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π's Brief + affidavit in opposition to motion to transfer Per Sec. 16(a) of Fair Housing Act of 1985

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CARL S. BISGAIER, ESQUIRE
510 Park Boulevard
Cherry Hill, New Jersey 08002
(609) 665-1911

JOHN G. VAN DALEN, etc., et al.,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
Plaintiffs,	:	MORRIS COUNTY/MIDDLESEX COUNTY DOCKET NO. L-045137-83 PW
vs.	:	Civil Action
WASHINGTON TOWNSHIP, etc.,	:	(Mount Laurel)
Defendant.	:	

PLAINTIFFS' BRIEF AND AFFIDAVIT IN OPPOSITION TO MOTION TO TRANSFER PER SEC. 16a OF THE FAIR HOUSING ACT OF 1985

On the Brief:

CARL S. BISGAIER, ESQUIRE

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 6, 1984, this court ruled that the defendant's land use ordinances violated the Constitution of the State of New Jersey as articulated in the decision of the Supreme Court of the State of New Jersey in Southern Burlington Cty. N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983). ("Mt. Laurel II"). VanDalen v. Washington Tp., Docket No. L-045137-83PW (Law Division, 1984). Pursuant to its decision, the court ordered ordinance revisions to satisfy a fair share obligation of 227 low and moderate income units and appointed a master to report to the court on compliance and whether to grant plaintiffs' site specific relief.[1]

The defendant was given ninety (90) days to comply which time ended on March 6, 1985. The defendant has adopted ordinance amendments which generally appear to comply but have chosen not to provide site specific relief to the plaintiffs. Judicial review of the proposed compliant ordinance and site specific issues have been delayed only because of extensions requested by the court's master for the filing of his report.

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[1] Reliance for this Statement of Facts and Procedural History is placed on the attached affidavit of Carl S. Bisgaier, Esquire, documents previously filed, evidence on record and the orders, judgments and opinions of this court.

For the most part, the only issue remaining to be resolved is whether the order granting a final judgment of compliance will include a provision awarding plaintiffs the builder's remedy. The Master's Report will apparently support a finding of compliance as to the ordinance provisions and will contain recommendations regarding site specific relief. As of August 7, 1985, the Master had indicated his report would be ready on August 9, 1985. The anticipated hearing should result in a relatively routine review of compliance and a full review of site specific issues.

Thus, we are as close to a final resolution of this matter as the court's schedule for the final hearing would permit. It is a relative certainty that had the master provided his report within the original timeframe suggested by the court, that hearing would be over and a final judgment resolving all issues entered. The Mt. Laurel II mandate would have already been fully vindicated.

The present motion is the last hurdle interposed by the defendant which stands in the way of a final resolution. The context of the motion requires an understanding of how we have gotten to this point.

Plaintiffs purchased the subject property in 1980. Efforts to obtain a rezoning were pursued between 1980 and 1982 and were not fruitful. In June of 1982, an application for a zoning variance was made before the defendant's Zoning Board of Adjustment.

Plaintiffs' commitment then was to provide "least cost" housing pursuant to Southern Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975) ("Mt. Laurel I") and Oakwood-at-Madison, Inc. v. Tp. of Madison, 72 N.J. 481 (1977) ("Madison").

Plaintiffs' application for a variance was reviewed in twelve (12) public hearings for a period of seven (7) months. Prior to the final decision, the Supreme Court rendered its decision in Mt. Laurel II. Plaintiffs immediately committed themselves to providing a substantial percentage of low and moderate income housing consistent with Mt. Laurel II.

On February 2, 1983, the Zoning Board of Adjustment denied plaintiffs' application essentially on jurisdictional grounds. Plaintiffs did not appeal the denial but sought a zoning change from the Governing Body. The process to obtain Mt. Laurel relief at that point had cost approximately $300,000.

On April 14, 1983, plaintiffs wrote to the Governing Body and Planning Board seeking a joint meeting of the two bodies to discuss a zoning change. Plaintiffs were not afforded an opportunity to meet until June 21, 1983, at which time the Planning Board held a meeting at which plaintiffs were permitted to present its request. It was readily apparent then and by actions of the Planning Board thereafter that plaintiffs would not receive a voluntary rezoning.

Prior to the institution of suit, the defendant's land use ordinances were patently in violation of Mt. Laurel II. In 1978 the defendant, along with 26 other Morris County municipalities had been sued by the New Jersey Department of the Public Advocate for violation of Mt. Laurel I and Madison. See Morris Cty. Fair Housing Council v. Boonton, 197 N.J. Super. 359-363 (Law Division, 1984). Subsequent to the filing of that lawsuit, the defendant determined that it was not a "developing" municipality and, therefore, not implicated by Mt. Laurel I. It attempted to repeal ordinances which it later asserted before this court it had adopted to comply with Mt. Laurel I. Subsequent court orders in a separate matter had in May of 1982 found the defendant to be a "developing" municipality and, in February of 1983, the defendant had been given until May 16, 1983, to rezone to accomodate its indigenous need. No appeal was taken and no rezoning had occurred as a result of those orders. The defendant simply readopted the same ordinance previously invalidated by the Superior Court.

Prior to the institution of suit, the defendant refused to acknowledge that it contained a SDGP "growth" area. It continued this position until the closing argument of a full plenary hearing on the SDGP despite numerous representations by plaintiffs and a clarifying statement by the Director of the agency responsible for the SDGP.

Immediately after plaintiffs' June 21, 1983, appearance, the defendant's Planning Board adopted an indigenous need number of 67 units. The Court would latter hold the number to be 102. The Planning Board's action came at a meeting during which the members were told by their attorney that plaintiffs posed a "threat". The Planning Board, however, had tabled any consideration of proposed ordinance amendments.

Previous history indicated that the defendant acted in the Mt. Laurel II context only on the eve of certain judicial action and then inadequately. This case presents a similar history. After suit was filed, but before a hearing on SDGP issues, the defendant in October, November and December of 1983 adopted ordinances purporting to satisfy its indigenous need obligation. After receipt of plaintiffs' expert reports and subsequent to the start of the trial on fair share and compliance, the defendant adopted new ordinance amendments purportedly to comply.

An SDGP hearing was held in February of 1984 as a result of which defendant was found to have an SDGP "Growth" area. The defendant had persisted in objecting to such a finding up until the final hour of the hearing.

The compliance hearing was held in June and July of 1984. In December of 1984, the previously mentioned decision was rendered in favor of plaintiffs. Post January 1983 expenses to date have been over $253,000 including approximately 565 hours of attorney time.

The proofs have demonstrated that the defendant is, by absolute number and percentage, one of the two or three fastest growing municipalities in Morris County. Adequate water and sewer capacity and land availability exists for extensive growth in an area served by major roads and proximate to substantial job opportunities. Low and moderate income housing has not been produced to date as this infrastructure and land availability continues to diminish. This has already occurred in defendant's primary area of development, the Schooley's Mountain tableland, which is virtually being totally absorbed by luxury, single-family houses and which has little or no available sewer capacity.

The defendant has avoided compliance for almost a decade. Now, on the verge of a court-ordered compliance, it again seeks the delay which has served its exclusionary policies so well in the past. The defendant has now been found by two courts to have violated Mt. Laurel principles. It cannot be provided with another opportunity to avoid its constitutional obligation.

LEGAL ARGUMENT

INTRODUCTION

On January 20, 1983, the Supréme Court rendered its decision in Mt. Laurel II providing a judicial mechanism to assure vindication of a constitutional mandate first articulated eight years earlier in Mt. Laurel I. The creation of an effective judicial mechanism was deemed necessary, to some extent, because of the lack of a legislative mechanism to effect the same end. Mt. Laurel II, supra, 92 N.J. at 212.

On July 2, 1985, the Fair Housing Act became effective. Senate 2046, Sec. 34 ("Act"). The Act was intended to create an administrative mechanism to address both Mt. Laurel I and Mt. Laurel II. Sec. 2 and Sec. 3.

In Mt. Laurel II, the Supreme Court had indicated its preference for legislative, as opposed to judicial, action but had asserted that:

> (W)e shall continue - until the Legislature acts - to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine. That is our duty.

Mt. Laurel II, supra, 92 N.J. at 352. The Legislature has now acted. The question presented then is the scope of the court's

"duty" in light of that action. In that regard, it is noteworthy that while the Court envisioned the possibility of "legislation that might completely remove this Court from those controversies" (Mt. Laurel II, supra, 92 N.J. at 212), it perceived that the judicial role would be more or less involved dependent upon the actual scope of the legislation in light of the constitutional mandate.

> The judicial role, however, which would decrease as a result of legislative and executive action, necessarily will expand to the extent that we remain virtually alone in the field.

Mt. Laurel II, supra, 92 N.J. at 213.

Thus, in determining the role of this court under the Act, it is necessary to consider the legislative intent in the context of the fundamental constitutional mandate which the Act purports to address. The court must be guided both by that legislative intent and by the underlying constitutional mandate, the implementation of which the courts are the ultimate guarantors.[1]

The defendant in this action seeks to trigger the provisions of Sec. 16(a)[2] of the Act. This Section provides

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[1] As will be demonstrated below, this was the legislative intent and involves no conflict between the roles of the two constitutional bodies.

[2] The marked up version of the Act available to plaintiffs does not indicate a subsection "a"; although, it does indicate a subsection "b". Plaintiff assumes this is a misprint.

circumstances under which the court may exercise its discretion to "transfer" a case to the Council on Affordable Housing ("Council"). As will be discussed below, this request for a "transfer", and the supporting documentation offered by the defendant to the court, makes a mockery of the Act and the legislative intent and would, if granted, thwart the constitutional mandate. The integrity of the Act, the legislative intent and the constitutional mandate is severely implicated by this motion. In fact, it is seriously tarnished by the motion itself.

The Act stands today as the nation's foremost State legislative effort to respond to the housing needs of lower income persons. It is an extraordinary credit to the people of this State that the Act is law.[1] It is a greater credit to our judiciary that it filled the void which previously existed in the absence of the Act. It is absolutely essential, however, that while the judicial role may "decrease as a result of legislative ...action", it must decrease only to the extent intended by that legislation and only to the extent permitted by the Constitution.

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[1] For the first time, as a result of the Act's amendment to the Municipal Land Use Law, every municipality, as a precondition of zoning, will have to adopt a housing plan element which "shall be designed to achieve the goal of access to affordable housing to meet present and prospective housing needs with particular attention to low and moderate income housing..." Secs. 10, 29(b)(3) and 30.

As will be demonstrated below, the Act contains numerous apparent flaws, internal inconsistencies and loopholes. To the extent possible, the court should interpret the Act in an effort to save it. There is substantial precedent for such action. Our courts have gone to great ends to fulfill the legislative intent by appropriately massaging statues (to the point of the most delicate judicial surgery) in order to save them. See e.g., Jordan v. Horseman's Benevolent & Protection Ass'n., 90 N.J. 422 (1982).

Plaintiffs believe that the Act should be saved and can be interpreted to be a constitutional and valid exercise of the police power. However, the transfer of this case to the Council would be contrary to the legislative intent and a manifest abuse of the constitutional mandate. As will be demonstrated below, the effect of a transfer would accomplish nothing more than delaying this court's review of site specific relief for two (2) years; a result which would unnecessarily test plaintiffs' ability to maintain this action and the ultimate likelihood that any lower income housing would be produced.

POINT I

THE EFFECT OF A TRANSFER WOULD SIMPLY BE TO UNNECESSARILY DELAY IMPLEMENTATION OF THE CONSTITUTIONAL MANDATE AND RISK ITS ULTIMATE LACK OF IMPLEMENTATION

It would be unthinkable for this case to be "transferred" per Sec. 16a, let alone a "manifest injustice". A "transfer" would be contrary to the legislative intent and the constitutional mandate. However, the legal issues raised by the motion cannot be resolved without agreement as to the effect of a "transfer" generally and with specific regard to this matter.

Unfortunately, the Act presents a rather complicated scheme in so far as the interplay between the judicial and administrative process. Both are deemed essential to the overall satisfaction of the constitutional mandate; however, in many respects, the Act is silent or apparently inconsistent in its treatment of how the two (court and Council) should work together.

The presentation below represents plaintiffs' effort to extract from the Act the legislative intent as to how it is to work mechanically. Plaintiffs' legal arguments rest in large measure on this interpretation.

A. THE GENERAL EFFECT OF A "TRANSFER" PER SEC. 16a OF THE ACT

Before determining whether a "transfer" per Sec. 16a is appropriate, it is first necessary to evaluate the effect of a "transfer". In this regard, the Act is seriously deficient; to such an extent that further legislation may be necessary before Sec. 16a is meaningful in certain respects.

Sec. 16a simply provides for a "transfer" (under certain circumstances) of "those exclusionary zoning cases instituted more than 60 days before the effective date of this Act". While the term "exclusionary zoning case" is not defined for general purposes under the Act[1], it is clear that by any reasonable definition the instant matter is such a case. Also, having been brought on July 15, 1983, it is covered by the provisions of Sec. 16a.

