CH - Motzenbecker v. Bernardsville ???

Appendix to

Trial Brief Filed on Behalf of all Above Captioned Plaintiff/Respondents

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In The
SUPREME COURT OF NEW JERSEY

HELEN MOTZENBECKER, Plaintiff, v. MAYOR AND COUNCIL OF BOROUGH OF BERNARDSVILLE and BOROUGH OF BERNARDSVILLE, Defendants.	Docket No. 24,781 A-123
SIEGLER ASSOCIATES, a partnership existing under the laws of the State of New Jersey, Plaintiff, v. MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE, Defendant.	Docket No. 24,783 A-125
NEW BRUNSWICK HAMPTON, INC., Plaintiff, v. TOWNSHIP OF HOLMDEL, ETC., Defendant.	Docket No. 24,784 A-126
RAKECO DEVELOPERS, INC., JZR ASSOCIATES, INC. and FLAMA CONSTRUCTION CORP., Plaintiffs, v. TOWNSHIP OF FRANKLIN, et al., Defendants.	Docket No. 24,799 A-133

APPENDIX: TRIAL BRIEFS FILED ON BEHALF OF ALL ABOVE CAPTIONED PLAINTIFFS/RESPONDENTS

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Plaintiff
HELEN MOTZENBECKER

vs.

Defendant
MAYOR AND COUNCIL OF BOROUGH OF BERNARDSVILLE and BOROUGH OF BERNARDSVILLE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN COUNTY

Docket No. L-37125-83

CIVIL ACTION

MOUNT LAUREL II

BRIEF OPPOSING DEFENDANTS' MOTION TO TRANSFER MATTER TO AFFORDABLE HOUSING COUNCIL

Douglas K. Wolfson,
Of Counsel and On The Brief

Jeffrey R. Surenian
On The Brief

STATEMENT OF FACTS

On June 21, 1983, Helen Motzenbecker ("plaintiff") filed suit seeking a builder's remedy. On February 9, 1984, this Court approved a stipulation of settlement, which awarded plaintiff a builder's remedy. On November 20, 1984, specific details pertaining to the builder's remedy were memorialized in a further order of this Court. Notwithstanding the fact that the builder's remedy was awarded over a year and a half ago and notwithstanding that this plaintiff is anxious to develop the parcel for Mount Laurel purposes, the remedy has yet to result in the actual construction of any lower income housing. The failure of the remedy to generate housing is the direct consequence of a series of obstacles created by the Borough.

The Borough's request to transfer the within case to the Affordable Housing Council represents yet another blatant attempt by the Borough to (1) renege on the builder's remedy consensually granted on February 9, 1984 and (2) to delay even further the day that lower income housing will actually be provided within the Borough.

The Borough first attempted to interfere plaintiff's-builder's remedy by stating its intent to condemn her parcel.[1]

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[1] In this regard, after stating its intent to condemn, the Borough never formally brought a condemnation action even though in Spring of 1985, this Court directed the Borough to proceed "lickety split" with the condemnation if the Borough so intended. Consequently, not only has the Borough effectively

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In addition, the Borough attempted to vacate that remedy. Finally, the Borough has filed this motion to transfer.

Despite the Borough's bare faced attempts to go to any length to thwart this plaintiff and to postpone as long as possible satisfaction of its constitutional obligation, the Borough would urge upon this Court that justice demands a transfer of this case, and that Plaintiff be compelled to renegotiate all of her rights before the Council.

The Borough dares to call out for justice when, in one breath, it proudly points to its settlement efforts with Helen Motzenbecker as evidence of its good faith while, in its next breath, it seeks to take away that which it has given. Similarly, Defendant proclaims that, unlike other recalcitrant municipalities, it has voluntarily moved forward with an innovative compliance program. Yet, if Defendant succeeds in obtaining the transfer it seeks, the net effect would be that not one unit of lower income housing would be built within the Borough for years to come, if at all. See infra at n.16. Not

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prevented the development of the parcel by its threat to condemn, but also Helen Motzenbecker has received no compensation in conjunction with a condemnation. Compare, N.J.S.A. 40:55D-44 (requiring compensation for temporary "freeze"). Unlike the corporate builder, which is more likely to have the financial wherewithall to withstand the expenses generated by such tactics, Plaintiff's resources are far more limited. Thus, absent this Court's resolve to uphold the builder's remedy it awarded on February 9, 1984, the Borough may effectively render meaningless Helen Motzenbecker's award of a builder's remedy.

only is the Borough unable to point to any lower income housing that has emanated from its efforts, but even a "plan" for the creation of lower income housing has yet to be implemented. In short, the Borough has failed to create any realistic opportunity for its fair share of lower income housing as is required by our State's Constitution. In light of this fact, the Borough's tiresome claims of its good faith and its desperate plea to balance the equities is nothing more than a smoke screen reminiscent of those recalcitrant municipalities desirous of precluding lower income housing at all costs.

LEGAL ARGUMENT

POINT I

THIS COURT SHOULD NOT VACATE HELEN MOTZENBECKER'S BUILDER'S REMEDY

In her Brief In Opposition To Defendant's Motion To Vacate Her Builder's Remedy, dated September 6, 1985 [hereinafter "Plaintiff's Brief"], Plaintiff opposed Defendant's motion to vacate her builder's remedy on two grounds. First, Plaintiff asserted what Defendant conceded - that the dispute has been reduced to a settlement. Defendant's Brief In Support Of Motion To Transfer, Dated September 19, 1985 at 8. [hereinafter "Defendant's Transfer Brief"]. In light of the important policies supporting the protection of settlements, in general, and Mount Laurel II settlements, in particular, Plaintiff argued that this Court should, in the exercise of its discretion, protect the within settlement. Plaintiff's Brief at 16-17. Second, Plaintiff emphasized that the settlement has been reduced to an order, and argued that the important public policies supported the inviolability of such an order. Plaintiff's Brief at 17-19.

Defendant does not address Plaintiff's argument regarding the importance of upholding settlements for an obvious reason - there is no basis in law or equity to support Defendant's request to renege on the settlement. Defendant does, however, challenge Plaintiff's argument that the Court

should stand behind its order based on R. 4:50-1(f), the "catch-all" provision of R. 4:50-1, which authorizes a Court to vacate an order for:

> (f) any other reason justifying relief from the operation of the judgment or order."

Relying on this Rule, Defendant urges this Court to "balance the equities." Defendant's Transfer Brief at 12, 14.[2] However, the appropriate test is not a balancing of the equities test, but an extreme hardship test. More specifically, this Court should not vacate its order unless it finds the existence of an exceptional situation. Hodgson v. Applegate, 31 N.J. 29, 41 (1959). Thus, in Baumann v. Marinaro, 95 N.J. 380, 395, our Supreme Court stated:

> We are mindful that this Court has repeatedly noted the broad parameters of a court's discretion to grant relief in exceptional situations under subsection (f). See Manning Eng'g., Inc., supra, 74 N.J. at 120; Palko, supra, 73 N.J. at 398; Court Invest. Co. v. Perillo, 48 N.J. 334 (1966); Hodgson, supra, 31 N.J. at 41. However, we also note that the importance of the finality of judgment should not be lightly dismissed. Thus, under R. 4:50-1(f) and the identical Fed. R.

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[2] Defendant does use the words "extreme hardship" to describe the appropriate standard for vacating an order. However, the thrust of Defendant's analysis is that the Court should vacate the order as a result of balancing the equities - not as a result of the extreme hardship to the Borough. Compare, Defendant's Transfer Brief at 9 with Defendant's Transfer Brief at 13-15.

> Civ. P. 60(b)(6), relief is available only when truly exceptional circumstances are present and only when the court is presented with a reason not included among any of the reasons subject to the one year limitation. Manning Eng'g., Inc., supra, 74 N.J. at 120.

(emphasis added)

Were the test for deciding whether to vacate an order to be any less stringent than an extreme hardship test, the law would be thrown into a state of chaos. For example, if the Court were to merely balance the equities, any party to a consent judgment that concluded, in retrospect, that he should not have consented to the judgment because he could presently get a "better deal" would be encouraged to undo the settlement. Since circumstances almost always change with time, one party will inevitably regret having consented to the judgment and thus will wish to reopen the judgment. Thus, the incentives created by Defendant's balancing test would result in an intolerable situation. Further examination of Defendant's argument reveals that Defendant has fallen far short of demonstrating the type of extreme hardship necessary to justify vacation.

Defendant's argument may be reduced to the following statement: if the Borough must permit Plaintiff to implement her builder's remedy, the Borough will be unable to comply with its Mount Laurel obligation because the property is too expensive to acquire by virtue of its increased value. See Defendant's Transfer Brief at 14 (referring to Plaintiff's "veto" of Defendant's compliance plan).

This argument is entirely specious and is totally without merit. First, it was Defendant that selected the condemnation process as its "sole" method of satisfying its Mount Laurel obligation. Defendant could have easily utilized other means of compliance. Second, Defendant has selected nine (9) sites for a rezoning, one of which is Plaintiff's. Defendant could easily have selected numerous additional sites given the vast amount of vacate developable land existing within Bernardsville. Finally, of the nine sites slated for a potential rezoning, Defendant insists that Plaintiff's site is the primary site.

An analysis of the master's April 30, 1985 report reveals the patent falsehood of the proposition that Plaintiff's site is "necessary" in order for the Borough to comply. Assuming that the Court accepts its master's report, Defendant would have to provide for a minimum of 178 units of lower income housing through new construction. Master's Report at 4. In addition to Plaintiff's site, the Borough has designated approximately 19.5 acres on the eight remaining sites as appropriate for a potential condemnation and has proposed that this acreage be developed at densities of between 8 to 20 units per acre. Master's Report, Appendix A at 5. Assuming a moderate density of 10 units per acre, the 19.5 acres would yield 195 lower income units. Thus, the Borough could easily satisfy its obligation to provide 178 units simply

by utilizing the remaining eight sites already slated for a potential condemnation.[3]

Defendant has made several other arguments in an effort to persuade this Court that the equities weigh more heavily in favor of granting its motion to vacate. For example, Defendant repeatedly bemoans the fact that Plaintiff's property has escalated in value since these proceedings began in June of 1983.[4] The fact that the property continues to increase in value while the Borough delays implementation of the builder's remedy can be no source of complaint. Defendant has ironically become the victim of its own recalcitrance.

Defendant also argues that had it been more recalcitrant by litigating rather than settling, it would not now find itself in the bind its in. Defendant mischaracterizes itself. Although the Borough settled rather than litigated, the Borough has managed to prevent any lower income units from being constructed within its borders. Moreover, had the

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[3] Defendant stands in no different position than an applicant for a variance who has created the very hardship for which he seeks relief. The law should look no more favorably on this Defendant than on such an applicant. See generally, Deer Glen Estates v. Board of Adjustment, Fort Lee, 39 N.J. Super. 380 (App. Div. 1956).

[4] In support of its motion to vacate, Defendant deliberately avoided reliance on R. 4:50-1(c), which permits a Court to vacate an order within one year if there has been any "misrepresentation or other misconduct." This decision reveals the obvious - that there has not been even the slightest wrongdoing on Helen Motzenbecker's part, and that the Borough is beyond the one (1) year limitation period for bringing such an application.

Borough selected the litigation route, there is little question that by now Plaintiff would have achieved through litigation that which she achieved through settlement - the award of a builder's remedy because all three elements of the builder's remedy would have been easily satisfied. Plaintiff's Vacation Brief at 19-21. Finally, to the extent that Defendant is arguing that it is being denied due process because it is being treated unfairly relative to municipalities that have not satisfied their Mount Laurel obligations, Mount Laurel II emphasizes that possible inequities between and among municipalities is no excuse for non-compliance. Mount Laurel II at 239.

In Defendant's feeble attempt to analyze the equities, Defendant belatedly accuses Plaintiff of failing to have submitted a preliminary site plan application. There can be no question in light of the Borough's stated intent to condemn Plaintiff's parcel that Helen Motzenbecker would never have been granted preliminary site plan approval had she sought it. To have attempted to obtain such approval under these circumstances would have been a foolish waste of time and money. Furthermore, Defendant insists that Plaintiff "got off easy" because she did not have to litigate to obtain a builder's remedy.[5] Plaintiff should hardly be punished for succeeding in her objective by the means chosen.

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[5] There can be little doubt that successful motion to strike (eliminating virtually all of the Borough's defenses) and her anticipated motion for summary judgment were salient factors in the Borough's decision to concede the inevitable.

In short, Defendant has not shown any hardship, much less the type of "extreme" hardship that is necessary to vacate this court's judgment awarding plaintiff a builder's remedy.

Even were dispositions of this motion to be dependent upon a balancing test as suggested by Defendant, the balance would weigh heavily in plaintiff's favor. Consider the following facts:

> (1) After repeatedly seeking the Borough's approval for various lower income housing projects and after sending a good faith letter upon the publication of Mount Laurel II again seeking the cooperation of the municipality, Bernardsville consistently answered Helen Motzenbecker's requests with flat out denials. This necessitated the filing of a Mount Laurel lawsuit.
>
> (2) After incurring substantial expenses in legal and planning fees to prosecute the within case, and after being rewarded for her efforts with a builder's remedy, the Borough has attempted to take away that which it has given by stating its intent to condemn Plaintiff's site, thereby effectively precluding implementation of the builder's remedy.
>
> (3) The Borough subsequently sought to vacate the builder's remedy.
>
> (4) The Borough now seeks to transfer the within case to a non-existing public entity which apparently lacks the power to give Plaintiff the relief she seeks.
>
> (5) As a result of the Borough's machinations, Helen

> Motzenbecker's property has not generated any of the lower income housing opportunities promised.
>
> (6) Furthermore, despite the two years of litigation, the poor are still lacking any housing opportunities within the Borough.
>
> (7) Although the Borough boasts of its innovative compliance package, should the Borough succeed in its efforts to transfer the case, it would guarantee that no lower income housing would be produced within the Borough for years to come.

In short, even if the extreme hardship test of R. 4:50-1(f) were to be replaced by a "balancing" test as urged by defendant, this Court would have little choice but to conclude that the equities strongly favor Helen Motzenbecker.

POINT II

THIS COURT SHOULD NOT TRANSFER THE CASE TO THE AFFORDABLE HOUSING COUNCIL BECAUSE SUCH A TRANSFER WOULD CAUSE A MANIFEST INJUSTICE TO HELEN MOTZENBECKER AND TO THE POOR REPRESENTED THROUGH THIS LITIGANT

The Fair Housing Act (the Act), Section 16.a. permits a court to transfer a case to the Council only if such transfer will not cause a "manifest injustice". A review of the Act reveals no legislative standard for ascertaining the parameters of this concept. Moreover, no singular definition capable of uniform application can be gleaned from our case law. Rather, the term "manifest injustice" has held a variety of meanings depending upon the various contexts in which it has been applied.[6] Logically, any definitional analysis should

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[6] Pursuant to R. 4:17-7, for example, a party shall be permitted to answer interrogatories out of time if it would not be manifestly unjust. In this context, courts have said that no manifest injustice would result if there was no intent to mislead; there was no element of surprise; the opposing party would not be unduly prejudiced. Westphal v. Guarino, 163 N.J. Super. 140, 146 (App. Div. 1978), Aff'd Mem. on opinion below, 78 N.J. 308 (1978). Similarly, the law permits remittitur if damages awarded by the fact finder would result in a manifest injustice. If a fact finder reaches a result that seems "wrong" through mistake, prejudice or lack of understanding, the court will find there to be a manifest injustice and will allow remittitur. Baxter v. Fairmount Foods Co., 74 N.J. 588, 596 (1977). See also, State v. Taylor, 80 N.J. 353, 365 (1979) (interpretting R. 3:21-1, which permits the withdrawal of a guilty plea at the time of sentencing to correct a "manifest injustice"). See also, Gibbons v. Gibbons, 86 N.J. 515, 523-24 (1981) (identifying when retroactive application of a statute would cause a manifest injustice). See also, State v. Cummins, 168 N.J. Super. 429, 433 (Law Div. 1979) (interpreting R.

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start with the Mount Laurel opinion and ought to draw its meaning from the rights, remedies and purposes sought to be achieved by the Supreme Court.

Mount Laurel II created rights not only for the poor, but also for builders.[7] As to builders, the Court declared that a builder would be entitled to a builder's remedy if that builder (1) succeeded in litigation, (2) proposed a project that would contain a substantial amount of lower income housing, and (3) proposed a project that would be suitable from a planning and environmental perspective. Indeed, the Court created the remedy in part out of a sense of fairness, acknowledging the need to reward builders who have invested substantial time and resources in public interest litigation. Mount Laurel II at 279.[8] As to the poor, by asserting that a

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3:22-1, which allows petitions for a post-conviction relief from incarceration if continued incarceration would be "manifestly unjust". See also N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982) (setting forth under what circumstances requiring exhaustion of administrative remedies would cause a manifest injustice).

7 "Builder" is meant to encompass not only the entity that will build the housing, but also the landowner or developer that might take on the burden of bringing a Mount Laurel action in an attempt to obtain a builder's remedy.

8 Our Courts have long been painfully aware that the fundamental rights of the poor to decent housing would never be vindicated by the poor themselves due to the obvious inability to pursue the expense of such litigation against the firm resolve of exclusionary municipalities. Thus, the need exists to confer standing upon builder/developers and to encourage them to vindicate the rights of the poor. Urb. League New

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growth area municipality has an affirmative immediate obligation to provide for its fair share of the present and prospective regional need for lower income housing, the Court was stating that the poor have the correlative rights (1) to housing opportunities within the municipality in numbers equivalent to the municipality's fair share; and (2) to realize these opportunities in a timely fashion.

In light of the rights thus created by Mount Laurel II, a manifest injustice would clearly result where a proposed "transfer" to the Council substantially affected or impaired either party's legitimate rights and expectations.[9] The rights of builders and the poor would be thus affected in at least the following circumstances:

(1) where the builder is required to perform a futile act;

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Bruns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11, 18 (Ch. Div. 1976); Mount Laurel II at 326-27. J.W. Field v. Township of Franklin (slip opinion at 3-4). Without builder plaintiffs and remedies, these constitutional rights would be irretrievably lost. Mount Laurel II at 279, 309 n. 58, 327 (wherein the Supreme Court expressly encouraged a substantial amount of Mount Laurel litigation). See also, J.W. Field at 3-6 (explaining how critical builders are to the effectiveness of Mount Laurel II in ensuring constitutional compliance).

[9] Builders not only represent their own rights, but also the rights of the poor. Mount Laurel II at 289 n. 43. In fact, builders derive standing to assert their own rights because they are representing the rights of the poor. Morris Cty. Fair Housing County v. Boonton Twp., 197 N.J. Super. 359, 366 (Law Div. 1984). Therefore, if a transfer would not work manifest injustice to the plaintiff in question, but would work a manifest injustice to the poor represented by that plaintiff, then the Court should still deny the motion to transfer.

(2) where despite an overriding public interest calling for a prompt adjudication of important rights, resolution is unduly delayed; and

(3) where the builder and/or the poor suffer irreparable harm.

Under these circumstances, considerations of justice will relieve a party from exhausting the administrative review and mediation process contemplated by transfer. See generally, N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super. 59, 64 (Ch. Div. 1974).

Although these ennumerated items are by no means an exhaustive list,[10] they are illustrative of the type of con-

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[10] In at least two other circumstances, the injustice to a transfer would be manifest: (1) if retrospective application of a statute divested a party of a vested right; and (2) if the party claiming that justice requires transfer itself has unclean hands.

As to retroactive application of statutes, the Courts of our State have long followed the general rule of statutory construction that favors prospective application of statutes. Gibbons v. Gibbons, 86 N.J. 515, 521 (1981). This rule has been more clearly articulated as follows:

> "The essence of this inquiry is whether the affected party relied, to his or her prejudice, on a law that is now to be changed as a result of the retroactive application of the statute, and whether the
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siderations urged by Plaintiff as relevant to a determination of the present motion. As such, they will be more fully analyzed below.

A. Manifest Injustice Would Undoubtly Result When Transferring A Case That Has Been Completely Or Partially Resolved Through Litigation Or Settlement.

Where a case has been at least partially tried or where the plaintiff has obtained the builder's remedy sought, a transfer should be deemed to constitute a manifest injustice, per se. Short of a trial or the award of a builder's remedy, a manifest injustice should be presumed if significant or key

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> consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively?"

Id. at 523-24. See also, Farrell v. Violator Division of Chemetron Corp., 62 N.J. 111 (1973), Feuchtbaum v. Constantini, 59 N.J. 167 (1971); Townsend v. Great Adventure, 178 N.J. Super. (App. Div. 1981); and Newark v. Padula, 26 N.J. Super. 251 (App. Div. 1953). Applying this standard to the within case, it becomes clear that subjecting Helen Motzenbecker to the Fair Housing Act would have a deleterious and irrevocable effect on her rights because transfer would in all likelihood, deprive her of her builder's remedy.

As to the second principle, it is a fundamental principle of equity that he who seeks equity must come with clean hands. A. Hollander & Sons, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 246 (1949). Surely a municipality such as Bernardsville, that has continuely exhibited bad faith by doing all in its powers to renege on its agreement with Helen Motzenbecker and to postpone satisfaction of its constitutional obligation should not be heard to claim that justice requires transfer.

issues have been substantially resolved either through settlement, stipulation or adjudication.[11] Under such circumstances, the Court should shift the burden of proof to the municipality to demonstrate that a transfer would not cause an injustice.

Analogous support for this proposed standard can be found in the Supreme Court's decision regarding the presumption of validity that normally attaches to a municipality's land use regulations. The Court emphasized that

> Given the importance of the societal interest in the Mount Laurel obligation and the potential for inordinant delay in satisfying it, presumptive validity of an ordinance attaches but once in the face of a Mount Laurel challenge.... It is not fair to require a poor man to prove you were wrong the second time you slammed the door in his face.

Mount Laurel II at 306. Similarly, a builder that has tried all or part of an exclusionary zoning case, or has, through stipulation or adjudication resolved key issues relative

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[11] Defendant repeatedly suggests that this Court should not transfer the within case because "no issues have been adjudicated". Defendant's Brief in Support of Motion to Transfer at 19, 21. Such an argument is far from persuasive. It suggests that Plaintiff should suffer the consequences of transfer because she achieved her builder's remedy through settlement rather than "an adjudication." By settling, Plaintiff fulfilled a fundamental objective of Mount Laurel II and the Fair Housing Act - that parties achieve through settlement what would otherwise be achieved through litigation. Mount Laurel II at 214; Fair Housing Act, Section 3. Thus, Plaintiff's conduct should be rewarded, not punished. Defendant also mysteriously omits any reference to the fact that virtually all of its defenses were stricken by this court on plaintiff's motion.

thereto, ought not have to prove that the municipality was "wrong the second time."

Interests of judicial economy and the Court's goal of minimizing litigation while maximizing the production of lower income housing, lend still further support to the standard urged by Plaintiff. Were this matter to be transferred, all the energy that this Court and counsel have invested in the within case to bring the case to the eve of compliance would be for naught. To require a duplication of the entire procedure up to the point of the Borough's presentation of its compliance package would be patently counterproductive because it would force time, energy and money to be channeled into further process, rather than into the refinement of the Borough's existing compliance proposal and the implementation of Helen Motzenbecker's builder's remedy.

Applying the proposed standard to the instant case, no transfer can be permitted. This case is over. Plaintiff filed suit seeking a builder's remedy and obtained what she sought on February 9, 1984. At that point, the Borough consciously chose to forego its opportunity to obtain repose at that time. Only after a change of heart, late in the proceedings, did the Borough decide to pursue repose. Having obtained the relief sought, Plaintiff's consent to keep the complaint active was merely an accommodation to the Borough, which wished to remain

under this Court's jurisdiction and obtain a judgment of compliance.[12]

Thus, under either a per se rule, or a standard creating a presumption against transfer (with an attendant shifting of the burden of proof) Bernardsville transfer motion should be denied.

B. Transfer Of The Partially Tried Matter Or One In Which Key Issues Have Been Resolved Will Lead To Duplicative Expense and Undue Delay Over And Above That Incident To The Act.

Since there is no question as to Helen Motzenbecker's right to a builder's remedy, she would clearly produce lower income housing more quickly than in a case in which the review and mediation process must start anew.[13] Thus, the key to evaluating whether or not any particular delay accompanying transfer will be manifestly unjust should reasonably depend to

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[12] It is important to note that when this Court signed the "interim" order on November 20, 1984, this Court's declaratory relief procedure had not yet been formulated. By that procedure, the Borough might have obtained repose without the presence of a plaintiff. That procedure did not formally become available until January 3, 1985 when this Court decided the J.W. Field case. J.W. Field at 8. Thus, the Borough needed Plaintiff's presence, if only nominally, in order to maintain the Court's jurisdiction and obtain repose. In short, without Plaintiff's presence it was procedurally impossible for the Borough to obtain repose.

[13] This proposition assumes that this Court will remove the obstacles to Plaintiff's builder's remedy by denying Defendant's motions to vacate the builder's remedy and by granting Plaintiff's motion to prohibit condemnation of her track. If this Court should permit vacation and condemnation, housing will still be produced more quickly than if the case were transferred for the simple reason that the delays created by transfer exceed the delays created by a publicly produced housing project.

some degree upon how far along the case has progressed.[14] With regard to the instant case, the case is complete as to Helen Motzenbecker and housing production is close at hand.[15] In stark contrast, if this Court transfers the case, lower income

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[14] The legislature was undoubtedly aware of and likely intended some of the delays that are inherent in the administrative review process. It is thus unlikely that the legislature intended that the "manifest injustice" exception to transfer would result in the Court's retaining all cases. However, if a case has been largely resolved through settlement or litigation, the delays inherent in the Act are magnified and plainly result in a manifest injustice.

[15] A manifest injustice would also result in the event that this Court retained the case and did not declare the builder's remedy moratorium unconstitutional. Fair Housing Act, Section 28 imposes a moratorium on the courts' ability to award a builder's remedy. A builder's remedy is defined as

> a court imposed remedy for a litigant who is an individual or profit making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonuses which provide for the economic viability of a residential development by including housing which is not for low and moderate households.

Since the moratorium only applies to builder's remedies, as opposed to other inclusionary developments wherein the municipality has imposed a mandatory set aside, Section 28 creates an anamolous and harsh result. More specifically, although the court has the authority during the moratorium period to require the municipality to rezone parcels other than the builder/plaintiff's, the court does not have the authority during the moratorium period to require the municipality to rezone the builder/plaintiff's parcel. Thus, the entity responsible for creating the pressure on the municipality to comply is the entity that is punished. Moreover, landowners that made no efforts to pursue a rezoning, will reap the benefits thereof while at the same time, be excluded from the provisions of the

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housing will likely be delayed for many years.[16]

By denying a transfer, not only will this Court save the way for the implementation of Helen Motzenbecker's builder's remedy, but also this Court will be in a position to test the Borough's compliance package. Any defects can be identified and remedied so that the Borough's regulations promptly create the realistic opportunity for its full fair share.

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moratorium. Such a result is not only fundamentally unfair and thus violative of the due process clause, but also violates the constitutional guaranty to equal protection under the law.

[16] The Act gives the Council the ability to complete its mediation and review process between Bernardsville and Helen Motzenbecker as late as October 2, 1986 - over two years after Bernardsville consensually agreed to this Court's award of a builder's remedy to Plaintiff on February 9, 1984. Fair Housing Act, Section 19. The Borough will not be required to file its housing element pursuant to Fair Housing Act, Section 9.a, until January 1, 1987. Therefore, it is likely that the mediation process cannot realistically begin until the municipality has submitted its housing element. Consequently the Council is more likely to complete its mediation procedure by July 1, 1987 rather than October 2, 1986. If the mediation efforts fail to culminate in a settlement, the Act directs the Council to transfer the case to the Office of Administrative Law for proceedings before an administrative law judge. Fair Housing Act, Section 15.c. Although the Act requires the administrative law judge to complete a complete evidentiary hearing and to submit his findings to the Council within 90 days, the Act authorizes an extension of the 90 day period "for good cause shown". Fair Housing Act, Section 15.c. Moreover, the Act does not specify how long the Council will have to make a decision regarding whether to issue a substantive certification once it has received the recommendations of the administrative law judge. In fact, even after the issuance of the substantive certification, the municipality still has an additional forty-five days within which to adopt land use regulations to implement the housing element. Fair Housing Act, Section 14.b. Thus, the Act creates a substantial likelihood that there will be years of delay in the production of housing.

In addition to the unconscionable delay that would accompany transferring a completed case, the need to engage in additional proceedings before the Council will substantially intensify the expense of litigation. The Fair Housing Act conflicts so sharply with the fundamental underpinnings of Mount Laurel II that innumerable legal issues will inevitably arise, each of which will undoubtedly require extensive litigation.[17] To force Helen Motzenbecker to pay twice for what has already been an expensive lesson is unconscionable. The legislature could not have intended so harsh a result. This Court should not permit the Borough to continue the procedure indefinitely.[18]

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[17] Compare Mount Laurel II at 352 and AMG at 74 to Fair Housing Act, Section 4.j. (wherein the Act undermines the Court's interpretation of what constitutes the prospective need). Compare Countryside Properties v. Borough of Ringwood at 15-16 to Fair Housing Act, Section 7.c.(1) (wherein the Act again undermines any credit standard accepted by any court to date). Compare Mount Laurel II at 218-19 to Fair Housing Act, Section 7.c.(2)(b) and Section 23 (wherein the Act substantially dilutes the constitutional obligation established by Mount Laurel II through an established pattern defense and through a phasing provision). Compare Mount Laurel II at 263-64 and AMG at 70 to Fair Housing Act, Section 11.d (wherein the Act substantially reduces a municipality's obligation when that municipality seeks a reduced obligation based on lack of infrastructure).

[18] The law is well settled that if an overriding public interest exists calling for a prompt judicial decision, one need not exhaust his administrative remedies. N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); and Patrolman's Benev. Assoc. v. Montclair. 128 N.J. Super. 59, 64 (Ch. Div. 1974). In this case, as in any other Mount Laurel case, an overriding public interest calling for a prompt judicial decision clearly exists and would be unduly delayed were

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As the Court is well aware, a lengthy delay will encourage non-Mount Laurel development to flourish, which will, in turn, strain existing infrastructure and eliminate suitable lower income housing sites. The need for housing will be further exacerbated since no housing is presently being produced to satisfy that need.[19]

(continued from previous page)

this Court to grant Defendant's transfer motion. Mount Laurel II at 306-7.

The need for prompt, actual construction of lower income housing is part of the vary fabric of the constitutional obligation. It was precisely this sense of urgency that motivated the Supreme Court to develop innovative procedural devices to hasten the process and to ensure the early construction of lower income housing. Mount Laurel II at 293. In addition, the Supreme Court modified the traditional time of decision rule in the context of Mount Laurel litigation in order to expedite production of lower income housing. Mount Laurel II at 306-7. Finally, the Court guaranteed that the housing would be produced more quickly by expressly eliminating the exhaustion requirement as a prerequisite to bringing a Mount Laurel lawsuit:

> If a party is alleging that a municipality has not met its Mount Laurel obligation, a constitutional issue is presented that local administrative bodies have no authority to decide. Thus, it is entirely appropriate for a party claiming a Mount Laurel violation to bring its claim directly to court. See, e.g., Nolan v. Fitzpatrick, 9 N.J. 477 (1952) (holding that no exhaustion of administrative remedies is required where only a question of law is at issue).

[19] In this regard, it is important to note that the current litigation was brought on June 21, 1983. If through Mount Laurel II procedures, the actual construction of lower income housing does not begin until 1986, the years of delay will have been a substantial price to pay for the end of exclusionary land use policies in the Borough of Bernardsville. If through transfer, however, the production date is extended even further, the manifest injustice to the poor will be intolerable.

C. The Transfer Of The Case Would Cause A Manifest Injustice To Helen Motzenbecker Because A Transfer Would Force Helen Motzenbecker To Conduct A Futile Act.

The transfer would undeniably result in a manifest injustice to Helen Motzenbecker due to the futility of the available administrative process. Under the Act, neither the Council nor the administrative law judge appear to have any authority to grant a builder's remedy[20] such as has been obtained by Helen Motzenbecker in the current litigation. The Council's authority includes only the power to grant, deny or conditionally approve a municipality's housing element in

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[20] The lessons of history are clear. When a builder sues a municipality for its exclusionary zoning, the municipality is generally not grateful for the reminder that it has not satisfied its moral and legal obligation to maintain compliant ordinances. Rather, an exposed municipality typically resents the litigant that called the municipality's regulations to the Court's attention and, consequently, the municipality usually attempts, with great resolve, to prevent that builder from obtaining a rezoning. The psychological dynamics of the situation understandably lead to this result. Municipalities simply resent the infringement on their home rule represented by a builder's remedy. Therefore, if given a choice regarding how to comply once a builder has demonstrated to a Court that the municipality is exclusionary, the municipality would undoubtedly select sites other than the plaintiff's for a rezoning. It is precisely this phenomenon that lead to the ineffectiveness of Mount Laurel I in achieving any significant construction of lower income housing. That is, because a builder could succeed in litigation only to have other parcels rezoned, builders had little interest in spending the enormous time and money necessary to prosecute a Mount Laurel lawsuit.

To place Helen Motzenbecker in the position of a successful Mount Laurel I litigant after she has accepted the Supreme Court's Mount Laurel II invitation to bring a lawsuit in the quest of a builder's remedy, would plainly result in a manifest injustice. Mount Laurel II at 279-80, 309 n. 58.

response to a municipality's request for substantive certification. Section 14. Similarly, by the terms of the Act and by the traditional relationship between an administrative agency and an administrative law judge, the administrative law judge is empowered only to make recommended findings of facts and conclusions of law. Fair Housing Act, Section 15.c.; N.J.S.A. 52-14B et seq. To the extent that neither the administrative law judge nor the Council have any express authority to grant a builder's remedy, the specific remedy cannot be said to be "clearly available, clearly effective, and completely adequate to right the wrong complained of". Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super 59, 64 (Ch. Div. 1974). Inasmuch as an administrative procedure is futile unless the specific remedy sought is "clearly available," the review and mediation process afforded by the Act is definitionally futile.[21]

Finally, Defendant has openly and repeatedly attempted to thwart the implementation of Helen Motzenbecker's builder's remedy through the threat of condemnation and through motions

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[21] One of the primary goals of requiring exhaustion of administrative remedies is to prevent the need for resorting to the courts where an agency decision may satisfy the parties. City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979). This fundamental purpose of the exhaustion rule could never be satisfied since the Council apparently lacks the authority to award a builder's remedy. Rather than minimizing litigation, the Act merely postpones it. During the delay period, substantial costs are generated, reducing the likelihood that the builder will ever be able to provide lower income housing.

to vacate the builder's remedy and transfer the case. Under these circumstances, Helen Motzenbecker could not hope to achieve any possible relief in a procedure wherein Defendant decides how it will comply. The injustice under these circumstances could not be any more manifest.

To compound the injustice, the primary goal of the Act is to create alternatives to litigation through the establishment of a procedure involving negotiations. By successfully negotiating a settlement, the Borough has fulfilled the primary objective of the Act in precisely the manner the Act seeks to achieve its objective. In light of this fact, it is ironic indeed that now Defendant seeks to take advantage of the Act's review and mediation procedure.

Courtrooms have often echoed with the maxim that justice delayed is justice denied. It is precisely this sentiment that motivated our Supreme Court to state:

> Our warning to Mount Laurel-and to all other municipalities-that if they do 'not perform as we expect, further judicial action may be sought...,'' Id. at 192, will seem hollow indeed if the best we can do to satisfy the constitutional obligation is to issue orders, judgments and injunctions that assure never ending litigation but fail to assure constitutional vindication.

Mount Laurel II at 289-90 (emphasis added). In short, the Court was tired of the "paper, process, witnesses, trials and appeals." Mount Laurel II at 199. The Court wanted to see actual construction of lower income housing. Mount Laurel II

at 352. In light of these objectives and the facts of this case, the transfer will cause a manifest injustice to the poor by depriving them of the housing opportunities which exclusionary municipalities such as Bernardsville have denied them for so long.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that this Court deny the Borough of Bernardsville's motion to transfer this case to the Affordable Housing Council.

GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN
Attorneys for Plaintiff Helen Motzenbecker

By: 
Douglas K. Wolfson

DATED: October 8, 1985

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Plaintiff
HELEN MOTZENBECKER

vs.

Defendant
MAYOR AND COUNCIL OF BOROUGH OF BERNARDSVILLE and BOROUGH OF BERNARDSVILLE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN COUNTY

Docket No. L-37125-83

CIVIL ACTION

AFFIDAVIT OF HELEN MOTZENBECKER

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

HELEN MOTZENBECKER, of full age, being duly sworn according to law, upon her oath, deposes and says:

1. I am the owner of an approximately eight and one-half (8½) acre tract in the Borough of Bernardsville which was the subject of a complaint in the above captioned matter.

2. I purchased the property in question in 1970.

3. In November of 1978, I appeared informally before the Planning Board suggesting that the Planning Board revise its Master Plan and recommend to the Mayor and Council that the property in question be rezoned from half-acre residential zone to a zone that permits multiple family dwellings. The Planning Board rejected my request. The subsequent Master Plan revision did not alter the current treatment of the property in question.

4. Thereafter, on June 19, 1980, a planner employed by the Planning Board, John Rakos from Catlin Associates, recommended to the Planning Board that it revise the Master Plan and recommend to the Council that the property be rezoned to permit, as a conditional use, a senior citizen project, which could be developed at a density of 12 units per acre. See generally, Exhibit A. Again, despite the Planning Board planner's recommendations, the land was never rezoned as suggested.

5. In 1981, the Planning Board once again proposed to the Borough Council that the property be rezoned to permit a senior citizen project to be developed at a density of 12 units per acre. The Borough Council once again failed to act on the Planning Board's recommendation.

6. In November, 1982, I again sought to meet with the Planning Board in an effort to obtain a zone change that would permit the property in question to be developed for

senior citizen housing and other multi-family uses. My proposed project was to be financed through HUD and would have included a substantial number of low and moderate income housing units. Although the Planning Board met with me and my representatives, no further action was taken.

7. Between December 27, 1982 and February, 1983, I again approached the Planning Board seeking to obtain its support for a senior citizen, lower income housing project. In one of the Planning Board meetings, Mr. Hugh Fenwick, a Planning Board member and the head of the committee for Senior Citizen Housing, asked me, "Mrs. Motzenbecker, do you live in Bernardsville? Are you going to ruin Bernardsville for a buck?" Mr. Fenwick went on to say that it would be "over his dead body" that such housing be allowed in Bernardsville.

8. Shortly after January 20, 1983, when Mount Laurel II was decided by our Supreme Court, I reviewed the opinion in detail. I subsequently approached the Greenbaum firm seeking advice as to the potential development of the site in question in accordance with the Mount Laurel opinion.

9. On March 17, 1983, my attorneys wrote to the assistant administrative officer for the Borough of Bernardsville to propose a meeting with the Planning Board in order to discuss the potential development of the property for Mount Laurel housing. Only after it became clear that the Borough had no intention of permitting the site to be developed

for Mount Laurel purposes, that I instructed my attorneys to institute suit seeking a builder's remedy.

HELEN MOTZENBECKER

Sworn to and subscribed
before me this 7th day
of October, 1985.

Attorney at Law of the
State of N.J.

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ROBERT T. CATLIN, A
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JOHN J. RAKOS, A

MEMORANDUM

TO: Bernardsville Planning Board
FROM: Robert Catlin & Associates - John Rakos, Planning Consultant
SUBJECT: Senior Citizen Housing
DATE: June 19, 1980

Pursuant to your request, I have reviewed the suitability of Borough Tax Map Block #125, Lot #27 for the development of Senior Citizen Housing.

The site fronts on and is located west of North Finley Avenue and southeast of Morristown Road (Route 202) and is in the R-3 Residence District, which permits single-family residences with a minimum lot area of 20,000 square feet. The property generally slopes from northwest to southeast. The highest elevation is in the northwest corner of the property approximately 390 feet above sea level with the lowest elevation of approximately 340 feet above sea level in the southeast corner of the property. A stream generally parallels the entire southerly property line from the Conrail railroad right-of-way to and under North Finley Avenue. The property is presently undeveloped and predominantly wooded except for four existing single-family residences located along North Finley Avenue.

Directly across from the site and south of the site, along North Finley Avenue are single-family residences also located in the R-3 Residence District. In the C-1 District adjoining the site to the north there are a number of commercial establishments fronting on Route 202. Several office buildings, a bus company and a shopping center directly abut the northern boundary of the site while the Conrail right-of-way abuts the western boundary of the site.

Presently, the site is provided with potable water from the Commonwealth Water Company. The 1977 Bernardsville Comprehensive Master Plan Background Analysis Report indicated that, as of December 31, 1976, the Commonwealth Water Company supply in Bernardsville was being utilized at only 22 percent of system capacity, indicating sufficient room for further expansion.

EXHIBIT A

There is no sanitary sewer service to the site at the present, however, due to the relatively high intensity of residential uses the area of North Finley Avenue there is a primary need to expand sewer service to this area, as noted in the 1978 Master Plan. The expansion of the sewer system, as noted above, is crucial to the proposed utilization of the site for Senior Citizen Housing.

We find no other major obstacles or objections to utilizing this particular site for Senior Citizen Housing. Among the positive attributes of the site are its close proximity to shopping areas and public transportation on Route 202, and its location with regard to being a potentially suitable transitional use between the commercial uses on Route 202 and the moderate density residential uses on North Finley Avenue.

In the event the Borough wishes to adopt the necessary regulations and controls permitting Senior Citizen Housing, we suggest that the Planning Board first amend the Master Plan, in an appropriate fashion, which is a prerequisite under the provisions of the New Jersey Municipal Land Use Law. Provisions of the Master Plan may then be implemented by suitably amending the Development Regulations Ordinance. For the method to best accomplish this objective it is recommended that a new R-3A Zone District be established as shown on the accompanying illustration. This district should be designed to accommodate the same uses with the same required conditions as does the R-3 Zone District, provided, however, that it would also permit as a conditional use, housing development for elderly persons. The establishment of a new Zone District will limit the area of potential development for multi-family use, while the provision for a conditional use permit will afford maximum control over any such development for the Planning Board.

Pursuant to the above, we have prepared draft amendments to the Master Plan and Development Regulations Ordinance of the Borough of Bernardsville. These are enclosed for your consideration.

Please notify us of any questions or comments that you may have in connection with any of the above.

John Rakos

JR/sas

RESOLUTION OF MASTER PLAN AMENDMENT
BOROUGH OF BERNARDSVILLE
SOMERSET COUNTY, NEW JERSEY

WHEREAS, in accordance with Municipal Land Use Law (CH. 291, Laws of N.J. 1975) the Planning Board of the Borough of Bernardsville has made careful and comprehensive surveys and studies of present conditions and the prospects for future growth in the Borough of Bernardsville in the preparation of a Master Plan; and

WHEREAS, the Planning Board has published a report entitled "Master Plan Borough of Bernardsville, Somerset County, N.J." dated November, 1978, wherein are presented the objectives, assumptions, standards and principles upon which the Master Plan is based and including therein that portion of the Master Plan covering streets, parks, playgrounds and school sites, public land use and the intensity and pattern for future land uses in the Borough of Bernardsville; and

WHEREAS, the Planning Board has held a public hearing thereon as required by law, at which hearing all those desiring to be heard were afforded an opportunity to express their views thereon; and

WHEREAS, the Planning Board has, by unanimous vote on adopted said Plan as the Master Plan of the Borough of Bernardsville; and

WHEREAS, subsequent considerations and current needs have justified certain changes to be effected on said Master Plan; and

WHEREAS, said changes were presented by the Planning Board at a public hearing on , as required by law, at which hearing all those desiring to be heard were afforded an opportunity to express their view thereon; and

WHEREAS, the Planning Board has given due consideration to the comments, suggestions and petitions made before and during the public hearing;

NOW, THEREFORE, BE IT RESOLVED, that the Planning Board of the Borough of Bernardsville does hereby amend the Master Plan of the Borough of Bernardsville as prepared by Candeub Fleissig and Associates by supplementing the Land Use Plan Element with the addition of the following on page 16 of the Report as appropriate:

POLICIES AND PRINCIPLES.

To recognize the needs of those senior citizens who have lived in the Borough for years and have raised their families and who want to remain as residents but do not wish to maintain their large single-family residences.

PROPOSALS.

To make provisions for adequate and affordable housing for senior citizens in compact areas at densities not to exceed 12 dwelling units per acre.

IMPLEMENTATION.

It is recommended that the Zoning Ordinance be amended to permit Senior Citizens Housing developments at suitable locations as a conditional use.

NOTE: The location of the subject area should also be indicated on the Land Use Plan map as a conditional residential high density use by amending same.

FIRST DRAFT
June 18, 1980

AN ORDINANCE TO SUPPLEMENT AND AMEND THE BOROUGH OF BERNARDSVILLE DEVELOPMENT REGULATIONS ORDINANCE 1979, BEING ORDINANCE NO. 581, ADOPTED JANUARY 30, 1979.

BE IT ORDAINED, by the Mayor and Common Council of the Borough of Bernardsville, County of Somerset and State of New Jersey, as follows:

1. The aforesaid Ordinance No. 581 adopted January 30, 1979, as heretofore supplemented and amended, is further supplemented and amended as follows:

(a) Subsection 1-3.2 entitled "Definitions" is supplemented and amended by adding thereto (inappropriate alphabetical order) the following:

1-3.2 Definitions.

HOUSING FOR THE ELDERLY. A building or group of buildings designed to accommodate more than two dwelling units within a single structure and which is designed so that the group of dwelling units utilize such common facilities as pedestrian walks, parking and garage areas, open space, recreation areas and utility and service facilities wherein not less than 80 percent of the total number of dwelling units in a development qualify at all times as housing units for the elderly."

HOUSING UNIT FOR THE ELDERLY. A housing unit for the elderly shall be a single dwelling unit intended and designed to be occupied by a single individual 52 years of age or older; a married couple, at least one of whom is 52 years of age or older; two closely related persons united by blood or legal adoption when both persons are 52 years of age or older; one person under the age of 52, but over the age of 20, may reside in a dwelling unit with an elderly person or persons as permitted above, if the presence of said person is essential for the physical care or economic support of the elderly person or persons. Children may reside with a parent or parents as permitted above.

(b) Section 12-2.1 entitled "Zone Districts" is amended to read as follows:

12-2.1 Zone Districts. For the purpose of this Ordinance the Borough of Bernardsville is hereby divided into thirteen zone districts known as:

a. R-1 Residence District

b. R-1A Residence District

c. R-2 Residence District
d. R-3 Residence District
e. R-3A Residence District
f. R-4 Residence District
g. R-5 Residence District
h. R-8 Single-Family Attached Residence District
i. B-1 Business District
j. O-B Office Building District
k. C-1 Commercial District
l. I Industrial District
m. H-D Highway Development District

(c) Article 12 entitled "Zoning" is supplemented and amended by adding thereto a new Section 12-8A to read as follows:

12-8A R-3A RESIDENCE DISTRICT.

12-8A.1 Primary Intended Use. This zone district is designed for single family residential use but also permits any use as permitted and regulated in the R-1 Residence District, except that conditional uses shall be limited to:

a. Professional Uses
b. Institutional Uses
c. Public Utilities
d. Housing for the Elderly

12-8A.2 Prohibited Use. Any use other than those listed in 12-5.1 and 12-8A.1 is prohibited.

12-8A.3 Required Conditions. The following requirements must be complied with in the R-3A District: for uses other than conditional uses:

a. Height. No building shall exceed a maximum of two and one-half stories or 35 feet in height, whichever is the lesser.

b. Front Yard. There shall be a front yard of not less than 50 feet, except that where the existing buildings on the same side of the street and within 300 feet from each side line, exclusive of streets or private roads, form an irregular setback line, new buildings may conform to the average of such irregular setback lines, provided that no new building may project closer than 40 feet to the street or road property line nor need setback more than 50 feet from said property line. A less than required setback line

for existing principal building may be extended laterally along said line, provided that the front yard toward the street property line is not further encroached upon and that the side line requirements are observed.

c. Side Yards. There shall be two side yards, and no side yard shall be less than 15 feet, provided, however, that the aggregate width of the two side yards combined must equal at least 35 percent of the lot width at the building line. These requirements shall apply for a new building and for an alteration to an existing building.

d. Rear Yard. There shall be a rear yard of at least 50 feet. This requirement shall apply for a new building and for an alteration to an existing building.

e. Minimum Lot Area. There shall be a minimum lot area, as defined, of 20,000 square feet; the lot shape shall be such that the minimum area can be measured within 200 feet of the front lot line, or in the case of non-rectangular lots, within 200 foot radii from the front corners of the lot; no lot shall have a front lot line less than 50 feet in length.

f. Minimum Floor Area. Every dwelling house hereafter erected shall have a minimum floor area of 1,000 square feet.

(d) Section 12-19 entitled "Conditional Uses" is supplemented and amended by adding thereto a new Subsection 12-19.2(f) entitled "Housing for the Elderly" to read as follows:

f. Housing for the Elderly. No housing for the elderly, as defined in Article 1, shall be considered except in accordance with the following restrictions and conditions:

1. Minimum Lot Area. The site shall have a minimum lot area of 8 acres.

2. Density. The gross density for any development of housing for the elderly shall not exceed 12 dwelling units per acre. The maximum number of dwelling units for any project shall be determined by multiplying the total area of the tract in acres exclusive of any abutting public streets by 12. Any fractional number of units shall be deleted.

3. Height. No building shall exceed 2-1/2 stories or 35 feet in height, whichever is the lesser.

4. Setbacks. No building or structure shall be located closer than 50 feet to any property line.

5. Buffer Areas. The setback areas required in 12-19.2(f)(4) above shall be landscaped with plant material as approved by the Planning Board and shall not contain any building, structure or improvements other than access into the interior of the tract as approved by the Planning Board. Off-street parking is permitted within the setback required in paragraph 4 above provided said parking is not closer than 25 feet from any property line.

6. Off-Street Parking. At least one and one-half (1-1/2) off-street parking spaces are required for each dwelling unit.

7. Open Space. There shall be a minimum distance of 30 feet between all structures containing dwelling units.

8. Landscaping. A landscaping plan shall be submitted and be subject to review and approval by the Planning Board at the same time as the Site Plan. The landscaping plan will show in detail the location, size, and type of all plantings including lawns to be used on the site. All areas not used for buildings or off-street parking shall be included in the landscaped plan. All parking and service areas shall be so screened that said areas are shielded from residential areas adjacent to the site.

9. Access. The location and alignment of all ingress and egress streets and driveways shall be approved by the Planning Board to assure convenience and safety of traffic.

10. Lighting. Yard lighting shall be provided during the hours of darkness to provide illumination for the premises and all interior sidewalks, walkways and parking areas thereon. All wiring shall be laid underground and all lighting fixtures shall be arranged so that the direct source of light is not visible from any residential areas adjacent to the site.

11. Architecture and Construction. The architecture employed shall be aesthetically in keeping with the surrounding area and shall be subject to approval by the Planning Board. All buildings shall be constructed in accordance with the Building Code and shall comply with the following requirements:

(a) The exterior of each building wall of structures housing the elderly shall be wood, brick or stone facing, solid brick or stone, or some other acceptable durable material. Asbestos shingle and cinder or concrete block as exterior finishes are prohibited. The applicant shall submit to the Planning Board for review and approval, in

addition to any and all other documents required by any other Ordinance concerning Site Plan Review, floor plans, elevation drawings, color rendering and detailed finish schedules.

(b) The exterior of accessory structures shall harmonize architecturally with and be constructed of materials of a like charcter to those used in principal structures.

12. Utilities. Every dwelling unit must be connected to the public sanitary sewer and water systems as approved by the Borough Engineer. All utilities shall be installed underground. Every dwelling unit shall be serviced by a fire hydrant within 500 feet of said unit which hydrant shall be connected to a six inch main. If more than one fire hydrant is required, said hydrants shall be connected to an eight inch main.

13. Roads. All roads and driveways within the project shall be private roads constructed and maintained by the developer pursuant to specifications prepared by the Borough Engineer and subject to approval by the Planning Board.

14. Fees. At the time of filing an application for Site Plan Approval, the applicant will file with the Borough Clerk a fee of $75 per dwelling unit within the project. Said fees shall be used to defray the cost of processing said application. No part of the application fee is refundable. At such time as the Site Plan is approved by the Planning Board but prior to the issuance of a Building Permit, the applicant shall file with the Borough Clerk an inspection fee equal to or not less than 5 percent of the estimated costs of all improvements on site exclusive of the dwelling structures. Said fee shall be determined by the Borough Engineer and will be used to defray any engineering inspections made by the Borough. Any part of said fee that is not used as above outlined will be returned to the developer after approval by the Borough Council.

15. Easements. Any easements as required by the Planning Board, after review by the Borough Engineer, shall be shown on the Site Plan and said easements shall be given to the Borough at such time as said Site Plan is approved. Said easements may include but are not necessarily limited to utility lines, public improvements, and ingress and egress for emergency vehicles.

16. Guarantees. The developer shall furnish to the Borough as a condition of Site Plan Approval such guarantees, covenants, Master Deed or Builder's Agreement, which shall satisfy the requirements of the Planning Board for the construction and maintenance of common areas, landscaping, recreational areas,

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Plaintiff
HELEN MOTZENBECKER

vs.

Defendant
TOWN COUNCIL OF THE BOROUGH OF BERNARDSVILLE and THE BOROUGH OF BERNARDSVILLE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY/
SOMERSET COUNTY
Docket No. L-37125-83

CIVIL ACTION

MOUNT LAUREL II

PLAINTIFF'S REPLY BRIEF TO DEFENDANTS' OPPOSITION BRIEF IN RESPONSE TO PLAINTIFF'S MOTION TO PROHIBIT CONDEMNATION: AND PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO VACATE

DATED:

Douglas K. Wolfson
Of Counsel and on
the Brief

Jeffrey R. Surenian
On the Brief

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INDEX OF EXHIBITS

STATEMENT OF FACTS

The record is replete with examples of the Borough of Bernardsville [hereinafter "the Borough" or "Defendant"] actively consenting to this Court's award of a builder's remedy to Plaintiff. See Exhibit A, wherein the Borough stipulates that Plaintiff is entitled to a builder's remedy. See also Exhibit B, wherein the Borough adopts a resolution permitting Plaintiff to develop her property at a density of 9 units per acre. See also Exhibit C, wherein the Borough again consents to Plaintiff's builder's remedy. See also Exhibit D, wherein the Borough reveals that it does not question Plaintiff's right to a builder's remedy, but only the fair market value of the parcel. See also Exhibit E, wherein the Borough again acknowledges that the only issue remaining is the fair market value of the property "with the builder's remedy."

Having agreed that Plaintiff is entitled to a builder's remedy, Defendant now seeks to undo its settlement by moving to vacate the builder's remedy.

Although the Borough's consent and stipulation to Helen Motzenbecker's builder's remedy is dispositive of the Borough's motion to vacate, it is important to correct certain misimpressions created by Defendant's counterstatement of facts.

First, Defendant contends that

> "plaintiff, totally inconsistent with her prior negotiations state-

> ments, presently contends that the property's value has appreciated to a value in excess of $2,000,000.00."

Defendant's Brief at 3. This language is merely representative of a strain that runs throughout Defendant's brief: Defendant repeatedly insinuates that Plaintiff somehow defrauded the Defendant, the Master and the Court so as to (1) cause an overestimation of the value of the property and (2) cause Plaintiff to earn a windfall. Defendant's Brief at 23-24, 27.

This simply is not true. It was the Defendant and not the Plaintiff that suggested that the value of the property (after the remedy) exceeded $2,000,000.00. See Certification of J. Albert Mastro. More importantly, in contrast to Defendant, who submitted an appraisal to the master by the professional firm of Krauser, Welsh, Sorich and Cirz, Plaintiff never submitted such an appraisal.[1] Thus, the master was not beguiled by a Plaintiff misinforming him as to the value of the parcel. Rather, the master was estimating the value of the property based on Defendant's professional appraisal. See Report of Master attached to J. Albert Mastro certification. In addition, the master brought his own professional experience and expertise to bear when considering the value of the property.

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[1] Plaintiff's planner did suggest to the master that the value of the land prior to any rezoning was $603,250 as contrasted against the Defendant's appraiser's figure of $490,000. See Report of Master, attached to J. Albert Mastro certification.

In the final analysis, what is most apparent is that the Borough made a risk assessment based on the reports it had submitted to the master. The Borough first assessed the density the master was likely to deem appropriate for the Motzenbecker parcel. Thereafter, the Borough assessed the density the Court was likely to award in the context of litigation. Even had Plaintiff submitted an appraisal report, the master still would have been guided by his own expertise. Having made this risk assessment, the Borough obviously concluded that it would be far better served by settling than by litigating the appropriate density for the property.

Second, Defendant repeatedly insists that Helen Motzenbecker is standing in the way of the Borough's compliance efforts. Witness the following statement:

> "the inconsistent and unconscionable amount now sought by plaintiff as a result of her builder's remedy award, would so burden defendants that the entire compliance plan would be threatened."

Defendant's Brief at 3. See also Defendant's Brief at 14, 19, and 22-23.

It is the Borough that is interfering with Helen Motzenbecker's builder's remedy - not Helen Motzenbecker interfering with the Borough's compliance efforts.

As proof of this proposition, it is important to recapitulate the undisputed sequence of events. Prior to the publication of Mount Laurel II, Plaintiff repeatedly sought to

develop her property with a lower income housing project. The municipality rejected her offers and chose to do nothing to comply. When Plaintiff subsequently brought a Mount Laurel action, the municipality sought to resolve the matter with her, but expressly chose to relinquish the opportunity to obtain repose. Thus, the Borough consciously chose to remain vulnerable to subsequent Mount Laurel actions. Only after Plaintiff obtained her remedy did the municipality seek repose. See Exhibit F, October 25, 1984 letter. Indeed, the Borough expressly consented to the form and entry of an order which permitted the Borough to pursue repose providing that

> "...if for any reason, the municipality is unable to satisfy the Court that it has fully complied with its Mount Laurel obligations such failure shall neither affect the terms and provisions of this Order nor Helen Motzenbecker's right to a builder's remedy awarded hereby."

Exhibit C, November 20, 1984 Order, paragraph 10 (emphasis added).

Since the builder's remedy was in place when the Borough first decided to seek repose, the Borough's decision to condemn Plaintiff's land after the Borough's consent to a builder's remedy constitutes a blatant interference with the Plaintiff's builder's remedy.[2] Surely if the Borough had taken

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[2] To the extent the Borough argues that is must acquire Plaintiff's site in order to achieve compliance, it is significant that Plaintiff's site is one of nine sites slated for a

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its obligation seriously when the Supreme Court promulgated the Mount Laurel doctrine ten years ago in 1975, and if the Borough was so enamored with the idea of condemning the Motzenbecker parcel to comply, the Borough could have attempted to condemn the tract long ago. Instead, the Borough permitted Helen Motzenbecker to expend the considerable time and resources required in the arduous Mount Laurel procedure. With Plaintiff finally on the verge of obtaining the fruits of her labor, Bernardsville seeks to deny her the economic benefits and profits which are to be derived from the builder's remedy - actual construction.

Given the historical attitude of this municipality, this Court ought to reject efforts to preclude this Plaintiff from proceeding with implementing the builder's remedy awarded over 18 months ago in February, 1984. If the builder's remedy is to ever create lower income housing opportunities, Plaintiff must have this Court's protection now and throughout the approval process.

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possible condemnation. Thus, if this court permits condemnation for compliance purposes, the Borough could fashion a far more legitimate compliance package by promptly acquiring other parcels already earmarked for Mount Laurel purposes and by assisting in, rather than obstructing the development of Plaintiff's parcel through condemnation. This analysis further demonstrates that Helen Motzenbecker is not standing in the way of the Borough's compliance efforts.

LEGAL ARGUMENT

I. THIS COURT SHOULD PROHIBIT THE BOROUGH FROM CONDEMNING THE MOTZENBECKER PARCEL

A. The Use of Eminent Domain For Compliance Purposes Is Unavailable To A Municipality

In Plaintiff's Brief in Support of its Motion to prohibit the condemnation of a builder's remedy parcel, Plaintiff argued, inter alia, that this Court should not permit condemnation to be utilized as a compliance mechanism because (1) timeliness is part of the very fabric of the Mount Laurel doctrine and because (2) the housing that will be provided through condemnation will take so much longer to produce than if Plaintiff were permitted to implement the builder's remedy consensually awarded on February 9, 1984.[3]

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[3] Plaintiff further argued that if the site proposed for condemnation is the subject of a builder's remedy, then the Court should be even more unwilling to permit the municipality to condemn because (1) such a condemnation would undermine the builder's remedy which should be sacrosanct and (2) it is unfair to force the landowner to engage in still further litigation.

In addition to those arguments, Plaintiff relies on the brief submitted by Princeton Ridge, Inc., in the case of Calton Homes, Inc. v. Township of Princeton, Docket Nos. L-019451-84P.W. and L-040335-84P.W. The brief was submitted in support of Princeton Ridge's motion for summary judgment invalidating Princeton Township's "Affordable Housing Ordinance." Essentially, the Princeton Ridge Brief points out that a municipality may only exercise the right of eminent domain for Mount Laurel purposes if there is a specific delegation of authority for the use of eminent domain for such purposes. See Exhibit G. Princeton Ridge Brief at 133-152 annexed hereto and made a part hereof. The Brief reveals that nowhere has the authority to utilize eminent domain for Mount Laurel purposes been delegated to a municipality.

Additional policy considerations also compel the conclusion that the power of eminent domain may not be exercised to acquire the Motzenbecker tract. If this Court were to permit the Borough to condemn the Motzenbecker tract, that conduct would so severely diminish the value of the builder's remedy that it would jeopardize the very purpose of its raison d'etre.

The builder's remedy, when achieved, is comprised of at least three major components:

> (1) The raw value of the land before the builder's remedy.
>
> (2) The increase in the land's value attributable to the increased density accompanying the remedy.
>
> (3) The profit derived from the development and sale of the actual housing units.

Arguably, in a condemnation proceeding, a condemnee might be entitled to compensation reflecting only the increased value of the land (Components #1 and #2). However, such an award would not compensate Plaintiff for the third component - the profit derived from actually constructing and selling the project.[4]

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[4] This, of course, could be substantial. Indeed, if Plaintiff were to sell the 51 market units at $200,000 per unit and if Plaintiff would have been able to earn 15% of the total sale price, the value of the third component alone would be $1,530,000 (51 x $200,000 x .15).

In fact the value of this third component was clearly one of the cornerstones of the builder's remedy concept. The

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The Borough bound itself in accordance with the Stipulation of Settlement. (Exhibit B) Plaintiff was awarded a builder's remedy. Depriving Plaintiff of the third component violates the covenant the Borough made in acceding to the builder's remedy and promising not to interfere with its implementation. Moreover, Mount Laurel II sought to entice plaintiffs by making a remedy available to builders, who are not interested in the limited profits that may be achieved as a result of a Mount Laurel rezoning, but rather, are enticed by the very thing that has apparently offended the Borough's sense of fairness - the potentially large profits that flow from the development of the parcel. Condemnation should be prohibited under these facts because of the inequity that would clearly result from precluding the valid expectations of builder's profits.

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Supreme Court repeatedly emphasized the need to insure a builder's profit, sufficient to create an incentive to file suit in the first instance. Mount Laurel II at 279 n. 37. Cf. Mount Laurel II at 261 and 268. Moreover, it is clear that this "profit" element is the key component in the value of the remedy, as evidenced by multi-million dollar proposals presently being considered by Plaintiff from bona fide builders and joint venturers. See Affidavit of Helen Motzenbecker.

B. A Court Should Not Permit An Untrustworthy Municipality To Use Eminent Domain Even If A Municipality May Otherwise Condemn For Mount Laurel Purposes.

Even were this Court to conclude that a municipality may properly rely on condemnation as its exclusive compliance mechanism, this Court should prohibit the use of the condemnation in the instant case because, in light of the Borough's past conduct, the Borough cannot be trusted to deliver the lower income housing it promises through the use of condemnation.

In Allan-Deane Corp. v. Township of Bedminster, Docket Nos. L-36896-70P.W. and L-28061-71P.W. (Law Div., May 1, 1985) (unreported), this Court clarified the standard to be used in evaluating whether a "realistic opportunity," sufficient to pass constitutional muster, had been created. See generally, Allan Deane at 12-16.

Bedminster, however, relied primarily on mandatory set asides as the key component to its compliance package. Bernardsville, on the other hand, has totally precluded that option in its compliance proposals, thus prompting the need for additional standards. Plaintiff respectfully suggests the following standards are appropriate for evaluating whether condemnation will produce the "realistic opportunity" for the construction of lower income housing:

> (1) The municipality must demonstrate by clear and convincing evidence that the parcels selected

> for condemnation are suitable for the specific density contemplated and are in clearly suitable locations from a planning and environmental standpoint.
>
> (2) If the municipality intends to develop the land itself, then the municipality must demonstrate to the court that it has committed adequate resources. If the municipality intends to develop the land in conjunction with another public or private entity, then the court should be adequately assured that the coventuror has also committed adequate resources.
>
> (3) The court must be assured that no intangible factors interfere with the creation of a realistic opportunity.[5]

As to the second element, it is entirely evident that the Borough has provided insufficient dollars to fund its compliance package. Indeed, the fair market value of this Plaintiff's property will itself utilize approximately two-thirds of the sum set aside by the Borough for compliance purposes. As proof of this proposition, the Borough has set aside $6,100,000 for its Mount Laurel obligation. See Exhibit G to Master's Second Report. Helen Motzenbecker is anticipating a

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[5] The need to determine whether or not a municipality has committed "adequate" funds for purposes of condemnation itself establishes the folly of utilizing condemnation as a compliance tool. Because such an evaluation would require the Court to essentially determine the fair market value of each parcel of land targeted for acquisition (and this Court will have no other way of knowing whether a realistic opportunity has in fact been created), it is entirely likely that the court will be impossibly burdened with a substantially complete condemnation trial for each parcel.

profit of 3.8 million dollars. See Affidavit of Helen Motzenbecker.

With regard to intangible factors, the court must be especially assured that a Borough that promises it will condemn adequate parcels by 1987 will in fact do that which it has promised. The need for some security is particularly acute under the Borough's selected mode of compliance. With a set aside mechanism, the court often has before it substantial evidence that the affected landowners will willingly and profitably develop the property in accordance with the Mount Laurel rezoning. By way of contrast, with a condemnation, the Court only has the promise of the municipality that it will take certain actions at some subsequent time.

This creates a series of problems. First, nothing happens as to the actual production of lower income housing until the municipality acts and nothing prevents the municipality from acting at the latest possible date, which in the case of Bernardsville is December 31, 1987. If the municipality does act, but acts inappropriately, no entity has the incentive to challenge the municipality's misconduct because the municipality would have repose at the point of any challenge. Even if such a plaintiff were to exist and even if the court were to retain jurisdiction to hear such a complaint, the condemnation compliance mechanism would result in precisely what Mount Laurel II sought to avoid - more litigation and less housing.

Moreover, each parcel so condemned can spawn its own litigation as to each of the statutory prerequisites.[6]

The Borough has also hinted at its future conduct by the significant delays which have stalled its compliance. On November 20, 1984, the Court ordered the Borough to submit a compliance package by February 20, 1985. Six months after the February 20 deadline for compliance, the Borough had still not satisfied its constitutional obligation.[7]

In light of these facts, it is obvious that the longer the municipality is given to actually comply, the longer it will be before the requisite number of lower income units are

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6 Under N.J.S.A. 20-1 et seq., a municipal exercise of its power of Eminent Domain may be challenged under a variety of procedural and subtantive theories, e.g., that the taking was not for a public purpose, or was in excess of the public need. Moreover, each property owner will undoubtedly litigate the compensation sought to be deposited into court in conjunction with the filing of the declaration of taking. Thus, a substantial likelihood exists that funds in excess of that "committed" would be needed in the future. What guarantees or assurances can be provided to insure that the compliance program will not be bankrupted at some future date, or that the municipal resolve (both financial and political) to complete and operate Mount Laurel projects will not have waned? To pose the question is to establish the serious flaws inherent in utilizing the condemnation power as the sole exclusive mechanism to achieve compliance.

7 Similarly, in the Spring of 1985 this Court specifically directed the Borough to condemn the Motzenbecker tract "lickety-split" if that is what the Borough intended as part of its compliance. To date, no offer has been made by the municipality regarding the acquisition of the site nor have any condemnation proceedings been instituted. Thus, the Borough has ignored the Court's directive and maintained the cloud of condemnation over Plaintiff's head.

actually produced. Given the historical conduct of the municipal defendant, the Court should not entrust the Borough with creating the lower income housing opportunities it promises - there are simply too many pitfalls and too many opportunities to fail in its essential purpose.

C. Defendant Has Failed To Demonstrate Why This Court Should Permit The Condemnation Of Plaintiff's Parcel.

Finally, Defendant raises several arguments in its Brief which require attention. Defendant argues that "plaintiff's present motion is brought in an improper forum." Defendant's Brief at 6. Essentially, Defendant contends that since Plaintiff is challenging the Borough's use of condemnation, the proper forum to challenge the Borough is Somerset County. Furthermore, Defendant suggests that Plaintiff should not even have the right to challenge the use of condemnation in Somerset County until Defendant instituted a condemnation proceeding.

This argument is unpersuasive. The legal questions raised by Plaintiff's motion to prohibit the Borough from condemning its parcel are twofold:

> (1) Whether condemnation is a legitimate means of complying with Mount Laurel II?[8]

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[8] By relying so heavily on condemnation to satisfy its constitutional obligation, the Borough itself has also forced this Court to resolve the legitimacy of condemnation as a compliance mechanism.

(2) Whether a court should permit the condemnation of a parcel which is the subject of a builder's remedy, even if the court would otherwise permit the use of condemnation as a compliance mechanism?

In addition, Plaintiff's brief raises a question as to Paragraph 4 of the Court's Order of November 20, 1984 in which this Court directs the Borough not to "interfere" with the implementation of plaintiff's builder's remedy. Exhibit C. Thus, a factual issue is raised as to whether the proposed condemnation constitutes the type of interference which this Court intended to prohibit? In light of the distinct Mount Laurel nature of the legal and factual questions raised by Plaintiff's brief, there can be no question that this Court provides the only appropriate forum to resolve these issues.

Defendant also argues that Plaintiff should not be permitted to challenge the Borough's proposed condemnation of its parcel until the Borough actually institutes condemnation proceedings. Thus, Plaintiff would be totally stymied until the Borough decided to act and the Borough would not be required to act until Decmeber 31, 1987 - three years after the award of the builder's remedy. In this three year period, Plaintiff could have completely constructed the project and lower income households could have occupied the lower income units.[9]

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9 Moreover, Plaintiff would suffer severe financial prejudice. Were the Borough to condemn Plaintiff's parcel, it would

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The mere suggestion that Plaintiff could be prohibited from challenging the condemnation in this forum reveals in stark fashion the Borough's transparent objective - delaying the production of lower income housing.

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be forced to deposit its estimate of fair market value into Court which would earn interest and could be drawn out on a proper application. Under the Borough's suggested mode of compliance, the Borough need not act on this or any other parcel, thus depriving the landowner, of any reasonable use of the property and severely diminishing the value of those parcels. Compare, N.J.S.A. 40:55D-44, precluding a muncipality from "reserving" designated areas for future public use absent payment of just compensation for the temporary deprivation of use. See also, Lomarch v. Mayor and Common Council of City of Engelwood, 51 N.J. 108 (1968). Cf. Washington Market Enterprises v. Trenton, 68 N.J. (1975) (A declaration of blight followed by a decision not to condemn creates a compensable taking).

