CH- general

12/9/85

Joint Brief on behalf of all above-captioned TTS/ Respondents (~~[illegible]~~)

p 69

CH0000~~29~~38 B

In The
SUPREME COURT OF NEW JERSEY

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

JOINT BRIEF ON BEHALF OF ALL ABOVE-CAPTIONED PLAINTIFFS/RESPONDENTS

GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN
Gateway One
Newark, New Jersey 07102
Attorneys for Plaintiffs
Helen Motzenbecker, Siegler Associates, Rakeco Developers, Inc. and New Brunswick Hampton, Inc.,
(201) 549-5600

LANFRIT & LINNUS
Tall Pine Center
15 Cedar Grove Lane
Somerset, New Jersey 08873
Attorneys for Plaintiff
JZR Associates, Inc.
(201) 560-9100

MEZEY & MEZEY
93 Bayard Street
New Brunswick, New Jersey 08901
Attorneys for Plaintiff
Flama Construction Corp.
(201) 545-6011

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

Statutes

Miscellaneous

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Motzenbecker v. Bernardsville (A-123).

Plaintiff, Helen Motzenbecker, relies upon the facts set forth in Judge Serpentelli's oral decision. D/Ba 100-102,[2] and upon the procedural history set forth in the Brief submitted by defendant-appellant Bernardsville to this court on or about December 3, 1985, except as follows. Plaintiff excepts to the characterization of the "stipulation of partial settlement" entered into in February, 1984 as a "partial settlement" and to the characterization of the November 20, 1984 order as an "interim order". Although such consent orders were literally phrased in these nominal terms, the orders granted plaintiff the ultimate relief sought--a builder's remedy. The

---

[1] This brief is submitted jointly on behalf of the following plaintiffs: Helen Motzenbecker, sole plaintiff in the case of Motzenbecker v. Bernardville, Docket No. L-37125-83; New Brunswick Hampton, Inc. in the case of New Brunswick Hampton, Inc. v. Township of Holmdel, Docket No. L-33910-84 PW; Siegler Associates in the case of Siegler Associates v. Mayor & Council of the Township of Denville, Docket No. L-029176-84 PW; and JZR Associates, Inc., Flama Construction Corp., and Rakeco Developers, Inc, in the case of JZR Associates, et al. v. Township of Franklin, Docket Nos. L-7917-84 PW, L-14096-84 PW, and L-25303-84 PW.

[2] References to D/Ba ___ refer to the appendix to the brief submitted on behalf of the Mayor and Council of the Borough of Bernardsville and the Borough of Bernardsville in support of its Motion for Leave to Take and Interlocutory Appeal, filed in the Appellate Division on or about November 1, 1985. Plaintiff also relies upon the Statement of Facts contained in the briefs submitted on behalf of Helen Motzenbecker below.

orders were captioned so as to accommodate the Borough of Bernardsville which, upon reflection, changed its litigation and settlement strategy and decided to seek "repose." See Plaintiffs' Appendix, Tab 4, Exhibits B and F.

B. Siegler Associates v. Denville Township (A-125).

Plaintiff, Siegler Associates, relies upon the statement of facts set forth and Morris County II at 48-50. In addition, Plaintiff relies upon the "counterstatement of facts" set forth in the brief of Stonehedge Associates at the trial level in opposition to Denville Township's motion to transfer (pages 1-4).

C. New Brunswick Hampton v. Holmdel (A-126).

Plaintiff relies upon the facts set forth in Judge Serpentelli's oral opinion. D/Ba 102-106. In addition, plaintiff relies upon the facts set forth in plaintiff's brief in opposition to the Township's motion to transfer. See Plaintiffs' Appendix, Tab 6.

D. JZR Associates, Inc. Flama Construction Corp. and Rakeco Developers Inc. v. Township of Franklin (A-133).

Plaintiffs rely on the statement of facts set forth in plaintiffs' trial court briefs, as well as the certification of Harry Rieder, opposing the Township's motion to transfer. See Plaintiffs' Appendix, Tabs 7, 8, 9 and 10. Plaintiffs rely on the procedural history and statement of facts set forth in the brief of respondent, Brener Associates, filed on or about December 4, 1985.