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[1]Sec. 28 of the Act, which deals with the moratorium on the builder's remedy, does contain a definition of the term "exclusionary zoning litigation" which, although limited to the purposes of that section and containing the word "litigation" instead of "case", does indicate the thrust of the legislative intent in this regard. See also Sec. 16b which refers to "litigation...challenging a municipality's zoning ordinance with respect to the opportunity to provide for low or moderate income housing".

Assuming this case is covered by Sec. 16a and further assuming that a "transfer" is otherwise appropriate, the question arises as to what would happen to the case if it were "transferred" Absent agreement on this point, it will be difficult, if not impossible, to determine whether a "transfer" is appropriate. Before addressing the implications of "transfer" in this case, plaintiffs will first evaluate the general effect of a "transfer" per Sec. 16a.

Neither Sec. 16a, nor any other provision of the Act, directly defines the term "transfer". However, Sec. 16a, itself, and others address what happens once a case is transferred.

1. Loss of Superior Court jurisdiction: First and foremost, the decision to transfer appears to divest the Court of jurisdiction. Sec. 16a especially provides that the failure of a municipality to file a housing element and fair share plan with the Council, in a timely manner, will result in a reversion of jurisdiction; a fortiori, jurisdiction must have lost. Further, if a housing element and fair share plan are timely filed, then the court cannot obtain further jurisdiction over the controversy unless and until its jurisdiction is invoked per Sec. 18 if the Council denies substantive certification or its conditions for obtaining certification are not agreed to in a timely manner.[1]

[1]Plaintiffs also believe jurisdiction could be invoked if the defendant fails to act in good faith to pursue substantive certification. As will be shown, plaintiffs view a motion to transfer as a commitment to file for substantive certification immediately per Sec. 13.

This latter point is critical since the mere filing of a housing element and fair share plan is a relatively insignificant action under the Act which appears to trigger no further responsibility on the part of the municipality whatsoever. Thus, pursuant to Sec. 13, ordinarily (in the absence of litigation) the municipal decision whether to petition for "substantive certification" of the housing element is completely voluntary and, under that section, no Council review of the housing element and fair share plan will occur absent a petition being voluntarily filed by the municipality.

This would be a fatal defect in the Act if it were not properly interpreted. If the result of transfer per Sec. 16a (or the exhaustion requirement per Sec. 16b) were simply to require the filing of a fair share plan and housing element, any "transfer" would effect a manifest injustice and be unconstitutional (and the Sec. 16b exhaustion requirement would be unconstitutional). This is because the result of a transfer would place compliance within the exclusive and voluntary control of the defendant.

In any event, plaintiffs contend that the effect of a "transfer" is much different and compels not only mediation and review per Sec. 15(c) but also the ability ultimately to compel compliance in anticipation of appellate review either through a grant of substantive certification per Sec. 14 or reviewed jurisdiction in this court per Sec. 18.

2. Ability to Force Mediation and Review: The question then is whether there is any way by which a "plaintiff" in a transferred case per Sec. 16a can force review of the housing element and obtain a determination by the Council of whether a substantive certification should be granted per Secs. 13, 14 and 15. The answer lies in Sec. 15 which covers those instances in which "(t)he Council shall engage in a mediation and review process..." (Emphasis added).

The ability to trigger "mediation and review" is significant. The Act does provide timeframes in which mediation review should be completed and provides for a hearing before the Office of Administrative Law ("OAL") where mediation and review is unsuccessful. See Secs. 15 and 19. The significance of the OAL provision is that it brings into force existing statutory mechanisms to create a record, obtain a final administrative decision and achieve access to appellate review (N.J.S.A. 52:14B-1, et seq.) or reversion to this court's jurisdiction per Sec. 18.

The problem lies in Secs. 15a and 16a. Pursuant to Sec. 15a, mediation and review is mandated in only two instances:

1. where a municipality has voluntarily petitioned for "substantive certification" pursuant to Sec. 13 and an objection is filed pursuant to Sec. 14 "within 45 days of the publication of the notice of the municipality's petition..." Sec. 15a(1); and

2. where "a request for mediation and review is made pursuant to section 16 of this Act." See 15a(2).

Sec. 16, however, apparently limits the right to seek "review and mediation" to plaintiffs in Sec. 16b cases; that is, in those cases filed "less than 60 days before the effective date of this act or after the effective date..." In such cases, a plaintiff must "file a notice to request review and mediation with the Council pursuant to sections 14 and 15 of this act". The administrative process then need be exhausted only if a timely resolution of participation is adopted per Sec. 9a.

Sec. 16a does not explicitly provide for the obligation or right of a plaintiff in a "transfer" case to request review and mediation. Therefore, given the limiting language of Sec. 15a(2), it might appear that a plaintiff in a 16a transfer case has three options:

1. pack up, go home and forget about the case;

2. await the possible voluntary action by the municipality to seek substantive certification per Sec. 13; or

3. file a new action and come under the provisions of Sec. 16b.

The alternative, of course, is for the Legislature to amend the Act to explicitly provide for the right of a Sec. 16a plaintiff to seek "mediation and review" or for the court to determine that the right is implicit in the concept of "transfer". The latter tack may be appropriate since Sec. 16b can be read as mandating that a Sec. 16b plaintiff request "mediation and review"

whereas, Sec. 16a can be read as leaving the process up to the initial discretion of a party to seek it through a transfer motion and the ultimate discretion of the court as to whether to grant it. Further, it can be concluded that the effect of granting a 16a transfer motion is to put the matter, for procedural purposes, on the same track as a 16b case and that the request for a tranfer is the legal equivalent of a petition for certification per Sec. 13. Support for this view can be found also in the language of Sec. 3 declaring "(t)he State's preference for the resolution of existing...disputes...is the mediation and review process" suggest that all existing cases were intended to be covered by Sec. 15(c) and not just 16b cases.

3. Timing of Completion of Trial Level Stage: Once this issue is clarified, another emerges: whether the timeframe set for completion of mediation and review is reasonable. This is an issue which will be discussed below in the context of whether a transfer is appropriate. It is sufficient here to note that pursuant to Sec. 19 the process might be completed in this case within fifteen (15) months of the effective date of the Act, or October 2, 1986.[1] Even then, the process comparable to a trial

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[1] Sec. 19 does not require completion of the mediation and review process within 15 months. No section establishes a time limit for that process. Sec. 19 merely provides some leverage for a litigant to push for finality since failure to complete the process within 15 months gives the litigant the right to file a motion to be relieved of the exhaustion requirement. Presumably, if the motion is successful, jurisdiction would revert to the court. Sec. 19 does not provide for automatic termination of the duty and appears to leave it to the court's discretion. Further, since there is no incentive to complete the process before a motion is filed, it may not be completed until one is filed. This is true since even after a motion is filed, if the Council determines that mediation and review is complete, the Court may still require a litigant to go to the OAL.

level decision is not complete. Pursuant to Sec. 15(c), unsuccessful mediation efforts are transferred to the OAL and are heard as contested cases.

Sec. 15(c) provides for issuance of the "initial decision" of the Administrative Law Judge (ALJ) within ninety (90) days of transmittal. Presumably, that would require an initial decision on or before January 2, 1987. However, the Act is not clear that the date of transmittal must be on or before October 2, 1986. Thus, while the review and mediation process should be "completed" within 15 months of the Act's effective date, there is no requirement that the Council transmit the case within that timeframe. There, again, the Act must be amended or be judicially interpreted to provide certainty as to the date of transmittal.

Further, Sec. 15(c) provides for an extension of the ninety (90) day OAL review period by the Director of Administrative Law "for good cause shown". No other standard is provided; nor is any substance given to that standard. It is possible, therefore, if not probable, that this period will be enlarged given the complexities attenuating exclusionary zoning litigation despite the "expediting" language in the Act. Again, further legislation or judicial surgery is needed.

It is clear that a party subject to further delay by a finding of "good cause" will have absolutely no recourse to challenge such a decision. An interlocutory appeal is unthinkable in that context and there will be obvious pressure on an adverse litigant in a contested matter to "play ball" with the ALJ and his or her desire for more time. It is relevant to note here that in Mt. Laurel II the Supreme Court chose to select three special judges to provide for the "expeditious" handling of Mt. Laurel cases. This was in spite of the fact that our trial judges are relatively used to handling traditional zoning cases (which ALJ's are not). Further, even with their expertise, the three judges have not been able to resolve contested remanded cases, let alone those newly instituted, within any time remotely like 90 days.

Thus, without some precision given to the term "good cause shown" in Sec. 15(c), it is likely that the OAL review will be far more than ninety (90) days. For that reason and the lack of specificity as to the transmittal date, even the January 2, 1987, date for the issuance of the ALJ's "initial decision" is extremely unlikely to be achieved. Regardless, even then the matter will not have reached a stage comparable to the finality of the initial trial level.

Pursuant to N.J.S.A. 52:14B-10, the "initial decision" or ALJ recommendation is transmitted to the Executive Director of the Council who has an additional forty-five (45) days to "adopt, reject or modify" the recommendation. This would bring us to approximately February 16, 1987, and still the law provides for extensions in the discretion of the agency head, again "for good cause shown". N.J.S.A. 52:14B-10(c).

Thus, even under the most hopeful timeframe, the Act does not provide for the conclusion of the comparable trial level stage until February 16, 1987, over a year and a half from the effective date. Further, it is clear that the timeframe will be much longer for reasons previously stated. More importantly, the "final" Council decision may be that substantive certification should not be granted unless site specific relief is awarded to the plaintiff. Pursuant to Sec. 14, the municipality need not agree to the conditions and there is no provision in the Act to require it to do so. The Act provides only that, in such a circumstance, jurisdiction will revert to the court. Sec. 18.

Regardless, even the minimum timeframe provided for conclusion of the Council's review will mean that over four years will have elapsed since January 20, 1983 (the date of Mt. Laurel II) and three and a half years since the filing of this action.[1]

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[1]It should be noted that this plaintiff, by letter to the defendant's Zoning Board of Adjustment in February of 1983, and by letter to the Governing Body and Planning Board in April 1983, had agreed to provide low and moderate income housing.

For now, it suffices to say that such a delay is obviously unconscionable given the plain language of our Supreme Court's opinion in Mt. Laurel II (particularly since it is merely a delay of this court's action). See Mt. Laurel II, supra, 92 N.J. at 199, 200 fn. 1, 200, 212, 286, 289, 290-91, 293 and 341. This will be discussed further below when plaintiffs address the question of whether "transfer" should be permitted in this case.

4. Scope of OAL and Council Review: Assuming mediation and review can be triggered and the timeframe for such review is reasonable, the next issue is whether the scope of such review is broad enough to effectuate Mt. Laurel II compliance. Before addressing that issue below, it is necessary first to determine the intended scope of review and mediation which can be undertaken by the Council and OAL. Any case which is transferred under Sec. 16 will contain the following issues which are potentially in dispute:

a. fair share (and all attendant issues such as indigenous need, SDGP impact, region, present and prospective regional need, fair share allocation methodology, credits, phasing);

b. ordinance compliance (and all attendant issues such as ordinance provisions, site availability, site suitability, legality of means chosen for compliance (e.g. condemnation, development fees, etc.), financing, state or federal funding availability, phasing); and

c. builder's remedy (and all attendant issues such as vindication of constitutional mandate, provision of sufficient lower income housing, good faith, site availability, site suitability).

It is relatively clear that most issues raised by "a" and "b" above (fair share and compliance) can be addressed by the Council under authority granted by the Act. The Council's Sec. 14 power to grant substantive certification and its statutory power to review an ALJ determination in a contested case transmitted under Sec. 16 certainly contains within it the authority to address most of those issues. Problems may appear in other cases where a municipality chooses a "novel" manner of compliance such as through acquisition, condemnation and the imposition of fees. These mechanisms are of questionable legality and are being tested in cases pending before the three special Mt. Laurel judges. Whether they are of the sort of legal issues which can be resolved by the Council or an ALJ is questionable. The problem is not ripe for resolution here since the defendant is not proposing to use any novel mechanism. Its compliance approach is the standard set-aside method.