II. THIS COURT SHOULD NOT VACATE HELEN MOTZENBECKER'S BUILDER'S REMEDY.

A. Having Consented To A Settlement In Which Plaintiff Was Awarded A Builder's Remedy, There Is No Basis For The Borough to Renege.

As demonstrated by Exhibits A through E, the Borough has repeatedly expressed its consent to the award of a builder's remedy to Helen Motzenbecker. Undoing that settlement[10] at this late date would fly in the face of (1) an important policy in our state to uphold settlements, and (2) Mount Laurel II, which similarly seeks to promote settlements.[11]

As to Mount Laurel II, the Supreme Court asserted that one of the bases for its decision was to encourage "voluntary compliance." Mount Laurel II at 214. See also J.W. Field

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[10] Under New Jersey law, stipulations or representations between counsel are deemed fully binding and enforceable. E.g., State v. Atlantic City Electric Co., 23 N.J. 259, 264 (1957); City of Jersey City v. Reality Transfer Co., 129 N.J. Super. 570, 573 (App. Div. 1974), aff'd 67 N.J. 104 (1974); Carlsen v. Carlsen, 49 N.J. Super. 130, 137 (App. Div. 1958). Accord, Philadelphia Welfare Rights Org'n. v. Shapp, 682 F.2d 1114 (3d Cir. 1979), cert. den., 444 U.S. 1026 (1980), stating that

> where defendants made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment, their burden to obtain relief from that judgment is even more formidable then if they had litigated and lost.

[11] To the extent Defendant relies on the Fair Housing Act, it is significant that the Act also expressly attempts to promote settlements by creating an alternative to litigation. Fair Housing Act, Section 3.

Company Inc. v. Franklin Township, Docket No. L-6583-84 P.W. at 8-12 (unreported). This emphasis on voluntary compliance is consistent with the Court's desire to minimize litigation and maximize the actual construction of lower income housing. Mount Laurel II at 199, 342.

As to the policy of our state regarding settlement, our Courts have repeatedly emphasized that settlement is preferable to litigation and therefore have gone to great lengths to protect settlements. Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974); Dodd v. Copeland, 99 N.J. Super. 48 (App. Div. 1968) affirmed 52 N.J. 537; Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div. 1961); Iskander v. Columbia Cement Co., Inc., 192 N.J. Super. 114 (Law Div. 1983); Deblon v. Beaton, 103 N.J. Super. 345 (Law Div. 1968); Clarke v. Brown, 101 N.J. Super. 401 (Law Div. 1968); and Liquore v. Allstate Ins. Co., 76 N.J. Super. 204 (Ch. Div. 1962).

In light of the importance of settlement in New Jersey law generally and in Mount Laurel II specifically, this Court should categorically reject the Borough's belated and ill-advanced attempt to up-end the settlement it reached with this plaintiff.

Defendant is not only seeking to renege on its agreement, but it is asking this Court to vacate its prior order. A motion to vacate a judgment or order is within the discretion of the trial court guided by equitable principles,

Hodgson v. Applegate, 31 N.J. 29, 37 (1959); however, the very essence of the rule is that such relief should be afforded only in exceptional situations in order to avoid an unjust or oppressive ruling. Id. at 41. The rule permitting vacation of orders or judgments "is designed to afford a remedy in rare situations in which for some equitable reason the judgment or order pronounced by a competent court should not be enforced." Greenberg v. Owens, 31 N.J. 402, 405 (1960). See Sec'y of State v. GPAK Corp., 95 N.J. Super. 82, 92 (App. Div. 1967).

The Supreme Court in Hodgson, supra, at 43 also recognized that:

> "The principle of finality of judgments is one of repose. It dictates that litigation must eventually be ended and that at some point the prevailing party be allowed to rely confidentially on the inviolability of his judgment."

Accord, West Jersey Title, etc., Co. v. Industrial Trust Co., 27 N.J. 144, 150 (1958).

Finally, it is significant that throughout Defendant's brief, Defendant failed to mention Rule 4:50-1. An examination of this rule reveals that Defendant's failure to site the applicable rule arises from the total inapplicability of any of the justifications for the vacation of a judgment. Moreover, a motion to vacate must be made within a "reasonable time." Rule 4:50-2. Surely a stipulation granting a builder's remedy signed by this Court on February 9, 1984, renders Defendant's

motion out of time. Therefore, this Court should enforce that which it awarded long ago.

B. Even If The Borough Had Not Settled, The Facts Reveal That Plaintiff Clearly Would Have Been Entitled To A Builder's Remedy Had The Matter Been Litigated.

This Court has repeatedly spelled out the elements for the builder's remedy. In Orgo Farms & Greenhouses v. Township of Colts Neck, 192 N.J. Super. 599, 603 (Law Div., October 7, 1983), this Court stated:

> Our Supreme Court in Mount Laurel II discussed the guidelines by which the trial court can determine if a builder's remedy is appropriate. (at 279-80) I find that they can be categorized into three elements and I shall hereafter refer to them as the first, second and third element of the builder's remedy.
>
> 1. The developer must succeed in litigation, that is, demonstrate that the zoning ordinance fails to comply with Mount Laurel II.
>
> 2. The developer must propose a substantial amount of lower income housing as defined in the opinion.
>
> 3. The impact of the proposal on the environment or other substantial planning concerns must not be clearly contrary to sound land use planning.

See also AMG v. Warren Township, Docket Nos. L-23277-80PW and L-67820-80PW (Law Div., July 16, 1984) (unreported) at 68; J.W. Field Company, Inc. v. Township of Franklin, Docket No. L-6583-84P.W. at 14 (Law Div., January 3, 1985).

Defendant demonstrates throughout its brief that all three elements of the builder's remedy were satisfied.

As conclusive proof of the fact that the Borough was exclusionary when Plaintiff filed suit on June 21, 1983, the Borough has submitted a compliance package to satisfy a fair share of 178. To date, Defendant does not pretend that the fair share has yet been satisfied. Indeed, Defendant notes

> "what defendants stipulated was that their zoning ordinance did not fulfill Mount Laurel II obligations or meet its standards - hardly a surprise to anyone. Disposition of the validity of defendants' ordinance could have been on motion. Why litigate what is obvious to the world. . ."

Defendant's Brief at 15. Having conceded that the municipality's regulations were blatantly exclusionary, Defendant apparently is suggesting that the extend to which the Borough was exclusionary has rendered Plaintiff's burden as to the first element so easy that the Plaintiff should not be deemed "successful". If Defendant's rule were adopted, the more exclusionary the municipality, the more difficult it would become for a plaintiff to qualify as "successful." Mount Laurel II hardly supports the rewarding of exclusionary practices in such a fashion. Cf. Mount Laurel II at 256.

As to the second element of the builder's remedy, there can be no suggestion that the project does not provide a "substantial" amount of lower income housing. Indeed, in light

of the February 9, 1984 stipulation and the November 20, 1984 order, both Defendant and this Court agree that a 20% set aside satisfies the "substantial" requirement.

Finally, as conclusive proof of the suitability of Plaintiff's parcel, the Borough itself now proposes developing the parcel at a density of 9 units per acre. Surely, if Defendant would develop the parcel of such a density, Defendant should not now be heard to suggest that such a density is unsuitable.

The above analysis of each element of the builder's remedy reveals that the Borough wisely chose to settle rather than litigate with this plaintiff. Had the Borough selected a litigation route, certainly it would have lost, and its fair share number would undoubtedly have been significantly higher. Having settled, it is entirely inappropriate for the Borough to conduct itself in this manner.

C. Defendant's Arguments To Vacate The Builder's Remedy Clearly Fail To Justify The Vacation Sought.

1. The Moratorium On A Builder's Remedy Provided By The Fair Housing Act, Section 28 Does Not In Any Fashion Justify The Vacation Of The Builder's Remedy In This Case.

As this Court is well aware, Fair Housing Act, Section 28 seeks to impose a moratorium on the award of a builder's remedy in all cases filed after January 20, 1983 unless a non-appealable builder's remedy had already been awarded. Defendant would have this Court believe that the moratorium

provides a basis for this Court to totally eliminate the builder's remedy in all cases. Such a proposition is plainly incorrect. First, the moratorium is, by definition, temporary. Therefore, rather than removing the builder's remedy as a means for the Court to ensure vindication of the constitutional right, the Act only prevents the Court from issuing a builder's remedy for a specified period of time.

Moreover, as Defendant concedes, "the Fair Housing Act does not seek to vitiate a final judgment, one where a builder's remedy has been awarded against a municipality which promulgated a constitutionally defective zoning ordinance." Defendant's Brief at 13. Clearly the Court has awarded a builder's remedy to a municipality that has promulgated a constitutionally defective zoning ordinance in the instant case. To hold otherwise would be to ignore the fact that Defendant is currently seeking to persuade this Court to adopt a compliance package to rectify an admittedly defective ordinance.

Defendant repeatedly argues that Plaintiff is not protected by the legislative exception to the moratorium since her builder's remedy was granted via a "stipulation of partial settlement" and an "interim order." The argument is without merit.

Helen Motzenbecker instituted suit seeking a builder's remedy and obtained the relief sought. There was and is

nothing left of her litigation. As the Borough and the Court are aware, the stipulation and order were written to provide the Borough with an option to seek repose if at some point it had a change of heart and decided to admit non-compliance and to seek a judgment of repose. See Exhibit F, in which the Borough admits to a change of heart, and thereby explains why the Order of November 20, 1984 was not termed a final judgment. Plaintiff's accession to Defendant's request was entirely reasonable and cannot now be used against Plaintiff. Indeed, it is inappropriate, if not unseemly, for Defendant to now seek to capitalize on Plaintiff's accommodation (even assuming it was necessary).

Defendant itself admits that the legislation must be defined in terms of its history and that the moratorium provision ultimately adopted resulted from the Govenor's conditional veto. In that veto, the Govenor expressly sought to render the moratorium "more" constitutional by limiting its scope to builder's remedies awarded after the effective date of the Act. Defendant's Brief at 12-13. It cannot seriously be suggested that the Govenor intended to undo a settlement made on February 9, 1984 just because a municipality had not at that time also obtained repose. Aside from the patent unfairness to the plaintiff, no purpose of the Act would be served by any such requirement.[12]

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[12] Even if the moratorium provided a basis to eliminate Plaintiff's builder's remedy and even if this Court were to

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2. This Court Should Reject Defendant's Argument That The Time Of Decision Rule Justifies Vacation Of The Builder's Remedy.

Although not entirely clear, Defendant is apparently arguing that this Court should apply the Fair Housing Act to the instant case because the time of decision rule mandates that a Court apply the law in effect at the time of its decision.

Again, Defendant seeks to obfuscate the obvious - that the decision to award a builder's remedy was made with Defendant's consent in February, 1984. To suggest that now the Court should apply law created over a year after its decision is ludicrous.

To the extent that Defendant is, in fact, arguing that the Borough has revised its regulations to satisfy its constitutional obligation and that this Court should consider the revised compliance regulations, this Court has already disposed of this issue fully and comprehensively. See Exhibit I (Transcript from Orgo Farms v. Colts Neck where Court rejects time of decision argument).

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construe Helen Motzenbecker's award as less than final, this Court ought still not undo the settlement awarding the builder's remedy because the moratorium provision is patently unconstitutional. Rather than duplicating the analysis demonstrating why the moratorium is unconstitutional, Plaintiff hereby incorporates the legal arguments contained in the Brief of Guilet F. Hirsch, Esq., dated August 8, 1985, a copy of which is attached hereto as Exhibit H.

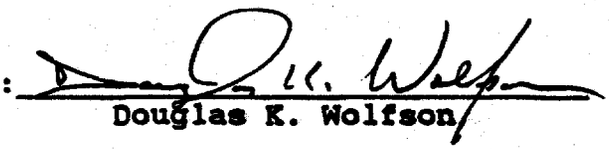
To the extent that Defendant is suggesting that the Borough should have a grace period following the publication of Mount Laurel II on January 20, 1983 to revise its regulations to satisfy the Mount Laurel II mandate, this Court has similarly disposed of this issue as well, in the case of Pizzo v. Branchburg, wherein the Court rejected the Township's argument that it should be given a grace period free from builder's remedy actions, in which to comply.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that this Court grant Plaintiff's motion to prohibit condemnation of her parcel and that this Court deny Defendant's motion to vacate Plaintiff's builder's remedy.

Respectfully submitted,

GREENBAUM, GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN

By: 
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Dated: September 6, 1985

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HELEN MOTZENBECKER

vs.

Defendant

TOWN COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY/
SOMMERSET COUNTY

Docket No. L-37125-83

CIVIL ACTION

MOUNT LAUREL II

APPENDIX TO PLAINTIFF'S REPLY BRIEF

GREENBAUM, ROWE, SMITH, RAVIN,
DAVIS & BERGSTEIN
Attorneys for Plaintiff
Helen Motzenbecker

INDEX OF EXHIBITS

J. ALBERT MASTRO
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924
(201) 766-2720
ATTORNEY FOR Defendant

Plaintiff
HELEN MOTZENBECKER,

vs.

Defendant
MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH BERNARDSVILLE,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

Docket No. L-37125-83

CIVIL ACTION
(Mt. Laurell II)
STIPULATION OF PARTIAL SETTLEMENT

This matter having been opened to the Court on the application of the parties hereto (J. Albert Mastro, Esq., appearing on behalf of the defendants, Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville, and Douglas K. Wolfson, Esq., appearing on behalf of the plaintiff, Helen Motzenbecker), and it apppearing that the parties hereto have reached agreement regarding certain aspects of this matter, and it appearing that the parties have consented to the within stipulation of settlement, they do hereby stipulate and agree, subject to the approval of the Court, as follows:

1. In accordance with the holding of Mt. Laurel II, the parties hereto agree that the plaintiff, Helen Motzenbecker, be and is hereby awarded a builder's remedy which will permit her to develop the property specified in the Complaint in a manner to be approved by the Court to include a substantial percentage of low and moderate income housing free from the constraints of the present zoning ordinance and zoning maps.

2. George M. Raymond is hereby appointed special master to assist the parties and the Court in formulating, planning, designing and negotiating a particular builder's remedy that is both appropriate and feasible for the property in question; or, if the parties are unable to reach an agreement in this regard, to make recommendations to the Court and to offer testimony relative to such builder's remedy, in the context of a trial limited to resolving the issue of the precise builder's remedy to be awarded plaintiff in this action. The special master shall commence his duties at such time as the parties request his participation or the Court on its own motion so determines.

3. The award of a builder's remedy to plaintiff in this action does not constitute an admission of non-compliance with the requirements of Mt. Laurel II for the purposes of any other Mt. Laurel litigation now pending, or hereinafter filed against the Borough of Bernardsville and is, for the purposes of any other such litigation, without prejudice to the Borough of Bernardsville.

4. The award of the builder's remedy to the plaintiff, Helen Motzenbecker, and its implementation in this case does not constitute an "order of compliance" as described in Mt. Laurel II, and does not afford the defendant, Borough of Bernardsville, any repose from other Mt. Laurel litigation which may be now pending, or hereinafter filed against it, unless defendant elects to modify

its development regulations ordinance which the Court determines fulfills its Mt. Laurel obligations.

5. The parties will hereafter meet and determine the parameters within which the special master shall act in formulating and recommending a builder's remedy for the property in question.

6. The special master will complete his task of assisting the parties and the Court in formulating and negotiating a feasible and appropriate builder's remedy for the property in question within a time period to be established and approved by the Court.

7. Compensation of the special master shall be the joint responsibility of the plaintiff and the defendant, each party being required to pay one-half of the fees charged by the master for his assistance in formulating, planning, designing, and negotiating a feasible and appropriate builder's remedy for the property in question. To the extent that the special master is requested by either party to perform any studies or activities other than those contemplated in connection with the formulation and implementation of a builder's remedy, such as revisions to the zoning ordinance of the Borough of Bernardsville, calculations of the regional need for low and moderate income housing, or calculation of a fair share allocation of low and moderate income housing, compensation for such additional activities shall be the sole responsibility of the party making such request in writing.

8. After the special master has fulfilled his responsibilities and has made his recommedations to the parties and to the Court, a case management conference will be scheduled by the Court. If no agreement regarding the builder's remedy has been reached, a pretrial and trial date will be assigned by the Court

and the matter will proceed to trial on the issue of the builder's remedy only, and not as to the compliance with Mt. Laurel II.

DATED: January 31, 1984

J. ALBERT MASTRO, ESQ.
Attorney for Defendants,
Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville

GREENBAUM, GREENBAUM, ROWE, SMITH, BERGSTEIN, YOHALEM & BRUCK
Attorneys for Plaintiff,
Helen Motzenbecker

DATED: February 6, 1984

By:

The within Stipulation of Partial Settlement is hereby approved.

Dated: 2/9/84

EUGENE D. SERPENTELLI, J.S.C.

JAM 8/17/84

BOROUGH OF BERNARDSVILLE

RESOLUTION NO. 84 - 166

WHEREAS, the Mayor and Council have heretofore authorized entering into a Stipulation of Partial Settlement in the matter of Helen Motzenbecker vs. Mayor and Council of the Borough of Bernardsville, Superior Court of New Jersey, Docket No. L-37125-83; and

WHEREAS, said Stipulation of Partial Settlement provided that plaintiff was awarded a "Builder's Remedy" allowing her to develop property known as Block 125, Lot 27 on the tax map as a Mount Laurel project; and

WHEREAS, a Court appointed Master assisted the parties in the formulation of an appropriate "Builder's Remedy" feasible for the property in question; and

WHEREAS, representatives of plaintiff and defendant together with the Court appointed Master met on several occasions in an effort toward reaching an accord as to an appropriate "Builder's Remedy" for the tract in question; and

WHEREAS, the Court appointed Master prepared and filed with the Court a report which did recommend that a Mount Laurel project at a density of eight units per acre was feasible for the tract in questions which recommendation was rejected by plaintiff; and

WHEREAS, further negotiations between the parties resulted in a general accord that nine units per acre was acceptable to plaintiff as a total sale project with 20% being affordable to senior citizen lower income households.

NOW THEREFORE, BE IT RESOLVED by the Mayor and Council of the Borough of Bernardsville, in the County of Somerset, State of New Jersey, as follows:

1. A 'Builder's Remedy" of total sale Mount Laurel project consisting of a density of nine units per acre upon Block 125, Lot 27 with 20% affordable for qualifying senior citizens is hereby approved.

2. This approval is subject to all other municipal approvals and requirements applicable to a Mount Laurel project.

3. The Borough attorney is hereby authorized, empowered and directed to enter into a Consent Order implementing the approval granted herein.

J. ALBERT MASTRO
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924
(201) 766-2720
ATTORNEY FOR Defendants

Plaintiff
HELEN MOTZENBECKER,

vs.

Defendant
MAYOR AND COUNCIL OF THE BOROUGH OF BERNARDSVILLE AND THE BOROUGH OF BERNARDSVILLE

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY/
OCEAN COUNTY

Docket No. L-37125-83

CIVIL ACTION

INTERIM ORDER

This matter having come before the Court on the joint application of the parties for the entry of a Consent Judgment, and the parties having earlier entered into a stipulation of partial settlement dated and filed in this cause on February 9, 1984, and the parties having consulted with the Special Master, George M. Raymond, who was appointed by this Court, and with his aid having reached agreement on the nature of the builder's remedy to be incorporated in this Judgment entered by consent of the parties, and it appearing to the Court that there is good cause for the entry of this Judgment,

IT IS on this 20th day of November, 1984,

ORDERED AND ADJUDGED:

1. That notwithstanding any land use or zoning regulation to the contrary, plaintiff, Helen Motzenbecker, be and is hereby granted a builder's remedy by which she may lawfully develop the lands and premises described in the Complaint, consisting of 8.454 acres in the Borough of Bernardsville, County of Somerset, State of New Jersey, shown as Block No. 125, Lot 27, on the official tax map of the Borough, for multi-family purposes and in a manner consistent with the terms and conditions of this Judgment. All references in this Order to plaintiff or to Helen Motzenbecker shall be deemed to include her grantees, heirs or assigns.

2. The builder's remedy awarded to plaintiff by this Judgment is the right to build multi-family housing units on the property at a density of nine (9) units per acre (76 units). Twenty (20%) percent of the units to be constructed (15 units) will be affordable to lower income households, with priority to be given to qualifying senior citizens. Plaintiff will provide all units on a "for-sale" rather than a "for-rental" basis.

3. Of the fifteen (15) units that will be affordable to lower income households, eight (8) units will be affordable to moderate income households and seven (7) units will be affordable to low income households.

4. Plaintiff shall submit a development application incorporating her builder's remedy to the Planning Board of the Borough of Bernardsville for its input and review. This process, however, may not be utilized by the Planning Board to delay or hinder the project or to reduce the proposed number of dwelling units, or otherwise to prevent plaintiff from developing its multi-family development at densities of nine (9) units per acre. Furthermore, neither the Planning

Board nor the municipality may impose any exactions or restrictions upon this plaintiff or her proposed project that are not necessary for health and safety.

5. The phasing schedule for the construction of the lower income units relative to the market units shall be as follows:

PERCENTAGE OF TOTAL MARKET HOUSING UNITS	MINIMUM PERCENTAGE OF LOWER INCOME HOUSING UNITS
25	0
50	25
75	75
100	100

6. Subesquent to the signing of this Order, the parties will submit proposals to the master regarding.

(a) the price at which the units must be sold to be affordable to low and moderate income households; and

(b) the mechanisms that will be implemented to ensure that the units remain affordable to lower income households for an appropriate period of time.

7. Following the submissions specified in subparagraphs (a) - (b) of paragraph 6 above, the parties will attempt to agree on the appropriate solutions to these problems. If the parties are unable to agree, the parties will abide by the determinations of the Court.

8. The Borough of Bernardsville shall be given a period of ninety (90) days from the date of this Order to submit to the Court for its review and approval, revised zoning ordinances and land use regulations which provide a realistic opportunity for the construction of two hundred ninety (290) units of lower income housing, representing the Borough's fair share of the region's present

and prospective needs calculated by the Borough of Bernardsville in accordance with the AMG analysis attached to this Order. For purposes of this settlement, plaintiff does not oppose the fair share calculation. The Borough of Bernardsville shall have the right to seek readjustment of its fair share allocation by presenting evidence to the Court demonstrating less indigenous need, or credits for existing and adequate lower income housing, or such other factors warranting same.

9. The Borough of Bernardsville shall be granted repose from any further Mount Laurel litigation during the ninety (90) day period aforesaid.

10. Notwithstanding provisions 8 and 9, if for any reason, the municipality is unable to satisfy the Court that it has fully complied with its Mount Laurel obligations, such failure shall neither affect the terms and provisions of this Order nor Helen Motzenbecker's right to the builder's remedy awarded hereby.

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

Consented as to Form and Entry:

J. ALBERT MASTRO
Attorney for Defendant,
Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville

GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN

By
DOUGLAS K. WOLFSON,
Attorney for Plaintiff, Helen Motzenbecker

CALCULATION OF FAIR SHARE HOUSING OBLIGATION BASED ON CONSENSUS (LERMAN) FORMULA

I PRESENT NEED

A. INDIGENOUS NEED

1. Overcrowded units	11
2. Units lacking complete plumbing	13
3. Units with inadequate heating	42
	66
	x 82%
Total Units Low and Moderate	54

B. REALLOCATED REGIONAL NEED

$$\frac{\text{1982 Munic. Emp.}}{1{,}843} \div \frac{\text{1982 Reg. Emp.}}{1{,}244{,}632} = \text{Factor } .0015$$

$$\frac{\text{Munic. Growth Area}}{2{,}740} \div \frac{\text{Reg. Growth Area}}{699{,}163} = \text{Factor } .0039$$

$$\frac{\text{Munic. Med. Income}}{30{,}558} \div \frac{\text{Reg. Med. Income}}{24{,}177} = \text{Factor } 1.2639$$

$$\frac{.0015 + .0039}{2} = .0027 \times 1.2639 = .0034$$

$$\frac{.0015 + .0039 + .0034}{3} = .0029 \times 35{,}014 = 102$$

$102 \div 3 = 34$

$34 \times 1.2 \times 1.03 = 42$

C. TOTAL PRESENT NEED

42 + 54 (indigenous) = 96

II PROSPECTIVE NEED

Commutershed Region = Essex, Hunterdon, Middlesex, Morris, Somerset and Union

1982 Munic. Emp.	÷	1982 Reg. Emp.	=	Factor
1,843		734,179		.0025

Munic.Growth Area	÷	Reg.Growth Area	=	Factor
2,740		491,209		.0056

Munic. Emp. Growth	÷	Reg. Emp. Growth	=	Factor
23		21,932		.0010

Munic. Med. Income	÷	Reg. Med. Income	=	Factor
30,558		24,177*		1.2639

$$\frac{.0025 + .0056 + .0010}{3} = .0030 \times 1.2639 = .0038$$

$$\frac{.0025 + .0056 + .0010 + .0038}{4} = .0032 \times 49{,}004 = 157$$

$$157 \times 1.2 \times 1.03 = 194$$

*The median income for the 11-county present region is used in calculating prospective need. The median income for the prospective need is not readily available and considerable time to make the calculation would be involved. This effort seems unjustified since experience elsewhere reveals very little difference between median incomes of present and prospective regions.

III TOTAL NEED SUMMARY

A.	Present Need		
	1. Indigenous	54	
	2. Reallocated	42	
			96
B.	Prospective Need		194
C.	Total Need		290

J. ALBERT MASTRO
ATTORNEY AT LAW
7 MORRISTOWN ROAD
BERNARDSVILLE, N. J. 07924
201 766-2720

January 31, 1985

Douglas K. Wolfson, Esq.
Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein
P. O. Box 5600
Woodbridge, New Jersey 07095

Re: Motzenbecker Tract

Dear Doug:

This will confirm my previous telephone calls to you indicating that the Borough of Bernardsville is earnest in its desire to acquire the Motzenbecker tract for construction of lower income housing. In as much as Mrs. Motzenbecker is interested in selling we should be in a position to negotiate since I presume her primary concern is market value. The Borough is in the process of updating its appraisal in order to put it in a position to negotiate with your client.

Hopefully, everything will work out to everyones satisfaction.

Very truly yours,

J. Albert Mastro

JAM/jc

J. ALBERT MASTRO
ATTORNEY AT LAW
7 MORRISTOWN ROAD
BERNARDSVILLE, N.J. 07924
(201) 766-2720

April 19, 1985.

Mr. Jeffrey R. Surenian
GRENBAUM, ROWE, SMITH,
RAVIN, DAVIS & BERGSTEIN
Engelhard Building
P.O. Box 5600
Woodbridge, New Jersey 07095

RE: Motzenbecker vs. Bernardsville.

Dear Jeff:

I am making every effort to keep you fully informed of all developments that are taking place in the above entitled action. At its public meeting on April 15, 1985, the Borough Council appropriated funds for an appraisal of the Motzenbecker Tract in anticipation of acquiring same.

Clearly, the market value of the Tract will reflect its present use in accordance with the builders' remedy as a Mount Laurel Project. As soon as the appraisal has been completed. we will be in a position to negotiate for a voluntary sale of the Tract.

The appraisal firm of Krauser, Welsh, Sorich and Cirz of Morristown, N. J. has been retained for this purpose.

I am also enclosing what I hope to be the final revision of the compliance report dated April 17, 1985, prepared by the office of Robert Catlin and Associates.

I trust that the above matters will bring you up to date.

Very truly yours,

J. Albert Mastro

JAM/mc.
Enclosures.
cc. Hon. Eugene D. Serpentelli
Mr. George Raymond

J. ALBERT MASTRO
ATTORNEY AT LAW
7 MORRISTOWN ROAD
BERNARDSVILLE, N.J. 07924
(201) 766-2720

October 25, 1984

Robert S. Greenbaum, Esq.
Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein
P. O. Box 5600
Woodbridge, New Jersey 07095

Re: Helen Motzenbecker v Mayor and Council of Borough of Bernardsville and the Borough of Bernardsville - Docket Nol L-37125-83

Dear Bob:

The Governing Body has been reconsidering its attitude towards repose and the majority of its members is leaning in that direction. Accordingly, I have prepared a proposed form of Order that would address both builder's remedy and trigger a methodology toward obtaining a Certificate of Compliance. I would appreciate your reviewing the enclosed and forwarding any comments you might have.

Hopefully, this matter is scheduled to be considered by the Governing Body at its work meeting on November 5, 1984 and public meeting on November 19, 1984.

Thank you for your anticipated cooperation in this matter.

Very truly yours,

J. Albert Mastro

JAM/jc

enc.

cc: Paul J. Passaro, Jr.

POINT VII

THE AHO IS ILLEGAL IN THAT IT CONTEMPLATES ACQUISITION OF REAL PROPERTY BY THE EXERCISE OF THE POWER OF EMINENT DOMAIN IN AN UNLAWFUL MANNER NOT AUTHORIZED BY THE LEGISLATURE

As has been shown in preceding points, the AHO created two new zoning districts, the R-M and R-H zones. While it is contemplated that strictly private enterprise will develop the lands in the R-M zone, R-H development is to be under the control and direction of the Township's surrogate, the Housing Fund, a Title 15A non-profit corporation. In the R-H zone, construction will take place on sites made available to The Housing Fund. Site availability, it is anticipated, may result either from the R-M developer's purchase of R-H sites or the Township's acquisition. To assure availability of R-H sites, the Township, through its representatives, has made clear that it will condemn such R-H tracts as necessary to initiate and fulfill the purposes of the affordable housing program. MR, p. 3; MDI pp. 73-74; KD, pp. 5,11.

In fact, it is admitted that the program's success depends on the availability of R-H sites. MDI, p. 160. Such availability can be assured only through the Township's ability to exercise, and its exercise of, the power of eminent domain. If the means to forcibly acquire R-H lands are lacking, the Township is largely left to the marketplace and the intentions of R-H

owners in procuring and producing sufficient quantities of suitable land for Mt. Laurel development. In this regard, two R-H owners have clearly made their views known that their lands are unavailable for development under current R-H zoning. See Exhibits B, C and G.

As will be shown by this portion of the argument, there is no statutory basis for the Township's proposed exercise of the eminent domain power as conceived by the compliance program. The right to condemn reposes solely in the State Legislature. That body can, as it has done frequently, delegate the eminent domain power to State agencies, private entities, municipalities and their subdivisions, and other subdivisions of the State. While the Legislature has done so in respect to the housing field, there is no statutory authority which permits Princeton Township to condemn in the manner it proposes and in the context of the AHO. This absence is fatal. The Township as any other municipality is a government of delegated powers and has no inherent authority to enact laws or promulgate regulations of government. Giannone v. Carlin, 20 N.J. 511, 517 (1956). If a power has not been expressly conferred, or cannot be fairly implied from an express legislative statement, it cannot be exercised by a municipality for lack of the Legislature's grant of that power, Grogan v. DeSapio, 19 N.J. Super, 469, 476 (Law Div. 1952), aff'd 11 N.J. 308 (1953). A more extended discussion follows.

Eminent domain is a right of the sovereign that was first manifested in our jurisprudence in the Magna Carta. It is an

inherent right that is subject only to the equitable principle that just compensation be made to the owner of the property appropriated. The New Jersey Constitution and its predecessor are not the source of this power; provisions in these documents serve only to limit the scope of the sovereign's right to condemn. Abbott v. Beth Israel Cemetery Ass'n of Woodbridge, 13 N.J. 528, 543-545 (1953); Valentine v.Lamont, 13 N.J. 569, 575-576 (1953); see State v. Lanza, 27 N.J. 516, 529-530 (1958).

It is well settled that the power of eminent domain resides exclusively in the State Legislature. State v. Lanza, supra at 530. Therefore, the lawmakers authorize the manner and the extent to which the power of eminent domain can be exercised. Abbott v. Beth Israel Cemetery Ass'n of Woodbridge, supra at 545; State, By Comm. of Tax vs. Hackensack Tp., 111 N.J.Super. 543 (App. Div. 1970). Absent legislative expression, this power is reserved and cannot be exercised . Valentine v. Lamont, supra, at 576; State, etc. v. Union County Park Com., 89 N.J. Super. 202, 212 (Law Div. 1965), app. dis. 48 N.J. 246 (1966). When established by legislation, the private or governmental beneficiary thereof may then act to legally appropriate property as the agent for the Legislature. City of Trenton v. Lenzner, 16 N.J. 465, 469 (1954).

Eminent domain is solely the prerogative of the lawmakers; accordingly, the exercise of the power is the exclusive province of the legislative branch and is not a judicial function. Lenzner v. City of Trenton, 22 N.J. Super. 415, 421 (Law Div. 1952).

Judicial involvement is usually limited to a review of whether the legislative agent acted properly within its grant. State v. Orenstein, 124 N.J. Super. 295, 298 (App. Div. 1973).

Thus, to assess the AHO and the Township's right to condemn R-H sites in furtherance of the program, one must ascertain a municipality's authority to exercise a right of eminent domain within the bounds of statutory grants from the legislative branch of State government.* Further, in making this analysis it is incumbent to do so within the framework of the AHO and the Township program as the structure and content of the AHO limits the number of available statutorily-authorized housing programs as well as the Township's locale. See e.g., the Urban Renewal Corporation and Association Law of 1961, N.J.S.A. 40:55C-40, et seq.; the Urban Renewal Non-profit Corporation Law of 1965, N.J.S.A. 40:55C-1 et seq.; the Redevelopment Companies Law, N.J.S.A. 55:14D-1 et seq.; the Urban Redevelopment Law, N.J.S.A. 55:14E-1 et seq.; the State Housing Law of 1949, N.J.S.A. 55:14H-1; the Senior Citizens Nonprofit Rental Housing Tax Law; N.J.S.A. 55:14I-1 et seq.; the New Jersey Housing and Mortgage Finance Agency Law of 1983, N.J.S.A. 55:14K-1 et seq.; and the

* In the abstract, a similar inquiry could be made with regard to like Congressional grants to municipalities as it is recognized that this State's eminent domain power is subservient to the Federal Government's. This, however, is not necessary here as the Township concedes that its program is not predicated on Federal participation or financial commitment given the current political climate and availability of funds. Moreover, the Township is not participating in Federal programs and is not a local public agency.

Limited-Dividend Nonprofit Housing Corporations or Associations Law, N.J.S.A. 55:16-1 et seq.

The available legislative schemes that the AHO and the program "fit" are the Local Housing Authorities Law (the "LHAL"), N.J.S.A. 55:14A-1, et seq., and the Redevelopment Agencies Law (the "RAL"), N.J.S.A. 40:55C-1, et seq. The LHAL was passed in 1938, L. 1938, c. 19, and the RAL in 1949, L. 1949, c. 306, both in response to federal legislation dealing with housing. In amendments to each, the Legislature authorized municipal governing bodies to designate themselves as either local housing authorities (see N.J.S.A. 55:14A-56; L.1956 c. 211,§8), or redevelopment agencies (see N.J.S.A. 40:55C-37; L. 1956, c. 212, 8). Accordingly, as amended, these statutes provide a clear means by which municipalities can address and remedy local lower income housing problems.

The LHAL was enacted in 1938 and was one of the first legislative endeavors in New Jersey in the field of public housing. An early attack on its constitutionality was weathered successfully. See Romano v. Housing Authority of City of Newark, 123 N.J.L. 428 (Sup. Ct. 1940), aff'd 124 N.J.L. (E.& A. 1940), which held in part that the Legislature, through this law, could delegate its authority to act in the housing field and its eminent domain power as long as just compensation was provided for the taking of property. Id. at 434. Numerous local housing authorities, including one for the Borough of Princeton, were formed under the authority of the legislation. Id. at 429.

