A-5394-84T1. Monroe has neither made the payments nor sought a stay of the the trial court's Order.

has by its own inequitable conduct placed itself in a position where it can now seek further delay by transfer to the Affordable Housing Council. It should be denied.

Unlike Monroe and South Plainfield, Piscataway's delay in coming to compliance has, until recently, been compelled by complex issues that had to be resolved before its fair share could be established. To this extent, its delay does not suggest bad faith of any kind. The fair share issues were resolved by Judge Serpentelli in a decision issued on July 23, 1985, however, and Piscataway was ordered to begin preparing a compliance plan immediately. Instead of doing so, by its own admission it let the October 23 compliance deadline pass without any compliance work being done. Piscataway's compliance is presently under stay reluctantly issued by Judge Serpentelli on November 22, who felt compelled to do so by this Court's affirmance of the Appellate Division's stay in the Bernards case. Piscataway's continuing disinterest in compliance planning, which would be of use to it as a housing element even if the case were transferred to the Council, bespeaks a disrespect for its constitutional obligation that borders on the inequitable. Moreover, by refusing to prepare a compliance plan, it is poorly prepared to take advantage of an expedited hearing before the Council, as urged in Point II(B). Although a closer case, it too should be denied transfer on equitable grounds.

## CONCLUSION

For the foregoing reasons, the Urban League respondents respectfully submit that this Court should affirm the Orders of the Trial Court dated October 11, 1985, denying the motions of Cranbury, Monroe, Piscataway and South Plainfield to transfer to the Council on Affordable Housing. In the alternative, but only if this Court reaches the conclusions on the statutory and constitutional issues urged in Points II, III and IV above, the Order with respect to Cranbury should be reversed but all the other Orders affirmed.

Dated: December 4, 1985

Respectfully submitted,

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