Before addressing "c" above, the builder's remedy, two major questions remain:

1. are provisions of the Act which affect the scope and nature of review (both procedurally and substantively) unlawful or unconstitutional); and

2. what effect, if any, must be given by the Council and ALJ to the present record before this Court and prior rulings of the court.

a) Provisions of the Act raising legal or constitutional problems:

Many aspects of the Act which address how the Council and the ALJ shall evaluate fair share and compliance are subject to serious legal and constitutional attack under Mt. Laurel II. Examples include:

(1) Sec. 4b, definition of "Housing Region". This section specifies that regions shall consist of "no less than two nor more than four contiguous, whole counties..." In this matter, the court has ruled that the appropriate region for Washington Township is one which consists of less than two counties and which does not consist of "whole counties". See VanDalen v. Washington Tp., Docket No. L-045137-83PW (decided December 7, 1984). In other matters, this court and another Mt. Laurel court have utilized regions of greater than four counties.[1]

(2) Sec. 4c and 4d, definitions of "low income housing" and "moderate income housing". Set at the 50% and 80% standard respectively, they do not provide for any "reach" into the various lower income categories. This "reach" has been mandated by the special Mt. Laurel judges in several cases including this one (see p. 38, fn. 16 of the slip opinion).[2]

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[1] One cannot state, however, that it would be impossible to develope a scheme of regions which is reasonable and constitutional for Washington Township and all municipalities and which consist of between two and four whole counties. Until the Council establishes its regions it would be premature to rule on the validity of this provision.

[2] This problem could be rectified by Council regulations and, therefore, would not be ripe for review until after the resolution of the matter in a specific case.

(3) Sec. 5a presents a minor inconsistency with Sec. 7a. The former states that Council members be "balanced to the greatest extent practicable among the various housing regions of the State. The latter calls for the Council to "(d)etermine the housing regions of the State." Presumably, the term "extent practicable" will enable the Governor to nominate members and the section will be truly implemented as members are appointed to fill vacancies once the regions have been established.

(4) Sec. 7 and Sec. 8 limit the Council's power to adopt criteria, guidelines and procedural rules to matters of procedure and fair share. Thus, the Council appears to have no power to issue criteria and guidelines for a compliant ordinance. Secs. 10 and 11 provide legislative standards for a housing element but no regulatory power. While Secs. 13, 14 and 15 provide for Council (and OAL) review of the housing element, no power is given to adopt rules, criteria or guidelines. This appears consistent with the legislative intent to give municipalities maximum flexibility to devise their own compliance programs. On the other hand, it raises serious questions as to why so much time is necessary simply to promulate fair share standards and whether transfer is appropriate when the only issues to be resolved by regulation relate to fair share. See also Sec. 12 which provides for Council review and approval of

"regional contribution agreements", but no power to regulate, by rule, criteria or guideline, the form of such agreement, other than as explicitly provided in Sec. 12(f) "the duration and amount of contribution" in such agreements.

This is significant in considering whether to grant a transfer motion. Most of the delay accorded the Council and municipalities is simply for the Council to adopt regulations relevant to fair share. While consistency in fair share methodologies is relatively important, it is hardly the type of concern which outweighs the public interest in getting on with the construction of housing.

Further, the Act does not shy away from inconsistencies or the duplication of effort in the fair share context. First, as will be demonstrated below, the legislative scheme contemplates a substantial role for the courts independent of the administrative process. Second, the Council will not necessarily be imposing a single fair share methodology pursuant to Sec. 7. Review will be given to municipal fair share plans per Sec. 14 which require them only to be "consistent with the rules and criteria adopted by the Council..." Lastly, consistency in fair share was not seen as a constitutional prerequisite by the Supreme Court, nor has it been an experience at the trial level with the three special Mt. Laurel judges. The Court provided

for presumptive validity only of region and regional need determinations. Mt. Laurel II, supra, 92 N.J. at 216.

The fair share issue has already caused an enormous delay in realizing satisfaction of the mandate, generally and in this case. It seems particularly inappropriate for it to continue to act as such a delaying factor.

(5) Sec. 7c(1) permits one-to-one crediting against the fair share for "each current unit of low and moderate income housing of adequate standard..." Secs. 4c and d would provide that such housing is affordable to lower income households and "occupied or reserved for occupancy" by such households. The disjunctive in the last phrase is troublesome as is the failure in Sec. 7c(1) to limit the credits to units constructed or made newly available within the fair share period, e.g. since 1980.[1]

The special Mt. Laurel II judges have concluded in unpublished opinions that pre-1980 units generally cannot be credited and that a credit depends on the unit being newly available after 1980, occupied by an eligible household,

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[1]This problem could be rectified by Council regulations and, partially, by interpreting the last clause ("including any such housing constructed or acquired as part of a housing program specifically intended to provide housing for low and moderate income households") as delimiting the type of unit which could be credited.

affordable to such a household and subject to resale or rerental controls. The reason is obvious: the fair share is intended to address a need which exists and is being created within the fair share period. The existence of a pre-1980, standard unit is irrelvant to the satisfaction of that need; particularly since it already contains a household not counted in the need figure. Even if that household were to move, the net effect would not be to increase the supply of housing since it would occupy another unit. (An exception might be made for elderly housing on the assumption that a "move" means death, transfer to institutional quarters or relocation with a relative).

(6) Sec. 7c(2) mandating "adjustments" to the fair share. No specificity is given as to how such adjustments are to be made and some of the criteria are very troublesome; such as: Sec. 7c(2)(b) ("established pattern of development") and Sec. 7c (2)(g) (the prohibitive costs "to the public" of "(a)dequate public facilities and infrastructure").[1]

(7) Sec. 7e providing for ceilings on the municipal fair share. This is one of the most troublesome

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[1] Regulations could easily resolve these problems. For example, Mt. Laurel II recognizes the potential need to phase based on deference to the existing development and suggests care be given to implementation of a fair share plans where existing development may be affected. Mt. Laurel II, supra, 92 N.J. at 240, fn. 5, 280 and 331-332.

sections of the Act. If applied literally, it would clearly "favor" municipalities which have had the most exclusionary history. The use of the term " and any other criteria" results in such a broad delegation of authority as to be of questionable legal validity. The provision, however, is so vague that it might be salvaged by regulations.

(8) Sec. 9a establishes the voluntary nature of participation with the Council. First, whether to adopt a resolution of participation is voluntary and, second, the adoption of such a resolution only results in the required submission of a housing element. Sec. 13 provides that the municipality still retains the total discretion as to whether to seek substantive certification. The only "exposure" a municipality has is that failure to adopt a timely resolution of participation may permit a litigant not to exhaust administrative remedies. Sec. 9b. Pursuant to Sec. 16a, failure to file a housing element and fair share plan, results in reversion to the court of a transferred case. Pursuant to Sec. 16b, failure to adopt a timely resolution of participation eliminates any exhaustion requirement (by inference). The Sec. 16b exhaustion requirement is also waived by Sec. 18 if a municipality fails timely to file its housing element or, if pursuant to Sec. 14, the municipality fails to achieve substantive certification in a timely manner.

Plaintiff has interpreated these sections as mandating mediation review and triggering a Council determination on whether or not to grant substantive certification. Lastly, Sec. 19 provides for possible reversion to the court if the review and mediation process is not completed in a timely manner. The issue which all of this triggers is the builder's remedy, since it stands as the only thing which will create any "exposure" for a recalcitrant municipality. This will be addressed further below.

(9) Sec. 9a presents another problem relative to timing. While the resolution of participation must be filed on or before November 2, 1985 (four months after the Act's effective date), the housing element may not be submitted until January 1, 1987, under a worse case scenario (i.e., under Sec. 7 the adoption by Council of criteria and guidelines seven months after January 1, 1986, or August 1, 1986) and filing of the housing element five months thereafter or January 1, 1987 (pursuant to Sec. 9a). Consider this timeframe in light of the Sec. 19 pressure to complete review and mediation on or before October 2, 1986; almost three months before the outside date a housing element may have to be filed and only two months after the outside date when the Council's criteria and guidelines must be adopted per Sec. 7. Consider it further in light of the previously cited references in Mt. Laurel II for prompt satisfaction of the constitutional mandate.

(10) Sec. 9b presents a problem for a potential litigant. Mt. Laurel II appears to require that a potential plaintiff first seek volunary compliance before suing. Mt. Laurel II, supra, 92 N.J. at 218. If still required, it would be simple for a recalcitrant municipality not to adopt a resolution of participation until such a request is made and then immediately adopt one and submit a fair share plan and housing element before litigation is filed. This would totally take the sting out of the Sec. 9b "exposure" of waiver of the obligation to exhaust.[1]

(11) Sec. 11a states that "i)n adopting its housing element...the municipality shall establish that its land use and other relevant ordinances have been revised to incorporate the provisions for low and moderate income housing". This appears to be somewhat inconsistent with Sec. 9a which calls for mandatory submission of the housing element and the apparent discretionary submission of "any fair share ordinance introduced and given first reading and second reading...which implements the housing element. It may further conflict with the MLUL process by which the element is adopted not by the Governing Body but by the Planning Board

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[1]This could be rectified by removing the "good faith" requirement as a pre-litigation obligation in light of the Act's admonition that failure timely to adopt the resolution creates the exposure of litigation. It could be assumed to be a futile gesture where a municpality has failed to adopt a timely resolution or to file a timely housing element and fair share plan.

prior to the adoption of responsive zoning ordinance amendments. See Secs. 29 and 30; N.J.S.A. 40:55D-28 and 62.[1]

(12) Sec. 11a(3) provides that resale and rerental controls last for not less than six years. See also Sec. 12f and Sec. 20e. This may prove inconsistent with requirements imposed by the special Mt. Laurel judges that the controls last for as long as possible (25-30 years) and the admonition in Mt. Laurel II, supra, 92 N.J. at 269, favoring such controls.[2]

(13) Sec. 11b and Sec. 23 provide for phasing of the fair share. In most cases (municipalities with fair share of 500 units or greater) consideration is given to phasing periods of greater than six years (or the period of repose). These sections present some difficulties; particularly in light of the admonition in Mt. Laurel II that phasing should be sparingly used and that the housing is needed now. Mt. Laurel II, supra, 92 N.J. at 219, 280 and 331-332. Sec. 23 also presents potential due

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[1]The most reasonable interpretation of these conflicts would interpret Sec. 9a as requiring submission of a proposed compliance ordinance with the housing element and distinguish between municipal "adoption" of a housing element for Council submission purposes and planning board "adoption" for MLUL purposes. It also does not make sense to have substantive certification where the compliant ordinance has not been adopted.

[2]This most likely cannot be saved by regulation since it is an express statutory statement as to the municipal obligation. The power to regulate and adopt criteria and guidelines is limited to fair share issues and does not appear to allow for modification of this provision.

process and logistic problems. See Sec. 23b and c (re: phasing of particular developments) and Sec. 23d (e.g., "to prevent sites...from being used for other purposes..."). Also, deference is to be paid, per 23e(3) to historical growth patterns which may "reward" the more exclusionary municipalities.[1]

(14) Sec. 11c and 12 describe "regional contribution agreements" by which up to 50% of the municipal fair share may be satisified by a "transfer (of units) to another municipality". See Sec. 12a. This poses very serious constitutional problems. Mt. Laurel clearly indicates that one of the negative constitutional effects of exclusionary zoning practices has been the polarization of our society-economically and geographically; the locking of the poor into urban ghettos. Mt. Laurel II, supra, 92 N.J. at 278. These sections would appear to reinforce that polarization. Further, Sec. 12b presents a problem of double counting fair share. It provides that the "sending municipality" receive a "credit against its fair share for housing provided". Presumably, the receiving municipality will also demand a "credit". Unless resolved, each transferred

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[1] On the other hand, whereas phasing appears to be mandated, the specific way in which it is implemented is not mandated by the Act which specifically refers to the timeframes as "guidelines". See Sec. 23e. Most of the suggested criteria are matters which the courts have been open to considering in any event. See Allan-Deane v. Tp. of Bedminster. Attacks on the facial validity of these sections would be inappropriate. Once a specific plan is approved, the courts will be able to evaluate it in the context of Mt. Laurel II.

unit will be counted twice. Another question is how these sections will be related to Secs. 11b and 23 regarding phasing. It would seem clear that units "transferred" need not be phased since none of the phasing criteria are applicable to transfers. If anything, the provisions on phasing would mitigate against phasing any "transferred" units.[1]

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[1]The transfer sections are clearly suspect. The purpose of the fair share methodology is to locate areas in which the development of lower-income housing is appropriate. While no methodology is perfect, the 50% transfer is so substantial as to make any methodology ineffective. On the other hand, given various practical realities, most "sending" municipalities cannot be realistically expected to be able to generate their full fair share. Also, "receiving" municipalities will be, typically, just those which could not provide any conventional means of satisfying their indigenous need or fair share obligations; if any. "Transfer" would be plainly inappropriate for a "sending" municipality which, because of its location and market forces, could well provide its full fair share within the municipal borders within a reasonable time. It is most appropriate for "sending" municipalities which cannot do that. Thus, the constitutional question may really turn on the specific facts of each municipality. These provisions would be clearly unconstitutional if invoked by certain municipalities (such as the defendant herein) but would be a practically sound accomodation of the constitutional mandate if invoked by others; such as relatively built-up suburbs. A legal question may arise as to whether the failure to "propose the transfer" by such municipalities is unreasonable under Mt. Laurel II. Transfer may be a way to avoid problems with a lack of adequate vacant land and could mitigate against use of vacant land as a criteria for fair share adjustments (per Sec. 7c(2)(f) and phasing (see Sec. 23a[3]). The effect of the provision may be to open up many municipalities to a Mt. Laurel II attack; attacks which may be mounted by urban municipalities or citizen groups to prevent a municipality from phasing or reducing its fair share unless it is willing to pay for transfers. While Sec. 11d, discussed below, would not require municipalities to build housing, it would not stand in the way of conditioning phasing or mitigating fair share adjustments on the condition that an affluent municipality agree to pay for transfers.