The Legislature determined that a local housing authority would be a public body corporate and politic exercising governmental functions. N.J.S.A. 55:14A-7. As such, an authority would prepare, carry out, construct and operate housing projects; enter into contracts for provision of housing projects; own real property; and acquire real property by eminent domain or other means for such purposes within its "area of operation." N.J.S.A. 55:14A-7 (b) and (d). To condemn, a local housing authority must adopt a resolution of necessity and, in the case where it proposed to condemn the interest of a public body or corporation possessing the power of eminent domain, obtain its consent. N.J.S.A. 55:14A-10. A local housing authority may not operate a project for profit or as a source of revenue for the municipality. N.J.S.A. 55:14A-8.

In 1949, the Legislature enacted substantial amendments to the law. In short, the powers of local housing authorities were greatly expanded as the amendatory act allowed a local housing authority to act as a redevelopment agency under certain prescribed conditions while retaining all powers previously conferred by law. N.J.S.A. 55:14A-34 and -38. The act required that the municipality creating the local housing authority not already have a redevelopment agency; that the governing body promulgate a declaration of blight; and that the redevelopment plan approved by the governing body conform to the community's master plan. N.J.S.A. 55:14A-35. When the declaration of blight (see N.J.S.A. 55:14A-31, -32 and -33) and a redevelopment plan

had been properly approved, then the local housing authority could acquire through eminent domain or otherwise, property within the redevelopment district identified by the redevelopment plan. N.J.S.A. 55:14A-40.

Local housing authorities were thus freed of the restrictive definition of the areas within which their jurisdiction had previously been identified--essentially, those areas in which unsafe and unsanitary dwellings were located. See N.J.S.A. 55:14A-2. Consequently, a local housing authority could proceed with redevelopment of low income housing in either slum or redevelopment areas, the latter defined by a declaration of blight adopted in accordance with statutory procedures. Further, the eminent domain powers of local housing authorities were extended by the amendatory law to permit forced acquisition within a redevelopment area, N.J.S.A. 55:14A-38 and-46, and to then make such acquired real property available to public or private redevelopers at its "use value," * N.J.S.A. 55:14A-41.

In 1956, the LHAL was further amended to provide further flexibility to housing authorities. Redevelopment was authorized for "blighted, deteriorated or deteriorating areas," N.J.S.A. 44:14A-49, -50 and -52, and in furtherance thereof, acquisition of real property was authorized, N.J.S.A. 55:14A-50(2). This amendment authorized the governing body to prepare a "workable program" for a "well-planned community with well organized residential neighborhoods of decent homes*** for utilizing

---

* See Ott v. West New York, 92 N. J. Super. 184 (Law Div. 1966) which illustrates the meaning of this term.

appropriate private and public resources" in order to fulfill the purposes of the act. N.J.S.A. 55:14A-54.

Determination of blight or deterioration and adoption of a redevelopment plan conforming to a community plan were legislated, necessary prerequisites to implementation of redevelopment projects within blighted or deteriorated areas. N.J.S.A. 55:14A-50 and -51. Further, the governing body of the municipality by resolution had to authorize the local housing authority to exercise the powers conferred by these amendments. N.J.S.A. 55:14A-56.

The 1956 amendment, for the first time, authorized the municipality to designate itself, or its governing body, as a local housing authority. See N.J.S.A. 55:14A-56. Thus, a governing body, if it so acted, was empowered to exercise all powers of a local housing authority conferred by the 1938 law and subsequent amendments. For the first time, direct control of provision of lower income housing under the LHAL was vested in the municipality in the event it chose to become a local housing authority. Accordingly, municipalities could direct construction of housing without creating a semi-autonomous agency. (See City of Paterson v. Housing Auth. of Paterson, et al., 96 N. J. Super. 394 (Law Div. 1967), which held that a housing authority's powers are derived from the State as well as that a housing authority was not a subordinate branch of a municipal governing body.

The RAL, enacted in 1949, is another piece of legislation directed to the ameliorazation of blight conditions. Its stated

purpose is to encourage, through the efforts of redevelopment agencies, redevelopment of blighted areas, to "stimulate the proper growth of urban, suburban and rural areas of the State," and to "encourage the sound growth of communities." N.J.S.A. 40C:55-2. The act authorized the municipal governing bodies to create by ordinance redevelopment agencies that would carry out the goals of the statute. N.J.S.A. 40:55C-6. As in the case of local housing authorities, redevelopment agencies were designated as public bodies corporate and politic, exercising governmental functions. N.J.S.A. 40:55C-6 and -12.

The RAL also prescribes prerequisites to governmental development. A redevelopment agency cannot proceed unless: (1) the governing body of the municipality determines, pursuant to the Blighted Areas Act, N.J.S.A. 40:55-21.1 et seq., that the area selected for redevelopment is blighted; (2) the governing body has approved the redevelopment plan studied and recommended by the municipal planning board; and (3) the redevelopment plan conforms to statutory criteria enumerated therein. N.J.S.A. 40:55C-17 and -18. Once these conditions are met, a redevelopment agency can proceed with development in the identified redevelopment area upon obtaining the approval of the governing body. N.J.S.A. 40:55C-15.

N.J.S.A. 40:55C-12 and -15 set forth the powers of a redevelopment agency, duly created by ordinance and operating after a determination of blight and an adoption of a redevelopment plan. Pertinent to this discussion, a redevelopment agency

is empowered by the Legislature to acquire by eminent domain real property situated in the blighted area which is owned by "any person, firm, or corporation, public or private." N.J.S.A. 40:55C-12(j) and -15(a). Property acquired thusly or in any other approved manner may be transferred for "fair value" for uses specified in a redevelopment plan to "any person, firm, or corporation, or public agency." N.J.S.A. 40:55C-15(d); see Ott v. West New York, supra. The agency may also contract with public agencies or redevelopers for construction of a redevelopment project and presumably part of the agreement's consideration would be real property so acquired. See N.J.S.A. 40:55C-15(i).

In 1956, the RAL was amended by companion legislation to the amendments to the LHAL. L. 1956, c. 212. Thus, the definition of "blight" was expanded to include deteriorating and deteriorated areas, N.J.S.A. 40:55C-30, and, in like manner, a redevelopment agency was authorized to acquire property situated in a blighted area so defined, N.J.S.A. 40:55C-31(2) and -33. Section 6 authorized the municipal governing body to prepare a "workable program" to deal with the declared blight and deterioration and to provide for a "well-planned community with well-organized residential neighborhoods of decent homes" and to "utiliz[e] appropriate private and public resources" to further the objectives of the act. N.J.S.A. 40:55C-35. Similarly, the amendment mandates as prerequisites to agency action a declaration of blight in accordance with the Blighted Areas Act, N.J.S.A. 40:55-21.1 et seq. and an adoption of the redevelopment plan

conforming to a community-wide plan which details plans for land acquisition and which

> "shall be sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements, conservation or rehabilitation as may be proposed to be carried out in the area of the project, zoning and planning changes, if any, land uses, maximum densities, building requirements, and the plan's relationship to definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements."

N.J.S.A. 40:55C-32. Compare N.J.S.A. 55:14A-51. These additional powers were executory in that a governing body by resolution first had to authorize a redevelopment agency to exercise such powers. N.J.S.A. 40:55C-37.

The RAL was further amended to permit a municipality, or its governing body, if so designated, to act as a redevelopment agency. N.J.S.A. 40:55C-37. As a result of the amendments to the RAL and the LHAL, municipalities had the option to control housing policy and production directly either as a redevelopment agency or a local housing authority. This would be simply accomplished by the governing body appointing itself the agency by a resolution. Cf. Ott v. West New York, supra at 194. Moreover, the ability to operate as a redevelopment agency reposed in the governing body the opportunity to shape and plan various types of development in an integrated fashion; thus permitting the provision of housing rationally related to and in

concert with other necessary development projected by the municipality (e.g. infrastructure, parks, recreational facilities and the like)

At present, the Township has neither a local housing authority nor a redevelopment agency. About 15 years ago the Housing Authority of the Borough of Princeton by agreement with the Township Committee expanded its "area of operation" to encompass the Township's geographical area. This was done to bring a HUD-supervised project under unified management and control with similar projects which were situated within the Borough's boundaries that were already managed by the Borough Housing Authority.

In adopting the AHO, the Township did not make a determination of blight. It also did not adopt a redevelopment plan for the R-M and R-H districts (compare AHO Sec. 108-336(c) and -339(b)) or find the existence of slum areas containing unsafe or unsanitary housing. KD, pp. 5-7, 9, 14; MDI, p. 90. In fact the AHO created large zoning districts and prescribed conditions for development within them. The November 1984 master plan amendments adopted by the Regional Planning Board purported to justify the creation of the R-M and R-H districts yet failed to interrelate the district's development to local objectives set forth in and required by the LHAL and the RAL. See N.J.S.A. 55:14A-41 and -51; N.J.S.A. 40:55C-17 and-32.

Under no circumstances can it be argued that the Master Plan amendments or the AHO constitute a redevelopment plan. A

redevelopment plan contains typically a detailed description of existing conditions and proofs of how an area qualifies as blighted. It further presents a blueprint for redevelopment either in the form of a specific development proposal or, if the acquired land is to be turned over to redevelopers, a specification of housing densities, kinds and mix of units, rental and sales price of units, the proposed sales price of the land, and the like. Further, site characteristics such as soils, topography, etc., and available infrastructure would be identified. Moreover, the relationship of the redevelopment plan to zoning and the municipality's Master Plan would be discussed.

In sum, the AHO is purely the product of a planning and zoning process purportedly authorized by the MLUL and not by either the LHAL or the RAL. The governing body is neither a local housing authority nor a redevelopment agency. It has not declared blight conditions as mandated by the statutes. The Township has not adopted any redevelopment plans or made a finding of slum conditions. Accordingly, the Township has not utilized statutorily-required procedures directed by either the LHAL or RAL. Since it has failed to act within the legislatively delegated powers as set forth in the statutes, the powers of eminent domain authorized by these legislative schemes are not available to the Township for the purposes of the affordable housing program.

It is clear from a review of the LHAL and the RAL the legislated powers inferred by these acts have the most direct

applicability to the provision of lower income housing contemplated by the affordable housing program. Putting aside other legal infirmities of the AHO raised in this brief, it is possible to envision that, as part of its compliance program, the Township Committee could have designated itself a local housing authority or a redevelopment agency and utilized the newly-gained powers to attempt to effectuate the purposes of the AHO. Acting in either capacity, the Township might then have been able to exercise the power of eminent domain and proceed to acquire real property, provided it had also established a proper basis for a blight declaration and redevelopment area and the necessary funding (which it has not) for such acquisition.

Nonetheless, there still remains the question whether the State Legislature has by virtue of other legislation conferred to the Township the power of eminent domain that could be arguably exercised in the context of the Affordable Housing Program. If such were the case; that is that alternative statutorily-authorized methods are available to place real property thusly acquired in the hands of either the developers or the Housing Fund, the Township could argue that acquisition could be assured notwithstanding the unavailability of condemnatory powers conferred by the LHAL and the RAL.

An exhaustive review of legislation pertaining to municipalities, however, fails to disclose a legislative delegation of such necessary powers. As has been said, the power of eminent domain resides in the State Legislature. The legislators have

jealously guarded this power and, in respect of municipalities, have carefully and particularly parcelled it to them for specified public purposes. By way of example, reference to the provision of adequate parking is apt. See City of Trenton v. Lezner, 16 N.J. 465 (1954). As the Lezner case demonstrates, the Legislature afforded municipalities, at the time of that decision, with three legislative schemes to provide public parking and delegated in the legislation the power of eminent domain to fulfill the stated public purpose.

Other sources of a municipality's right to condemn are found principally in three areas of the Revised Statutes. These are the Local and Other Improvements Law, N.J.S.A. 40:56-1 et seq.; the Public Lands and Buildings Law, N.J.S.A. 40:60-25.1 et seq.; and the Local Lands and Buildings Law, N.J.S.A. 40A:12-1 et seq. As to the former, the definition of "improvement" quickly eliminates it from consideration. See N.J.S.A. 40:56-1. Likewise, the second particularizes many public uses for which condemnation is authorized -- bus terminals, parking lots, schools, etc. -- but none remotely resembles housing. See N.J.S.A. 40:60-25.1, -25.27, -25.51 and -25.54.

The last, N.J.S.A. 40A:12-1 et seq., gives one fleeting pause before it too is dismissed as a possible source of a municipality's right to condemn for lower income housing. The law authorizes a municipality (as well as a county) to acquire lands and buildings

> "(a)*** necessary and suitable for the performance of its functions, the accommodation of the courts required to be held in the county or municipality, the conduct of public business and the use of the county and municipal departments, officers, boards, commissions and agencies in charge of institutions and facilities and any other county or municipal public purposes, and from time to time as necessary, repair, alter, enlarge, rebuild, furnish, refurnish, refurbish or rehabilitate such buildings.
>
> "(b) Any county or municipality may acquire the necessary land for the construction thereon of buildings or other capital improvements or additions thereto and for suitable surrounding grounds and parking facilities to be used in connection therewith. Any such buildings, capital improvements or facilities may be constructed and maintained upon real property acquired by the county of municipality."

N.J.S.A. 40A:12-3(a) and (b). Real property owned by the State, County or another municipality body can only be acquired with their express consent. N.J.S.A. 40A:12-4(a). The Legislature expressly authorized a municipality to acquire such property by condemnation for the purposes of the Act. N.J.S.A. 40A:12-5(a)(1).

The Act, as noted, permits acquisition for several specified public purposes and "any other *** municipal public purposes." N.J.S.A. 40A:12-3(a). At first blush, the term "any other ***municipal public purposes" appears to be expansive and thus permits condemnation for any public use or benefit arguably falling in the domain of municipal endeavor. Nonetheless, such is not the case. That phrase must be read in the context of the

entirety of subsection (a) specifically and the statutory scheme generally.

Subsection (a) permits acquisition of "buildings or other capital improvements" for the provision of buildings to provide the public and governmental employees with a meeting and working place to carry on and participate in the essential functions of government. Further, the cited phrase is an integral part of a larger passage of subsection (a), namely:

> "***the use of the *** municipal departments, officers, boards, commissions and agencies in charge of institutions and facilities and any other *** municipal public purposes."

A comma is notably absent between the words "facilities" and "and"; yet its presence is essential in order to give any credence to an expansive reading of the term "any other public purpose." Without it, it is clear that "any other public purpose" serves as a catch-all phrase and is intended to authorize acquisition of lands and buildings for those departments and agencies not responsible for "institutions and facilities." Clearly, then, this phrase was added to assure that a municipality would be authorized to acquire improved and unimproved real property to house employees of its agencies and subdivisions carrying out any municipal public purpose whether or not related to institutions or facilities.

Moreover, the limiting nature of subsection (a) is made explicit by reference to subsection (b) which authorizes acquisition of lands to <u>construct</u> buildings and provide "suitable

surrounding grounds and parking facilities" for such buildings and subsection (c) which permits a municipality to furnish and equip such buildings and facilities. N.J.S.A. 40A:12-3. The definition of "capital improvement" and reference to that term throughout Chapter 12 further supports the fact that "other public purpose" has limited meaning. See, e.g. N.J.S.A. 40A:12-2(c); -3(a) and (b); -4(a) and (b); and -5(a), (b) and (c).

Further, a broad reading of the term would operate as an implied repealer of the LHAL, RAL and other housing laws which painstakingly have established detailed procedures and means for the provision of lower income and other housing. A municipality could simply disregard these procedures mandated by the Legislature and avoid the procedures for investigating and declaring blight conditions and thereby materially prejudicing the substantive rights of affected property owners. Adoption of carefully thought out redevelopment plans would similarly be avoided. In short, development of substantial areas could take place in a manner not envisioned by the Legislature.

Implied repealers are disfavored in the law. The Supreme Court in Swede v. City of Clifton, 22 N.J. 303, 317 (1956) stated that:

> "The question of repeal is essentially one of legislative intention: and there is a presumption as a matter of interpretive principle and policy against an intent to effect a repeal of legislation by mere implication. The purpose so to do must be free from all reasonable doubt. Repeals by

> implication are not favored in the law; and where the statutory provisions may reasonably stand together, each in its own particular sphere of action, there is not the repugnancy importing the design to repeal the earlier provision."

For this and other reasons previously stated, the Local Lands and Building Law is not a source of the eminent domain power delegated by the Legislature for the purpose of the Township's compliance program. Thus, the Township cannot utilize that Act as justification for an acquisition program of R-H sites to implement the affordable housing program.

To summarize, the AHO may be a "novel" approach to the municipal obligation to provide a realistic opportunity for the production of low and moderate income housing, yet its success depends on the development of such housing in the R-H zone which in turn is contingent on the assured availability of R-H tracts. If the tracts cannot be secured to assure their availability to an R-M developer hoping to exercise the off-site option or to the Housing Fund so that it can produce low income housing the program will fail necessarily unless the marketplace responds and R-H lands become available in one fell swoop for purchase by either the Township or an R-M developer.

The power of eminent domain is not available to the Township. With the exception of the housing and redevelopment laws, it is clear that legislation governing municipalities conferring the right of eminent domain deals with other subjects and is thus inapplicable. The pertinent housing laws, the LHAL and the RAL, confer such power which is exercisable by a municipality if

certain prerequisites are satisfied. Here, the preconditions, however, have not been satisfied -- Princeton Township is not a local housing authority or a redevelopment agency, and its governing body has not made a declaration of blight, adopted a redevelopment plan and made a finding of slum conditions. Thus, the Township cannot proceed under the legislative authority of the LHAL or the RAL. Accordingly, plaintiffs are entitled to partial summary judgment that the Township is not empowered by law to exercise the power of eminent domain in order to acquire any R-H-zoned land.

> taxes for municipal governmental and school costs on homeowners, relief from the consequences of this tax system will have to be furnished by other branches of government. It cannot legitimately be accomplished by restricting types of housing through the zoning process in developing municipalities." 67 N.J. 185-86.

C. Provisions of the Act Governing Settlements Violate Mt. Laurel II.

Section 22 of the Act provides that "any municipality which has reached a settlement of any exclusionary zoning litigation prior to the effective date of this Act, shall not be subject to any exclusionary zoning suit for six years following the effective date of this Act. Any such municipality shall be deemed to have a substantively certified housing element and ordinances, and shall not be required during that period to take any further actions with respect to provision for low and moderate income housing in its land use ordinances or regulations."

There are two problems caused by the Legislature's attempt to give absolute sanctity to settlements. First of all, the res judicata effect of a judicial determination of compliance should apply for six years, unless a "substantial transformation of the municipality" occurs during this time, in which case a valid Mt. Laurel claim may be asserted. 92 N.J. at 292, n. 44. Section 22 precludes this reassessment from occurring. Additionally, Section 22 does not require either judicial or Council review of the settlement, thus conflicting with this court's ruling that a hearing must be held on a proposed settlement and that a judgment of compliance not be effective until court approval is granted. Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 368-370 (Law. Div. 1984).

D. The Moratorium on the Award of Builder's Remedies is Unconstitutional.

The Fair Housing Act imposes a moratorium on the award of builder's remedies:

> "No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a final judgment providing for a builder's remedy has already been rendered to that plaintiff. This provision shall terminate upon the expiration of the period set forth in subsection a. of section 9 of this act for the filing with the council of the municipality's housing element.
>
> For the purposes of this section, "final judgment" shall mean a judgment subject to an appeal as of right for which all right to appeal is exhausted.
>
> For the purposes of this section " exclusionary zoning litigation" shall mean lawsuits filed in courts of competent jurisdiction in this State challenging a municipality's zoning and land use regulations on the basis that the regulations do not make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people living within the municipality's housing region, including those of low and moderate income, who may desire to live in the municipality.
>
> 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 for the economic viability of a residential development by including housing which is not for low and moderate income households." (Section 28).

The moratorium terminates upon the expiration of the time period for filing municipal housing elements, and thus between September 1, 1986 and January 1, 1987[8]. (See Statement of Facts at p. 3).

The builder's remedy was authorized in Mount Laurel II in order to achieve compliance with the constitution:

> "In Madison, this court, while granting a builder's remedy to the plaintiff appeared to discourage such remedies in the future by stating that "such relief will ordinarily be rare". 72 N.J. at 551-52 n. 50. Experience since Madison, however, has demonstrated to us that builder's remedies must be made more readily available to achieve

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[8] It may be argued that the moratorium does not apply to the consolidated Denville cases since (1) the Morris County Fair Housing Council action was filed prior to January 20, 1983 and (2) an order to rezone specific sites pursuant to the court's remedial powers for non-compliance, would not be a "builder's remedy" as defined in the Act since the award to the Fair Housing Council would not be to a litigant who is a profit-making entity.

> compliance with Mount Laurel. We hold that where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." 92 N.J. at 279-80; See also, 92 N.J. at 290.

Since the builder's remedy is necessary for enforcement of the constitutional right and is an essential part of the right, the legislature may not interfere with it. Morin v. Becker, 6 N.J. 457, 471 (1951). Furthermore, the moratorium violates the separation of powers clause of the New Jersey Constitution since it is an attempt to override the Supreme Court's constitutional power to make rules governing the administration, practice and procedure in all Courts. New Jersey Constitution, Art. 3, par. 1, and Art. 6, §2, par 3; Sears, Roebuck & Co. v. Katzmann, 137 N.J. Super, 106 (App. Div. 1975). When a statutory provision and a court rule are in conflict, the rule must prevail. Borough of New Shrewsbury v.Block 115, Lot 4, 74 N.J. Super 1. (App. Div. 1962); State v. U.S. Steel Corp., 19 N.J. Super 274, aff'd 12 N.J. 38 (1953).

The second deficiency of the builder's moratorium section is that it does not meet the due process mandate of the New Jersey Constitution, Article 1, Paragraph 1. Due process requires that the legislative purpose bear a rational relationship to a constitutionally permissible objective, Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028 (1963); U.S.A. Chamber of Commerce v. State, 89 N.J. 131, 155 (1982). Although the court should not review the wisdom of legislative action, it must determine whether such action is within constitutional limitations. N.J. Sports Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972).

No public purpose can be envisioned for the twelve to fifteen month moratorium. In the event that the Denville cases or any other case is not transferred to the Council on Affordable Housing, no public purpose is served by

preventing the court from awarding an appropriate remedy authorized in Mount Laurel II. Any further delay is in fact clearly contrary to the public interest. 92 N.J. 199-200, 289-90, 291, 293, 341.

E. The Preclusion of the Award of Builder's Remedies By the Council Violates Mt. Laurel II.

The powers of the Council are set forth in detail in the Fair Housing Act. The Council must determine housing regions and regional need, adopt criteria and guidelines for fair share determination, adjustment and phasing (Section 7); propose procedural rules (section 8); approve regional contribution agreements (section 12); review petitions for substantive certification and grant, deny or conditionally issue substantive certification (section 14); engage in a mediation and review process where an objection to certification is filed or mediation is requested (Section 15).

The above-cited sections of the Act are completely silent on the availability of builder's remedies. Aside from the moratorium section, the remainder of the Act is also silent except for the strong statement of legislative intent in Section 3: "The legislature declares 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." Where a municipality has petitioned for substantive certification of its housing element and ordinance, the Council is directed to issue certification if the plan is consistent with the Council's criteria and guidelines and the combination of eliminating cost-generative features and affirmative measures make achievement of the municipal fair share realistically possible. (Section 14a & b). The Council is not directed to consider whether vested builder's remedies are carried out in the municipal plan. The Council is similarly not directed to consider or empowered to award builder's remedies in

the mediation and review process. Thus, builder's remedies are effectively wiped out.

As discussed in the preceding section on the builder's remedy moratorium, the builder's remedy is essential for enforcement of the constitutional right. Voluntary municipal compliance is encouraged under Mt. Laurel II by the impending dark threat of the award of a builder's remedy. The system under the Fair Housing Act, in the absence of potential builder's remedy awards, contains no impetus for compliance. Municipalities have the option of filing a resolution of participation at any time; they may file a housing element at any time, and exhaution of administrative remedies is not required if the housing element is filed before a lawsuit is commenced (section 9b). Once the housing element is filed with the Council, the municipality has six (6) years to request substantive certification (Section 13). Plaintiffs who file after 60 days before the effective date of the Act must seek mediation and review, and those who challenge requests for certification also must opt for the administrative process. If effective remedies are not guaranteed, however, no developer will waste his time in an administrative challenge, and municipalities will have no reason to voluntarily comply. The Act's failure to preserve builder's remedies is a fatal flaw.

F. The Administrative Process Pursuant to the Act Is Unconstitutional Because It Does Not Serve the Mt. Laurel II Goals of Streamlining Litigation and Expediting Lower Income Housing Production

As discussed throughout this brief, efficient litigation processes and timely housing production are the primary goals announced by the Supreme Court in Mt. Laurel II. 92 N.J. 199-200, 210, 286, 289-90, 291, 293, 341. The administrative process set up by the Fair Housing Act must serve these goals and thus the constitutional mandate, or be considered violative of the general welfare clause.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. L-3299-78 P.W.
L-13679-80 P.W.

ORGO FARMS AND GREEN-HOUSES, LTD.,

Plaintiff

vs.

THE TOWNSHIP OF COLTS NECK,

Defendant,

CONSOLIDATED WITH:

PARTIAL TRANSCRIPT
OF PROCEEDINGS

JUDGE'S DECISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. L-3540-84 P.W.

SEA GULL LTD BUILDERS, INC.,

Plaintiff,

vs.

THE TOWNSHIP OF COLTS NECK,

Defendant.

OCEAN COUNTY COURTHOUSE
TOMS RIVER, NEW JERSEY

MARCH 19, 1985

Rosemary Fratantonio, C.S.R.
Official Court Reporter

B E F O R E:

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

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

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For Plaintiff Seal Gull Ltd Builders, Inc.

MESSRS. STOUT, O'HAGAN & O'HAGAN
By: ROBERT W. O'HAGAN, ESQUIRE
For the Defendant Township of Colts Neck

THE COURT: All right. This is the first case in which the Court's been formally asked to address the Time of Decision Rule in Mount Laurel cases, and this case in particular. I might say that I would have preferred to draft a short formal opinion concerning this question because it has been raised in a number of cases and will probably continue to be an issue in some cases, however, the Mount Laurel underground has a way of spreading these rulings in any event, and beeause of my present duties, I simply am unable to provide a formal opinion for filing. It may be that I may want to supplement what I've said here or what I will say today concerning the Time of Decision Rule. The Rule itself has been characterized in the case of Hohl vs. Redington Township, 37 N.J., 271 at page 279 as being the Rule that holds that the zoning ordinance in effect at the time that the case is ultimately decided is the controlling ordinance. The purpose of the Rule has been summarized in the case of Kruvant vs. Mayor & Council of the Township of Cedar Grove which is in 82 N.J., 435, and specifically I refer to page 440 in which the Court says, and I quote,

"The purpose of the principle is to effectuate the current policy declared by the legislative body - a policy which presumably is in the public interest. By applying the presently effective statute, a Court does not undercut the legislative intent. Moreover, when a facial attack on a statute is involved, or an injunction is sought against future violations of a statute, the Time of Decision Rule is necessary to avoid rendering an advisory opinion on a moot question." So, therefore, it really has a twofold question, in other words to avoid deciding decisions which are moot, and to give deference to and effectuate the most current policy declaration of the legislative body when that is appropriate. As I will explain in a minute, the purposes of the Time of Decision Rule, in my view, are not further in their application to Mount Laurel II building remedies, and to the contrary the Time of Decision Rule could serve to totally frustrate the very existence of the Builder's Remedy device. Before explaining my reasons for that conclusion, I want to first briefly summarize the positions of the parties as I understand them. Colts Neck Township takes the position that the Time of Decision Rule should

be applied to this case and the effect of the application would be to require the plaintiffs to demonstrate non-compliance of an ordinance which was adopted on September 27, 1984, which was shortly before the time when this Court had promised this case would resume trial, a promise kept. Sea Gull Ltd., one of the plaintiffs in the litigation, agrees with the Township's position in that reliance may have something to do with the fact that the September 25th ordinance rezones Sea Gull's tract to accommodate high density development. Orgo, on the other hand, asserts that to apply the Time of Decision Rule to a Mount Laurel case would fly in the face of Mount Laurel principles of encouraging Builder's Remedies suit, and Orgo contends that the Time of Decision Rule is wholly contrary to the Builder's Remedy. For this reason Orgo argues that Builder's Remedy entitlement or for the purposes of Builder's Remedy entitlement, the Court should test the ordinance at the time the complaint was filed. The Court should add, however, that Orgo does take the alternate position that even if the Court utilizes the latest ordinance, that is September 22, 1984 ordinance, to determine a Builder's Remedy

entitlement, that Orgo still could not show that the -- I'm sorry, that Orgo could show that the ordinance is still non-compliant and so that the whole issue, in effect, doesn't have to be decided today.

As I indicated, I have to hold that the Time of Decision Rule is inapplicable in the setting of this case within the context of the determination as to whether the Builder's Remedy has been issued. Mount Laurel sets forth three criteria for determining entitlement to a Builder's Remedy, and they are to be found at pages 279 and 280 in the opinion. And for the purpose of this issue we must focus upon the first of those three tests, and that is, demonstrating that the municipal ordinance is non-compliant. That is sometimes called success in litigation. The cases since Mount Laurel II reveal that the plaintiff must satisfy the first problem by actively litigating non-compliance and by prevailing in some manner on that issue either by way of summary judgment, by convincing the town to stipulate non-compliance, by obtaining a settlement of the issue whereby the town voluntarily complies, or, of course, by having the Court rule on non-compli-

ance. I don't deem it vital that, in fact, a plaintiff must prove through litigation and Court determination that there was non-compliance, rather, if through the acts of the plaintiffs the town has rezoned, has revised its ordinance, and that those acts are attributable to litigation brought by the plaintiff, that the first part of the test has been satisfied. In other words, the important result is that the town, in fact, revises, and that the result came about because the plaintiff sued, and the plaintiff has sued because of the inducement of the Builder's Remedy. The Supreme Court recognized that a Builder's Remedy inducement would encourage suits and thereby force recalcitrant municipalities into compliance. And I elaborate to some extent on that issue in the case of Field vs. Franklin, still another of my unreported Mount Laurel decisions, decided on January 3, 1985, where at page 4 I emphasized the importance to encourage the bringing of Builder's Remedy actions, the incentive or inducement of being a remedy at the end of the line, and where at page 6 I talked about the necessity to maintain a sufficient level of litigation to bring about Mount Laurel compliance. If a non-compliant municipality could defeat

a Builder's Remedy by mending its ordinance after litigation, and even if the Time of Decision Rule was to be literally applied even before the final appeal is to be decided, then the Builder's Remedy inducement will be rendered meaningless. The plaintiff would not sue if it were so fragile.

It is significant to highlight the fact that the Supreme Court in Mount Laurel II did contemplate, and apparently, although not explicitly, rejected the possibility that the Time of Decision Rule be used to subvert a Builder's Remedy. The Court at page 200 said the following in the first footnote of the opinion, and here they are talking about the remand of the cases, the six cases consolidated into Mount Laurel II. "While we recognize the legitimacy of the municipal interest in having these amendments considered on remand, the circumstances may indicate, on balance, that vindication of the Constitutional obligation requires that compliance with Mount Laurel be determined on the basis of the prior ordinances, and that ordinance revisions be made pursuant to a remedial order of the Trial Court in accordance with this opinion." Now, I understand that footnote to mean that, A, first, that the vindication

of the obligation would require determination based upon the prior witnesses and any amendments should be dealt with within the context of the revision process and would be considered for that purpose in order to determine whether the town had brought its ordinance into compliance. The Court in Mount Laurel II also spoke to the Time of Decision Rule, again at pages 306 and 307 of the opinion, and I think it's useful to again quote what the Court said in that regard. The Court says, beginning at 306, "This ruling is similar to Kruvant vs. Mayor & Council of Township of Cedar Grove," citing the case, "where we announced a Time of Decision Rule that precluded a municipality from blocking a particular use of land by continually adopting prohibitory ordinances, one just as invalid as the next. There was a time to stop, we said, and while it may have taken six ordinances in Kruvant before we called a halt to dilatory municipal action, the principle is the same:. Depending upon the circumstances, a time must come when the Courts will cease to defer in the conventional manner to municipal action. In Kruvant, we refused to consider the most recently adopted municipal ordinance; here we refuse to

accord presumptive validity to Mount Laurel's revised ordinance." What Kruvant and Mount Laurel II say to me is that the old rule that was the favorite of the municipal attorney's nursery, so to speak, is beginning to be chipped away at. I must admit, in my own confusion, to having taken advantage of the principle which has existed for so long in municipal law and been party to change in municipal ordinances to meet the apparent rulings or announced rulings of Courts, and there is growing recognition that there's only so far that one might go to allow that principle to continue and give deference to municipal action. Kruvant represents one of the instances in which the Court said, not in this case, it's totally unfair. And I believe Mount Laurel II, the Court, by inference, is indicating that it would be unfair as well. Judge Skillman has had occasion to address the Time of Decision Rule in a Mount Laurel context in what, I believe, is another unreported Mount Laurel decision in Vandalen vs. Washington Township decided December 6, 1984. And at page 26, note twelve, Judge Skillman says the following: "Even where the Court determines that it should pass on the validity of newly amended ordinances,

a plaintiff may still argue that it is entitled to a Builder's Remedy if the zoning effect at the time of the filing of its complaint failed to satisfy its Mount Laurel obligation. In view of the Court's strong statement that Builder's Remedies must be made more readily available to a chief compliance with Mount Laurel, a Builder's Remedy arguably may be awarded where the ordinance in effect, when a complaint was filed, violated Mount Laurel, but amendments adopted during the pendency of the action bring the ordinance into compliance with Mount Laurel."

Now, I think it should be clear that I don't consider that statement to be a holding within the context of Vandalen but it's rather strong as to what I perceive is Judge Skillman's position in accordance with what I've already enunciated. Since the Mount Laurel II decision, Builder's Remedy is a unique device. The Time of Decision Rule, in a sense, really has no applicability to it at all. By this Court refusing to embody the Rule in Mount Laurel, no negative results that the Rule seeks to avoid actually occurs. The argument that the Time of Decision Rule voids rendering advisory opinions or moot

questions is totally inapposite to the Builder's Remedy context. After all, the question of whether a plaintiff is entitled to a Builder's Remedy by satisfying Mount Laurel II tests cannot become moot under any circumstances. By its very nature it focuses upon a fixed point in time, that is, the time of the filing of the complaint, and it focuses upon rights which grow from that point. The concept of mootness which triggers the Time of Decision Rule does not rise even if the Court is called upon to assess an ordinance that is no longer in effect. And there's nothing advisory about a Court ruling that will, in fact, determine a right to Builder's Remedy.

Now, much of what I've said so far concerns the nonapplicability of the Time of Decision Rule in the Mount Laurel case generally. The parties in this case have also spent some time addressing what might be called particular equities, and not surprisingly, depending on which party is to be heard, the equities point in opposite directions. Orgo notes that Colts Neck amended its ordinance on September 27, 1984, more than six years after the initial complaint was filed, more than one year after the remand from the Supreme Court,

more than seven months after the pre-trial conference and the commencement of the trial, and only one month before the case was scheduled by the Court to resume. This scenario painted against the backdrop of the Kruvant case, according to Orgo, warrants the Court's refusal to apply the Time of Decision Rule on pure equitable grounds. Kruvant which notes that there is an equitable limit beyond which a municipality can no longer benefit from the Time of Decision Rule involved a municipality that revised its ordinance several times, and the final revision coming after the trial testimony had been taken but before the decision. The Supreme Court noted that the Time of Decision Rule could not affect such municipal behavior, and that at some point the previous ordinance would have to be tested in Court; to hold otherwise would allow the municipality to interfere with the judicial process. And put succinctly, the equities, and I quote, "warrant a judicial integrity justifies the inapplicability of the Time of Decision Rule." That was at page 445.