(15) Sec. 11d provides that municipalities need not "raise or expend municipal revenues in order to provide low and moderate income housing". If read literally, this would defeat the Mt. Laurel II doctrine since needed infrastructure, public services and tax abatements would not be forthcoming.[1]

(16) Sec. 13 provides for the voluntary request for substantive certification. As previously discussed, absent the threat of litigation and builder's remedy, there is no incentive to seek certification. This would be a greater problem if the Act were read to preclude a litigant in a "transfer" case from triggering mediation and review and forcing an ultimate Council ruling on substantive certification. Further, in light of Secs. 14 and 15, a question arises as to whether the request can be voluntarily withdrawn if an objector appears. Clearly, under Sec. 14 a municipality need not accept Council requirements for certification; that is, it need not "refile its petition with changes satisfactory to the Council".[2] The Act is best read to permit a municipality to withdraw if an objector appears but to permit a litigant to force review either by the court or Council. The objector could become a litigant if the municipality withdrew; the withdrawal resulting in no exhaustion requirement. See 9b and 16b.

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[1]This is rectified by a strict reading, consistent with Mt. Laurel II that the municipality need not directly finance the actual construction of the units. In support, see Sec. 11a(4), (5), (6), (7) and (8).

[2]This underscores the need for potential litigants and, in turn, an effective builder's remedy.

(17) Sec. 15c provides for transfer to the OAL of any case where mediation is unsuccessful. No time limit for mediation is imposed in litigated cases, except to the extent to which Sec. 19 acts as a time limit.[1]

(18) Sec. 22 provides for a 6-year repose for municipalities which have settled exclusionary zoning litigation "prior to the effective date of this act". Cherry Hill in Camden County is now attempting to use this section to get repose even though the relevant "settlement" provided for no lower income housing either on the developer's tract or anywhere else; nor did it receive judicial approval or a judgment of repose.[2]

(19) Sec. 25 provides powers to municipalities to actively engage in housing production. Its elimination of "condemn or otherwise acquire" from previous drafts suggests that such action is illegal. This issue is presented by several municipal compliance programs which contemplate condemnation as one mechanism to effectuate compliance.

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[1]This obviously must be corrected by procedural rules. The Council should not be permitted to allow fruitless mediation to go on. This would clearly be contrary to the constitutional mandate.

[2]The problem could be easily rectified by an interpretation of the word "settlement" to include the criterion of a judgment of repose as part of the "settlement"; that is, a settlement in the nature of the one approved by this court in Morris Cty. Fair Housing Council v. Boonton, 197 N.J. Super. 359 (Law Div. 1984).

(20) Sec. 28 provides for a moratorium on granting the builder's remedy in Mt. Laurel II litigation until as late as January 1, 1987. See Secs. 7 and 9(a). The period could be shortened if the Council adopts its criteria and guidelines earlier than the latest possible date (August 1, 1986). While this does not directly address fair share and compliance, it and the builder's remedy generally are crucial to the overall constitutionality of the Act and will be separately addressed below.

b) The Utilization of the Present Record:

As previously indicated, a "transfer" per Sec. 16a would trigger the mediation and review process.[1] If that process is unsuccessful, Sec. 15(c) would trigger an OAL hearing. The question is: what use, if any, would be given to the present record in this case; that is, what will be mediated and reviewed and the subject of the "contested case"?

The present record includes a determination of the implications of the SDGP, fair share and non-compliance. The defendant has prepared a new ordinance which, as to its land use controls, is relatively unflawed. Perhaps the only remaining contested matter between the parties is the issue of site

[1]Again, Sec. 16(a) does not explicitly indicate that mediation and review would follow a transfer. This must be judicially read into the Act.

suitability for the award of the builder's remedy. The initial two prongs of the remedy have been satisfied: vindication of the constitutional mandate and commitment to provide a substantial percentage of lower-income housing. Thus, of the multiplicity of factual and legal issues presented by a Mt. Laurel II case, all have essentially been resolved but for site suitability.[1]

Thus, having fully litigated a Mt. Laurel II claim, plaintiff now raises the question of the significance of the extensive record created.

The defendant, by way of its counsel's July 27, 1985, correspondence to the court, seeks "an Order rescinding all previous Orders of the Court inconsistent with the transfer of this matter..." The Order he has prepared states, in relevant part:

> ORDERED, that all previous Orders and Judgments of this Court inconsistent with the transfer of this matter to the Council on Affordable Housing, shall be declared superceded by this Order.

The defendant is not specific as to which previous orders or judgments are being referenced or how and to what extent they would be inconsistent.

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[1] It is true that the court has yet to rule on the compliance of the defendants' new ordinance. However, the master has orally indicated his support for the ordinance and, in the absence of major concerns by plaintiffs (given the severe adversity with which this case has been litigated), one can assume a finding of compliance even subject to possible modifications.

The Act, itself, is silent. No substance is given to the term "transfer". However, given the sixty (60) day line drawn between a 16(a) and 16(b) case, the use of a term like "transfer", and the divestiture of jurisdiction during transfer, it appears that the Legislature intended the Council to review and mediate what is left of this case. Since numerous issues in this case are no longer left for mediation and review, but are resolved by orders and judgments, those matters are no longer reasonably subject to mediation and review.[1]

On the other hand, parties are always capable of further settlement discussions which, if successful, may, with court approval, modify prior rulings or orders. This has been the experience in Mt. Laurel II litigation. However, if settlement efforts, subsequent to the entry of a judgment or order, fail, then the judgment or order stand.

The legislation, then, is most reasonably read to permit mediation on all issues. However, the OAL "contested case" requires adjudication only of those issues not previously resolved by the court by judgment or order. In the context of this case, that would essentially mean that as a result of transfer:

1. possibly 15 months or more would be spent attempting to mediate site specific relief;

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[1]See Sec. 3. The purpose of "transfer" is not to relitigate but to use the court to resolve disputed issues.

2. upon the lack of success of mediation efforts, that issue alone would go to the OAL for a determination; that is, whether the grant of substantive certification should be conditioned on site specific relief.

The effect of transfer, therefore, would be to present the site specific relief issue to the ALJ and Council prior to its probable ultimate consideration by this court and to delay the site suitability determination for almost two (2) years.[1] This, of course, presumes that the Council and OAL have jurisdiction to review site suitability disputes in the context of the builder's remedy. If they do not, "transfer" is clearly ridiculous and, more importantly, the Act itself may fail.

Before addressing the builder's remedy issue, it should be noted that legally the "transfer" need by viewed as nothing more than a change of venue from the Superior Court, Law Division, to the Council and OAL. Viewed as such, it may be given the simplest and most realistic interpretation, one which must have been intended by the Legislature in the absence of explicit language to the contrary (of which there is none).

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[1]As has been indicated above, failing successful mediation, the most plaintiffscan hope for is that the Council will condition an award of substantive certification on municipal provision of site specific relief. If the municipality then refuses, the matter returns to this court per Sec. 18 for ultimate review.

This interpretation is consistent with the Transfer Act, N.J.S.A. 52:14D-1, et seq. Pursuant to N.J.S.A. 52:14D-7, an inter-agency transfer does not affect on-going actions or proceedings... "nor shall the transfer affect any order or recommendation made by, or other matters or proceedings before the agency."

The Legislative scheme, in this light, becomes relatively clear. Further, it is most consistent with the plain language of the Act. As will be discussed further below, the Legislature clearly did not envision a major departure from the on-going process to satisfy the constitutional mandate. The Act was intended to supplement, not emasculate, existing compliance mechanisms.

5. The Builder's Remedy Under the Act: Perhaps the Act's most serious potential defect - both legally and constitutionally - is its treatment of the builder's remedy. The issue here is greater than simply the constitutionality of Sec. 28, the "moratorium" provision. The question presented is whether the builder's remedy is at all viable; that is, whether the Council or the OAL havethe legal authority first to consider and, second, to award that relief to a litigant.

The reason why the issue is so fundamental is because of the voluntary nature of participation under the Act (see Secs. 9a and 13). No municipality is required to participate before

the Council and no municipality is required to seek a substantive certification. The latter is true even if the municipality has adopted a resolution of participation and filed its fair share plan, housing element and proposed compliant ordinance. In fact, it appears that a municipality could withdraw its request for substantive certification if an objector appears and, in any event, it need never agree to refile its petition to accord with conditions imposed by the Council. See Secs. 14 and 15.

The Act is strictly voluntary. It is, on the other hand, as the Legislature has explicitly stated, both a comprehensive "scheme...which satisfies the constitutional obligation" and an alternative "to the use of the builder's remedy as a method of achieving fair share housing". Sec. 3. However, it is only those things if a municipality voluntarily undertakes to utilize the scheme.

The Supreme Court has already spoken on this issue and, after the most careful and extensive deliberation, held that the satisfaction of this constitutional mandate cannot rest upon voluntary compliance. It reached this conclusion reflecting on the history of voluntary action subsequent to Mt. Laurel I. It should be remembered that the first trial level decision in this area was rendered in 1971[1]; twelve (12) years prior to

[1] Oakwood-at-Madison, Inc. v. Madison Tp., 117 N.J. Super. 11 (Law Div. 1971). The trial decision which was the basis of the Court's ruling in Mt. Laurel I was rendered in 1972. Southern Burlington Co. NAACP v. Tp. of Mt. Laurel, 119 N.J. Super. 164 (Law Div. 1972).

Mt. Laurel II. Mt. Laurel I, itself, was rendered in 1975; eight (8) years prior to Mt. Laurel II.

The Supreme Court, therefore, had ample opportunity to evaluate whether and, if so, to what extent, "voluntary" compliance was a reasonable likelihood. In fact, compliance was not purely "voluntary" prior to Mt. Laurel II. Many municipalities had been sued by both public interest and private (for-profit) plaintiffs.

The six consolidated cases which resulted in the Mt. Laurel II decision involved approximately twelve (12) municipal defendants, two municipalities participating as amici curiae (which were separately involved in their own Mt. Laurel II action) and fifteen (15) Middlesex County and three (3) Bergen County municipalities which were not the subject of the appeals; in all, approximately 31 municipalities. Other municipalities were also under litigation; including, but not limited to, twenty-seven (27) in Morris County (one of which, Chester, was also before the Court in Mt. Laurel II). Most of these municipalities - all buth three (Franklin, Clinton and Chester - which had also been sued by the Public Advocate) had been sued by public interest groups. Thus, prior to Mt. Laurel II, at least as many as sixty (60) municipalities (and clearly many, many more) had been sued, mostly by public interest groups.

Despite this history of litigation with public interest plaintiffs, the Court acknowledged that more was needed. The

Court was aware of the reasonable likelihood that public interest sponsorship for Mt. Laurel II litigation was waning. Representation by counsel at oral argument and subsequent history have confirmed that fact. The Public Advocate has not filed any Mt. Laurel II actions since 1978 (other than amicus presentations in other matters) and, in fact, dropped its Morris County litigation against fifteen of the original 27 municipalities sued partially on the basis of inadequate resources. Boonton, supra, 197 N.J. Super. at 363. This case, in fact, involves a municipality which the Public Advocate had sued and then voluntarily dismissed its complaint. The National Committee Against Discrimination in Housing ("NCDH"), the funding source for the Middlesex County case, is nearly out of business and is no longer participating in that case. The matter is being pursued by the Constitutional Law Clinic at Rutgers. The resources limitation on that group is obvious. The Suburban (now Metropolitan) Action Institute, which funds the Mahwah case, has barely been able to pursue that action, let alone the three others initially sued. Legal Services programs undertook only one Mt. Laurel case other than Mt. Laurel itself, (East Windsor). That case was settled without trial and the Mt. Laurel case was picked up by the Public Advocate in 1975.

As the trial court noted in J.W. Field Co., Inc. v. Tp. of Franklin, Docket No. L-6583-84 P.W. (Law Div. 1985) every suit since Mt. Laurel II has been brought by a builder. (Slip Op.,

pg. 4). This is largely confirmed by plaintiffs' knowledge that the only non-builder Mt. Laurel II suit brought since 1983 is one against Cherry Hill Township and that only because of an alleged misuse of the builder's remedy by a builder plaintiff.

Thus, at the oral argument of the Mt. Laurel II consolidated cases, the Court addressed its concern that there was no plaintiff class to continue the vindication of the Mt. Laurel mandate. Colloquy ensued as to the use of attorney's fees and/or the builder's remedy (eschewed as a routine remedy in 1977 in Madison. The decision in Mt. Laurel II represents the Court's resolution of this problem.