Now, both Colts Neck and Sea Gull assert that the equities point in favor of considering the latest ordinance revision, particularly, they

assert, until the Court ruled upon the issue of the SDGP line and refused to alter it which occurred in April of 1984, the Township was not aware that it had a Mount Laurel obligation; and as soon as it became aware that it did, it then began to revise. Therefore, the September 27, 1984, revision is not analogous to a last minute revision in Kruvant, and that equity then would argue in favor of giving the Town a chance after it had determined its position. I would have to conclude that this argument simply does not hold up. In the first place, the Town had a Mount Laurel obligation from day one to the extent that it had an indigenous obligation, and to the extent that that indigenous obligation was met, the strong dictates of the opinion concerning the SDGP would not warrant any municipality to assume that it might convince the Court that the SDGP line should be moved, and that, therefore, it shouldn't do anything in compliance. At the very least the Township could have adopted an ordinance subject to determination of that issue, or under protest subject to the determination of that issue, or at least undertaken revision on its master plan in anticipation of its revision, or take many other steps which

Colts Neck, in fact, did not take in this case. If the equities were to decide this case, Orgo would still prevail with respect to its position concerning the Time of Decision Rule; but I don't find it necessary to determine this case on the issue of equities. I've discussed them only because the parties have spent a substantial amount of time briefing them. I'm entirely satisfied that what I said initially concerning the purposes and the intent of the Rule, the inapplicability of the Rule in the setting of the Builder's Remedy, and the entitlement of Builder's Remedy issue completely justify the finding that the position taken by Orgo with respect to the question of entitlement of Builder's Remedy is correct, and that for that purpose the Court will determine Builder's Remedy based upon the ordinance in effect at the time of the filing of the Orgo complaint.

****

C E R T I F I C A T E

I, ROSEMARY FRATANTONIO, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of the proceeding had in the above-entitled matter.

Rosemary Fratantonio

ROSEMARY FRATANTONIO, C.S.R.
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Plaintiff MORRIS COUNTY FAIR HOUSING COUNCIL, et al *vs.* *Defendant* BOONTON TOWNSHIP, et al	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY *Docket No.* L-6001-78 P.W *CIVIL ACTION*
Plaintiff AFFORDABLE LIVING CORPORATION, INC., a New Jersey Corporation vs. Defendant MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS/MIDDLESEX COUNTY Docket No. L-042898-84 P.W. CIVIL ACTION
Plaintiff SIEGLER ASSOCIATES, a partnership existing under the laws of the State of New Jersey vs. Defendant MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS/MIDDLESEX COUNTY Docket No. L-029176-84 P.W. CIVIL ACTION

Plaintiff STONEHEDGE ASSOCIATES vs. **Defendants** THE TOWNSHIP OF DENVILLE, in the COUNTY OF MORRIS, a Municipal Corporation of the State of New Jersey, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF DENVILLE and THE PLANNING BOARD OF THE TOWNSHIP OF DENVILLE	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS/MIDDLESEX COUNTY Docket No. L-086053-84 CIVIL ACTION
Plaintiff MAURICE SOUSSA and ESTHER H. SOUSSA vs. Defendants DENVILLE TOWNSHIP, a Municipal Corporation of the State of New Jersey, situate in Morris County, and THE DENVILLE TOWNSHIP PLANNING BOARD	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS/MIDDLESEX COUNTY Docket No. L-38694-84 P.W. CIVIL ACTION

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER CASE TO THE AFFORDABLE HOUSING COUNCIL

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INTRODUCTION

Aside from the constitutional infirmities of the new Mount Laurel legislation [hereinafter the Fair Housing Act or the Act] upon which Denville Township relies, the very terms of the Act prohibit a transfer if such a transfer would cause a "manifest injustice". If there is any case in which it would be manifestly unjust to transfer the matter to the Council, this is that case. This case has reached the final steps in a process spanning almost seven years of litigation. Therefore, this Court should complete the process and thereby ensure that Denville Township satisfies its Mount Laurel obligation and that lower income housing at long last is built in this recalcitrant Township.

STATEMENT OF FACTS

There is no dispute as to the facts central to this dispute. On October 13, 1978 a Complaint in Lieu of Prerogative Writ was filed by the Department of Public Advocate on behalf of itself, the Morris County Fair Housing Council and the Morris County Branch of the National Association for the Advancement of Colored People against the Township of Denville. Following the Mount Laurel II decision, on January 20, 1983, this case was transferred to this Court, which held status conferences in the spring and summer of 1983. Defendant's brief at 1-2. On May 15, 1984, Siegler Associates brought a Mount Laurel action seeking a builder's remedy. Defendant's brief at 2. Thereafter, several additional plaintiffs brought suits seeking builder's remedies. In July, 1984, this Court tried the case. When Denville announced that it would probably agree to settle this matter, the Court suspended the trial on August 3, 1984 to give the parties the opportunity to settle the case. When settlement discussions failed to bear fruit, Siegler Associates moved and obtained summary judgment declaring Denville's zoning ordinances non-compliant. The trial to determine Denville's "fair share" resumed in January 1985 and the Court established Denville Township's fair share to be 924 units. Defendant's brief at 5-6.

On January 31, 1985, the Court appointed David Kinsey, Ph.D. to serve as the master. Beginning in May, 1985, the

master held a series of meetings in which all the parties attended. In those meetings, the master sought (1) to establish standards for evaluating the suitability of each site and (2) to evaluate the suitability of each site based on the standards developed. The master always stood ready to mediate between any plaintiff or other landowner in Denville and the Township, in an effort to reach a compromise that would result in a project consisting of a substantial amount of lower income housing. Throughout the proceedings, the master stood ready to assist the municipality in revising its regulations to satisfy Mount Laurel.

Despite the master's considerable efforts, despite the willingness of each builder to develop a project that would be attractive to the Township, and despite the considerable efforts of each builder in attending numerous meetings and hearings, the municipality ultimately submitted a compliance proposal to the master which was not only facially invalid, but also evidence of the bad faith of the municipality. See Exhibit A. That compliance package relied on a mandatory set aside wherein the owner was assured of losing more money by building under the set aside than by building in accordance with the existing zoning. Such a set aside mechanism hardly creates the type of incentives necessary to create a realistic opportunity. See Exhibit B at page 6 (explaining how the set aside creates disincentives to development). In light of the

Township's vast experience with Mount Laurel compliance mechanisms through years of litigation and through intensive negotiations with the Public Advocate, the Township's production of a compliance package which relied on such a set aside was not the product of the Township's naivete. Rather, the Township was continuing the pattern of delay and evasion which had typified its conduct throughout the proceedings.

It was obvious to all the parties to the proceedings before the master that the Township was not genuinely interested in satisfying its obligation. Instead, the Township's tactic was clear -- stall, in the hope that legislation would be enacted and that this case would be transferred to a legislative body, thereby delaying as much as possible the day when lower income housing would be produced in Denville.

Legislation was enacted on July 2, 1985. Almost immediately thereafter, on July 8, 1985, Denville filed its motion papers seeking a transfer to the Council on short notice. Should this Court permit Denville to do that which it seeks, this Court will have rewarded Denville for the game it has played so masterfully.

LEGAL ARGUMENT

POINT I

ASSUMING THE FAIR HOUSING ACT PASSES CONSTITUTIONAL MUSTER, UNDER THE TERMS OF THAT ACT, IT WOULD BE MANIFESTLY UNJUST TO TRANSFER THIS CASE AT THIS LATE DATE TO THE AFFORDABLE HOUSING COUNCIL

The Fair Housing Act provides the following:

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

Fair Housing Act, Section 16 (emphasis added).

Thus, it is the clear legislative intent that a Court should not release a case to the Affordable Housing Council if it would be "manifestly unjust." Given the stage in the Mount Laurel process that this case has reached, it would be manifestly unjust to all the parties to eliminate all that has been accomplished thus far and to begin again at the first step before the Council. Furthermore, the need for the prompt, actual construction of lower income housing is such a part of the fabric of the Mount Laurel doctrine that a transfer would be manifestly unjust to ask the poor to wait still longer for the housing opportunities which Denville has denied them for so long.

A. The Defendant's Request Comes Too Late in the Proceedings

Of the several stages in the Mount Laurel process, we have now reached the final stages. To summerize, in the first step, the builder must seek to negotiate in good faith with the municipality in an effort to reach a Mount Laurel settlement without litigation. Mount Laurel II at 214. Second, the plaintiff may file his complaint if negotiations fail to bear fruit or if negotiations appear futile. J.W. Field v. Franklin Tp. at 15. Third, Mount Laurel II calls for "the strong hand of the judge at trial" to move the case through case management proceedings. Mount Laurel II at 292. Fourth, the trial begins. At trial, the Court initially must identify the municipality's obligation, and thereafter determine whether the municipality has satisfied its obligation. If the municipality fails to satisfy its obligation, the Supreme Court instructed each trial court to deem the municipality's regulations to be exclusionary and to give the municipality 90 days to satisfy its obligation. Mount Laurel II at 281. Following the 90 day revision period, the Supreme Court instructed the trial courts to hold a second compliance hearing wherein the constitutionality of the revised regulation would be tested once again. If the revised regulations again failed to pass constitutional muster, the Supreme Court permitted the trial courts to implement the "remedies for non-compliance." Mount Laurel II at 285. These "remedies" essentially give the Court

the power to do whatever is necessary to ensure that the municipality satisfies its Mount Laurel obligation, even if that means rewriting the municipality's land use regulations. Id.

It is clear from this recitation of the standard sequence of events in any Mount Laurel action that we have reached the last step in this long process. The Township has been deemed exclusionary, given more than ample time to revise its regulations and returned to Court with an outlandish compliance proposal. See Exhibit A. This Court is in a position where it must implement the "remedies for noncompliance" if lower income housing will ever be built in Denville Township. To suggest at this point that the Court tie its hands behind its back when it should be moving the proceedings forward would be to undermine the Mount Laurel procedure. The time has come to act -- not to turn this case over to a body which does not yet exist and thereby guarantee that nothing will be done for a long time to come.

Should this Court permit the Township to delay the production of housing by the transfer, this will severely impact upon the ability of the present developers to produce lower income housing. Not only will the carrying costs accentuate the difficulty of the builders in bearing the economic burden of providing lower income housing, but also the unavailability of sewerage is likely to become worse with time. Thus, delay could effectively foreclose many builders that are now ready and able to implement their Mount Laurel projects.

B. The Delay Caused By The Transfer Would Be Fundamentally Unfair To The Poor

The delay in the actual construction of lower income housing that would result from the transfer of this case to the Council would be manifestly unjust to the poor who have been denied housing in Denville for so long. This would be anathema to a principle that is a foundation to the Mount Laurel doctrine -- that there is a critical need for the prompt, actual construction of lower income housing and that the vast energy spent in litigating Mount Laurel matters in the past would be far better spent in constructing the lower income units. Mount Laurel 219-200, 210-11 n. 5,352. As evidence of the Court's concern for speed, note that the Court developed a very difficult standard for obtaining an interlocutory appeal, reasoning that:

> municipalities will not be able to appeal a trial court's determination that its ordinance is invalid, wait several years for adjudication of that appeal, and then, if unsuccessful, adopt another inadequate ordinance followed by more litigation and subsequent appeals. We intend by our remedy to conclude in one proceeding, with a single appeal, all questions involved.

Mount Laurel II at 290. The Court further demonstrated its concern for dispatch by instructing the trial courts to give the municipality in question only ninety (90) days from the moment the Court declares the regulations to be invalid to revise its regulations to comply with the Mount Laurel II man-

date. Mount Laurel II at 281. The Supreme Court tied together the many threads of its numerous new procedural laws in the following passage:

> We hope that individualized case management, the growth of expertise on the part of the judges in handling these matters, the simplification and elimination of issues resulting both from our rulings and from the active involvement of judges early in the litigation, and the requirement that, generally, the matter be disposed of at the trial level in its entirety before any appeal was allowed, will result in an example of trial efficiency that needs copying, not explaining."

Mount Laurel II at 293 (emphasis added). The Court emphasized trial efficiency so greatly because the Court recognized that the more energy spent in litigating, the less energy would be spent by builders and municipalities cooperatively working towards the actual construction of lower income housing.

Aside from the concern for speed demonstrated by the many procedural rulings in Mount Laurel II, the sense of urgency underlies the entire opinion. For example, the Supreme Court describes the conduct of Mount Laurel Township as follows:

> Nothing has really changed since the date of our first opinion, either in Mount Laurel or its land use regulations. The record indicates that the Township continues to thrive with added industry, some new businesses, and continued growth of middle, upper-middle, and upper income housing. As far as lower income housing is concerned, from the date of [Mount Laurel I] to today

> (as far as the record before us shows), no one has yet constructed one unit of lower income housing - nor has anyone even tried to. Mount Laurel's lower income housing effort has either been a total failure or a total success - depending on its intention.
>
> We realize that given today's economy, especially as it affects housing, the failure of developers to build lower income housing does not necessarily prove that a town's zoning ordinances are unduly restrictive. One might have expected, however, that in the eight years that have elapsed since our decision, Mount Laurel would have something to show other than this utter cipher. . .

Mount Laurel II at 396-97 (emphasis added). In light of Mount Laurel Township's conduct, it is understandable why the Supreme Court expended such great efforts to design procedural as well as substantive law that would provide housing quickly and thereby prevent history from repeating itself.

The Supreme Court's ruling with regard to the traditional exhaustion of administrative requirements is also telling:

> We comment here on defendants' claim that plaintiffs should have exhausted administrative remedies before bringing this suit. There is no such requirement in Mount Laurel litigation. If a party is alleging that a municipality has not meet its Mount Laurel obligation, a constitutional issue is presented that local administrative bodies have no authority to decide. Thus, it is certainly appropriate for a party claiming a

> Mount Laurel violation to bring its claim directly to court.

Mount Laurel II at 342 n. 73. By eliminating the exhaustion requirement, the Supreme Court ensured that law suits would proceed more expeditiously and that housing would be produced more quickly.

Finally, the Supreme Court's ruling with respect to the time of decision rule also evidences the Court's desire to get the plaintiff out of the courtroom and into the field building housing. In this regard the Supreme Court stated:

> Given the importance of the societal interest in the Mount Laurel obligation and the potential for inordinate delay in satisfying it, presumptive validity of an ordinance attaches but once in the face of a Mount Laurel challenge.

Mount Laurel II at 306 (emphasis added). The trial courts have similarly refused to allow municipalities to prolong the process by adopting a compliant regulation after the filing of the suit in order to defeat a builder's remedy. Van Dalen v. Washington Township, Docket No. L-045137-83 P.W. at 26 n.12. See also Orgo Farms v. Colts Neck, Docket Nos. L-3299-78 P.W., L-13679-80 P.W. and L-3540-84 P.W. Transcript (March 19, 1985). By preventing a municipality from circumventing a Mount Laurel challenger through a strict application of the time of decision rule, both the Supreme Court and the trial courts have eliminated a major weapon in the arsenal of delay

of municipalities. Again, the intent can only be to ensure that the housing is produced as quickly as possible.

In its decision regarding the case of Mount Laurel Township, the Supreme Court granted Davis a builder's remedy because:

> "We feel that after ten years of litigation it is time that something be built for the resident and non-resident lower income plaintiffs in this case who have borne the brunt of Mount Laurel's unconstitutional policy of exclusion."

Mount Laurel II at 308 (emphasis added). The case at bar is approaching the seven year mark, and after all this time, the most this Township is willing to do to provide for the needs of the poor is to provide a compliance package that creates the realistic opportunity for 12 units. See Appendix B, letter of Steven Eisdorfer to the master, David Kinsey. The creation of a realistic opportunity of 12 units is a far cry from the Township's obligation of 883 units.

Since the Affordable Housing Council does not yet exist and is not likely to be functioning effectively for a long time to come, Denville will probably become another Mount Laurel if this Court transfers this case. Surely, when considering the manifest injustice to the plaintiffs, this Court should consider the fundamental unfairness to those for whom these plaintiffs speak -- the poor. See generally Morris County Fair Housing Council v. Boonton (suggesting that builders derive their standing to sue because they represent

the interests of the poor). It is the poor who will again bear the brunt of municipal tactics of evasion and delay, if this Court permits a transfer. Such a result is wholly unconscionable.

POINT II

THIS COURT SHOULD NOT TRANSFER THIS CASE TO THE AFFORDABLE HOUSING COUNCIL BECAUSE THE FAIR HOUSING ACT IS UNCONSTITUTIONAL

The Fair Housing Act raises significant questions as to its constitutionality. Had Mount Laurel II never been decided and had the specialized trial judges never expended such considerable effort to clarify the constitutional obligation, it would be difficult to challenge the constitutionality of the Fair Housing Act. However, through Mount Laurel II and its progeny, the law has become relatively well settled, the constitutional obligation has been clarified and the yardstick against which the legislation must be measured has been established. Relative to this yardstick, the legislation clearly does not pass constitutional muster. Indeed, a close examination of the legislation reveals that, contrary to its stated intent, the Act seeks to undermine the constitutional obligation as set forth in Mount Laurel II and as clarified by its progeny.

The basic issues are the same in a Mount Laurel challenge, regardless of whether those issues are resolved in the context of the Fair Housing Act or in the context of Mount Laurel II and its progeny. To demonstrate how the Fair Housing Act undermines the Mount Laurel doctrine, it is necessary to show how these basic issues are resolved differently pursuant to the Fair Housing Act than pursuant to Mount Laurel II.

The basic issues may be summarized as follows:

(1) What is the appropriate procedure to determine quickly and fairly the rights and duties of Mount Laurel challengers and municipalities?

(2) What is the appropriate methodology to determine what is the scope of the constitutional obligation of each municipality?

(3) What mechanisms are acceptable means for a municipality to satisfy its obligation?

(4) What rights do Mount Laurel challengers have to a rezoning of their particular parcels?

A. This Court Should Declare The Fair Housing Act Unconsitutional Because The Act's Procedures Delay The Production Of Lower Income Housing.

As explained above in full, the Supreme Court's interpretation of the constitutional obligation in Mount Laurel II reveals that the Supreme Court was not just concerned with the actual production of lower income housing. The Court was equally concerned with the production of that housing on a timely basis. This concern for timeliness is at the root of (1) the Court's creation of its many new procedural rulings, and (2) the Court's substantive decisions as to the time of decision rule, exhaustion of administrative remedies requirement and grant of a builder's remedy. See generally supra at 11-14.

Very often delay can result in the severe reduction of the amount of lower income housing that can be produced. As sewerage capacity is used up, as land suitable for Mount Laurel

development is condemned for other purposes, and as site plan approval is given on other parcels, further obstacles to the production of lower income housing are created. The longer the municipality takes to revise its regulations, the greater the potential for the creation of such obstacles.

When examining the timing of the production of lower income housing pursuant to the Fair Housing Act, it is clear that the legislation is designed to slow the process which the judiciary designed to move quickly. The Act contemplates the existence of three categories of challengers:

> (1) Plaintiffs in Mount Laurel actions commenced before the sixty day period preceding the effective date of the Act (before May 2, 1985);
>
> (2) Plaintiffs in Mount Laurel actions commenced during the sixty day period preceding the effective date of the Act (between May 2, and July 2, 1985); and
>
> (3) Plaintiffs in Mount Laurel actions commenced after the effective date on the Act (after July 2, 1985).

See generally Fair Housing Act, Section 16.

In all three categories, rather than mandating that the municipality provide for its fair share of lower income housing promptly, the Act establishes a series of dates by which time the municipality must take certain actions.

First, municipalities must adopt a "resolution of participation," no later than November 2, 1985. Fair Housing

Act, Section 16.b. referring to Sections 9.a. A "resolution of participation" is a resolution by a municipality stating that the municipality intends to participate in the legislative process before the Affordable Housing Council. Fair Housing Act, Section 4.e.

Second, even if the municipality adopts a resolution of participation as late as November 2, 1985, the municipality may do nothing until June 1, 1986,* at which time the municipality must submit a "housing element." Fair Housing Act, Section 16.a. and 18. A "housing element" is a report submitted by a municipality to the Council in which the municipality presents an analysis of (1) what it perceives as its obligation and (2) how it plans to satisfy its obligation. Fair Housing Act, Section 10 and 11 (explaining, respectively what a municipality should include in its housing element relative to the identity of its obligation and the establishment of a compliance package).

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* The Act defines a timely period as "within five months after the council's adoption of its criteria and guidelines" for determining a municipality's obligation. Fair Housing Act, Section 9.a. The Council must develop its criteria and guidelines within "seven months after the confirmation of the last member initially appointed to the council or January 1, 1986, whichever is earlier." Fair Housing Act, Section 7. Since the Council can potentially establish its guidelines as late as January 1, 1986 and since five months thereafter would be June 1, 1986, the municipality in question may be permitted to file its housing element as late as June 1, 1986 without fear of being transferred back from the Council to the specialized trial court.

Third, even if a municipality adopts its resolution of participation on November 2, 1985 and even if the municipality files its housing element on June 1, 1985, the actual production of lower income housing still will not begin. The party challenging the municipality's regulations must participate in the Council's review and mediation process. For all requests to review and mediate filed before April 2, 1986, the Council has until October 2, 1986 to complete mediation. Fair Housing Act, Section 19. For all requests to view and mediate filed after April 2, 1986, the Council has six months from the point of the request to complete review and mediation. Fair Housing Act, Section 19. Failure of the Council to complete its review and mediation within the six month period does not result in an automatic release of the challenger of the requirement that the challenger submit to mediation. Rather, the challenger must now seek the leave of a court of competent jurisdiction to be relieved of the obligation to exhaust. Id.

Fourth, if the mediation efforts fail to culminate in a settlement, the Act directs the Council to transfer the case to the Office Administrative Law for proceedings before an administrative law judge. Fair Housing Act, Section 15.c. The Act requires the administrative law judge to conduct a complete evidentiary hearing within 90 days and to submit a preliminary decision to the Council within this 90 day period - "unless the time is extended by the Director of Administrative Law for good

cause shown." Fair Housing Act, Section 15.c. If a specialized trial judge, well seasoned in the complexities of Mount Laurel litigation cannot complete an evidentiary hearing and submit a decision within 90 days from the time the judge receives the case, certainly it is unrealistic to expect that the administrative law judge will be able to complete the proceedings with any degree of frequency within 90 days. Thus, one can reasonably expect that these proceedings will take substantially longer.

Fifth, the Act does not specify the time for action by the Council once it has received the recommendations of the administrative law judge to make a decision on whether to issue a substantive certification. Even if the Council issues a substantive certification, no housing will be built until the municipality adopts ordinances consistent with the housing element submitted to the Council. This best case scenario still contemplates that the municipality will have 45 days from the issuance of the substantive certification to adopt such an ordinance. Fair Housing Act, Section 14. If the Council denies or conditions the issuance of the substantive certification, the municipality has 60 days to petition the Council to reconsider its denial or to satisfy the Council's conditions. Fair Housing Act, Section 14.b. Assuming that the Council either reverses its denial or that the municipality satisfies the conditions, again the municipality has 45 days to

adopt an appropriate ordinance. Id. If the Council denies certification and if the municipality fails to persuade the Council to reverse itself, then the municipality must appeal the refusal of the issuance of the substantive certification to an appellate court. Similarly, if the Council issues a substantive certification, the challenger must appeal to an appellate court.

The point of tracing the laborious exercise is to illustrate the attenuated procedures established by the Act which will substantially delay the day when lower income housing is produced. This result is most offensive in the context of suits involving plaintiffs that had filed suit before May 2, 1985. If the defendant prevails, it is possible for a municipality on the brink of settling on July 1, 1985 to now successfully petition the specialized trial court for a transfer and thereby substantially delay the day that lower income housing is produced.

As frustrating as the procedure may be, even the time frames established by the Act are not likely to be satisfied. The Act substitutes a totally inexperienced Council and administrative law judge for the specialized judiciary, which the Supreme Court designed to be a model of "trial efficiency". Once the Council is established, it will have to determine the procedural rules that will govern it as well as numerous guidelines relating to issues involving the identification of the

obligation and the determination of compliance with that obligation. Fair Housing Act, Sections 7 and 8. Similarly, the administrative law judge is to take elaborate proofs within a 90 day period regarding various compliance packages and proposals for Mount Laurel projects. There remains a litany of delay inducing factors, all similarly frustrating.

This raises yet another factor that is critical in this diagnosis of delay. The Act does not specify what happens if deadlines are not met. For example, within 30 days from the enactment of the Fair Housing Act, the Governor was to nominate the nine members to the Council. Fair Housing Act, Section 5.d. Already the 30 day mark has passed and no such nominations have been made. However, the Act specifies no consequences for the tardiness. What should happen if the Legislature refuses to approve the Governor's appointments. Or, what if the Council fails to establish the rules that will govern its procedures or if the Council fails to establish appropriate fair share guidelines. The point is that the Act's failure to identify specific consequences for satisfying deadlines creates a series of unanswered questions, which will only lead to more litigation, which in turn will lead to further delay.

Our Supreme Court described procedure under Mount Laurel I as follows:

> The deficiencies in its applications range from uncertainty and inconsistency at the trial level to inflexible review at the appellate level. The waste of judicial energy

> involved in every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue.

Mount Laurel II at 200. This passage aptly describes the procedure created by the Fair Housing Act. Thus, the Act frustrates the ultimate goal of Mount Laurel II-the refocusing of the litigation on the actual and prompt construction of lower income housing. The Mount Laurel obligation was designed to provide a realistic opportunity for housing, not litigation. Mount Laurel II at 352. The Act will achieve just the reverse - more litigation and less housing.

B. The Act Substantially Dilutes The Constitutional Obligation Of The Municipalities Of Our State To Provide Lower Income Housing.

Mount Laurel II did not set forth the specific methodology by which the obligation of each municipality would be identified. Rather, Mount Laurel II set forth some broad guidelines ostensibly with the hope that the specialized judiciary it created would find a means of resolving the most troubling and vexing issue in all of Mount Laurel litigation the fair share issue. Mount Laurel II at 248. In AMG v. Warren Twp., Docket Nos. L-23277-80PW and L-67820-80PW (L. Div. 1984) (unreported), Judge Serpentelli accepted the Court's challenge and issued an elaborate opinion spec-

methodology which could be utilized to identify with precision the obligation of each municipality in the State. That opinion also set forth in detail the specific reasons for each step in the methodology as well as the justification for the methodology as a whole. This Court, with equal rigor, has developed alternative methodologies in Countryside Properties v. Borough of Ringwood, Docket No. L-42095-81 (1984) (unreported) and Van Dalen Associates v. Washington Tp., Docket No. L-045137-83P.W. Whether applying the AMG methodology or any variation of the AMG methodology, the estimates of the need for lower income housing across our state are very close.

When evaluating the standards set forth in the Fair Housing Act relative to the existing standards, it becomes clear that the Fair Housing Act's standards do not measure up. Indeed, the standards are little more than a transparent attempt to dilute the constitutional obligation and save suburban municipalities from the more substantial obligations that would be produced by the existing standards.

The definitions that form the vocabulary of the Act are themselves exclusionary when viewed in light of the standards developed by the specialist trial courts. "Housing region" is defined as a configuration of between two to four contiguous counties "which exhibit significant social, economic and income similarities, and which . . .". Fair Housing Act, Section 4.b. By grouping counties with similar social and economic conditions to form a region, the Act tends to preserve

exclusionary patterns. The emphasis on smaller regions tends to ensure that many municipalities will be better able to exclude from their region Essex County in which Newark is located and Camden County in which Camden is located. The presence of these two cities in a municipality's region tends to increase a municipality's obligation because these cities contain substantial numbers of substandard units, thereby raising the present need of the region and the obligation of any municipality in that region. The AMG methodology deliberately established an expansive present need region for Warren Township to ensure that there would be adequate land resources in the outlying counties to address the tremendous need for lower income housing generated by the urban core areas surrounding Newark. AMG at 32-34.

In a similarly exclusionary fashion, the Act states that "prospective need" is to be based on the development and growth which is likely to occur in a region or municipality. In this regard, the Council is to consider the approvals of development applications. Fair Housing Act, Section 4.j.

In the AMG case, Warren Township proposed a similar argument in an attempt to persuade the Court to reduce the Township's obligation. More specifically, the defendant argued that if one were to compare (1) the number of units that would have to be built across our state to satisfy the obligation of each municipality as derived from a strict application of the

AMG methodology to (2) the number of units that are likely to be built across the state based on the greatest number of units that have been produced in the state in any given year, one reaches the conclusion that the statewide obligation will never be satisfied because there never will be enough units built in any given year. Therefore, defendant argued that the obligation of each municipality should be reduced to reflect what the market will bear. This argument misunderstands a fundamental principle in the law concerning fair share and compliance. The Supreme Court deliberately urged its specialized trial courts to establish the obligation of any given municipality in the ideal and to let the marketplace determine whether or not that ideal would be satisfied. AMG at 73-74 citing Mount Laurel II at 352. By arguing that courts should consider the maximum number of units built in the past, or the approvals of development applications, as in the Fair Housing Act, municipalities are asking the courts to account for the marketplace in establishing the obligation. Thus, if there had been few approvals issued in a region because of widespread exclusionary practices, the municipalities in that region are likely to be rewarded for the exclusionary practices. Id.

As with the above definitions, the guidelines which the Act directs the Council to formulate for purposes of evaluating housing elements submitted by municipalities are similarly designed to facilitate the dilution of the constitutional

obligation. Fair Housing Act, Sections 7.c., d. and e. For example, any municipality may argue that the Council should permit it to accept a lower obligation because (1) the municipality is entitled to credits; (2) the municipality lacks adequate vacant developable land; (3) the municipality lacks adequate infrastructure; or (4) the municipality has a sensitive environment. Fair Housing Act, Sections 7.c.(1), 7.c.(2)(f), 7.c.(2)(g) and 7.c.(2)(a).

While all of these defenses appear to be available to a municipality before a specialized trial judge, the Fair Housing Act would have the Council not only adopt particularly lenient standards for these defenses, but also provide additional defenses.

As an example of leniency, the Act calls for the municipality to receive a full credit towards its obligation for each standard unit occupied by a lower income household. Fair Housing Act, Section 7.c.(1). According to this credits standard, the date the lower income unit came into existence is not relevant nor is it relevant whether there are any re-sale or re-rental controls to ensure that the lower income unit remains affordable to a lower income household. The disregard for the lack of re-sale and re-rental controls results in a municipality receiving a full credit for a unit if an upper income household purchases the lower income unit the day after the Council issues a substantive certification. The disregard for

the date the lower income unit came into existence results in a municipality receiving full credit for a unit even if the unit was never part of the municipality's indigenous need to begin with because the unit was rehabilitated before 1980 - the date upon which the data is based which is used to calculate the indigenous need. Since a municipality automatically receives credit for lower income units rehabilitated before 1980 by having a lower indigenous need, the Act promotes a double counting of credits by granting a municipality an additional credit for the same unit. For precisely this reason, this Court rejected the Borough of Ringwood's request to obtain credits for units rehabilitated before 1980. Countryside Properties at 15-16.

Estimates contained in a book published by the Center for Urban Policy and Research in 1983, entitled "Mount Laurel II-Challenge and Delivery of Low-Cost Housing" reveal the severest flaw in the Act's credit standard. The authors of this book estimated that 960,080 units in New Jersey would satisfy the type of credit standard promulgated by the Act. Id. at 142. The authors also estimated that the state has a present need of 120,160 units. Id. Since the supply of lower income housing far outweighs the need, application of the Act's credit standard leads to the conclusion that there is an overabundance of lower income housing in our state.

As an example of new defenses, the Council is instructed to accept a lower obligation for any given municipa-

lity if the preservation of historically or important architecture may be jeopardized by the provision of the full obligation. Fair Housing Act, Section 7.c.(2)(a). If "the established pattern of development in the community would be drastically altered," again the Council should permit a reduction in the obligation. Fair Housing Act, Section 7.c.(2)(b). Thus, an exclusionary municipality which has succeeded in depressing the intensity of development through exclusionary practices could obtain a lower obligation as a direct result of these exclusionary policies because in such a municipality any intensive high density development for Mount Laurel purposes would tend to drastically alter the established pattern of exclusionary development. A municipality may also assert that it wishes to preserve farmlands or open space to justify a reduced obligation. Fair Housing Act, Sections 7.c.(2)(c) and (d).

Under the standards set forth in this Act, a municipality would be unimaginative indeed not to find a way to substantially reduce its obligation. In the event that a municipality is unimaginative, however, the Act provides additional mechanisms designed to ensure a substantial reduction of a municipality's obligation. For example, the Act calls for a phasing of the issuance of final approvals for units in Mount Laurel housing projects based upon the size of a municipality's obligation. Fair Housing Act, Sections 7.c.(3) and 23. Furthermore, the Council may establish caps for the obligation

of any municipality based on the number of jobs in the municipality or "any other criteria ...which the council deems appropriate." Fair Housing Act, Section 7.e.

C. This Court Should Declare The Fair Housing Act Unconstitutional Because The Act Promotes The Use Of An Unconstitutional Compliance Mechanism.

In the spirit of Mount Laurel II, the specialized trial judges have been extremely willing to entertain the use of new compliance mechanisms. Mount Laurel II at 265-66. However, to date, no court has permitted a municipality to comply by transferring its obligation to other municipalities. Nonetheless, the Fair Housing Act has created precisely this type of new compliance mechanism.

This new compliance mechanism would permit a municipality to transfer up to half of its obligation to another municipality within its region by entering into a contractual agreement with the receiving municipality. Fair Housing Act, Section 12. For example, if Municipality A, a suburban municipality, had an obligation of 500 units, Municipality A might provide the opportunity for 250 lower income units within its borders and 250 lower income units within the borders of Municipality B, an urban municipality, by making monetary contributions to Municipality B in such amounts that Municipality B could produce lower income housing either through rehabilitation of existing substandard units or through the development of new units. Fair Housing Act, Section 12.f.

This mechanism tends to ensure that Municipality A will remain an enclave of affluence contrary to the intent of our Supreme Court. Mount Laurel II at 211.

D. This Court Should Declare The Fair Housing Act Unconstitutional Because The Act Eliminates The Builder's Remedy.

In contrast to Mount Laurel II, in which the Supreme Court deliberately urged the trial courts to liberally grant builders' remedies, the Fair Housing Act just as deliberately seeks to preclude builders' remedies. Indeed, the Act states:

> "it is the intention of the act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing."

Fair Housing Act, Section 3. Consistent with this objective, the Act directs municipalities, when designing their housing element, to include:

> "[a] consideration of lands that are most appropriate for low and moderate income housing...including a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing."

Fair Housing Act, Section 10.f.(emphasis added).

In further support of the proposition that the Act seeks to eliminate the builder's remedy, an examination of the Act reveals that nowhere in the elongated process does any entity have the authority to award a builder's remedy. Thus, in the first step of the Act's new procedure, the Mount Laurel challenger must submit to mediation before the Council.

However, the Council only has the authority to grant, deny or condition the issuance of a substantive certification to the municipality. Fair Housing Act, Sections 14. and 15. The Council does not have the authority to issue a builder's remedy to the challenger. Similarly, if the Council's mediation efforts fail and if the challenger now finds himself before an administrative law judge, the judge may not grant a builder's remedy. Rather, the administrative law judge may only submit his recommendations and conclusions of law and fact to the Council. Fair Housing Act, Section 15.c. The Council is free to reject the judge's recommendations even if the judge were to recommend rezoning the challenger's parcel.*

Assuming the Council issues a substantive certification, the final stage in the Act's new procedure is an appeal to an appellate court. In this proceeding, the plaintiff must meet the heavy burden of demonstrating that there was no basis as to the Council's factual conclusions or that the Council was arbitrary and capricious as to its legal conclusions. See generally New Jersey Standards For Appellate Review at 12-14 (1982) In short, it is clear that the plaintiff challenging the issuance of a substantive certification at the appellate level has an extremely difficult burden. Even if the plaintiff overcomes this burden, it is not clear that the

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* Assuming the Council were to accept a recommendation, even then the Council would continue to lack the authority to grant a builder's remedy.

plaintiff's victory renders him a "successful" plaintiff entitled to a builder's remedy upon satisfaction of the remaining two elements of the test for a builder's remedy. Mount Laurel II at 279-80.

In sum, in contrast to the certainty created by the test for a builder's remedy set forth in Mount Laurel II, the Fair Housing Act renders the builder's fate uncertain in those municipalities that have elected to participate in the Act's legislative procedures. It is entirely possible for the builder to undergo a process that is longer and more arduous than the Mount Laurel II process and to be denied a Mount Laurel rezoning in the end.

The Supreme Court created the builder's remedy because these remedies are (i) essential to maintain a significant level of Mount Laurel litigation, and the only effective method to date of enforcing compliance. Mount Laurel II at 279. Therefore, elimination of the remedy in municipalities participating in the Act's procedures will remove the builders' desire to participate in the process. This, in turn, will eliminate the pressure on exclusionary municipalities to do any more than necessary to satisfy the Council. The Act establishes such lenient standards for fair share and compliance purposes that one can hardly expect that the Council will demand as much as is necessary to ensure constitutional

satisfaction.*

History has demonstrated that the tribunal must be steadfast if lower income housing opportunities will ever be produced. Thus, Mount Laurel II repeatedly calls for the "strong hand of the judge at trial". Mount Laurel II at 199,292. The Act appears to replace the strong hand of the trial judge with the weak hand of the Council in municipalities participating in the legislative process. Thus, to the extent that a significant number of municipalities elect to participate in the procedures before the Council, the Act ensures that there will be fewer housing opportunities for lower income households-especially in the suburbs. Mount Laurel II expressly sought to open the doors of suburban municipalities to the poor. Mount Laurel II at 210-11 n.5.

The Supreme Court also created the builder's remedy because "these remedies are required by principles of fairness to compensate developers who have invested substantial time and resources in pursuing such litigation." Mount Laurel II at 279. The Act's elimination of the builder's remedies in municipalities participating in the legislative process is fundamentally unfair. If equity required the trial court to reward builders efforts under the favorable procedural and substantive law of Mount Laurel II, then certainly equity

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* In contrast to the specialized trial judge who can award a builder's remedy or implement the remedies for noncompliance, the Council can only grant, conditionally grant or deny a request for a substantive certification.

should require the Council, administrative law judge or appellate court to reward the builder under the law established by the Act, which does nothing more than create a series of obstacles for the builder.

Finally, the Supreme Court created the builder's remedy because "these remedies are the most likely means of ensuring that lower income housing is actually built." Mount Laurel II at 279. Elimination of the builder's remedy destroys the surest source of lower income housing. All other sources are speculative, relative to the builder that stands before the court claiming readiness and waging the expensive legal battle necessary to obtain the right to a Mount Laurel rezoning. Mount Laurel II at 249 citing Oakwood at Madison, Inc. v. Tp. of Madison, 72 N.J. 481, 499 (1977).

CONCLUSION

Notwithstanding our Court's clear mandate to municipalities in Mount Laurel I that these municipalities have a constitutional obligation to use their powers to regulate the use of land to provide lower income housing opportunities, few municipalities took the Court's demand seriously and little lower income housing was produced. Mount Laurel II ended the reign of municipal complacency. However, Mount Laurel II left critical issues unresolved. For example, what was a municipality's "fair share" of the regional need? When did a municipality in fact create a "realistic opportunity"? When was a builder's site "suitable" for a rezoning? In less than two years from the date of their appointment, the specialized trial judges have largely resolved these critical issues and the law is relatively well settled. As a result, municipal energy that once was used to delay and avoid the constitutional obligation is now being used to develop creative means to comply. Similarly, the tremendous amount of builder time and resources that once were directed towards fighting a seemingly endless battle are now being used to build the lower income housing.

On this judicial landscape, the Fair Housing Act emerged. The Act created a procedure that invites municipalities to play the delay game once again. The Act substantially dilutes the obligations of municipalities relative to the constitutional mandate. The Act enables exclusionary suburban

municipalities to transfer half their obligation to other municipalities and thereby remain enclaves of affluence. Finally, the Act eliminates builder's remedies in those municipalities that elect to participate in the legislative process and the Act imposes a moratorium on the builder's remedy in those municipalities that remain under the jurisdiction of the specialized judiciary.

In short, the Act is nothing more than an attempt to undermine the Mount Laurel doctrine. It was precisely because Mount Laurel II was so effective in producing the lower income housing it promised that the political pressure was created that gave birth to the Act. Therefore, whatever lofty ideals the Act purports to promote, the above examination demonstrates that the Act is designed to delay the process, reduce the obligations of suburban municipalities, maintain these municipalities as enclaves of affluence, and eliminate the builder's remedy - which is the fuel that propels the whole process.

Respectfully submitted,

GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN

By: _____
Jeffrey R. Surenian

Dated: August 9, 1985

SCHEDULE A

DENVILLE TOWNSHIP
MOUNT LAUREL II COMPLIANCE PROGRAM DATE: 6-12-85

II. FAIR SHARE COMPLIANCE

A. INTRODUCTION

Denville Township already has a significant stock of low and moderate income housing. As shown by the 1980 census, Denville has over 400 units of housing affordable to low and moderate income people. Twenty-six percent of the Township's households are low and moderate income households as defined in the Mount Laurel II decision.

The Township acknowledges that homes for low and moderate income people should continue to be made available in Denville. Denville believes that this can best be accomplished by a coherent and coordinated program designed, controlled and implemented by the Township itself. The social, environmental and economic health of the community must be carefully preserved if Denville is to continue to provide affordable low and moderate income homes.

The helter-skelter, immediate force-fit approach must be avoided, because Denville Township cannot survive the introduction of a large number of new residents without adequate environmental review and prior development of adequate infrastructure. In the interest of orderly progress and preservation of community character, Denville's fair share should be provided at a pace consistent with the overall development of the community.

B. COMPLIANCE PROGRAMS

Denville Township will provide its fair share of affordable housing through five principal mechanisms:

1. Rehabilitation of existing substandard housing with assistance from the Morris County Department of Community Development.

2. Conversion of existing structures to create affordable rental units within them.

3. Construction of publicly subsidized affordable senior citizen housing.

4. High density development of approximately 60 acres of land appropriate for such development to provide additional affordable housing.

5. Creation of an overlay zone requiring that all developers provide affordable low and moderate income housing within their developments.

1. Rehabilitation

Denville has already received a one for one compliance credit for 41 housing units rehabilitated by the Morris County Department of Community Development as of July 1984. Department director Grace Brewster reports that twelve Denville households were assisted or found eligible for assistance between August 1984 and May 1985. Ms. Brewster anticipates completing 50 to 60 additional cases in the next five years, making a total of 62 to 72 units beyond the 41 for which Denville has already received credit. Thus, the Township can be expected to satisfy at least 62 units of its fair share obligation by continuing to encourage and support housing rehabilitation.

2. Accessory Conversion

In the spring of 1984 the Township proposed and was prepared to adopt an ordinance providing for and encouraging accessory conversions. A full year has been lost because this approach to implementing fair share was not agreed to at that time. Now, more than a year later, Denville Township again proposes to adopt an accessory conversion ordinance allowing homeowners to create apartments within or, where appropriate, as additions to their homes.

Accessory apartments in Denville must meet the following criteria:

1. The unit must be rented to a low or moderate income household.

2. The rent, including utilities, must be no more than 30% of the income of a low or moderate income household.

3. The owner must agree to comply with the New Jersey Law Against Discrimination, NJSA 10:4-1 et seq.

4. The unit must be subject to controls administered by the Denville Affordable Housing Board to ensure that it is rented by and affordable to lower income households for a reasonable period of time.

Based upon citizen response, the Township believes that accessory conversion will be a very active program. For the purpose of estimating the number of potential conversions, it should be noted that Denville contains about 4,500 single-family detached housing units, of which about 3,200 have three or more bedrooms. Conversion of as little as 3% of the 3,200 larger homes would provide about 100 Mount Laurel units, while a more realistic 5% conversion rate would provide 160 Mount Laurel units.

3. Senior Citizen Housing

With a large and rapidly increasing older population, Denville is particularly concerned about providing additional housing for senior citizens. Denville proposes to build (150) units of publicly subsidized senior citizen housing. This housing will be administered by the Denville Affordable Housing Board. Units will be rented or sold to senior citizens of low and moderate income. Sites should be selected for their proximity to existing adequate infrastructure, public transportation and community services. Possible sites include a 21 acre tract between the end of Luger Road and the Parsippany Troy Hills border and the 19 acres owned by the township on Vanderhoof Avenue.

4. High Density Development

To implement the immediate development of low and moderate income housing, Denville will rezone a limited area of the Township for well-planned high density development. This zone will provide for an initial maximum of (60) acres with densities between 7 and 10 units per acre depending on environmental and infrastructural constraints and community resources. In areas judged by the Township Planning Board to have only minor constraints, densities of 7 units per acre will be sought. In areas with significant constraints densities of up to 10 units per acre of suitable land will be allowed depending on the developer's efforts to minimize impacts to the environment and to contribute to infrastructural improvements. In all cases, site selection and development criteria must be compatibility with existing uses, adequacy of existing infrastructure, environmental constraints and access to public transportation and community services.

If the Planning Board determines that high density development should be allowed such development must provide a significant proportion of the Township's fair share of low and moderate income housing. Denville Township has determined that a 30% set-aside of low and moderate income housing should be mandatory in such high density developments.

It is anticipated that the Nuzzo and Stonehedge tracts may be suitable for a high density approach. Development of these tracts at 7 units per acre with a 30% set-aside could provide approximately 122 units of low and moderate income housing.

5. General Mandatory Set-Aside

To provide additional affordable housing as the Township develops, Denville will prepare an overlay zone requiring that at least 30% of all newly constructed housing units within a subdivision of five or more building lots be affordable to and reserved for persons of low and moderate income. Construction of low and moderate income units will generally be allowed at a

density four times the zoned density. Because small subdivisions will not contain enough market rate units to subsidize development of low and moderate income housing on the site, subdivisions of less than five building lots will have the alternative of paying a fee to the Denville Affordable Housing Board. The Township will specify the structure of this fee after further economic analysis. The Affordable Housing Board will use the proceeds to supplement other sources of financing for the senior citizen housing and accessory conversions discussed in sections 2 and 3 above.

Under this plan, development of all residentially zoned vacant land in the Township would provide about 386 units of Mount Laurel housing.

C. SELECTION OF BUYERS AND RENTERS

All low and moderate income housing units produced under the programs outlined above will be sold or rented to persons of low and moderate income.

The Denville Affordable Housing Board will select buyers and renters from among the income eligible applicants in accordance with the following priority list:

1. Residents of Denville who have lived in the Township for at least one year and who are living in shared or deficient housing.

2. Employees of Denville Township, Denville Township School District, or other public agencies or educational facilities located within the Township who are living in shared or deficient housing.

3. Other persons employed in Denville who are living in shared or deficient housing.

4. Residents of Denville Township not included in (1), (2), or (3) above.

5. Persons employed in Denville Township and living more than 20 miles from their place of work in the Township or living in any urban aid municipality within the Township's Mount Laurel II prospective housing need region.

6. Persons employed within ten miles of the municipal boundary of Denville Township and living in shared or deficient housing.

7. All other persons living in shared or deficient housing within Denville Township's prospective need region, with preference given to those living in designated urban aid municipalities.

8. All others.

In all categories, preference will be given to former residents of Denville over persons who have never lived in the Township.

(302/2)

EXHIBIT B

State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
CN 850
TRENTON, NEW JERSEY 08625

AMY PIRO,
ACTING PUBLIC ADVOCATE

RICHARD E. SHAPIRO
DIRECTOR
TEL. 609-292-1693

June 20, 1985

David Kinsey
252 Varsity Road
Princeton, New Jersey

Re: Morris County Fair Housing Council v.
Boonton Township - Docket No. L-6001-78
P. W. (Denville Township)

Dear Mr. Kinsey:

Plaintiffs, Morris County Fair Housing Council, et al., have reviewed the attached proposed compliance plan submitted by Denville Township on June 14, 1985, in the above entitled matter.

The plan unfortunately does not correspond in specificity to the "revised ordinance" called for by the Supreme Court, Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158, 284 (1983), or even the detailed written plan promised by the municipality. It contains major gaps and is sketchy or unclear in a number of major areas. As a result, analysis of some aspects of the plan is difficult or impossible at this time. We can, however, offer some preliminary comments.

In general, any plan for compliance must be evaluated in terms of the standards enunciated by the Supreme Court: does it create a "realistic opportunity" for creation of sufficient safe, decent housing affordable to low and moderate households to satisfy the municipality's indigenous housing need and its fair share of the regional housing need. 92 N.J. 214-15. The opportunity must not be merely hypothetical or theoretical. It must be "realistic", i.e. designed and actually result in provision of housing. 92 N.J. at 260-61. In the context of a remedial proceeding such as this, the result must be that "the opportunity for low and moderate income housing found in the new ordinance [is] as realistic as judicial remedies can make it." 92 N.J. at 214. It is in this context that we offer the following comments on the various components of the Denville plan.

1. Rehabilitation of Existing Units (II-2)

Denville seeks credit for anticipated rehabilitation by Morris County using Community Development Block Grant funds of 62-72 substandard units occupied by lower income households between July 1984 and 1990. As noted in our letter of May 8, 1985, plaintiffs support the concept of rehabilitation of existing substandard housing, provided the program is in fact designed to provide realistic housing opportunities for lower income households.

The Denville proposal, however, has two serious deficiencies. First, it is inconsistent with the determination by Judge Skillman as to the number of substandard lower income units in Denville. At Denville's urging, Judge Skillman deviated from the so-called consensus methodology to find that Denville has only 92 substandard and overcrowded units occupied by lower income households. Of these, 53.8 percent, a total of 46, are physically substandard. Denville received credit for rehabilitation of 41 of thes units in the Court's order of January 31, 1985. Thus, any credit for rehabilitation of substandard units must be limited to no more than 5 units.

While there may well be more physically substandard lower income units in Denville-a matter as to which Denville has submitted no data - any additional such units would have to be added to Denville's constitutional housing obligation. Rehabilitation of such units, although highly desirable, cannot logically result in a net credit against Denville's housing obligation.

Second, exclusive reliance on county expenditure of federal Community Development Block Grant funds does not create "realistic housing opportunities. Morris County is not legally or contractually bound to fund this program. There are many demands on these scarce funds and there is no assurance that the County will not direct them to some other worthy project next year or at any time between now and 1990. Moreover, this year, as in every year since 1980, President Reagan has sought to reduce or eliminate funding for the federal Community Development Block Grant program. See 12 Housing and Development Reporter 829 (March 25, 1985). There is no assurance that this program will survive even one more fiscal year.

In light of this uncertainty, the municipality cannot properly rely on the Morris County housing rehabilitation program in the absence of a fully developed municipal backup plan that

would satisfy the standards described in our letter of May 8, 1985, and would go into effect whenever the county program drops, for whatever reason, below the anticipated rate of rehabilitation.

For these reasons, Denville's rehabilitation plan does not create realistic housing opportunity for 62-72 lower income households as claimed.

2. Accessory Conversions (II-2)

Denville proposes to adopt a permissive accessory conversion ordinance which, it claims, will create realistic housing opportunities for 100 to 160 low income households. The municipality also proposes to impose affordability standards to ensure that newly created accessory units will in fact be affordable to, and occupied by, lower income households.

The municipality, however, offers no evidence to suggest that its housing stock lends itself to accessory conversions. Nor does it offer any evidence to suggest that any significant number of homeowners desire to construct accessory units under the standards proposed by the municipality. Indeed, in presenting this plan on June 14, 1985, counsel for the municipality acknowledged that the "citizen response" cited in the report, consisted of persons expressing support for the concept of conversions rather persons expressing a desire personally to construct apartments for lower income families in their homes.

There is no evidence at this point to support the claim that permissive accessory conversions will create any significant stock of housing affordable to lower income households. After reviewing extensive testimony, Judge Smith rejected municipal claims that accessory conversions would create more than a negligible quantity of lower income housing in the Mahwah litigation.

As noted in my letter of May 8, 1985, it may well be that the municipality could create a subsidy or grant program that would make development of low income accessory units sufficiently attractive to make accessory conversions a "realistic" source of lower income housing. In the absence of such subsidies, Denville's proposal cannot be considered to create "realistic" housing opportunities.

3. Senior Citizen Housing (II-3)

Denville proposes to construct 150 units of subsidized lower income housing. This proposal is unimpeachable in concept. In its present form, however, it is entirely speculative and unrealistic.

First, Denville identifies no source of subsidy funds. It suggests no existing state or federal program which is likely to provide funds and does not propose a municipal appropriation or issuance of municipal bonds.

In addition, the so-called Luger Road site is relatively inaccessible and located in an area of heavy industry. There are serious questions as to its feasibility and suitability as a senior citizen housing site.

For these reasons, the senior citizen housing proposal is, at best, theoretical and not "realistic" as required by the Supreme Court.

4. Rezoning for "High Density" Development (II-4)

Denville proposes to rezone two sites, known for purposes of this litigation as the Nuzzo and Stonehedge sites, totaling 60 acres, for residential development at densities of 7 to 10 units per acre with mandatory setasides of 30 percent lower income units. Owners of both sites have indicated a willingness to construct at densities of 10-15 units per acre with 20 percent lower income setasides,but have asserted that development on the terms proposed by the municipality is not economically feasible.

As the Supreme Court noted, a purported lower income housing opportunity is not realistic if the rezoning does not create an economic incentive (i.e. the likelihood of securing a favorable economic return) for the property owner to construct that housing. Experience in northern New Jersey now suggests that rezoning for a 20 percent lower income setaside at densities of 10-15 units per acre provides such an incentive. While there may be special market circumstances in particular communities or exceptional characteristics of particular sites that would support a slightly higher setaside or slightly lower densities, Denville has offered no demonstration of such special market circumstances or exceptional site characteristics. In presenting the plan, counsel indicated that Denville had no such information. It should be noted that Judge Skillman declined to approve a 25 setaside in Montville Township as part of a negotiated settlement.

In the absence of any such extraordinary showing, this rezoning cannot be deemed a realistic means of providing lower income units.

5. General Mandatory Setaside (II-4)

Denville proposes imposition of a requirement in all residential zones that all residential development be subject to a 30 percent lower income setaside. In developments of less than five units, the municipal plan suggests this setaside could be satisfied by the property owner paying an unspecified sum to a municipal entity. Lower income units could be constructed at a density four times greater than the prevailing density in the zone. Denville seeks credit for 386 lower income units under this proposal. This figure, according to counsel, is based on full buildout of all existing residential zones.

For purpose of this analysis, we assume that this zoning is not barred by the Municipal Land Use Law or other statutory or constitutional requirements.

This proposal has several critical defects. First, the proposed rezoning does not contemplate removing any existing cost-increasing features. To the contrary, it preserves all existing densities and design requirements for the conventional units. Even as to lower income units, the proposal does not remove any cost-increasing features except for the limited increase in density. For example, 18 percent of all vacant land* zoned for residential uses in Denville is in the C zone, which permits construction only of single family detached housing of at least 1,500 square feet in floor area on lots of 81,000 square feet (approximately 2 acres). Under Denville's proposal, lower income units would have to be built in this zone as single-family detached houses with at least 1,500 square feet of floor space on lots of at least half an acre.

Similarly, approximately 58 percent of the vacant land zoned for residential purposes is located in the R-C and R-1 zones which permit construction only of single family detached houses with at least 1,200 square feet of floor area on lots of 40,250 square feet (approximately one acre) or more. In this zone, lower income units would have to be built as single-family detached

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* Land in tracts of eight acres or more. Montney, Denville Township Revised Vacant Land Analysis, (May 1984).

houses with 1,200 square feet of floor area on lots of a quarter acre or more. These densitites and design requirements are very similar to those struck down ten years ago by the Supreme Court in Mt. Laurel I, 67 N.J. 155, 183 (1975).

Second, Denville's proposal does not create economic incentives for production of lower income housing. The density increase is limited to lower income units. It does not provide any increased income to offset the losses in the lower income units, much less profit to encourage development of such units. Indeed, the proposal has the contrary effect. On a hypothetical 100 acre tract currently zoned at one unit to the acre as in Denville's R-1 and R-C zones, a developer would be able to construct 129 units, of which at least 39 would be required to be lower income and 90 could be conventional units. The proposal thus increases the developer's costs by requiring him to construct 29 lower income units at a maximum density of four units per acre and to market them at a loss while simultaneously reducing his income by reducing by ten the permitted number of conventional units

Denville offers no analysis to show what the effect of this rezoning would be on the incentive for property owners to build. It can hardly be doubted, however, that, even if property owners can derive an economic return under this ordinance (a question which we cannot answer at this point), their incentive to construct housing is very dramatically reduced. Indeed, this proposal would appear to function more as a device to discourage residential development than a device to foster development of lower income housing.

Third, as noted above, the claim that this proposal will produce 386 units, ispremised on full buildout of all vacant land zoned for residential uses in Denville. In none of Denville's planning documents has it been suggested that this is likely within the next six years. To the contrary, this proposal virtually guarantees that construction of these units will stretch out over a very long period of time.

Finally, while the proposal suggests that this general mandatory setaside will also generate funds from developments of five acres or less, none of the details of this aspect of the proposal have been spelled out. It is therefore impossible to evaluate this aspect of the proposal at this time.

6. Selection of Buyers and Renters (II-5)

Denville proposed an elaborate array of selection criteria for prospective buyers and renters. These critieria would create an unlimited and unconditional legally mandated preference for present residents and employees of Denville, former residents of Denville, and persons living in the immediate vicinity of Denville.

These criteria are inconsistent with the municipality's duty to meet its fair share of the regional housing need as well as the needs of its indigenous poor. In addition, they have a disparate impact on racial minorities. The population of New Jersey is 13 percent black. The population of northeastern New Jersey is 14 percent black. The population of Denville, by contrast, is 0.34 percent black. In the past, its black population has been even lower (0.13 percent in 1960 and 0.27 percent in 1970). Morris County, which would encompass most of the 20 mile radius in Denville's fifth rank of preference, has a population which is only 2.5 percent black. These criteria would thus appear to represent a prima facie violation of the Title VIII of the Civil Rights Act of 1964, as amended. See Metropolitan Development Corporation v. Village of Arglington Heights, 558 F.2d 1283 (7th Cir. 1977) cert. denied, 434 U.S. 1025 (1978).

Several matters are conspicuous by their absence from Denville's plan.

a) Overzoning - Denville seeks credit for 122 units of lower income housing on two sites to be rezoned for lower income housing. It cannot and does not assert that the owners of these properties are ready, willing, and able to build under the terms of its proposed rezoning. Even if its proposed rezoning were otherwise unimpeachable, overzoning would be virtually mandatory under these circumstances to ensure that realistic housing opportunities are in fact created.

b) Affordability - The plan is generally silent on measures to ensure affordability. In particular, it does not specify what proportion of all units created by the plan would be affordable to low income households.

In sum, none of the components of the proposed plan appear to create realistic opportunities for provision of

significant quantities of safe, decent housing affordable to lower income households. The only aspect of the plan that appears both workable and nonspeculative is the 12 units of substandard housing which Morris County has agreed to rehabilitate.

Plaintiffs recommend therefore that you report to the Court that Denville has not proposed a realistic plan for compliance and that you proceed to formulate such a plan. In our letter of May 8, 1985, we outlined what we believe to be a reasonable and realistic plan for compliance. We are prepared to amplify and elaborate on that plan to ensure a workable and realistic program for compliance by Denville with its constitutional obligations.

Very truly yours,

Stephen Eisdorfer
Assistant Deputy Public Advocate

SE:cc
Enclosure
cc: All Counsel
Hon. Stephen Skillman, J.S.C.

REAL ESTATE EQUITIES, INC., ETC.,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY/OCEAN COUNTY
Plaintiff,	:	
v.	:	Docket No. L-015209-84 P.W.
HOLMDEL TOWNSHIP, ETC.,	:	
Defendant,	:	
and	:	
NEW BRUNSWICK HAMPTON, INC.,	:	
Plaintiff,	:	
v.	:	Docket No. L-33910-84 P.W.
TOWNSHIP OF HOLMDEL, ETC.,	:	
Defendant,	:	
and	:	
GIDEON ADLER, et al, ETC.,	:	
Plaintiff,	:	
v.	:	Docket No. L-54998-84 P.W.
HOLMDEL TOWNSHIP, ETC.,	:	
Defendant.	:	

BRIEF IN OPPOSITION TO TOWNSHIP OF HOLMDEL'S MOTION TO TRANSFER CASE TO AFFORDABLE HOUSING COUNCIL

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Douglas K. Wolfson
Of Counsel and
on the Brief

STATEMENT OF FACTS

The facts critical to the disposition of this motion are beyond dispute. On February 28, 1984, Real Estate Equities filed a Mount Laurel II challenge against the Township of Holmdel. Shortly thereafter, on May 16, 1984, New Brunswick Hampton filed suit. The Court sua sponte consolidated the two cases on June 7, 1984, without any objection from the Township. On August 13, 1984, Gideon Adler also filed a Mount Laurel II challenge which was consolidated with the existing cases. Subsequent to the filing of all three complaints, on August 27, 1984, Holmdel adopted an ordinance which was alleged by the Township to satisfy its constitution obligation.

Trial proceedings began on October 15, 1984, and spanned approximately two weeks. After the conclusion of trial, this Court, on November 9, 1984, appointed Richard Coppola to be a special master and to assist the Court inter alia: (1) by applying the AMG methodology to Holmdel Township; (2) by determining the Township's fair share; and (3) by examining the three builder plaintiffs' sites to determine whether each was suitability for a builder's remedy.[1]

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[1] Although the Court ordered the master (1) to complete its fair share analysis within thirty days - that is, no later than December 9, 1984 and (2) to complete the preparation of his suitability analysis within ninety days - that is, no later than February 9, 1985, both of these dates passed without the master having completed his assigned tasks. In fact, the master has yet to produce the fair share and suitability reports.

Following submission of the master's reports, the Court would have been in a position to finalize Holmdel's fair share as well as the suitability of the builders' sites. Thus, the builders' remedies could have been awarded.

LEGAL ARGUMENT

I

THIS COURT SHOULD NOT TRANSFER THE CASE TO THE AFFORDABLE HOUSING COUNCIL BECAUSE SUCH A TRANSFER WOULD CAUSE A MANIFEST INJUSTICE TO NEW BRUNSWICK HAMPTON AND TO THE POOR REPRESENTED THROUGH THIS LITIGANT

The Fair Housing Act (the Act), Section 16.a. permits a court to transfer a case to the Council only if such transfer will not cause a "manifest injustice". Review of the Act reveals no legislative standard for ascertaining the parameters of this concept. Moreover, no singular definition capable of uniform application can be gleaned from our case law. Rather, the term "manifest injustice" has held a variety of meanings depending upon the various contents in which it has been applied.[2] Logically, any definitional analysis should

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[2] Pursuant to R. 4:17-7, for example, a party shall be permitted to answer interrogatories out of time if it would not be manifestly unjust. In this context, courts have said that no manifest injustice would result if there was no intent to mislead; there was no element of surprise; the opposing party would not be unduly prejudiced. Westphal v. Guarino, 163 N.J. Super. 140, 146 (App. Div. 1978), Aff'd Mem. on opinion below, 78 N.J. 308 (1978). Similarly, the law permits remittitur if damages awarded by the fact finder would result in a manifest injustice. If a fact finder reaches a result that seems "wrong" through mistake, prejudice or lack of understanding, the court will find there to be a manifest injustice and will allow remittitur. Baxter v. Fairmount Foods Co., 74 N.J. 588, 596 (1977). See also, State v. Taylor, 80 N.J. 353, 365 (1979) (interpretting R. 3:21-1, which permits the withdrawal of a guilty plea at the time of sentencing to correct a "manifest injustice"). See also, Gibbons v. Gibbons, 86 N.J. 515, 523-24 (1981) (identifying when retroactive application of a statute would cause a manifest injustice). See also, State v. Cummins, 168 N.J. Super. 429, 433 (Law Div. 1979) (interpretting R. 3:22-1, which allows petitions for a post-conviction relief from incarceration if continued incarceration would be

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start with the Mount Laurel opinion and ought to draw its meaning from the rights, remedies and purposes sought to be achieved by the Supreme Court.

Mount Laurel II created rights not only for the poor, but also for builders.[3] As to builders, the Court declared that a builder would be entitled to a builder's remedy if that builder (1) succeeded in litigation, (2) proposed a project that would contain a substantial amount of lower income housing, and (3) proposed a project that would be suitable from a planning and environmental perspective. Indeed, the Court created the remedy in part out of a sense of fairness, acknowledging the need to reward builders who have invested substantial time and resources in public interest litigation. Mount Laurel II at 279.[4] As to the poor, by asserting that a

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"manifestly unjust". See also N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982) (setting forth under what circumstances requiring exhaustion of administrative remedies would cause a manifest injustice).

[3] "Builder" is meant to encompass not only the entity that will build the housing, but also the landowner or developer that might take on the burden of bringing a Mount Laurel action in an attempt to obtain a builder's remedy.

[4] Our Courts have long been painfully aware that the fundamental rights of the poor to decent housing would never be vindicated by the poor themselves due to the obvious inability to pursue the expense of such litigation against the firm resolve of exclusionary municipalities. Thus, the need exists to confer standing upon builder/developers and to encourage them to vindicate the rights of the poor. Urb. League New Bruns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11, 18 (Ch. Div. 1976); Mount Laurel II at 326-27. J.W. Field at 3-4.

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growth area municipality has an affirmative immediate obligation to provide for its fair share of the present and prospective regional need for lower income housing, the Court was stating that the poor have the correlative rights (1) to housing opportunities within the municipality in numbers equivalent to the municipality's fair share; and (2) to realize these opportunities in a timely fashion.

In light of the rights thus created by Mount Laurel II, a manifest injustice would clearly result where a proposed "transfer" to the Council substantially affected or impaired either party's legitimate rights and expectations.[5] The rights of builders and the poor would be thus affected in at least the following circumstances:

(1) where the builder is required to perform a futile act;

(2) where despite an overriding public interest calling for a prompt adjudication of impor-

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Without builder plaintiffs and remedies, these constitutional rights would be irretrievably lost. Mount Laurel II at 279, 309 n. 58, 327 (wherein the Supreme Court expressly encouraged a substantial amount of Mount Laurel litigation).

[5] Builders not only represent their own rights, but also the rights of the poor. Mount Laurel II at 289 n. 43. In fact, builders derive standing to assert their own rights because they are representing the rights of the poor. Morris Cty. Fair Housing County v. Boonton Twp., 197 N.J. Super. 359, 366 (Law Div. 1984). Therefore, if a transfer would not work manifest injustice to the plaintiff in question, but would work a manifest injustice to the poor represented by that plaintiff, then the Court should still deny the motion to transfer.

tant rights, resolution is unduly delayed; and

(3) where the builder and/or the poor suffer irreparable harm.

Under these circumstances, considerations of justice will relieve a party from exhausting the administrative review and mediation process contemplated by transfer. See generally N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super. 59, 64 (Ch. Div. 1974).

Although these ennumerated items are by no means an exhaustive list, they are illustrative of the type of considerations urged by Plaintiff as relevant to a determination of the present motion. As such, they will be more fully analyzed below.

A. Manifest Injustice Would Undoubtly Result When Transferring A Case That Has Been Completely Or Partially Tried.

Where a case has been at least partially tried, a transfer should be deemed to constitute a manifest injustice, per se. Short of a trial, a manifest injustice should be presumed if significant or key issues have been substantially resolved either through settlement, stipulation or adjudication. Under such circumstances, the burden of proof should be shifted to the municipality to demonstrate that a transfer would not cause an injustice.

Analogous support for this proposed standard can be found in the Supreme Court's decision regarding the presumption of validity that normally attaches to a municipality's land use regulations. The Court emphasized that

> Given the importance of the societal interest in the Mount Laurel obligation and the potential for inordinant delay in satisfying it, presumptive validity of an ordinance attaches but once in the face of a Mount Laurel challenge.... It is not fair to require a poor man to prove you were wrong the second time you slammed the door in his face.

Mount Laurel II at 306. Similarly, a builder that has tried all or part of an exclusionary zoning case, or has, through stipulation or adjudication resolved key issues relative thereto, ought not have to prove that the municipality was "wrong the second time."

Additional support for such a proposed standard can be found in Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 388 (1979). In this case, the Supreme Court refused to require exhaustion of administrative remedies reasoning that

> [a]n extensive amount of testimony has already taken place. One of the primary reasons for requiring administrative exhaustion is the opportunity to create a factual record. In this case such a record has already been established and there would be little gained...

Interests of judicial economy and the Court's goal of minimizing litigation while maximizing the production of lower income housing, lend still further support to the standard urged by Plaintiff. Were this matter to be transferred, the

weeks of extensive preparation for and trial by counsel and this Court would all have been for naught. To require a duplication of the same or similar efforts regarding Holmdel's non-compliance or its fair share would be patently counterproductive[6] because it would force time, energy and money to be channelled into further process rather than into planning for the Township's fair share and the actual construction of housing.

Applying the proposed standard to the instant case, no transfer can be permitted. Not only have the merits of the case been tried as to region, fair share, indigenous need, etc., but also key issues-e.g. Holmdel's non-compliance have already been resolved.[7] Under either a per se rule, or a standard creating a presumption against transfer (with an attendant shifting of the burden of proof) Holmdel's motion should be denied.

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[6] Of course, if the resolution of the fair share issue is to be given a collateral estoppel effect in proceedings before the Council, then a transfer would minimize the irreparable harm to New Brunswick Hampton. However, this would only be true if the Council did indeed have the authority to grant a builder's remedy. If the Council was not required to grant a builder's remedy based on the same standards applied by the courts, then any collateral estoppel effect given to the resolution of the fair share issue would not minimize to any degree the irreparable harm to New Brunswick Hampton by transferring the case.

[7] Holmdel Township conceded non-compliance as to the ordinance in effect at the time of the filing of the complaint. Moreover, nobody seriously contends that this Court will deem the Township compliant even if this Court modifies the AMG methodology to eliminate the use of the 82 percent Tri-state component. In several settlements, this Court's acceptance of a modification to its AMG formula regarding the 82 percent figure has not had significant impact on the municipalities' obligation.

B. Transfer Of The Partially Tried Matter Or One In Which Key Issues Have Been Resolved Will Lead To Duplicative Expense and Undue Delay Over And Above That Incident To The Act.

Since this case has been substantially tried and key issues have already been resolved, New Brunswick Hampton would clearly produce lower income housing more quickly than in a case in which the review and mediation process must start anew.[8] Thus, the key to evaluating whether or not any particular delay accompanying transfer will be manifestly unjust should reasonably depend to some degree upon how far along the case has progressed. With regard to the instant case, it is apparent that virtually all aspects of the builder's remedy claim have been proved.[9] Thus, housing production is close at

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[8] The legislature was undoubtedly aware of and intended some of the delays inherent in the administrative review process. It is thus unlikely that the legislature intended that the "manifest injustice" exception to transfer would result in the Court's retaining all cases. However, if a case has been substantially tried, the delays inherent in the Act are magnified and plainly result in a manifest injustice.

[9] As to requirement that New Brunswick Hampton "succeed" in litigation, Holmdel Township has conceded that the regulations in effect at the time of the filing of the suit were exclusionary and that its answer to Mount Laurel II was a Mount Laurel ordinance adopted subsequent to the filing of suit. In light of this Court's time-of-decision ruling in the case of Orgo Farms v. Colts Neck, Holmdel Township's concession as to the invalidity of its first ordinance disposes of the question of whether New Brunswick Hampton qualifies as a "successful plaintiff". Moreover, based on the fair share trial in the instant case, this Court has indicated its willingness to modify the AMG methodology by reducing the 82 percent Tri-state component. Although the master has not furnished the Court with the figures necessary to identify a precise fair share number, the impact of the elimination of the 82 percent component could not significantly impact the Township's obliga-

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hand.[10] In stark contrast, if this Court transfers the case,

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tion. There can be no legitimate dispute regarding the exclusionary character of Holmdel's zoning ordinance as of the filing of the complaints against it.

New Brunswick Hampton has also proposed to set aside a substantial number of units for lower income households. Thus, the second "element" for obtaining a builder's remedy has been satisfied as well.