Again, it should be noted, that the Court felt it had a problem in the first place because of the lack of voluntary compliance with the constitutional mandate. Over and over again, the Court reiterated its frustration and impatience. See Mt. Laurel II, supra, 92 N.J. at 199, 200, 200 fn.1, 212, 286, 289, 290-291, 293 and 341.

Its primary goal in the opinion was to encourage voluntary compliance. Mt. Laurel II, supra, 92 N.J. at 214. Its second was to simplify litigation and third was "to increase substantially the effectiveness of the judicial remedy". Id. Thus, to get compliance, the Court knew it needed a clearly defined obligation and "exposure" to those who did not voluntarily comply. "Exposure" would be effected by encouraging litigation. This encouragement would be effected by clarity to the mandate,

expeditious resolution of disputes and the creation of a plaintiff class willing to bring lawsuits. Thus, the Court turned to the builder's remedy.

As the Court has already held:

> Here we have plaintiffs who assert interest in one of the basic necessitites of life and seek protection that, if denied, would similarly affect many, many poor people.

Mt. Laurel II, supra, 92 N.J. at 307. In that context, it was clear to the Court that the judicial attitude toward municipalities could not be "that the Mount Laurel obligation is a matter between them (the municipalities) and their conscience". Mt. Laurel II, supra, 92 N.J. at 341.

Thus, the Supreme has held that the builder's remedy and the threat of builder litigation is essential to the satisfaction of the constitutional mandate. It is completely irrelevant whether the remedy, itself, is viewed as being of constitutional magnitude or rather in aid of the vindication of a constitutional wrong. The point is that as to the vindication of this constitutional mandate, the issue has been resolved.

Given this background, one can consider how the Legislature viewed the builder's remedy and the threat of builder litigation in the context of the Act. Plaintiffs' position is as follows:

1. if the builder's remedy cannot be awarded in a case transferred per Sec. 16(a) or when exhaustion is required per Sec. 16(b) then those provisions of the Act are unconstitutional;

2. the builder's remedy can be awarded in a case transferred per Sec. 16(a) or when exhaustion is required per Sec. 16(b) and, therefore, those provisions are not unconstitutional;

The first point above follows from the rulings of the Supreme Court in Mt. Laurel II for several reasons:

a. First, Secs. 16(a) and (b) cover all possible cases brought to vindicate the constitutional mandate. If Mt. Laurel II litigation will rarely result in a builder's remedy, then no builder is likely to sue to vindicate the constitutional mandate.[1] See discussion of Madison in Mt. Laurel II, supra, 92 N.J. at 279.

b. Second, no other plaintiff class is adequate to bring such actions. Mt. Laurel II is witness to the Court's opinion as to the ability of the public interest bar to carry this responsibility and there is no incentive in the Act or cases which would attract any other class of plaintiffs; e.g., a modification of the rules governing the award of counsel fees or direction and funding to the Public Advocate. The counsel fee remedy would be inadequate, in and of itself, given the tremendous front end and carrying costs inherent in Mt. Laurel II litigation.

c. Third, no other incentive exists for voluntary compliance. If no builder's remedy can be achieved, plaintiffs in transferred cases will drop out and no incentive will exist for the municipality to pursue certification.

This last point should be obvious. The Act, itself, creates no incentive whatsoever to voluntary compliance outside

[1] It may be that a rare builder or landowner will do this but very, very unlikely. Attaching a Mt. Laurel II count to an arbitrary and capricious challenge would jeopardize an early resolution of the non-Mt. Laurel II claim. The only hope for site specific relief would come from whatever leverage Sec. 15(c) gives by preventing substantive certification in a contested matter prior to an OAL hearing and the requirement in Sec. 10(f) that the housing element include a "consideration of lands of developers who have expressed a commitment to provide low and moderate income housing." Neither is likely to give any encouragement to a potential litigant. Further, if no builder's remedy could be required by the Council or OAL as a condition of receipt of substantive certification no municipality would be foolish enough to permit reversion to the jurisdiction of the Court per Secs. 9(a), 18 and 19.

of the scope of litigation. In fact, it is for this reason that it is fairly clear that the Legislature fully intended that the builder's remedy remain as the major, if not only, incentive to achieve voluntary compliance. In this regard, the Legislature did not depart one iota from the Court's findings and the lessons of history.

Thus, it is apparent that the Legislature did not intend to emasculate the builder's remedy at all. In fact, the Legislature intended to use it in exactly the same manner as the Supreme Court. This is witnessed by the fact that, in numerous sections of the Act, it is the threat of litigation alone which is used by the Legislature to encourage voluntary compliance.

First, one may look to the findings and declarations in the Act. Sec. 2, which contains the findings clauses, makes no reference to the builder's remedy at all. The Legislature is simply articulating the need for "a comprehensive planning and implementation response to the constitutional obligation..." and reiterating the Court'sown statement that to the extent such a response is legislatively provided, its role "could decrease". See Secs. 2b and c.

In Sec. 2d the Legislature finds that "state review of the local fair share study and housing element" is "an essential ingredient to a comprehensive planning and implementation response." In fact, such review is an "essential ingredient" to the scheme created by the Legislature for a non-judicial

mechanism which would provide "a comprehensive planning and implementation response to (the) constitutional obligation." Sec. 2c. The threat of litigation, however, is the only leverage used by the Legislature to assure itself that:

1. either municipalities voluntarily choose to utilize the scheme in the Act; or

2. the courts would remain available as a guarantor of compliance or, at least, as an alternative vehicle available to achieve compliance.

The legislative purpose, then, was not to supplant judicial enforcement but to supplement it. This is explicitly sated in Sec. 3:

> (I)t 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.

Immediately precedent to that statement is the Legislature's declaration for its preference for the mediation review process over litigation as a means of dispute settlement. Again, there is no declaration or intent to supplant litigation or the builder's remedy; merely to supplement that method and mechanism with another, "preferred" means.

Legislative reliance on the potential for litigation as leverage for voluntary compliance can be found in the following sections:

a. Sec. 9b provides for a loss of the exhaustion requirement in Sec. 16b cases for any municipality which does not adopt a resolution of participation on or before November 2, 1985, and which is sued prior to the filing of its fair share plan and housing element;

b. Sec. 12b provides for use of regional contribution agreements "in an exclusionary zoning suit". See also Sec. 17b;

c. Sec. 16a provides for only discretionary, not mandatory, transfer of existing Mt. Laurel II cases;

d. Sec. 16a provides that where a case is "transferred" to the Council from the Superior Court, "jurisdiction shall revert to the Court" if the defendant fails timely to file its housing element and fair share plan per Sec. 9a;

e. Sec. 16b provides that exhaustion is required only if a defendant timely adopts a resolution of participation per Sec. 9a;

f. Sec. 17 grants only a rebuttable presumption of validity, in subsequent litigation, to housing elements and implementing ordinances which have been granted substantive certification. The Courts, both appellate and trial level, therefore, act as reviewers of Council approvals. See also Sec. 17c;

g. Sec. 18 provides for elimination of the exhaustion requirement in Sec. 16b exclusionary zoning litigation where a municipality fails timely to submit its housing element. It also "expires" upon Council's rejection of substantive certification or municipal failure timely to adopt changes required by the Council. The time period cannot be extended without agreement "by the council and all litigants";

h. Sec. 19 provides that the exhaustion duty may be lifted where mediation and review are not completed within a specified timeframe;

i. Sec. 23 provides for judicial imposition of phasing; and

j. Sec. 28, attempting to affect a "moratorium" on the award of a builder's remedy, does not preclude the remedy from ultimately being granted and does not preclude pursuit of exclusionary zoning litigation by non-profit or public plaintiffs or even by a for-profit developer. This is consistent with the Court's treatment of builders who have been denied the remedy but also still deemed to have standing to pursue vindication of the mandate. See Mt. Laurel II, supra, 92 N.J. at 316 and 32).

From this perspective, the overall intent of the Act is clear. The Legislature sought to provide a means by which voluntary compliance with the constitutional mandate could be achieved - just as did the Supreme Court in Mt. Laurel I. Where the Court provided a judicial mechanism; the Legislature provided one which is administrative. However, both rely on the remedies utilized in Mt. Laurel II as the leverage to assure that either voluntary or involuntary compliance would occur. The Legislature did not reject the Court's findings that it was not the mandate which had failed but its administration. Just as the Court deemed the threat of litigation as essential to that administration, so did the Legislature.

The question then is how the Legislature intended a transferred matter to be handled with regard to the builder's remedy. The following depicts various scenarios and how they would be handled under this Act:

1. neither party in a 16a case moves for "transfer": the litigation proceeds to a judicial resolution per Mt. Laurel II;

2. a party in a 16a case moves for "transfer", and the motion is denied: the litigation proceeds to a judicial resolution per Mt. Laurel II;

3. a party in a 16a case moves for a "transfer", and the motion is granted: the litigation is "transferred" to the Council and the case is essentially treated as if 16b "exhaustion" was mandated and Secs. 14 and 15a(1) and b "objector" status occurs. The entire case and controversy (including whether to condition certification on granting site specific relief) moves to the Council for "mediation and review" per Sec. 15a(2); that is, the motion to transfer is deemed the functional equivalent of timely adoption of a resolution of participation per Secs. 9a and 16b and request for certification per Sec. 13.

4. if the "transferred" municipality fails timely to file its housing element and fair share plan per Sec. 16a: jurisdiction reverts to the court which proceeds to a judicial resolution per Mt. Laurel II;

5. if the Council fails timely to complete its mediation and review: jurisdiction may revert to the court per Sec. 19. If jurisdiction does not revert, more time will be available to complete the process. If jurisdiction does revert, the court will proceed to a judicial resolution per Mt. Laurel II;

6. if the mediation and review process is successful per Sec. 15b: the Council may grant substantive certification per Sec. 14. Presumably, the success of the process will mean a non-builder's remedy site specific settlement has occurred which is satisfactory to the builder. If approved by the Council (assuming the municipality makes such approval a condition of the "settlement"), that would resolve the matter;

7. if the mediation and review process is unsuccessful per Sec. 15c: whatever is left of the case and controversy (even if only the issue of site specific relief) is transmitted to the OAL and handled as a "contested matter". The OAL will then render an initial decision which may include recommendations that substantive certification should be granted or denied or denied subject to conditions and site specific relief should be granted or denied or granted subject to conditions.

The Council[1] then reviews the decision and renders its opinion:

a. if substantive certification is granted and site specific relief is not required as a condition of certification: the developer could appeal to the Appellate Division both the grant of substantive certification and denial of site specific relief as a condition of certification. If he prevails on either, the matter would be remanded to the Council. If he prevails only on reversing substantive certification, presumably he would drop out of the case; although he could legally continue as an objector. If he

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[1]Through its Executive Director.

prevails on site specific relief then the matter would be remanded and such relief would be a condition of obtaining certification. If the municipality refuses to refile per Sec. 14(b) in compliance with the condition, the matter reverts to the courts per Sec. 18.

b. if substantive certification is granted subject to provision for site specific relief: the municipality would not have the right of appeal. Per Sec. 14 it must decide whether to accept the condition. If it does not, Sec. 18 provides for reversion of jurisdiction in the court.

c. if substantive certification is denied: jurisdiction in Secs. 16a and b cases would revert to the court per Sec. 18 for resolution per Mt. Laurel II. The municipality would appear to have no right of direct appeal to the Appellate Division as jurisdiction vests at the trial level; a procedure consistent with the wisdom of Mt. Laurel II that only fully adjudicated, compliant (albeit "under protest") ordinances be appealable. Mt. Laurel II, supra, 92 N.J. at 214, 285-290.[1]

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[1] It could appear that in non-Sec. 16 cases a Council determination not to grant substantive certification would be directly appealable by the municipality. This also is consistent with Mt. Laurel II since it is not in the context of litigative adversity which triggered the Court's concerns for the single appeal mode. A non-Sec. 16 "objector" (see Secs. 14 and 15a(1)) would also be entitled to directly appeal the grant of certification. The effect of court approval would only be to grant a rebuttable presumption against future litigation and not repose per Mt. Laurel II.

Council?

The above presents an internally consistent framework for the resolution of Sec. 16a cases whether or not transferred. It is consistent with the Act and Mt. Laurel II and can readily be presumed to be representative of the legislative intent.

7. Conclusion: We come, then, to the so-called "bottom line" on the general effect of a transfer per Sec. 16a:

a. the entire case and controversy (including the request for site specific relief) goes to the Council for mediation and review and the matter essentially is a Sec. 16b action;

b. mediation and review will take place only as to those issues not yet resolved by Order or Judgment of the Superior Court; and

c. jurisdiction in the Council will remain unless divestiture is mandated by various sections of the Act as a result of the defendant's failure to satisfy certain deadlines for doing certain things and in the Court's discretion if mediation and review is not timely completed.