Finally, New Brunswick Hampton stands ready today, as it did a year ago, to defend against any suitability challenge that the Township might elect to mount. With regard to suitability, persumably the master will submit his suitability report on short order so that any potential dispute as to suitability can be put to rest.

[10] A manifest injustice would also result in the event that this Court retained the case and did not declare the builder's remedy moratorium unconstitutional. Fair Housing Act, Section 28 imposes a moratorium on the courts' ability to award a builder's remedy. A builder's remedy is defined as

> a court imposed remedy for a litigant who is an individual or profit making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonuses which provide for the economic viability of a residential development by including housing which is not for low and moderate households.

Since the moratorium only applies to builder's remedies, as opposed to other inclusionary developments wherein the municipality has imposed a mandatory set aside, Section 28 creates an anamolous and harsh result. More specifically, although the court has the authority during the moratorium period to require the municipality to rezone parcels other than the builder/plaintiff's, the court does not have the authority during the moratorium period to require the municipality to rezone the builder/plaintiff's parcel. Thus, the entity responsible for creating the pressure on the municipality to comply is the entity that is punished. Moreover, landowners that made no efforts to pursue a rezoning, will reap the benefits thereof while at the same time, be excluded from the provisions of the

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lower income housing will likely be delayed for many years.[11]

By denying a transfer, not only will this Court be in a position to order a compliant zoning ordinance to be adopted, but it can order that it be done immediately. Thus, in addition to any housing that might be produced by New Brunswick Hampton, the Township is more likely to satisfy a greater percentage of its fair share more quickly.

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moratorium. Such a result is not only fundamentally unfair and thus violative of the due process clause, but also violates the constitutional guaranty to equal protection under the law.

[11] The Act gives the Council the ability to complete its mediation and review process between Holmdel Township and New Brunswick Hampton as late as October 2, 1986 - approximately two years after the trial on Holmdel Township's constitutional obligation was complete. Fair Housing Act, Section 19. The Township will not be required to file its housing element pursuant to Fair Housing Act, Section 9.a, until January 1, 1987. Therefore, it is likely that the mediation process cannot realistically begin until the municipality has submitted its housing element. Consequently the Council is more likely to complete its mediation procedure by July 1, 1987 rather than October 2, 1986. If the mediation efforts fail to culminate in a settlement, the Act directs the Council to transfer the case to the Office of Administrative Law for proceedings before an administrative law judge. Fair Housing Act, Section 15.c. Although the Act requires the administrative law judge to complete a complete evidentiary hearing and to submit his findings to the Council within 90 days, the Act authorizes an extension of the 90 day period "for good cause shown". Fair Housing Act, Section 15.c. Moreover, the Act does not specify how long the Council will have to make a decision regarding whether to issue a substantive certification once it has received the recommendations of the administrative law judge. In fact, even after the issuance of the substantive certification, the municipality still has an additional forty-five days within which to adopt land use regulations to implement the housing element. Fair Housing Act, Section 14.b. Thus, the Act creates a substantial likelihood that there will be years of delay in the production of housing.

In addition to the unconscionable delay that would accompany transferring a partially tried case, the need to engage in additional proceedings before the Council will substantially intensify the expense of litigation. The Fair Housing Act conflicts so sharply with the fundamental underpinnings of Mount Laurel II that innumerable legal issues will inevitably arise, each of which will undoubtedly require extensive litigation.[12] To force New Brunswick Hampton to pay twice for what has already been an expensive lesson is unconscionable. The legislature could not have intended so harsh a result. This Court should not permit the Township to continue the procedure indefinitely.[13]

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[12] Compare Mount Laurel II at 352 and AMG at 74 to Fair Housing Act, Section 4.j. (wherein the Act undermines the Court's interpretation of what constitutes the prospective need). Compare Countryside Properties v. Borough of Ringwood at 15-16 to Fair Housing Act, Section 7.c.(1) (wherein the Act again undermines any credit standard accepted by any court to date). Compare Mount Laurel II at 218-19 to Fair Housing Act, Section 7.c.(2)(b) and Section 23 (wherein the Act substantially dilutes the constitutional obligation established by Mount Laurel II through an established pattern defense and through a phasing provision). Compare Mount Laurel II at 263-64 and AMG at 70 to Fair Housing Act, Section 11.d (wherein the Act substantially reduces a municipality's obligation when that municipality seeks a reduced obligation based on lack of infrastructure).

[13] The law is well settled that if an overriding public interest exists calling for a prompt judicial decision, one need not exhaust his administrative remedies. N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); and Patrolman's Benev. Assoc. v. Montclair. 128 N.J. Super 59, 64 (Ch. Div. 1974). In this case, as in any other Mount Laurel case, an overriding public interest calling for a prompt judicial decision clearly exists and would be unduly delayed were

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As the Court is well aware, a lengthy delay will encourage non-Mount Laurel development to flourish, which will, in turn, strain existing infrastructure and eliminate suitable lower income housing sites. The need for housing will be further exacerbated since no housing is presently being produced to satisfy that need.[14]

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this Court to grant Defendant's motion. Mount Laurel II at 306-7.

The need for prompt, actual construction of lower income housing is part of the vary fabric of the constitutional obligation. It was precisely this sense of urgency that motivated the Supreme Court to develop innovative procedural devices to hasten the process and to ensure the early construction of lower income housing. Mount Laurel II at 293. In addition, the Supreme Court modified the traditional time of decision rule in the context of Mount Laurel litigation in order to expedite production of lower income housing. Mount Laurel II at 306-7. Finally, the Court guaranteed that the housing would be produced more quickly by expressly eliminating the exhaustion requirement as a prerequisite to bringing a Mount Laurel lawsuit:

> If a party is alleging that a municipality has not met its Mount Laurel obligation, a constitutional issue is presented that local administrative bodies have no authority to decide. Thus, it is entirely appropriate for a party claiming a Mount Laurel violation to bring its claim directly to court. See, e.g., Nolan v. Fitzpatrick, 9 N.J. 477 (1952) (holding that no exhaustion of administrative remedies is required where only a question of law is at issue).

[14] In this regard, it is important to note that the current litigation was brought early in 1984. If through Mount Laurel II procedures, the actual construction of lower income housing does not begin until 1986, the years of delay will have been a substantial price to pay for the end of exclusionary land use policies in Holmdel Township. If through transfer, however, the production date is extended even further, the manifest injustice to the poor will be intolerable.

C. The Transfer Of The Case Would Cause A Manifest Injustice To New Brunswick Hampton Because A Transfer Would Force New Brunswick Hampton To Conduct A Futile Act.

The transfer would undeniably result in a manifest injustice to New Brunswick Hampton due to the futility of the available administrative process. Under the Act, neither the Council nor the administrative law judge appear to have any authority to grant a builder's remedy[15] such as has been sought by New Brunswick Hampton in the current litigation. The Council's authority includes only the power to grant, deny or conditionally approve a municipality's housing element in

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[15] The lessons of history are clear. When a builder sues a municipality for its exclusionary zoning, the municipality is generally not grateful for the reminder that it has not satisfied its moral and legal obligation to maintain compliant ordinances. Rather, an exposed municipality typically resents the litigant that called the municipality's regulations to the Court's attention and, consequently, the municipality usually attempts, with great resolve to prevent that builder from obtaining a rezoning. The psychological dynamics of the situation understandably lead to this result. Municipalities simply resent the infringement on their home rule represented by a builder's remedy. Therefore, if given a choice regarding how to comply once a builder has demonstrated to a Court that a municipality is exclusionary, the municipality would without doubt select sites other than the plaintiff's for a rezoning. It is precisely this phenomenon that lead to the ineffectiveness of Mount Laurel I in achieving any significant construction of lower income housing. That is, because a builder could succeed in litigation only to have other parcels rezoned, builders had little interest in spending the enormous time and money necessary to prosecute a Mount Laurel lawsuit.

To place New Brunswick Hampton in the position of a successful Mount Laurel I litigant after New Brunswick Hampton has accepted the Supreme Court's Mount Laurel II invitation to bring a lawsuit in the quest of a builder's remedy, would plainly result in a manifest injustice. Mount Laurel II at 279-80, 309 n. 58.

response to a municipality's request for substantive certification. Section 14. Similarly, by the terms of the Act and by the traditional relationship between an administrative agency and an administrative law judge, the administrative law judge is empowered only to make recommended findings of facts and conclusions of law. Fair Housing Act, Section 15.c.; N.J.S.A. 52-14B et seq. To the extent that neither the administrative law judge nor the Council have any express authority to grant a builder's remedy, the specific remedy cannot be said to be "clearly available, clearly effective, and completely adequate to right the wrong complained of". Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super 59, 64 (Ch. Div. 1974). Inasmuch as an administrative procedure is futile unless the specific remedy sought is "clearly available," the review and mediation process afforded by the Act is definitionally futile.[16]

Courtrooms have often echoed with the maximum that justice delayed is justice denied. It is precisely this sentiment that motivated our Supreme Court to state:

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[16] One of the primary goals of requiring exhaustion of administrative remedies is to prevent the need for resorting to the courts where an agency decision may satisfy the parties. City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979). This fundamental purpose of the exhaustion rule could never be satisfied since the Council apparently lacks the authority to award a builder's remedy. Rather than minimizing litigation, the Act merely postpones it. During the delay period, substantial costs are generated, reducing the likelihood that the builder will ever be able to provide lower income housing.

> Our warning to Mount Laurel-and to all other municipalities-that if they do 'not perform as we expect, further judicial action may be sought...,'' id. at 192, will seem hollow indeed if the best we can do to satisfy the constitutional obligation is to issue orders, judgments and injunctions that assure never ending litigation but fail to assure constitutional vindication.

Mount Laurel II at 289-90. In short the Court was tired of the "paper, process, witnesses, trials and appeals." Mount Laurel II at 199. The Court wanted to see actual construction of lower income housing. Mount Laurel II at 352. In light of these objectives and the facts of this case, the transfer will cause a manifest injustice to the poor by depriving them of the housing opportunities which exclusionary municipalities have denied them for so long.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that this Court deny Holmdel Township's motion to transfer this case to the Affordable Housing Council.

GREENBAUM, ROWE, SMITH, RAVIN,
DAVIS & BERGSTEIN
Attorneys for Plaintiffs

By: _____
Douglas K. Wolfson

DATED: October 1, 1985

J.W. FIELD COMPANY, INC. and
JACK W. FIELD,

Plaintiffs

v.

TOWNSHIP OF FRANKLIN,
PLANNING BOARD of TOWNSHIP
of FRANKLIN, FRANKLIN TOWNSHIP
SEWERAGE AUTHORITY and STONY BROOK
REGIONAL SEWERAGE AUTHORITY

Defendants

SUPERIOR COURT OF NEW JERSEY

Somerset / Ocean

MOUNT LAUREL II

Docket No. L-6583-84 PW

JZR ASSOCIATES, INC.,

Plaintiff

v.

TOWNSHIP OF FRANKLIN et als,

Defendant

Docket No. L-7917-84 PW

FLAMA CONSTRUCTION CORPORATION,

Plaintiff

v.

TOWNSHIP OF FRANKLIN et als.

Defendant

Docket No. L-14096-84 PW

WOODBROOK DEVELOPMENT CORP.

Plaintiff

v.

TOWNSHIP OF FRANKLIN, et als.

Defendant

Docket No. L19811-84 PW

WHITESTONE CONSTRUCTION, INC.

Plaintiff

v. Docket No. L-21370-84 PW

TOWNSHIP OF FRANKLIN et als,

Defendant

BRENER ASSOCIATES,

Plaintiff

v. Docket No. L-22951-84 PW

TOWNSHIP OF FRANKLIN, et als,

Defendant

RAKECO DEVELOPERS, INC.

Plaintiff

v. Docket No. L-25303-84 PW

TOWNSHIP OF FRANKLIN, et als,

Defendant

JOHN H. VAN CLEEF, SR., JOHN E. VAN CLEEF, JR. and BONNIE VAN CLEEF,

Plaintiffs

v. Docket No. L-26294-84 PW

TOWNSHIP OF FRANKLIN, et als,
Defendants

LEO MINDEL,

Plaintiff

v. Docket No. L-33174-84 PW

TOWNSHIP OF FRANKLIN, et als,

Defendant

R.A.S. LAND DEVELOPMENT COMPANY, INC.,

Plaintiff

v. Docket No. L-49096-84 PW

TOWNSHIP OF FRANKLIN, et als
Defendant

JOPS COMPANY,

Plaintiff

v. Docket No. L-51892-84 PW

TOWNSHIP OF FRANKLIN, et als,

Defendant

BRIEF IN OPPOSITION TO TOWNSHIP OF FRANKLIN'S MOTION TO TRANSFER CASE TO AFFORDABLE HOUSING COUNCIL

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On the Brief

STATEMENT OF FACTS

The facts critical to the disposition of this motion are beyond dispute. On January 27, 1984, J. W. Field Co., Inc. and Jack W. Field filed an amended complaint asserting that the Township of Franklin's land use regulations failed to satisfy the Mount Laurel II mandate.[1] Shortly thereafter, on April 11, 1984, Rakeco Developers Inc. [hereinafter "Rakeco"] filed suit. This case, as well as others filed in the same general time period, were all consolidated for trial.

The trial, which began on September 10, 1984, spanned approximately three weeks. During the course of trial, the Court fully tested its previously adopted fair share methodology.[2] On October 7, 1985, the Court issued an opinion regarding Franklin Township's fair share.[3]

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1 This complaint amended a complaint dated May 25, 1979 which also challenged the land use regulations of Franklin Township for being exclusionary. The amended complaint essentially refocused the challenge to correspond to the law as set forth in Mount Laurel II. Given the May 25, 1979 filing of the original complaint, this matter has been in litigation for over six years.

2 See AMG v. Warren Tp., _____ N.J. Super. _____ (Law Div. 1984). The Court also issued a written opinion dealing with "priorities" - e.g. - how to determine which builders would be entitled to a builder's remedy where the Township's fair share was insufficient to accommodate each plaintiff. See J.W. Field, et als. v. Tp. of Franklin, et als., _____ N.J. Super. _____ (Law Div. 1985).

3 Although this opinion resolves only Franklin Township's prospective need number (2,087), it does articulate a methodology which can be applied to derive the Township's exact fair share.

Following the trial, on October 12, 1984, this Court appointed Richard Coppola, A.I.C.P. to be a special master to assist the Court inter alia: (1) in applying the AMG methodology and several variations thereof to Franklin Township; and (2) in evaluating the Township's claim for "credits". Inasmuch as the master has not yet completed his assigned tasks, the builder plaintiffs have been unable to move forward with the actual construction of lower income housing projects.

On September 10, 1985, Franklin Township brought the within motion to transfer the cases to the Affordable Housing Council.

LEGAL ARGUMENT

I

THIS COURT SHOULD NOT TRANSFER THE CASE TO THE AFFORDABLE HOUSING COUNCIL BECAUSE SUCH A TRANSFER WOULD CAUSE A MANIFEST INJUSTICE TO RAKECO AND TO THE POOR REPRESENTED THROUGH THIS LITIGANT

The Fair Housing Act (the Act), Section 16.a. permits a court to transfer a case to the Council only if such transfer will not cause a "manifest injustice". Review of the Act reveals no legislative standard for ascertaining the parameters of this concept. Moreover, no singular definition capable of uniform application can be gleaned from our case law. Rather, the term "manifest injustice" has held a variety of meanings depending upon the various contexts in which it has been applied.[4] Logically, any definitional analysis should

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[4] Pursuant to R. 4:17-7, for example, a party shall be permitted to answer interrogatories out of time if it would not be manifestly unjust. In this context, courts have said that no manifest injustice would result if there was no intent to mislead; there was no element of surprise; and the opposing party would not be unduly prejudiced. Westphal v. Guarino, 163 N.J. Super. 140, 146 (App. Div. 1978), Aff'd Mem. on opinion below, 78 N.J. 308 (1978). Similarly, the law permits remittitur if damages awarded by the fact finder would result in a manifest injustice. If a fact finder reaches a result that seems "wrong" through mistake, prejudice or lack of understanding, the court will find there to be a manifest injustice and will allow remittitur. Baxter v. Fairmount Foods Co., 74 N.J. 588, 596 (1977). See also, State v. Taylor, 80 N.J. 353, 365 (1979) (interpretting R. 3:21-1, which permits the withdrawal of a guilty plea at the time of sentencing to correct a "manifest injustice"). See also, Gibbons v. Gibbons, 86 N.J. 515, 523-24 (1981) (identifying when retroactive application of a statute would cause a manifest injustice). See also, State v. Cummins, 168 N.J. Super. 429, 433 (Law Div. 1979) (interpretting R. 3:22-1, which allows petitions for a

(footnote continued on next page)

start with the Mount Laurel opinion and ought to draw its meaning from the rights, remedies and purposes sought to be achieved by the Supreme Court.

Mount Laurel II created rights not only for the poor, but also for builders.[5] As to builders, the Court declared that a builder would be entitled to a builder's remedy if that builder (1) succeeded in litigation, (2) proposed a project that would contain a substantial amount of lower income housing, and (3) proposed a project that would be suitable from a planning and environmental perspective. Indeed, the Court created the remedy in part out of a sense of fairness, acknowledging the need to reward builders who have invested substantial time and resources in public interest litigation. Mount Laurel II at 279.[6] As to the poor, by asserting that a

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post-conviction relief from incarceration if continued incarceration would be "manifestly unjust". See also N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982) (setting forth under what circumstances requiring exhaustion of administrative remedies would cause a manifest injustice).

5 "Builder" is meant to encompass not only the entity that will build the housing, but also the landowner or developer that might take on the burden of bringing a Mount Laurel action in an attempt to obtain a builder's remedy.

6 Our Courts have long been painfully aware that the fundamental rights of the poor to decent housing would never be vindicated by the poor themselves due to the obvious inability to pursue the expense of such litigation against the firm resolve of exclusionary municipalities. Thus, the need exists to confer standing upon builder/developers and to encourage them to vindicate the rights of the poor. Urb. League New Bruns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11, 18 (Ch. Div. 1976); Mount Laurel II at 326-27. J.W. Field at 3-4.

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growth area municipality has an affirmative, immediate obligation to provide for its fair share of the present and prospective regional need for lower income housing, the Court was stating that the poor have the correlative rights (1) to housing opportunities within the municipality in numbers equivalent to the municipality's fair share; and (2) to realize these opportunities in a timely fashion.

In light of the rights thus created by Mount Laurel II, a manifest injustice would clearly result where a proposed "transfer" to the Council substantially affected or impaired either party's legitimate rights and expectations.[7] The rights of builders and the poor would be thus affected in at least the following circumstances:

(1) where the builder is required to perform a futile act;

(2) where despite an overriding public interest calling for a prompt adjudication of impor-

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Without builder plaintiffs and remedies, these constitutional rights would be irretrievably lost. Mount Laurel II at 279, 309 n. 58, 327 (wherein the Supreme Court expressly encouraged a substantial amount of Mount Laurel litigation).

[7] Builders not only represent their own rights, but also the rights of the poor. Mount Laurel II at 289 n. 43. In fact, builders derive standing to assert their own rights because they are representing the rights of the poor. Morris Cty. Fair Housing County v. Boonton Twp., 197 N.J. Super. 359, 366 (Law Div. 1984). Therefore, if a transfer would not work manifest injustice to the plaintiff in question, but would work a manifest injustice to the poor represented by that plaintiff, then the Court should still deny the motion to transfer.

tant rights, resolution is unduly delayed; and

(3) where the builder and/or the poor suffer irreparable harm.

Under these circumstances, considerations of justice will relieve a party from exhausting the administrative review and mediation process contemplated by transfer. See generally N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super. 59, 64 (Ch. Div. 1974).

Although these ennumerated items are by no means an exhaustive list, they are illustrative of the type of considerations urged by Plaintiff as relevant to a determination of the present motion. As such, they will be more fully analyzed below.

A. Manifest Injustice Would Undoubtly Result When Transferring A Case That Has Been Completely Or Partially Tried.

Where a case has been at least partially tried, a transfer should be deemed to constitute a manifest injustice, per se. Short of a trial, a manifest injustice should be presumed if significant or key issues have been substantially resolved either through settlement, stipulation or adjudication. Under such circumstances, the burden of proof should be shifted to the municipality to demonstrate that a transfer would not cause an injustice.

Analogous support for this proposed standard can be found in the Supreme Court's decision regarding the presumption of validity that normally attaches to a municipality's land use regulations. The Court emphasized that

> Given the importance of the societal interest in the Mount Laurel obligation and the potential for inordinant delay in satisfying it, presumptive validity of an ordinance attaches but once in the face of a Mount Laurel challenge.... It is not fair to require a poor man to prove you were wrong the second time you slammed the door in his face.

Mount Laurel II at 306. Similarly, a builder that has tried all or part of an exclusionary zoning case, or has, through stipulation or adjudication resolved key issues relative thereto, ought not have to prove that the municipality was "wrong the second time."

Additional support for such a proposed standard can be found in Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 388 (1979). In this case, the Supreme Court refused to require exhaustion of administrative remedies reasoning that

> [a]n extensive amount of testimony has already taken place. One of the primary reasons for requiring administrative exhaustion is the opportunity to create a factual record. In this case such a record has already been established and there would be little gained...

Interests of judicial economy and the Court's goal of minimizing litigation while maximizing the production of lower income housing lend still further support to the standard urged by Plaintiff. Were this matter to be transferred, the weeks of

extensive preparation for and trial by counsel and this Court would all have been for naught. To require a duplication of the same or similar efforts regarding Franklin's non-compliance or its fair share would be patently counterproductive because it would force time, energy and money to be channelled into further process rather than into planning for the actual construction of housing.[8]

Applying the proposed standard to the instant case, no transfer can be permitted. Not only have the merits of the case been tried as to fair share, priorities, etc., but also key issues - e.g., Franklin's non-compliance have already been resolved.[9] Under either a per se rule, or a standard creating a presumption against transfer (with an attendant shifting of the burden of proof), Franklin's motion should be denied.

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[8] Of course, if the resolution of the fair share issue is to be given a collateral estoppel effect in proceedings before the Council, then a transfer would minimize the irreparable harm to Rakeco. However, this would only be true if the Council did indeed have the authority to grant a builder's remedy. If the Council was not required to grant a builder's remedy based on the same standards applied by the courts, then any collateral estoppel effect given to the resolution of the fair share issue would not minimize to any degree the irreparable harm to Rakeco by transferring the case.

[9] Franklin Township long ago conceded non-compliance of the ordinance in effect at the time of the filing of the complaints.

B. Transfer Of A Partially Tried Matter Or One In Which Key Issues Have Been Resolved Will Lead To Duplicative Expense and Undue Delay Over And Above That Incident To The Act.

Since this case has been substantially tried and key issues have already been resolved, Rakeco and the other builder plaintiffs would clearly produce lower income housing more quickly than in a case in which the review and mediation process must start anew.[10] Thus, the key to evaluating whether or not any particular delay accompanying transfer will be manifestly unjust should reasonably depend to some degree upon how far along the case has progressed. With regard to the instant case, housing production is close at hand.[11] In stark

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[10] The legislature was undoubtedly aware of and, perhaps, even intended some of the delays inherent in the administrative review process. It is thus unlikely that the legislature intended that the "manifest injustice" exception to transfer would result in the Court's retaining all cases. However, if a case has been substantially tried, the delays inherent in the Act are magnified and plainly result in a manifest injustice.

[11] As to the three elements of the builder's remedy, the first two have been satisfied for each of the builder/plaintiffs. That is, the Township has conceded noncompliance, thereby rendering "successful" the several plaintiffs responsible for this concession. All the builder/plaintiffs' have also promised to construct a substantial amount of lower income housing. Thus, the second element is satisfied as well.

As to the third element, suitability, there is no question that in light of the superabundance of plaintiffs there are enough plaintiffs with suitable sites capable of satisfying the Township's fair share.

contrast, if this Court transfers the case, the production of lower income housing will likely be delayed for years.[12]

This Court is now, or shortly will be in a position to specify Franklin Township's precise fair share. In light of its prior priorities opinion, those builders entitled to a builder's remedy can be readily identified. A revised zoning ordinance can be implemented in a matter of months. Thus, the ultimate purpose of Mount Laurel II - the timely, actual

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[12] The Act gives the Council the ability to complete its mediation and review process between Franklin Township and Rakeco as late as October 2, 1986 - approximately two years after the trial on Franklin Township's constitutional obligation was complete. Fair Housing Act, Section 19. The Township will not be required to file its housing element pursuant to Fair Housing Act, Section 9.a, until January 1, 1987. Therefore, it is likely that the mediation process cannot realistically begin until the municipality has submitted its housing element. Consequently the Council is more likely to complete its mediation procedure by July 1, 1987 rather than October 2, 1986. If the mediation efforts fail to culminate in a settlement, the Act directs the Council to transfer the case to the Office of Administrative Law for proceedings before an administrative law judge. Fair Housing Act, Section 15.c. Although the Act requires the administrative law judge to complete an evidentiary hearing and to submit his findings to the Council within 90 days, the Act authorizes an extension of the 90 day period "for good cause shown". Fair Housing Act, Section 15.c. Moreover, the Act does not specify how long the Council will have to make a decision regarding whether to issue a substantive certification once it has received the recommendations of the administrative law judge. In fact, even after the issuance of the substantive certification, the municipality still has an additional forty-five days within which to adopt land use regulations to implement the housing element. Fair Housing Act, Section 14.b. Thus, the Act creates a substantial likelihood that there will be years of delay in the production of housing.

construction of lower income housing - may at long last be achieved. Id. at 352.[13]

In addition to the unconscionable delay that would accompany transferring a partially tried case, the need to engage in additional proceedings before the Council will substantially intensify the expense of litigation. The Fair Housing Act conflicts so sharply with the fundamental underpinnings of Mount Laurel II that innumerable legal issues will inevitably arise, each of which will undoubtedly require exten-

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[13] A manifest injustice would also result in the event that this Court retained the case and did not declare the builder's remedy moratorium unconstitutional. Fair Housing Act, Section 28 imposes a moratorium on the courts' ability to award a builder's remedy. A builder's remedy is defined as

> a court imposed remedy for a litigant who is an individual or profit making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonuses which provide for the economic viability of a residential development by including housing which is not for low and moderate households.

Since the moratorium only applies to builder's remedies, as opposed to other inclusionary developments wherein the municipality has imposed a mandatory set aside, Section 28 creates an anamolous and harsh result. More specifically, although the court has the authority during the moratorium period to require the municipality to rezone parcels other than the builder/plaintiff's, the court does not have the authority during the moratorium period to require the municipality to rezone the builder/plaintiff's parcel. Thus, the entity responsible for creating the pressure on the municipality to comply is the entity that is punished. Moreover, landowners that made no efforts to pursue a rezoning, will reap the benefits thereof while at the same time, be excluded from the provisions of the moratorium. Such a result is not only fundamentally unfair and thus violative of the due process clause, but also violates the constitutional guaranty to equal protection under the law.

sive litigation.[14] To force Rakeco to pay twice for what has already been an expensive lesson, is unconscionable. The legislature could not have intended so harsh a result, and this Court should not permit the Township to continue the procedure indefinitely.[15]

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[14] Compare Mount Laurel II at 352 and AMG at 74 to Fair Housing Act, Section 4.j. (wherein the Act undermines the Court's interpretation of what constitutes the prospective need). Compare Countryside Properties v. Borough of Ringwood at 15-16 to Fair Housing Act, Section 7.c.(1) (wherein the Act again undermines any credit standard accepted by any court to date). Compare Mount Laurel II at 218-19 to Fair Housing Act, Section 7.c.(2)(b) and Section 23 (wherein the Act substantially dilutes the constitutional obligation established by Mount Laurel II through an established pattern defense and through a phasing provision). Compare Mount Laurel II at 263-64 and AMG at 70 to Fair Housing Act, Section 11.d (wherein the Act substantially reduces a municipality's obligation when that municipality seeks a reduced obligation based on lack of infrastructure).

[15] The law is well settled that if an overriding public interest exists calling for a prompt judicial decision, one need not exhaust his administrative remedies. N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); and Patrolman's Benev. Assoc. v. Montclair. 128 N.J. Super. 59, 64 (Ch. Div. 1974). In this case, as in any other Mount Laurel case, an overriding public interest calling for a prompt judicial decision clearly exists and would be unduly delayed were this Court to grant Defendant's motion. Mount Laurel II at 306-7.

The need for prompt, actual construction of lower income housing is part of the vary fabric of the constitutional obligation. It was precisely this sense of urgency that motivated the Supreme Court to develop innovative procedural devices to hasten the process and to ensure the early construction of lower income housing. Mount Laurel II at 293. In addition, the Supreme Court modified the traditional time of decision rule in the context of Mount Laurel litigation in order to expedite production of lower income housing. Mount Laurel II

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As the Court is well aware, a lengthy delay will encourage non-Mount Laurel development to flourish, which will, in turn, strain existing infrastructure and eliminate suitable lower income housing sites. The need for housing will be further exacerbated since no housing is presently being produced to satisfy that need.[16]

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at 306-7. Finally, the Court guaranteed that the housing would be produced more quickly by expressly eliminating the exhaustion requirement as a prerequisite to bringing a Mount Laurel lawsuit:

> If a party is alleging that a municipality has not met its Mount Laurel obligation, a constitutional issue is presented that local administrative bodies have no authority to decide. Thus, it is entirely appropriate for a party claiming a Mount Laurel violation to bring its claim directly to court. See, e.g., Nolan v. Fitzpatrick, 9 N.J. 477 (1952) (holding that no exhaustion of administrative remedies is required where only a question of law is at issue).

[16] In this regard, it is important to note that most of the current litigation was brought early in 1984. If through Mount Laurel II procedures, the actual construction of lower income housing does not begin until 1986, the years of delay will have been a substantial price to pay for the end of exclusionary land use policies in Franklin Township. If through transfer, however, the production date is extended even further, the manifest injustice to the poor will be intolerable.

C. The Transfer Of The Case Would Cause A Manifest Injustice To Rakeco Because A Transfer Would Force Rakeco To Conduct A Futile Act.

The transfer would undeniably result in a manifest injustice to Rakeco due to the futility of the available administrative process. Under the Act, neither the Council nor the administrative law judge appear to have any authority to grant a builder's remedy[17] such as has been sought by Rakeco in the current litigation. The Council's authority includes only the power to grant, deny or conditionally approve a municipality's

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[17] The lessons of history are clear. When a builder sues a municipality for its exclusionary zoning, the municipality is generally not grateful for the reminder that it has not satisfied its moral and legal obligation to maintain compliant ordinances. Rather, an exposed municipality typically resents the litigant that called the municipality's regulations to the Court's attention and, consequently, the municipality usually attempts, with great resolve, to prevent that builder from obtaining a rezoning. The psychological dynamics of the situation understandably lead to this result. Municipalities simply resent the infringement on their home rule represented by a builder's remedy. Therefore, if given a choice regarding how to comply once a builder has demonstrated to a Court that a municipality is exclusionary, the municipality would without doubt select sites other than the plaintiff's for a rezoning. It is precisely this phenomenon that lead to the ineffectiveness of Mount Laurel I in achieving any significant construction of lower income housing. That is, because a builder could succeed in litigation only to have other parcels rezoned, builders had little interest in spending the enormous time and money necessary to prosecute a Mount Laurel lawsuit.

To place Rakeco in the position of a successful Mount Laurel I litigant after Rakeco has accepted the Supreme Court's Mount Laurel II invitation to bring a lawsuit in the quest of a builder's remedy would plainly result in a manifest injustice. Mount Laurel II at 279-80, 309 n. 58.

housing element in response to a municipality's request for substantive certification. Fair Housing Act, Section 14. Similarly, by the terms of the Act and by the traditional relationship between an administrative agency and an administrative law judge, the administrative law judge is empowered only to make recommended findings of facts and conclusions of law. Fair Housing Act, Section 15.c.; N.J.S.A. 52-14B et seq. To the extent that neither the administrative law judge nor the Council have any express authority to grant a builder's remedy, the specific remedy cannot be said to be "clearly available, clearly effective, and completely adequate to right the wrong complained of". Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super. 59, 64 (Ch. Div. 1974). Inasmuch as an administrative procedure is futile unless the specific remedy sought is "clearly available," the review and mediation process afforded by the Act is definitionally futile.[18]

Courtrooms have often echoed with the maximum that justice delayed is justice denied. It is precisely this sentiment that motivated our Supreme Court to state:

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[18] One of the primary goals of requiring exhaustion of administrative remedies is to prevent the need for resorting to the courts where an agency decision may satisfy the parties. City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979). This fundamental purpose of the exhaustion rule could never be satisfied since the Council apparently lacks the authority to award a builder's remedy. Rather than minimizing litigation, the Act merely postpones it. During the delay period, substantial costs are generated, reducing the likelihood that the builder will ever be able to provide lower income housing.

> Our warning to Mount Laurel-and to all other municipalities-that if they do "not perform as we expect, further judicial action may be sought...," id. at 192, will seem hollow indeed if the best we can do to satisfy the constitutional obligation is to issue orders, judgments and injunctions that assure never ending litigation but fail to assure constitutional vindication.

Mount Laurel II at 289-90 (emphasis added). In short, the Court was tired of the "paper, process, witnesses, trials and appeals." Mount Laurel II at 199. The Court wanted to see actual construction of lower income housing. Mount Laurel II at 352. In light of these objectives and the facts of this case, the transfer will cause a manifest injustice to the poor by depriving them of the housing opportunities which exclusionary municipalities such as Franklin Township have denied them for so long.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that this Court deny Franklin Township's motion to transfer this case to the Affordable Housing Council.

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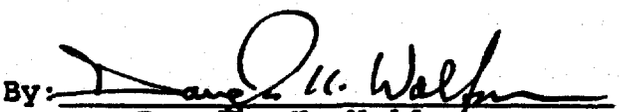
By: 
Douglas K. Wolfson

DATED: October 14, 1985

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:SOMERSET COUNTY
DOCKET NO. L-006583-84
CONSOLIDATED MT. LAUREL II CASES

J.W. FIELD COMPANY, INC., and JACK W. FIELD, et al,	:	Civil Action
Plaintiffs,	:	
vs.	:	
TOWNSHIP COUNCIL OF THE TOWNSHIP OF FRANKLIN, et als,	:	
Defendants.	:	

BRIEF AND CERTIFICATION IN OPPOSITION TO MOTION TO TRANSFER UNDER SECTION 16a OF THE FAIR HOUSING ACT OF 1985

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

On January 27, 1984, plaintiff, J.W. Field Company, Inc., et al, filed its complaint against the defendant Township Council of the Township of Franklin and the Township of Franklin, Somerset County, alleging, among other things, that the defendant Township's zoning ordinances were exclusionary and invalid contrary to the decision of the New Jersey Supreme Court in the Mount Laurel II case, 92 N.J. 158 (Sup. Ct. 1983). Seven days later, plaintiff, JZR Associates, on February 3, 1984, filed its Mount Laurel II challenge to the Franklin Township zoning ordinance.

Ultimately, nine more complaints seeking a builder's remedy were filed within a time span of approximately six months.

On July 20, 1984, the consolidated complaints were pretried before the Honorable Eugene D. Serpentelli, J.S.C., and the pretrial order, among other things, set forth that trial would be bifurcated with the first trial limited to fair share allocation and compliance of the Franklin Township zoning ordinances in effect prior to July 12, 1984 and the second trial would involve issues relating to a builder's remedy, if such trial was necessary.

The consolidated cases were tried before the Honorable Eugene D. Serpentelli, J.S.C., for a nine day period commencing September 10, 1984, with the last date of the trial being October 1, 1984.

The matter having been tried and the Township having conceded at the trial that the ordinances in effect as of July 11, 1984 do not comply with the Township's responsibilities under Mount Laurel II, Judge Serpentelli entered an order dated October 12, 1984 appointing Richard Coppola, AICP, to serve as

Master in this matter and directed Mr. Coppola to report to the court and the parties within thirty days of October 12, 1984 his findings with respect to Franklin Township's fair share of the present and prospective regional need for lower income housing. He further ordered the Master to report to the court regarding the credits claimed by Franklin Township.