B. THE SPECIFIC EFFECT OF A TRANSFER PER SEC. 16a OF THE ACT ON THIS CASE

If the court grants the defendant's motion for a transfer per Sec. 16a, it will have divested itself of jurisdiction over this matter and jurisdiction will lie in the Council. The case will be treated similarly to a 16b case in which exhaustion is mandated and the municipal master plan, proposed zoning ordinance amendments and the Court's adjudication of fair share and compliance would be submitted as the housing element and fair share plan.

Mediation and review would ensue, as a practical matter, on the single issue of site specific relief and would be unsuccessful. The defendant has been resolute in refusing to seriously consider negotiations as to a settlement throughout this matter. The court's master failed to obtain even an offer for plaintiffs' to consider (let alone reject or accept).

The remaining issue on which mediation and review has been unsuccessful (site specific relief as a condition of substantive certification) would be transmitted to the OAL for a hearing as a contested case. The ALJ would recommend granting or denying site specific relief. The initial decision would go to the Council which would render a decision.

The ultimate decision would either be a grant of substantive certification denying site specific relief or a grant of substantive certification on condition that site specific relief would be agreed to by the defendant.

In the former case, plaintiffswould appeal the denial of site specific relief. In the latter case, the defendant, per Sec. 14, would, within sixty (60) days, either make the "changes satisfactory to the council" or refuse to act. If it refused to act, jurisdiction would revert to the Court per Sec. 18.

Disregarding the unlikely possibility of a settlement, the process lasts between a year and a half to several years and, in the end, we would be at the same point where we now find ourselves - awaiting this court's determination on site specific

relief. The question as to whether a "transfer" should be granted in light of the above becomes almost rhetorical.

POINT II

THE TRANSFER OF THIS ACTION PER SEC. 16a OF THE ACT WOULD BE CONTRARY TO LAW AND A VIOLATION OF THE CONSTITUTIONAL MANDATE OF MT. LAUREL II.

This case, as all Mt. Laurel II cases, is an action in lieu of prerogative writs per R.4:69-1, et seq. As such, it is subject to R.4:69-5 which states that:

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

In light of the specific language in the rules requiring exhaustion except in cases of a manifest injustice, it is somewhat questionable as to why the Legislature felt the need to explicitly provide for discretionary transfer in Sec. 16a cases and mandatory exhausion in Sec. 16b cases. One would have thought that simply having provided a mechanism for administrative relief and having indicated its "preference" that the administrative mechanism should be utlized to resolve existing disputes (Sec. 3), the provisions of R.4:69-5 would control. Even without Sec. 16,

the courts would have had to evaluate whether a transfer or exhaustion would be appropriate.[1]

Absent Sec. 16, it would seem that exhaustion would be mandatory in all matters, subject only to the "manifest injustice" provision in the Rule and the "interest of justice" exception in the case law.[2]

Sec. 3 would have been sufficient to express the "retroactive" legislative intent and preference that the mechanism in the Act be used to resolve what is left to be resolved in existing disputed cases.

Sec. 16, therefore, must be viewed as supplemental to the Rule and existing case law. The Legislature was obviously concerned to be more specific as to how the courts should treat different matters. Both Secs. 16a and b, along with other provisions of the Act provide instances in which the court's

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[1]This is true despite the language in Mt. Laurel II that exhaustion is not required in those cases. Mt. Laurel II, supra, 92 N.J. at 342, fn.73. The Court was then referring only to local administrative bodies which clearly were not available mechanisms to resolve consititutional disputes and had never intended to do so under their enabling legislation. This court in this case has previously denied defenant's motion that such exhaustion was appropriate.

[2]See Roadway Express, Inc. v. Kingley, 37 N.J. 136, 141 (1962); Patrolmen's Benevolent Ass'n. v. Montclair, 128 N.J. Super. 59, 63 (Ch. Div. 1974), aff'd. 131 N.J. Super. 505 (App. Div. 1974); Brunetti v. Boro of New Milford, 68 N.J. 576, 588-589 (1975); N.J. Civil Service Ass'n. v. State, 88 N.J. 605, 613 (1982); State Dept. of Environmental Protection v. Ventron Corp., 92 N.J. 473, 498-499 (1983).

jurisdiction, once having been relinquished by transfer or exhaustion, would be re-invoked. However, read together, they also distinguish between two different types of cases as to how the court should evaluate the traditional exhaustion requirement.

Sec. 16b provides for mandatory exhaustion of all cases filed subsequent to the Act and those existing cases filed within sixty (60) days of the Act. As such, and to that extent, the section is total surplussage since Sec. 3 was sufficient to trigger mandatory exhausion for all existing and future cases. Sec. 16b makes sense only in contradistinction to Sec. 16a, circumstances in which the courts are being told that exhaustion is not mandatory and that the court shall use its discretion in determining whether to transfer. It represents the sense of the Legislature that dispite its "preference" that all existing disputes exhaust, a less rigorous standard of whether to exhaust should be applied in matters that predate the Act by greater than sixty (60) days. The sixty (60) day distinction, essentially, is one between matters which have just been filed and, at most, issue joined by way of Answer, and those which have proceeded beyond the pleadings stage.

Thus, although the manifest injustice standard is used in Sec. 16a, it is clear that the Legislature believed that such an injustice was more likely to exist in 16a cases than in 16b cases. Further, while the Legislature was not willing to say that exhaustion would not attach to any 16a case, nor was it willing to say that it should attach to all 16a cases.

In fact, the transfer of all cases had been considered[1] and rejected both by the Legislature and the Governor. The minority statement to the bill which came out of the Assembly Municipal Government Committee indicated that the Committee had rejected their amendment which would have required the courts to transfer all pending litigation to the Council. The effect of the amendment would have been to eliminate the sixty (60) day distinction between 16a and b cases and to put all cases into the Sec. 16b mode.

The Governor, who delivered a detailed conditional veto of the bill, did not agree to include the mandatory language. The Assembly Commitee's language, which stated a "preference" per Sec. 3, was accepted and Sec. 16a was modified to provide for transfer in the court's discretion utilizing the "manifest injustice" standard.

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[1]The following analysis of legislative history is largely adapted from work produced by Kenneth E. Meiser, Esquire, of Frizell and Pozycki, attorneys at law.

The use of this standard was considered superior to specific standards which had been in preceding versions.[1] This essentially represents the widsom of the case law which has found numerous instances where exhaustion should be waived and a preference not to impose rigid standards or criteria.

The point is, though, that whatever the standard or criteria, it was clearly the legislative intent that the Court should be more reluctant to transfer a 16a case than a 16b case. The standards are not identical even though similar language is used. The legislative intent is that despite the general preference for exhaustion, the requirement of exhaustion for 16b cases was far more rigid than that in 16a cases. Therefore, in considering what is a "manifest injustice" under 16a, clearly the legislative intent is for the court to look to how it is different from a 16b case - what has happened in the case which makes it different from one in which issues have just been joined only by way of pleading.

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[1] Initially, Sen. 2046 contained five factors for the court's guidance in considering a transfer: 1) the age of the case; 2) the extent of discovery and other pre-trial procedures; 3) trial date; 4) likely date by which mediation and review would be completed; and 5) whether transfer would facilitate and expedite the provision of a realistic opportunity for lower income housing. The Senate version was changed to preclude exhaustion unless a transfer was "likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing". See N.J. Civil Services Ass'n., supra, 88 N.J. at 615 regarding use of legislative committee statements for construing legislation.

A. The Manifest Injustice Standard

The concept of "manifest injustice" appears in the law in many different contexts. Three are relevant here: first, as to the retroactive application of a statute; second, as to the requirement of exhaustion per R.4:69-5; and third, as to a transfer per 16a.

1. Retroactivity and "Manifest Injustice":

The Act is clearly intended to apply retroactively in several respects (see e.g. Sec. 12(b), Sec. 23, Sec. 28). It explicitly is intended to apply to the resolution of existing disputes. Sec. 3 and Sec. 16. However, even where retroactivity is clearly intended, 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 (1981). The standard applied by the courts 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.

Gibbons, supra, 86 N.J. at 523-524. See also Ventron, supra, 90 N.J. at 498. The standard then is one of unfairness which, in turn, is a function of "deleterious and irrevocable"

consequences arising from reliance on prior law.

In this matter then, one issue which must be resolved is whether the retroactive application of the exhaustion requirement would be unfair either to plaintiffs or the class they represent. The question is whether any deleterious and irrevocable consequences would result by retroactive application given their reliance on Mt. Laurel II as providing a mechanism to satisfy the constitutional mandate.

2. R.4:69-5 Exhaustion and "Manifest Injustice":

As previously stated, the Rules of Court would have required exhaustion even in the absence of Sec. 16 given the legislative preference for utilization of the Act over litigation. Sec. 3. R.4:69-5, which embodies the traditional concept of exhaustion, would require it "except when manifest that the interests of justice require otherwise..." That concept of "manifest injustice" has been analyzed by the Courts.

While exhaustion is not deemed to be jurisdictional or absolute, the Supreme Court has acknowledged "a strong presumption favoring the requirement of exhaustion of remedies". (Brunetti, supra, 68 N.J. at 588) and has characterized the "course of bypassing the administrative remedies made available by the Legislature" as "extraordinary". Kingsly, supra, 37 N.J. at 141.

This judicial precedent gives some substance to the Act's distinction between 16a and 16b cases. It appears that the Legislature intended application of this standard to 16b cases in

which exhaustion is mandated. It further appears, as argued above and further supported here, that the Legislature intended the courts to apply a less demanding standard in 16a cases. While stating its "preference" for exhaustion in all cases, it provided for a different standard for a 16a transfer. The "strong presumption" and "extraordinary course" language of Brunetti and Kingsley would not apply in a 16a case. There, the legislative "preference" would not be honored if a "manifest injustice" (in the 16a context) would occur.

However, before addressing the 16a context, it is necessary to flush out the 16b standard since, if a transfer (16a) would violate that more rigorous test, a fortiori, it would not be granted. Traditional exhaustion is not required by the court for several reasons, all of which must be applied on a case by case basis. Exhaustion is not required if the interests of justice so require. Brunetti, supra, 68 N.J. at 589. The "interests of justice" have been found not to require exhaustion:

a. when exhaustion would be futile. Brunetti, id. Futility arises unless the remedy is "certainly available, clearly effective and completely adequate to right the wrong complained of". Patrolmen's Benev. Assoc., supra, 128 N.J. Super. at 63 (cited with approval in Brunetti, id.;

b. when a need exists for "a prompt decision in the public interest". Brunetti, id.;

c. when "the issues do not involve administrative expertise or discretion and only a question of law is involved". Brunetti, id.;

d. where "irreparable harm will otherwise result from denial of immediate judicial relief". Brunetti, id.; and

e. when not warranted in light of "underlying considerations such as the relative delay and expense, the necessity for taking evidence and making factual determinations thereon". Kingsley, 37 N.J. at 141. See also N.J. Civil Service Ass'n., supra, 88 N.J. at 613.

3. Sec. 16a Transfer and Manifest Injustice:

While the traditional exhaustion standards apply to the Sec. 16b case, something less rigorous was intended for Sec. 16a cases. The distinction and standard may be understood by a reconsideration of the fundamental policy behind the exhaustion doctrine.

The 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 from the courts.

Brunetti, supra, 68 N.J. at 588. (emphasis supplied). The underscored language is crucial to an understanding of the distinction between Sec. 16a and 16b cases and the standards to be applied.

Where there has already been "preliminary interference from the courts", the policy behind the rule of practice supporting exhaustion diminishes in importance. The Legislature assumed that in Sec. 16b cases there would be little or no such preliminary interference. For those matters, exhaustion would be mandated and required by the courts except, as previously indicated where exhaustion would not be in the interests of justice.

On the other hand, the Legislature assumed that in Sec. 16a cases there might be substantial preliminary interference as a result of the judicial process. It called upon the courts to act in their discretion to determine whether, over and above the traditional reasons used to waive exhaustion, there were other reasons and to apply a less rigorous standard; that is, to permit waiver in Sec. 16a cases for reasons which, in the context of a 16b case, waiver normally would not be permitted.

Substantial "preliminary interference" would occur, for example:

a. where some or all issues had been litigated and resolved;

b. where some or all issues had been litigated and a decision was imminent;

c. where some or all issues had been fully prepared for a hearing and the hearing imminent;

d. where substantial discovery had occurred and was essentially concluded; and

e. where settlement had been reached on some or all issues.

Further, it is clear that the Legislature intended that the traditional criteria for waiver (applicable in Sec. 16b cases) be less rigorously applied in Sec. 16a cases. Thus, the use of the term "preference" in Sec. 3 and acceptance of the Court's exercise of discretion in Sec. 16a yields to a less rigorous application of the judicial criteria than application in the Sec. 16b context where exhaustion is mandated and the court's "discretion" is that derived only from fundamental equitable principles.

B. A Transfer Per Sec. 16a Would Result in a Manifest Injustice

For purposes of this case, the factors mitigating against transfer are so numerous and overwhelming that transfer is out of the question. One might more easily address the question as to why the defendant brought the motion at all. Presumably,

the Legislature anticipated that there were some cases which should not be transferred. If Sec. 16a is intended to draw any line, this case clearly falls on the side of non-transferability.

This case is, for the most part, over at the trial level. Plaintiffs have incurred enormous expenses and spent an enormous amount of time seeking to vindicate the constitutional mandate. Their efforts pre-dated Mt. Laurel II by several years. Immediately after Mt. Laurel II was decided, they publicly committed their development to satisfaction of all of the criteria of a Mt. Laurel II project. They attempted to seek voluntary rezoning, a variance and negotiations prior to filing their lawsuit. The lawsuit was filed and has been diligently pursued for over two (2) years. Every relevant Mt. Laurel II issue has been extensively litigated. We are now on the eve of complete vindication of the constitutional mandate. The only issue in serious contention is site specific relief and that issue is ready for immediate hearing. It would have already been heard and resolved had this court not been required to address certain factual and legal issues for the first time in this case and the master's report had not been delayed for almost four months longer than the time originally established.

There may be Mt. Laurel II cases which have been litigated longer, but not many. The Supreme Court articulated its

standards in Mt. Laurel II and plaintiffs acted immediately to fashion their development (originally designed to further the principles of Mt. Laurel I) to comply with those standards.

When this case began, the defendant had a patently exclusionary ordinance which it had readopted in the face of a Superior Court order which had invalidated it and which had mandated satisfaction of the indigenous need requirement. Only a few days prior to the institution of this case, explicitly in response to plaintiffs' "threat" of litigation, the Planning Board adopted an indigenous need number; a number far lower than this court would ultimately determine was reasonable.

The defendant doggedly refused to acknowledge any fair share obligations until the SDGP issue was fully litigated. Ordinance amendments to satisfy the fair share obligation came only in response to expert reports filed by plaintiffs and were not adopted until after the start of the compliance trial. Ultimately, the Court held those amendments insufficient and found a fair share of 227 units, substantially higher than admitted to by the defendant prior to or during litigation.

The major concern is that of the represented class: lower income households which comprise the indigenous and regional needs. This case is, of course, a representative action in which plaintiffs are suing, in part, as representatives of the

interests of the poor. Boonton, supra, 197 N.J. Super. at 365-366. Those households would never have attained the articulation and vindication of their rights in Washington Township had it not been for plaintiffs' action. Those rights have been litigated by one party or another against this defendant since at least 1978 and have yet to be completely vindicated. Plaintiffs have brought them to the eve of complete vindication. Any further delay is unthinkable.

1. Defendant presents no basis for transfer: Given the history of this case and its present status, one would think that the defendant, in seeking a transfer, would present the court with a reason for transfer. The only reason given is that a transfer is necessary so that the defendant will have the benefit of the Council's guidelines on fair share. The defendant states that "(a)ll of this information is critical to the Defenant's determination of the best means to provide a realistic opportunity for the achievement of its Mt. Laurel obligation in its land use regulations". (Db 12).

Defendant appears to assume that a transfer will mean a complete relitigation of all issues previously resolved and, even if it does, that the Legislature envisioned Sec.7 a reasonable basis for transfer. As previously indicated, "transfer" does not entail relitigation of any issue already resolved. The fact is

that the timeframe for mediation and review in Sec. 19 is totally independent of the issuance of fair share criteria and guidelines in Sec. 7. Further, the Act is not retroactive as to covering matters already determined by court order or judgment such as fair share and compliance. Whereas it itends to be as to transfer per Sec. 16a and exhaustion per Sec. 16b and the moratorium on the builder's remedy per Sec. 28. The absence of an express intent to make a statute retroactive is essentially dispositive that it was intended for prospective application only. Ventrol, supra, 92 N.J. at 498.

Further, there is no direction in the Act that courts utilize the Council's guidelines under Sec. 7; whereas, Sec. 23 specifically directs courts to follow statutory guidelines for phasing. This is not to say that consistency is inapproriate; just that it was deemed necessary by the Legislature. In fact, the Act itself explicitly tolerates and anticipates two mechanisms - administrative and judicial - for the resolution of identical issues without the admonition that they be resolved pursuant to the same criteria or guidelines. Even under the administrative mechanism, the Act appears to tolerate substantial flexibility in fair share approaches. See Sec. 10, 11 and 14a. Further, the Supreme Court never mandated absolute consistency in fair share approaches, giving presumptive validity only to determinations of region and regional need.

While fair share has been deemed to be one of the most difficult and time-consuming issues to resolve (See Boonton, supra, 197 N.J. Super. at 371), its resolution with precision is not considered essential to fulfillment of the constitutional mandate. Boonton, supra, 197 N.J. Super. at 367-371. The fact is that fair share determinations have been made and approved in many cases. The Council's fair share criteria and guidelines are hardly a necessary prerequisite to compliance.

Furthermore, if the defendant is correct, then all cases should be transferred per Sec. 16a. The Legislature clearly knew of this issue and determined not to mandate transfer of all cases. Also, if transfer entails the relitigation of all issues, that in and of itself would be a manifest injustice in this case for reasons already stated.

2. the "manifest injustice" and retroactivity: a decision to transfer per Sec.16a is one to apply the compliance mechanism in the Act retroactively to a specific case brought in reliance upon a judicial determination in the judicial context. Since Mt. Laurel I, the poor have relied on the judicial mechanism. Since Mt. Laurel II, plaintiffs and their representative class have relied on the judicial mechanism to satisfy those rights in Washington Township.

Previously quoted passages in Mt. Laurel II indicated the court's desire for legislation and a mechanism for it to decrease its involvement if not totally withdraw. There was absolutely nothing in Mt. Laurel II to suggest that a litigant in bringing a Mt. Laurel II action risked the termination of that action as a result of subsequent legislative efforts.

The poor, of course, have suffered, are suffering and continue to suffer in anticipation of satisfaction of their most fundamental needs. One suffers more when hope is created and then dashed; expedition promised and then delayed. Plaintiffs have undertaken a major financial effort and risk. Their ability and resolve to pursue this case is finite.

The consequences of reliance are deleterious and irrevocable. An enormous commitment has been made in the face of the Supreme Court's promise that these matters would be administered expeditously. Over two years have now elapsed. Transfer would mean another year and a half or more before this matter would return to this court in the same posture as it stands today - if plaintiffs are capable of continued financing and maintain their resolve. If they do not, the reliance placed on this process by the poor will have been completely misplaced.

While retroactivity as to transfer and exhaustion in some 16a cases and in all 16b cases probably is appropriate, it is clearly not so here. In any event, this issue need not be addressed since plaintiffs do not believe the Legislature intended to cover this type of case by its retroactive application of Sec. 16a.

3. "Manifest Injustice" and R.4:69-5:

As previously indicated, an issue arises as to whether even under standard principles of exhaustion per R.4:69-5, it would be waived in this case. If so, we need not even address the lesser standard imposed in Sec. 16a. The resolution of the issue mandates waiver since for numerous reasons the imposition of the exhaustion requirement would seriously damage the public interest.

a. exhaustion here would be an act of futility. Plaintiffs interpret the Act to provide for mediation and review of site specific relief and the Council's ability to condition substantive certification on an award, by the municipality, of site specific relief. Presumably, the Council will use the same standards as the court in deciding whether a compliance program must include site specific relief to be acceptable.

Certainly, 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. The use of the term "transfer" in Sec. 16a and exhaustion in Sec. 16 generally must indicate the legislative intent that the whole controversy could be heard by the agency.

Further, this lends support for plaintiffs' argument that a party in a transfer case per Sec. 16a can force mediation and review, transmittal for an OAL hearing and an ultimate decision by the Council per Sec. 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 parties (the developer and the poor) affected.

Also, if a municipality in a transferred case fails to act in good faith or reasonably participate in mediation and review and the OAL hearing, the case would be appropriately returned to the court. The municipal movant for transfer is making the functional legal equivalent act as one seeking substantive certification in a different forum. If that turns out not to be done, the court's jurisdiction may again be invoked.

It is true that the Council has no enforcement powers. However, plaintiffs' interpretation of the Act is consistent with enforcement resting with the courts directly or indirectly given the leverage gained by the threat of ultimate judicial enforcement. If plaintiffs are wrong as to this interpretation, exhaustion would be truly futile and transfer unconstitutional.

We come then to the question of futility in the context of this case. Mediation and review on the site specif issue is totally useless. Plaintiffs have been seeking to negotiate to no avail for five years. Even the threat of this court's rulings on fair share and compliance did not trigger settlement. Even after the court's decision and the likelihood of site specific relief being judicially mandated, no settlement discussions occurred.

Plaintiffs then are faced with the prospect of meaningless mediation and review. They can only hope for a Council award of substantive certification conditioned on site specific relief. The defendant would surely fail to refile with that condition accepted per Sec. 14. Why should it? What does it have to lose? The only thing that will happen is a transfer back to this court per Sec. 18.

Time is on the defendant's side, delay is its only remaining weapon. It has worked for the defendant in the past. This motion is simply an attempt to use it again.

b. a prompt decision is in the public interest: The Supreme Court in Mt. Laurel II spoke often and at length of the need for a prompt adjudication to resolve such a fundamental injustice. As has been demonstrated, a transfer would mean a year and a half or more delay in the resolution of the issue of site specific relief. In a case which has lasted for two (2) years, where so much money has been spent and time consumed, where the issues are so ripe for final adjudication, a prompt decision is mandated by the Constitution. If Sec. 16a can be read to require a transfer in this situation, it is unconstitutional. It might be different if this case had barely begun or the issue not ripe for adjudication. Had not the plaintiffs endured two years of litigation, the timeframes in the Act might not be totally unreasonable. However, this is not such a case. The Constitution demands a prompt resolution of this matter.

c. lack of administrative expertise: the site specific issue has to be the least subject to administrative or ALJ expertise. While it is referenced in the Act (Sec. 10f), it

is hardly one which a Council mediator, ALJ or Council Executive Director will have more expertise than this court. Nor does the legislation intend for particular expertise to be developed on this issue. The court, in any event, has that expertise now.

d. irreparable harm: assuming plaintiffs' interpretation of the Act is correct, the major harm which would result from a "denial of immediately judicial relief" would be substantial additional expenditures and delay. These expenditures and delay could be the last straw as to plaintiffs' resolve. Having accepted the Court's invitation to undertake this effort, plaintiffs would be devastated by being forced to engage in a charade before the Council at great expense and for an enormous period of time. Plaintiffs are not threatening to drop their effort; however, the court must consider the realities of the situation. Whatever the Supreme Court intended to be the measure of a litigant's resolve, it never intended this. The defendant has been found twice, by separate courts, to have violated the fundamental rights of the poor. Those rights are irreparably harmed each day they must await vindication. Now that they are on the verge of vindication, they cannot be denied immediate judicial relief.

One must also consider the real possibility of a change in the housing market which could force further delays. Also,

during any delay of this case, other development is moving forward, water and sewer capacity is being absorbed. Further, the need for this housing began in 1980. We will be almost through the fair share period by the time this case is over if it is transferred.[1]

e. underlying considerations: relative delay and expense: little more need be said. Any attempt to balance the equities between plaintiffs (and their representative class) and the defendant tips and topples in favor of plaintiffs.

4. Manifest Injustice and Sec. 16a Transfer: The preliminary interference by the judicial process in this case has been so extensive that a 16a transfer is clearly unwarranted. Virtually every issue has been resolved. We are in the remedial phase of this case. If the Act mandated that such a case be transferred it would be unconstitutional - a direct undermining of the entire thrust of Mt. Laurel II that the non-compliant municipalities be brought to justice expeditiously and the court exercise a strong hand in assuring ultimate compliance. Further, all of the arguments given above as to R.4:69-5 are more weighty in the context of a Sec. 16a transfer since, as previously indicated, the "discretion" granted the court by Sec. 16a, as opposed to the standard in Sec. 16b, is clearly less rigorous.

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[1]Note that the Mt. Laurel case was brought in 1971. As a result of delay, the entire 1970-1980 fair share period was lost. Mt. Laurel now is settling to provide for a diminished fair share based on 1980-1990 needs. Meanwhile, thousands of conventional units were built.

C. Transfer and the Unconstitutionality of the Act.

Obviously, if the Act is unconstitutional in substantial and relevant respects, a transfer of this matter to the Council would be totally inappropriate. The Act, as demonstrated above, is extremely complicated and cumbersome and serious questions are raised as to the reasonableness and constitutionality of many of its provisions. However, our Supreme Court has ruled that:

> (A) legislative enactment will not be declared void unless its repugnance to the Constitution is so manifest as to leave no room for reasonable doubt.

Brunetti, supra, 68 N.J. at 599.