On December 21, 1984, the court appointed Master in this case, Richard Thomas Coppola, submitted his report on the fair share housing obligation of Franklin Township to the court and counsel. The Master, in his report, arrived at the following conclusions:

(1) Utilizing the consensus methodology for a six (6) county region, Franklin Township's total fair share obligation is 3,120 units (2,679 units to be provided by 1990);

(2) Utilizing the consensus methodology for a seven (7) county region, Franklin Township's total fair share obligation is 3,066 units (2,625 units to be provided by 1990);

(3) Utilizing the Chadwick methodology for a six (6) county region, Franklin Township's total fair share obligation is 2,856 units (2,457 units to be provided by 1990);

(4) Utilizing the Chadwick methodology for a seven (7) county region, Franklin Township's total fair share obligation is 2,824 units (2,425 units to be provided by 1990).

(5) The "functional center" of Franklin Township is within the Middlebush portion of the municipality where Routes 514, 619 and 615 intersect and where the municipal building is located. This functional center of Franklin Township falls just outside the thirty minute travel time to Morris County and therefore it appears that a six (6) county prospective need region applies.

The report however did not include a final analysis of Franklin's claim for a credit for existing units available and devoted to lower income households.

On January 3, 1985, Judge Serpentelli issued a written opinion on the issue of priorities among builders with respect to all plaintiffs' claims for a builder's remedy.

Since January 1985 and through the present, various reports have been exchanged between the parties and the court relating to providing input to the Master so that a final report would be forthcoming in accordance with the court order dated October 12, 1984. There is presently pending a motion brought on behalf of plaintiffs Flama Construction Corp. and JZR Associates seeking an order compelling the Township of Franklin to provide the court appointed Master, Richard Coppola, with all documentation in its possession relating to the issue of credits.

LEGAL ARGUMENT

POINT I

THE EFFECT OF A TRANSFER WOULD BE TO UNNECESSARILY DELAY AND PROBABLY RISK IMPLEMENTATION OF THE CONSTITUTIONAL MANDATE TO PROVIDE LOWER INCOME HOUSING

A transfer of this Mount Laurel II case pursuant to Section 16a of the Fair Housing Act of 1985 would most certainly be contrary to the constitutional mandate of Mount Laurel II and is even contrary to the legislative intent, assuming the constitutionality of the legislation.

In general, if one were to evaluate the effect of a "transfer" as per Section 16a of the Act, one will conclude that the Act is seriously deficient. Indeed, further legislation may be necessary before Section 16a has any meaning at all. It is significant that neither Section 16a nor any other provision of the Act directly defines the term "transfer". Nevertheless, Section 16a and other provisions address what happens once a case is transferred. The paramount significance as it relates to the defendant's motion in this particular case is the fact that if the court grants the defendant's motion for a transfer under Section 16a, it will have divested itself of jurisdiction over this matter and jurisdiction will presumably lie in the Council. One could read the Act to project the following scenario:

(1) The entire case and controversy and issues presented (which would include all plaintiffs' requests for site specific relief) would go to the Council for mediation and review under the Act and the matter would be essentially a Section 16b action.

(2) Mediation and review under the Act would take place only as to the issues not yet resolved by order, opinion or judgment of the Superior Court.

(3) Jurisdiction in the Council would remain unless there is a divestiture mandated by various sections of the Act as a result of the defendant's failure to satisfy certain deadlines for doing certain things and also in the court's discretion if mediation and review is not timely completed.

If one were to apply the general effect of such a transfer to the specific situation existing in this case, it would appear mediation and review would ensue only on the issues of the defendant's fair share obligation and site specific relief. As a practical matter, the Council would have to take the case in its present posture which is as follows:

(1) Franklin Township's zoning ordinance in effect as of July 11, 1984 is invalid.

(2) By court order of October 12, 1984, the Master was to issue a report relating to the fair share issues and on December 21, 1984, the Master reported that the Township's fair share obligation, prior to any credits being allowed, would be a minimum of 2,457 and a maximum of 2,679 through 1990.

(3) On January 3, 1985 the court issued an opinion with respect to priorities between and among the builders for a remedy.

It is submitted that the issues to be resolved by mediation and review would not be resolved based upon the defendant's past conduct. The court will note that the defendant has been resolute in not considering any negotiations as to a settlement throughout the history of this case.

Thus, it would appear that if the Township sought substantive certification precluding site specific relief, the matter would be transmitted to the Office of Administrative Law for a hearing as a contested case. The

Administrative Law Judge would then recommend granting or denying site specific relief and that recommendation would go to the Council which would then render a decision.

The ultimate decision of the Council would either be a grant of substantive certification denying site specific relief, or a grant of substantive certification on the condition that site specific relief would be agreed to by the defendant, or a denial of substative certification.

There is no question that in the former case, one or more of the plaintiffs would appeal the denial of site specific relief and in the latter case, the defendant as per Section 14 of the Act, would within sixty days either make the "changes satisfactory to the Council" or refuse to act. If it refused to act, jurisdiction would revert to the court as per Section 18. In the event the matter is not settled (and it appears that such a settlement is not likely), the process would appear to last between a year and a half and several years and, under this analysis, the parties would find themselves at the same point we now find ourselves, which is awaiting this court's final determination as to the fair share obligation of the Township and site specific relief.

Therefore, the question as to whether a transfer should be granted in light of the above, if answered affirmatively, becomes an exercise in futility.

POINT II

IT WOULD BE MANIFESTLY INJUST FOR THE COURT TO TRANSFER THIS ACTION AS PER SECTION 16a OF THE ACT

The manifest injustice standard, as it applies to the case at bar, requires an examination on three separate levels: **the retroactive application of the statute; the requirement of exhaustion as per Court Rule 4:69-5; and as it relates to a transfer under Section 16a of the Act.** With respect to the issue of retroactivity, there is no question that the Act is clearly intended to apply retroactively in several resects. For example, see Sections 12b, 23 and 28. It expressly is intended to apply to the resolution of existing disputes. See Sections 3 and 16. Nevertheless, the standard our courts have used, even where retroactivity clearly intended, is that it may not be applied in specific cases if it would result in a "manifest injustice" to an adversely affected party. Gibbons v. Gibbons, 86 N.J. 515, 523 (Sup. Ct. 1981). In that case, our Supreme Court reiterated the standard applied by our courts which has been articulated as follows:

> 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. See Gibbons, supra, 86 N.J. at 523-524.

Thus, it is clear that in this context, the standard is one of unfairness resulting from reliance upon the prior law. Applying that standard to the case at bar, if properly analyzed, will lead to the conclusion that a transfer in this matter would be an abuse of discretion. Since the Mount Laurel II decision, the plaintiffs and their representative class have relied on the judicial system to satisfy the constitutional mandate to provide low and

moderate income housing for the poor. Although our Supreme Court, in Mount Laurel II, expressed the court's desire for legislation as a mechanism to deal with the constitutional mandate, there is absolutely nothing in the Mount Laurel II decision to imply that a litigant, by instituting Mount Laurel II litigation, risked the termination of that action as a result of future legislative efforts.

The class of people to benefit from a successful Mount Laurel II action have been deprived, are being deprived and continue to be deprived, all in anticipation of satisfaction of their housing needs. This plaintiff and the other plaintiffs in this case have undertaken a substantial financial effort and risk in full, complete and justified reliance upon the Supreme Court decision.

There is no question that a tremendous commitment has been made in reliance upon New Jersey Supreme Court's commitment that a Mount Laurel II approach through the courts would be handled expeditiously and with dispatch. Almost two years has now elapsed in this case. Although no one knows for sure, a transfer in this matter would probably mean another eighteen months or more before this matter would return to this court at the same posture as it stands today. If that can only happen, this plaintiff or the other plaintiffs are capable of continued financing, continued maintenance of their resolution to prevail. If this does not happen, reliance placed on this process by the litigants and the class of people that would benefit from this procedure will have been completely futile.

Thus, while retroactivity as to transfer and exhaustion in some 16a cases and 16b cases probably can be construed to be appropriate, it clearly is not so here. Furthermore, it is this plaintiff's position that that issue need

not be addressed since this plaintiff does not believe that the legislature intended to cover this type of case by the retroactive application of Section 16a.

Furthermore, an issue arises as to whether even under standard principles of exhaustion of remedies pursuant to Court Rule 4:69-5, it would or should be waived in this case. If that is correct, we need not even address the lesser standard imposed in Section 16a of the Act. Resolution of the issue compels waiver since for numerous reasons, imposition of the exhaustion requirement detrimentally impacts on the public interest as follows:

(a) **To require an exhaustion here of administrative remedies would be an act of futility.** This plaintiff interprets the Act to provide for mediation and review of site specific relief and the Council's ability to condition sustantive certification on an award by the municipality of site specific relief. It is presumed that the Council will use the same standards as the court in deciding whether a compliance program must include site specific relief to be acceptable. Moreover, it is most certain that if all issues in a transferred case would not be reviewed and mediated by the Council, exhaustion would be totally futile since the legislature would not have provided for adequate jurisdiction in the agency to handle a transferred case. Therefore, the use of the term "transfer" in Section 16a and exhaustion in Section 16 generally must of necessity indicate that the legislative intent is that the whole controversy could be heard by the agency.

Moreover, this analysis lends support for plaintiff's argument that a party in a transferred case as per Section 16a can force mediation and review, transmittal for an Office of Administrative Law hearing and an ultimate decision by the Council per Section 14 as to whether

substantive certification should be granted, granted with conditions, or denied. If this ability were not present, then transfer would be patently damaging to the affected parties, that is, the developer and the poor.

In addition, assuming a municipality in a transferred case fails to act in good faith or reasonably participate in the process, the case would be appropriately be returned to the court. In effect, the municipal defendant here moving for a transfer is making the functionally legal equivalent act of one seeking substantive certification in a different forum. In the event it does not take place in that forum, it seems clear that the court's jurisdiction may again be invoked.

Futility in the context of this case should be readily apparent. This defendant has admitted over one year ago that its zoning ordinance did not comply with the dictates of Mount Laurel II, has admitted to a fair share allocation of at least 1,400 units, has had eleven developer plaintiffs offer to provide the needed housing units and has not made any efforts to settle this matter. Thus, mediation and review in the context of a transfer would in all likelihood also be unsuccessful.

(b) **A prompt decision is in the public interest.** Any fair reading of the Supreme Court decision in Mount Laurel II in the objective sense leads one to conclude that the Mount Laurel II court spoke often and at length of the need for a prompt adjudication to resolve the fundamental injustice that has existed in the area of lower income housing. Under the facts in the case at bar, the time, effort and financial expense of such a great magnitude where the issues are ripe for final adjudication, a prompt and expeditious decision is compelled by the constitution. Thus, if Section 16a can be read to require transfer in this situation, it is indeed unconstitutional as applied.

(c) **Lack of administrative expertise.** It would appear that this court has the expertise necessary to resolve the issues. It is certainly not clear that the Housing Council has such expertise at the present time.

(d) **Irreparable harm.** The harm which would result from a granting of this transfer motion would be substantial in additional expenditures and delay. The reality of the situation is such that any additional delay continues to violate the fundamental rights of the class of persons our Supreme Court ruled must be protected. Those rights are irreparably harmed each day they must await vindication.

Finally, a transfer under Section 16a under the circumstances of this case would present a manifest injustice when viewed in relation to a Section 16b case. It is clear that the legislature intended a distinction between a Section 16a transfer motion and a Section 16b case. The distinction is supported by an analysis of the fundamental policy behind the doctrine of exhaustion of administrative remedies.

Our Supreme Court has ruled that exhaustion of administrative remedies is

> "a rule of practice designed to allow administrative bodies to perform their statutory function in an ordinary manner without preliminary interference by the courts. See Brunetti v. Boro of New Milford, 68 N.J. 576 at 588 (Sup. Ct. 1982. (Emphasis supplied).

Thus, the judicial division line on exhaustion in this context appears to be that where there has already been "preliminary interference from the courts," the policy behind the rule of practice supporting exhaustion decreases in importance. The legislature may have assumed that in Section 16b cases, there would be little or no such preliminary interference. Thus, for those matters, exhaustion would be preference except that exhaustion would not be in the interests of justice. With respect to Section 16a cases, however,

the legislature assumed that there might be substantial preliminary interference as a result of the judicial process. In the case at bar, there is no question but that substantial preliminary interference has occurred in that substantial issues have been litigated and, in some instances, decided; some or all of the issues have been fully prepared for a hearing and the hearing should be imminent and substantial discovery has occurred and is essentially concluded.

In the final analysis, under any concept of manifest injustice, it seems clear that were this court to transfer this matter to the Housing Council, the same would result in an incorrect decision and involve an abuse of discretion.

POINT III

THE DEFENDANT PRESENTS NO BASIS FOR A TRANSFER

The defendant, in support of its application for a transfer of this matter under Section 16a, provides no real basis for the transfer but merely indicates that a transfer to the Council would be consistent with the intent and purposes of the Act and the stated legislative declaration. Defendant then further opines in a conclusory fashion that the transfer would not result in manifest injustice to any party to the litigation.

CONCLUSION

Based on all of the foregoing, it is respectfully submitted that defendant's motion for transfer in accordance with Section 16a should be denied.

Respectfully submitted,

LANFRIT & LINNUS

By _____
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:SOMERSET COUNTY
DOCKET NO. L-006583-84
CONSOLIDATED MT. LAUREL II CASES

J.W. FIELD COMPANY, INC., and JACK W. FIELD, et als,

Plaintiffs,

vs.

TOWNSHIP COUNCIL OF THE TOWNSHIP OF FRANKLIN, et als,

Defendants.

CIVIL ACTION

CERTIFICATION OF HARRY RIEDER ON BEHALF OF PLAINTIFF, JZR ASSOC.,

HARRY RIEDER, of full age, hereby certifies as follows:

1. I am a partner in the plaintiff entity known as JZR Associates, a partnership, and am fully familiar with the facts and circumstances set forth herein.

2. JZR Associates purchased the lands which are the subject matter of this litigation as follows:

(a) Lot 7.03 in Block 37 on the Tax Map of the Township of Franklin consisting of approximately 51.32 acres in 1978, and

(b) Lot 5 in Block 37 on the Tax Map of the Township of Franklin consisting of approximately 104.44 acres in 1985.

3. Plaintiff, JZR Associates, at all relevant times throughout these proceedings and since June, 1979, has been a residential real estate developer and builder.

4. On December 16, 1983, plaintiff filed an application for tentative approval of a Planned Unit Development with the Franklin Township Planning Board. During the pendency of that application, plaintiff made known its intention to set aside a portion of its proposed development for the construction of low and moderate income housing.

5. Since December of 1983 and continuing to the present, the defendant Planning Board and governing body has hindered and obstructed plaintiff's efforts to construct a development in accordance with the principles of Mount Laurel II as follows:

(a) At said time, the Franklin Township Zoning Ordinance allowed development of plaintiff's property for a maximum of 7 units per acre in the event plaintiff had amassed or assembled at least 100 acres. Plaintiff's application consisted of approximately 150 acres of land to be developed.

(b) On January 5, 1984, while said application was pending before the defendant, Franklin Township Planning Board, defendant, Franklin Township Council, entertained a motion to adopt an interim ordinance eliminating the aforesaid PUD option in the zone in which plaintiff's land is located.

(c) On January 12, 1984, the motion was withdrawn and replaced by a motion to adopt a zoning ordinance affecting plaintiff's property to reduce the density in the PUD Zone from 7 units per acre to 3-1/2 units per acre and to increase the acreage required to exercise the PUD option from 100 acres to 300 acres.

(d) On January 25, 1984, plaintiff appeared at a regularly scheduled work session meeting of the defendant, Franklin Township Planning Board, to discuss plaintiff's pending application.

(e) Defendant, Franklin Township Planning Board, at its meeting of January 25, 1984, deemed the application complete and set the application down for a public hearing to take place on March 21, 1984.

(f) On February 9, 1984, defendant, Franklin Township Council, considered for passage the final adoption of the previously proposed amendment to the zoning ordinance to reduce the density of plaintiff's development from 7 to 3-1/2 units per acre and increase the acreage required in the PUD Option Zone from 100 acres to 300 acres. Said ordinance was adopted by a five to four vote.

(g) A sufficient number of property owners affected by the proposed zoning change had filed a protest under N.J.S. 40:55D-63, thereby requiring that such amendment to the zoning ordinance be adopted by a two-thirds majority of the defendant, Franklin Township Council.

(h) On February 23, 1984, the defendant, Franklin Township Council, conducted a second vote on the proposed ordinance and by virtue of one Council Member's switch of vote to support said ordinance, the ordinance was adopted by a six to three majority. Said ordinance, as approved for final adoption by the defendant, Franklin Township Council, was published on March 1, 1984.

(i) Since said ordinance requires 300 acres of land and sets a maximum density of 3.5 units per acres, plaintiff's pending application before the defendant, Franklin Township Planning Board, previously conforming to the density requirements and acreage requirements, no longer conforms.

(j) Defendant, Franklin Township Council, knew about plaintiff's pending application before the defendant, Township Planning Board, and despite said knowledge, adopted the aforesaid zoning ordinance in an attempt to impede processing plaintiff's application for development before the defendant, Franklin Township Planning Board.

6. Plaintiff, JZR Associates, filed its initial complaint in this matter on February 3, 1984 and became the second Mount Laurel II plaintiff challenging the then existing zoning ordinances of Franklin Township. The

actions of the defendants, Township of Franklin and Planning Board, described above caused the filing of an amended complaint on behalf of the plaintiff to be filed on March 22, 1984, challenging the ordinance emasculating the PUD Option set forth above.

7. The history of the litigation in this matter which has now been pending since January 27, 1984 (the date of the filing of the first complaint on behalf of J.W. Field Company, Inc. and Jack W. Field), is approaching two years.

8. Between January 27 and July 20, 1984, the date of the pretrial in this matter, a total of ten (10) Mount Laurel II lawsuits were filed and consolidated, all challenging Franklin Township's zoning ordinances on Mount Laurel II grounds.

9. Subsequent to the pretrial, another developer filed suit, which suit was consolidated, thus resulting in eleven (11) plaintiffs challenging the Franklin Township zoning ordinances on Mount Laurel II groungs.

10. Between January 27, 1984, the date of the filing of the first Mount Laurel II complaint, and September 10, 1984, the first day of trial with respect to all issues other than the builder's remedy issues, intensive and massive discovery between and among the parties was conducted. Interrogatories were exchanged, depositions of experts were conducted, and status conferences were held.

11. On September 10, 1984, the first day of trial in this matter, defendant, Township of Franklin, after having defended its then existing zoning ordinance, then took a complete about-face and consented to facial invalidity of its ordinances that existed as of July 11, 1984. The trial consumed nine (9) trial days covering a span of time between September 10, 1984 and October 1, 1984.

12. By court order of October 12, 1984, the Honorable Eugene D. Serpentelli, J.S.C., entered an order appointing Richard Coppola, AICP, to serve as Master in the matter and directed Mr. Coppola to report to the court and the parties within thirty (30) days of October 12, 1984 his findings regarding Franklin Township's fair share of the present and prospective regional need for lower income housing.

13. Although the Township has conceded as of July 20, 1984, by virtue of the pretrial order entered in this matter, that the Township of Franklin has a fair share obligation of at least 1438 units, and although the December 21, 1984 report of the Master utilizing all of the variables directed by the court concludes that Franklin Township's fair share obligation, prior to the issuance of any credits, is somewhere between 2,457 and 2,679 through 1990, no order has, as of yet, been entered by the court with respect to the fair share obligation of Franklin Township.

14. Due to the fact that eleven builders are claiming a builder's remedy in this matter and due to the fact that the total proposed lower income units to be built would exceed the fair share of the defendant Township, the court, through Judge Serpentelli, issued an opinion as to the priority between and among the plaintiff developers, which opinion was decided on January 3, 1985.

15. It has been approximately one year since the conclusion of the trial in this matter and, during that time, all parties have continued to aggressively pursue this matter.

16. The record clearly shows that the defendant has responded only to the imminence of court proceedings. Two blatant examples of such conduct are as follows:

(a) On the first day of trial, after eight months of intensive discovery relating to the issue of the invalidity of Franklin Township's zoning ordinance as it existed on July 11, 1984, the Township conceded to the facial invalidity of the same, realizing that ordinance was indefensible.

(b) The final report of the Master appointed by the court relating to the issues of fair share and credits has been delayed for approximately one year after the initial due date imposed by the court order. This delay is the subject of a separate motion brought by the plaintiffs, Flama Construction Corp., JZR Associates and others. This plaintiff has spent almost a full two years seeking approval to develop its lands and setting aside a portion of the same for lower income housing. The climate for housing production is now extremely favorable but cannot be relied upon to last indefinitely. This plaintiff cannot be expected to maintain its present level of financing for this effort indefinitely. This plaintiff sees no reason to further delay the production of needed housing. Although the court has not yet rendered an opinion as to the fair share obligation of Franklin Township, it is clear that Franklin Township's fair share will be a minimum of 2,457 units before the issue of credits is determined. Thus, the only significant issue remaining to be addressed in this litigation is the location of the lands on which the housing will be built. That is, cite specific relief for plaintiffs in this action.

17. This plaintiff has proposed a development containing a substantial proportion of lower income housing units and has expended or is committed to expend over $2,187,659.00, including the cost of the premises known as Lot 5 in Block 37 on the Tax Map of Franklin Township, in an attempt to provide such housing.

18. Based on the above, it is my opinion that a transfer of this matter to the Council on Fair Housing would be manifestly unjust and may result in no lower income housing ever being built to satisfy Franklin Township's fair share obligations. On the other hand, this court is in a unique position, with the number of ready, willing and able developers in court, to effectuate the goal of Mount Laurel II which is to provide low and moderate income housing.

I certify that the foreging statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

HARRY RIEDER

Dated: October 9, 1985

J.W. FIELD COMPANY, INC. and JACK W. FIELD, et als	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET/OCEAN COUNTIES CIVIL ACTION DOCKET NO. L-006583-84 L-007917-84 L-014096-84 L-231370-84 L-022951-84 L-25303-84 L-019822-84 L-026294-84 L-033174-84 L-051892-84
Plaintiffs	:	
vs.	:	
TOWNSHIP COUNCIL OF THE TOWNSHIP OF FRANKLIN, et als	:	
Defendants	:	

BRIEF OF FLAMA CONSTRUCTION CORP. IN OPPOSITION TO MOTION FOR TRANSFER

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STATEMENT OF FACTS

PROCEDURAL HISTORY

For purposes of the instant motion, Flama Construction Corp. will rely upon the substantial record already before this Court.

POINT I

MANIFEST INJUSTICE TO A PARTY IS NOT THE SOLE CRITERION UPON WHICH A DECISION TO TRANSFER MUST OR SHOULD BE BASED

Franklin Township brings this motion to transfer jurisdiction of these consolidated cases to the Council on Affordable Housing pursuant to section 16a. of the Fair Housing Act, ch. 222, 1985 N.J. Laws 46, effective July 2, 1985 (Act). Section 16a. provides in relevant part:

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

As noted by Mr. Cafferty in his certification, the first complaint was filed on January 27, 1984 and the latest August 2, 1984, both clearly 60 days before the Act's July 2, 1985 effective date.

Unlike a 16b. case, there is no mandatory requirement that the Franklin cases be transferred to the Council for "mediation and review." Indeed, it is the clear expression of the Legislature that the jurisdiction of the three Mount Laurel judges over cases of greater than 60 days vintage should continue undisturbed

unless and until a "party to the litigation" files a motion seeking a transfer. And this is so despite the Legislature's declared preference for "mediation and review" over litigation. Sec. 3.

Although the lack of substance to the Township's motion would seem to suggest the contrary, the mere filing of a transfer motion does not compel the Court to relinquish its jurisdiction. The decision to transfer under 16a. is left entirely to the discretion of the Court. In reaching that decision, the Legislature has only mandated that the Court consider whether a transfer would be manifestly unjust to any party. Significantly, the Act does not direct transfer unless manifest injustice would result or, for that matter, that the Court must base its decision soley upon the presence or absence of manifest injustice to any party.

The failure of the Legislature to mandate a transfer of a 16a case in all cases unless manifest injustice would result indicates a recognition that other factors and circumstances may warrant the retention of jurisdiction in a particular case. Flama Construction Corp. respectfully submits that the Court may and should consider other factors such as the reasons advanced by the Township to support the transfer and the Township's bad faith in reaching a decision on a transfer motion. The presence of manifest injustice, we submit, must defeat a transfer motion but its absence, conversely, does not compel the Court to grant it.

POINT II

DEFENDANT'S TRANSFER MOTION SHOULD BE DENIED BECAUSE OF MANIFEST INJUSTICE TO PLAINTIFFS THE TOWNSHIP'S BAD FAITH AND THE ABSENCE OF ANY FACTUAL BASIS SUPPORTING THE TRANSFER

A. The Absence of a Factual Basis Supporting the Transfer

No where in its moving papers does Franklin disclose a factual basis to support its motion to transfer these consolidated cases to the Council. Rather, the Township merely quotes Sections 3 and 16a. of the Act and declares that a transfer would be consistent with the Act's intent and purpose.

The essence of the Mount Laurel doctrine is, of course, municipal recognition of its constitutional obligation to affirmatively afford a realistic opportunity for the actual construction of its fair share of the present and prospective regional need for low and moderate income housing. Mount Laurel II, 92 N.J. 158, 205 (1983); Fair Housing Act, Sec. 2a. The Act is expressly intended to address this constitutional obligation. Act, Sec. 2. Both the Supreme Court and the Legislature agree upon the legitimacy of the goal; the distinction lies in how the goal is reached.

At the fair share trial of these cases, all the planning experts, including Mr. Chadwick, were in agreement that there exists a significant but unsatisfied need for lower income housing in Franklin Township and its region. That need exists today and

was estimated through the year 1990. Thus, given the common goal of the Act and the judicially created remedy to satisfy the existing problem, the focus of inquiry upon this motion should be whether or not a transfer will advance or delay the actual production of lower income housing in the Township.

The Township, as the moving party, has presented nothing to the Court that even remotely suggests that proceeding before the Council will sooner implement the constitutional mandate. It is rather doubtful that it can do so. Assuming a 16a. transfer is granted, the Township is under no time constraint to even take the first step towards ultimate compliance until the Council first promulgates its criteria and guidelines pursuant to Sec. 7. Once those criteria and guidelines are promulgated, however, the Township has five additional months within which to file a housing element and a fair share plan with the Council. Sec. 16a. Thus, under the Act, Franklin is authorized to do absolutely nothing for at least five more months.

Moreover, giving the Township the benefit of the doubt by assuming the housing element and fair share plan are timely filed, one must read into the statute an obligation upon the Township to <u>immediately</u> seek a substantive certification or else the Township may wait 6 more months, as per Sec. 13, before the administrative review process of Secs. 14 and 15 can be

invoked,[1] which itself is clearly time consuming. Alternatively, one might read into Sec. 16a. the right of a plaintiff to seek mediation and review under Sec. 15a(2).

This brief outline of the statutory scheme is enough to show that a transfer will significantly delay the provision of any lower income housing in Franklin Township. Such delay is unnecessary and patently uneconomical as the instant case has progressed to the point where vindication of the constitutional rights of lower income persons is imminent. Franklin's fair share has been the subject of extensive discovery and a full plenary hearing. All that remains is the filing of the Master's report on proffered credits and the Court's decision. The Township, moreover, has the option and has repeatedly indicated an intention to submit its July 12, 1984 zoning ordinance as its compliance ordinance. As the Township was given two weeks to formally announce its intention to rely on that ordinance, it is clear that these cases are days and weeks from completion versus the probable months and years under the Act. Should the cases be transferred, moreover, there cannot be much doubt that the Township will want to retry the entire fair share issue. It is

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[1] A literal of Sec. 13 may very well make the decision to seek substantive certification entirely voluntary on the part of the Township.

difficult to conceive of a greater waste of time, public and private money and judicial resources should this be permitted to occur.

By allowing the Court discretion to transfer in Mt. Laurel cases filed more than 60 days before the Act's effective date, the Legislature was obviously aware of the fact that substantial progress had been made in many cases which should not be abandoned. Again, had it believed that continued judicial treatment of these cases to be wholly unacceptable, the Legislature would have provided for mandatory transfer of 16a cases. It did not. The line was drawn at complaints filed within 60 days of the Act's July 2, 1985 effective date. A 60 day case could, at best, have proceeded only to the point of initial discovery. There exists a world of difference between a case fully tried and awaiting decision and one which merely consists of the complaint and answer. Flama respectfully submits that this distinction was recognized by the Legislature by vesting discretion in the Court to refuse to relinquish jurisdiction. Given the present status of the instant cases as tried and awaiting decision together with the failure of the Township to cite any reason why transfer should be made, it is respectfully submitted that the instant motion should be denied.

B. Franklin Township's Bad Faith

Examination of the Township's moving papers discloses nothing more than a request for a change in forum. In deciding

whether or not to honor the Township's request, the Court should carefully consider the Township's motivation for requesting the transfer, especially in light of its prior conduct in the instant litigation.

It should be recalled that much time, money and effort was devoted by the parties to prove that the Township's zoning ordinance, as amended through July 11, 1984, patently failed to satisfy the constitutional mandate. In the face of multiple summary judgment motions demonstrating that Franklin's zoning ordinance would allow hundreds of units less than even the most conservative estimate of its fair share, Franklin resisted. It resisted by submitting the certification of Mr. Chadwick who continued to advance a methodology that this Court had earlier rejected in the AMG case. It was only when the Court warned the Township in the strongest terms of the distinct possibility that counsel fees might be assessed against it did the Township concede the invalidity of its ordinance, but not until the eve of trial. Meanwhile, plaintiffs were forced to incur substantial expense to prepare to try an issue that should have been stipulated at the outset of this litigation.

This example, at the very least, amply demonstrates that Franklin Township is not committed to providing lower income housing. There is nothing in the already substantial record before the Court that would indicate that the instant motion is anything other than another dilatory tactic. Delay is the Township's

ally. Franklin Township is hardly the defendant that, by any stretch of the imagination, could be said to have cooperated thus far. Indeed, not even in its moving papers does Franklin yet acknowledge that it has a constitutional obligation and that proceeding before the Council represents its first step toward addressing that obligation.

C. Manifest Injustice to Plaintiffs

As before noted, Sec. 16a. of the Act directs the Court to consider whether a transfer to the Council would result in a "manifest injustice to any party to the litigation." The Act does not define the term manifest injustice, however. For the reasons stated before, Flama Construction Corp. does not believe that the Act compels the Court to transfer a 16a. case unless manifest injustice would result. Nor does it believe that the Court is limited to considering only the question of manifest injustice on a transfer motion. Even so, Flama respectfully submits that a transfer would result in manifest injustice to the various plaintiffs in these consolidated cases and this fact should defeat the Township's motion.

It should be first noted that because transfer is mandatory in 16b. cases and discretionary in 16a cases, the Legislature apparently considered that manifest injustice is more likely to be found in the older pending cases, those in which substantial progress had been made towards achieving municipal compliance. Thus, in attempting to put some substance to the term

manifest injustice, the Court should bear in mind the distinction between cases begun before May 3, 1985 (60 days before the Act's effective date) and those started thereafter.

The Rules of Court regarding prerogative writ actions address the principle of exhaustion of administrative remedies. R.4:69-5. As the instant cases are prerogative writ actions and the proceedings before the Council and Office of Administrative Law an administrative remedy, R.4:69-5 is relevant. The Rule provides:

> Except where it is manifest that the interest of justice requires otherwise, actions under R.4:69 shall not be maintainable as long as there is available a right of review before an adminstrative agency which has not been exhaused.

Until July 2, 1985, there was no administrative remedy for a plaintiff to challenge the substantive validity of a municipal zoning ordinance. Thus, a transfer essentially gives retroactive effect to R.4:69-5 through Sec. 16a. of the Act.

In Brunetti v. Borough of New Milford, 68 N.J. 576 (1975), our Supreme Court described the doctrine of exhaustion as "a rule of practice designed to allow administrative bodies to perfrom their statutory functions in an orderly manner without preliminary interference from the courts." Id. at 588 (emphasis added). It is rather clear, however, that this declared purpose of the exhaustion requirement will not be served in the instant case because the question of fair share, "(t)he most troublesome issue

in Mount Laurel litigation" has been subject to discovery, fully tried, referred to the expertise of a Master, has been reported upon and presently only awaits a decision by the Court, subject to possible adjustment for credits. Mount Laurel II, supra, 92 N.J. at 248. In addition, the Township's zoning ordinance has already been stipulated as unconstitutional. There is, therefore, a substantial judicial legacy in this very case which will produce "interference" in any proceeding before the Council and later, an administrative law judge.

The Supreme Court, in Brunetti, supra, has also ruled that exhaustion is inappropriate "where there is a need for prompt decision in the public interest." 68 N.J. at 589. The Mount Laurel II decision itself was a judicial response to delay in municipal compliance with the constitutional mandate first articulated eight years before in 1975. 92 N.J. at 199. The vindication of the constitutional right of lower income persons to adequate affordable housing is clearly in the public interest. Id. at 208. The expert testimony of all experts in this case agreed that there currently exists unsatisfied need for lower income housing in Franklin Township. Thus, we respectfully submit, this case falls squarely within the long recognized exception to the exhaustion requirement of R.4:69-5. Given the distinct likelihood of delay associated with the untested administrative machinery created by the Act, it becomes certain that transfer would be a continuation of the manifest injustice already im-

posed upon persons of lower income.

It should also be recalled that the plaintiffs in this case have spent extraordinary time and money in prosecuting this case against the unyielding Township. The Supreme Court, in Mount Laurel II, made no attempt to hide the fact that it desperately needed a plaintiff class to litigate and vindicate the constitutional rights of lower income households. "Experience since Madison ... has demonstrated to us that builder's remedies must be made more readily available to achieve compliance with Mount Laurel." 92 N.J. at 270. The Supreme Court held out the carrot, so to speak, and invited the State's builders to do what the lower income citizens were unable to accomplish for themselves.

The builders accepted the opportunity offered to them by the Court. One must recognize that the diligence and enthusiasm with which the cases have been prosecuted is clearly the impetus that produced the Act itself. Now, having reached the threshhold of producing compliance, the Court is being requested to ignore the time and expense incurred by plaintiffs in reliance upon the express invitation presented directly to them by the Supreme Court.

It is difficult to imagine a more unfair result. This is not the case where discovery has just begun, experts have not been retained or paid and no substantial legal expense incurred. This is not a 16b. case. This case is almost two years old. For its part, Flama Construction Corp. began its struggle with

the Township in August, 1983 when it first applied to Franklin's board of adjustment proposing an application with a voluntary 20% set aside, an application ultimately denied. It is clear that plaintiffs here stand to suffer severe deleterious and irrevokable consequences if this case were to be transferred and R.4:69-5 thus be given retroactive effect through Sec. 16a of the Act. The Supreme Court, in Gibbons v. Gibbons, 86 N.J. 515 (1981), cautioned against retroactivity in such a case realizing that retroactivity may indeed be fundamentally unfair, despite a retroactive legislative intention or preference. Id. at 523-24.

It is respectfully submitted that the Court should not exercise its discretion to transfer these cases to the Council because of the fundamental unfairness to the plaintiffs herein and because of the continued need for an immediate vindication of the constitutional rights of lower income persons. Transfer of these cases will produce nothing more than delay which benefits Franklin but continues to harm plaintiffs, who have finite resources, and lower income households who must continue to wait for adequate and affordable housing. These facts, together with the Township's prior bad faith and present failure to provide any reasons in support of its motion, demonstrate that the balance of equities strikes against a transfer.

CONCLUSION

For the foregoing reasons, Flama Construction Corp. respectfully requests that the instant motion be denied.

Respectfully submitted,

MEZEY & MEZEY

BY _____
FREDERICK C. MEZEY