In light of that strong admonition and the public interest to be served by saving the Act, plaintiffs have undertaken this brief with the goal of interpreting the Act so that it is constitutional. Many assumptions have had to be made in advance of a judicial interpretation. Plaintiffs have indicated numerous sections which would fall if interpreted differently and will support a finding of unconstitutionality if those sections are so interpreted.

Plaintiffs have purposely not briefed the constitutionality of Sec. 28, the builder's remedy moratorium, since it does not appear to be directly implicated by this

motion. That provision raises profound questions of unconstitutionality and plaintiffs reserve the right to brief and argue the point if it is deemed relevant to this motion.

CONCLUSION

For the aforementioned reasons, defendant's motion for a transfer per Sec. 16a should be denied.

Respectfully submitted,

CARL S. BISGAIER
Attorney for Plaintiffs

Dated: August 8, 1985.

CARL S. BISGAIER, ESQUIRE
510 Park Boulevard
Cherry Hill, New Jersey 08002
(609)665-1911

JOHN G. VANDALEN, etc., et al., :	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
Plaintiffs, :	MORRIS COUNTY/MIDDLESEX COUNTY DOCKET NO. L-045137-83 PW
vs. :	Civil Action
WASHINGTON TOWNSHIP, etc., :	(Mount Laurel)
Defendant. :	AFFIDAVIT OF CARL S. BISGAIER

STATE OF NEW JERSEY:
SS
COUNTY OF CAMDEN :

CARL S. BISGAIER, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am an attorney-at-law of the State of New Jersey and counsel to the plaintiffs in the above-captioned matter.

2. Plaintiffs purchased the lands which are the subject matter of this litigation in 1980.

3. Between 1980 and March of 1982, plaintiffs appeared at least twice monthly at meetings of the defendant's Planning Board and Governing Body seeking to persuade those bodies to rezone the subject property.

4. It was always plaintiffs' intention, repeatedly made known to the bodies, to develop the property in accordance with the Mt. Laurel I and Madison decisions.

5. By March of 1982, plaintiffs had determined to seek a use variance for the property, prepared an application and filed it with the defendant's Zoning Board of Adjustment in June of 1982.

6. Formal hearings on the variance application began on July 8, 1982. Twelve hearings were conducted before the Zoning Board denied the variance on February 2, 1983; which denial was formalized by confirming resolution on March 10, 1983, and published on March 17, 1983.

7. At all times during the variance application process, plaintiffs repeatedly made known and expressed their commitment to develop the property in accordance with the Mt. Laurel I and Madison decisions.

8. Plaintiffs' expenditures prior to the variance denial and the Mt. Laurel II decision totalled $306,000.00.

9. Prior to the variance denial, the Supreme Court rendered its decision in Mt. Laurel II. Plaintiffs immediately informed the Zoning Board of willingness and commitment to satisfy the lower-income housing objectives of Mt. Laurel II by providing a substantial percentage of lower-income units.

10. Despite that representation, the use variance was denied. The denial was for mainly jurisdiction reasons. A copy of the resolution has been filed with the Court and is incorporated herein. It contains detailed references to the hearings, witnesses, exhibits and reports submitted.

11. On April 14, 1983, plaintiffs formally requested a rezoning consistent with Mt. Laurel II. The request was by way of letter addressed to the Governing Body and Planning Board which expressed plaintiffs' interest and sought a meeting with those bodies.

12. On May 23, 1983, the defendant's Mayor communicated to plaintiffs that they should meet with the Planning Board.

13. On June 21, 1983, plaintiffs appeared before the Planning Board, discussed their plans (referencing the extensive presentation made to the Zoning Board) and responded to questions, and on June 22, 1983, responded in writing to several issues raised at the meeting.

14. Plaintiffs received no indication of support for their development and, in fact, their attendance at a meeting on June 29, 1983, confirmed that the defendant would not voluntarily rezone their property.

15. On July 15, 1983, plaintiffs filed their Mt. Laurel II complaint. Service was effected on July 27, 1983, and an Answer filed on August 22, 1983.

16. On September 7, 1983, a status conference was held. Decisions made at that conference were reduced to a scheduling order entered on September 26, 1983.

17. On November 14, 1983, the Court heard argument on and denied defendant's motion to dismiss and for partial summary judgment.

18. Between February 1, 1984, and February 9, 1984, the Court conducted a plenary hearing on whether and, if so, to what extent, a SDGP "growth area" was located in the defendant municipality. On February 9, 1984, the Court ruled that such an area did exist (delineating the precise area) and that, therefore, the defendant had a Mt. Laurel II fair share obligation. The defendant did not admit to having any "growth" area or fair share obligation until the closing argument of that hearing.

a. prior to Mt. Laurel II, the defendant had maintained that it was not a developing municipality under Mt. Laurel I. Despite being sued by the Public Advocate in 1978 as one of 27 Morris County municipal defendants in Morris Cty. Fair Housing Council v. Booton, et al., the defendant attempted to repeal ordinances which it alleged had originally been adopted to satisfy what it once contemplated might have been a Mt. Laurel I obligation;

b. plaintiffs indicated in February of 1983 to the Zoning Board of Adjustment that a SDGP "Growth" area was located in the Township;

c. plaintiffs' April letter to the Planning Board and Governing Body reiterated that the defendant had a fair share obligation;

d. plaintiffs indicated at the Planning Board meeting of June 21, 1983, that the defendant had a SDGP "growth" area;

e. plaintiffs' complaint served on July 27, 1983, alleged that the defendant had a SDGP "growth" area;

f. at the September 7, 1983, status conference, the SDGP issue was thoroughly discussed and plaintiffs' counsel showed defendant's counsel the SDGP area located on a map in court;

g. on September 27, 1983, plaintiffs submitted a letter received from Richard Ginman confirming the location of the SDGP growth area in the Township;

h. on October 26, 1983, defendant's counsel, by letter to the Court, refused to accept that a "growth" existed in the Township and reiterated defendant's position that the maps appended to Mt. Laurel II should be used. These inadvertently omitted the "growth" area in the Township.

i. the defendant's own experts finally confirmed to the defendant the location of the SDGP "growth" area in Atlas sheets and State maps used by DCA in November of 1983;

j. Mr. Ginman's deposition was taken on December 3, 1983, at which he reiterated his position that an error had been made on the county maps (appended to Mt. Laurel II) and that the "growth" area was located in the Township;

k. still, defendant refused to acknowledge the propriety of the "growth" area and on December 16, 1983, the Court established procedures for a SDGP hearing on defendant's claim it had no "growth" area and on plaintiffs' claim it did and, in fact, it should be enlarged.

19. Absent plaintiffs' action, and its vigorous prosecution, the defendant would not have acknowledged the existence of a "growth" area and would not have felt obligated

to satisfy fair share obligations. Satisfaction of the constitutional mandate would not have occurred.

20. On February 24, 1984, the court entered its order on SDGP issues and on March 8, 1984, scheduled a status conference for March 16, 1984. At said conference, it was determined to run fair share numbers as a result of the new "concensus" methodology being generated in the AMG case and Carla Lerman was appointed to do that calculation.

21. On April 9, 1984, in anticipation of receipt of Ms. Lerman's report, the Court set April 23, 1984, for a status and settlement conference. There has been absolutely no serious effort to settle this case. The only meeting between the parties to discuss settlement came only at the Court's urging. On May 22, 1984, the parties met, on the eve of trial, but settlement proved fruitless. Later efforts by the master also proved fruitless. He was unable to provide plaintiffs with any settlement offer whatsoever. Given the history of this case, plaintiffs have no hope that "mediation and review" under the Act would accomplish anything as to a settlement on site specific issues.

22. Between June 11 and June 28, 1984, and again on July 12, 1984, a plenary hearing was held on the issues of fair share and compliance. During trial, the defendant adopted zoning

ordinance amendments and the Court ruled that plaintiffs should address those amendments. The zoning history prior to that time is as follows:

a. subsequent to the filing of the Public Advocate suit (which was voluntarily withdrawn in 1983) the defendant repealed those portions of its ordinances which permitted multi-family housing. On May 24, 1982, in a separate matter, Judge Gascoyne held that the defendant was a developing municipality under Mt. Laurel II. The Township did not amend its ordinances. On February 22, 1983, Judge Gascoyne ordered the defendant to provide for its indigenous need under Mt. Laurel II within 90 days; however, on May 16, 1983, the defendant simply readopted the same ordinance previously invalidated by the court. Thus, at the time of the filing of the complaint, the zoning ordinance provided for no new multi-family uses other than what had previously been approved;

b. subsequent to Mt. Laurel II, the Planning Board began considering ways to address the defendant's indigenous need obligation. At the time the suit was filed, the defendant had not determined on an indigenous need number and the Planning Board had, on June 13, 1983, tabled consideration of any ordinance amendments.

c. On June 29, 1983, the Planning Board reacting to the plaintiffs as a "threat" resolved that their indigenous need number was 67 units but did not recommend any new ordinance amendments.

d. subsequent to the filing of the complaint, on October 17, 1983, November 21, 1983, and December 19, 1983, the defendant adopted zoning amendments which purported to satisfy its indigenous need obligation. The Master Plan was amended on November 14, 1983;

e. subsequent to the Court's determination of the SDGP boundary, the defendant amended its ordinances purportedly to satisfy its assessment of its fair share. The amendments followed receipt of critical reports by plaintiffs' expert Alan Mallach and were adopted subsequent to the start of trial;

f. as late as May 10, 1984, the defendant's planner submitted a report indicating a fair share of 191 units (59 indigenous, 3 present need reallocated and 129 prospective need) and acknowledged the ordinances, as of then, provided for no more than 182 lower income dwelling units.

23. On December 6, 1984, the court rendered its opinion finding a fair share of 227 units (102 indigenous and 125 present and prospective). The court found the land use scheme not in compliance with Mt. Laurel II and ordered revisions within

90 days of the date of the decision or on or before March 6, 1985. A master was appointed who, according to the court's letter of December 7, 1984, was "to assist the defendant in rezoning and conforming with this opinion" and also to report to the court regarding the award of a builder's remedy.

24. Plaintiffs filed detailed submissions to the Master including an analysis of proposed rezoning and site suitability as well as a legal opinion that multi-family zoning on another site had not been mandated in a separate case. Further, plaintiffs met with the Master to respond directly to questions and to do a site inspection. Plaintiffs had virtually no contact with the defendant. Plaintiffs fully cooperated with requests by the Master for information and with his desire to pursue possible settlement - to no avail. The defendant, meanwhile, adopted zoning amendments which did not include relief to plaintiffs.

25. On April 24, 1985, the Court agreed to the Master's request to file his report on or before May 15, 1985, and scheduled a status and settlement conference on May 28, 1985.

26. On May 23, 1985, the Court agreed to the Master's request to file his report on or before May 31, 1985, and rescheduled the status and settlement conference for June 10, 1985.

27. The Master's report still had not been received and the June 10, 1985, conference was postponed.

28. On numerous occasions, plaintiffs' counsel attempted to reach the Master as to the status of his report and was informed by either the Master or his staff that release of the report was imminent.

29. Throughout this case, the parties have aggressively litigated every aspect of compliance. Voluminous interrogatories have been propounded and answered, requests for admissions sought and received, documents produced and depositions of numerous witnesses taken. Numerous briefs have been filed. The matter, to date, has cost approximately $253,000.00 since January of 1983, including litigation and development costs and including approximately 565 hours of attorney time through July 31, 1985.

30. The defendant has, as the record clearly shows, responded only to the imminence of court proceedings. Plaintiffs have been forced to litigate every possible issue. Further, because of this lawsuit and plaintiffs' success, they have been tainted and their ability to develop their lands has been seriously jeopardized given the state of animosity against them which is prevalent in the Township.

31. Plaintiffs' lands are now under agreement for development as soon as approvals can be obtained. This agreement will be seriously jeopardized by any extensive delay. Plaintiffs have been advised that the climate for housing production is now extremely favorable but cannot be relied upon to last indefinitely. Further, water and sewer capacities are finite and could be exhausted. Plaintiffs cannot be expected to maintain their present level of financing for this effort indefinitely. There is simply no reason to further delay the production of needed housing. The only significant issue remaining to be addressed is the location of the lands on which that housing will be built; i.e., site specific relief for plaintiffs.

32. Plaintiffs have proposed a development containing a substantial proportion of lower income housing and have expended over a half a million dollars in attempt to provide such housing. They have been vigorously acting in that regard for almost five years in the Mt. Laurel context generally and, in the Mt. Laurel II context, since the date that decision was rendered.

33. I have read plaintiffs' brief filed in opposition to this motion, and factual statements contained therein are true to the best of my knowledge, information and belief.

Carl S. Bisgaier (L.S.)
CARL S. BISGAIER

Sworn to and Subscribed
Before me this 8th day
of August, 1985.

Eileen M. McCloskey
EILEEN M. McCLOSKEY
A Notary Public of New Jersey
My Commission Expires Oct. 7, 198[illegible]