I. THE TRIAL COURTS PROPERLY CONCLUDED THAT TRANSFERRING THE CASES TO THE AFFORDABLE HOUSING COUNCIL WOULD CAUSE A MANIFEST INJUSTICE

A. THE PROPER SCOPE OF APPELLATE REVIEW

1. A Determination By The Trial Court That Transfer To the Council Would Result In A Manifest Injustice Should Be Binding On Appeal Unless The Decision Constitutes An Abuse Of Discretion

In deciding a transfer motion, a Mount Laurel judge is required to determine whether granting a transfer "would result in a manifest injustice to any party to the litigation." Fair Housing Act, Section 16(a). After conducting a careful evaluation of the factual record and procedural posture in plaintiffs' cases, the trial judges found that transfer would result in a "manifest injustice" and denied the transfer motions.

Plaintiffs urge this Court to uphold the lower court decisions unless this Court finds that the trial courts abused their discretion.

The trial level decisions should be evaluated by an abuse of discretion standard on appeal because any finding of manifest injustice requires the trial judge to exercise considerable discretion[3] and because the trial judges are most

---

[3] Each subsequent version of the Fair Housing Act broadened the trial court's discretion to order a transfer.

One early version of the Act laid out five specific factors which the Court was directed to consider prior to transferring a lawsuit (instituted prior to six months of the effective date of the Act) to the Council for its mediation and review.

(continued on next page)

familiar with the specific facts of the pending lawsuits and thus are in the best position to judge when a transfer to the Council would result in a manifest injustice to a party.

This Court appointed the three Mount Laurel judges to hear and decide Mount Laurel cases with the expectation that "the constant growth of expertise on the part of the judges in handling these matters" would result in the efficient processing of these cases as the procedures of the trial courts became well established and as the law became more settled. Mount Laurel II, 92 N.J. at 293. Consequently, those trial judges have developed a sophisticated sense of (1) the complexities and nuances of Mount Laurel litigation and (2) how the new substantive and procedural law of Mount Laurel II must

---

(continued from previous page)

A subsequent version of the Act omitted four of the five factors and mandated instead that exhaustion would not be required "unless the court determines that a transfer of the case to the council is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing..." Senate Bill 2046, as amended 11/29/84 by the Committee on State Government, Federal and Interstate Relations and Veterans Affairs, §14.a.

The Assembly Municipal Government Committee subsequently proposed that the standard governing transfer to the Council be modified so that "a court in determining whether to transfer pending lawsuits to the council must consider whether or not a manifest justice to a party to the suit would result, and not just whether or not the provision of law and moderate income housing would be expedited by the transfer." (emphasis added). Statement to Senate Committee Substitute for Senate Bills 2046 and 2334, as amended by Committee at p.1. The Assembly Committee's modifications were adopted and enacted as Section 16(a) of the Fair Housing Act.

be applied to maximize production of lower income housing, while simultaneously minimizing the impact of such housing on a community.

Moreover, an intended consequence of the Mount Laurel II decision was clearly to promote and encourage (1) close, intimate involvement by the trial court in the management of the cases and (2) substantial expertise upon the substantive issues. 92 N.J. at 216-17, 292-94. It is precisely this intimate involvement and expertise that has been relied upon to evaluate the relative equities presented by the transfer motions. Given these facts, the appellate function in reviewing a transfer decision should be substantially limited.

Specifically, unless plain legal errors have been made, plaintiffs respectfully submit that a "transfer" decision by the trial court should not be disturbed unless it is evident that the decision is manifestly unsupported by or inconsistent with the record such as to amount to an abuse of discretion.[4]

---

[4] Analogous support for this deferential standard of review can be found in cases reviewing decisions of administrative agencies. In reviewing such decisions, the courts have frequently taken note of the specialization, expertise and comprehensive knowledge acquired by agencies in their particular fields. E.g., Gloucester Cty. Welfare Bd. v. Civil Service Comm'n., 93 N.J. 384 (1983). As a result, the courts have long deferred to such expertise and limited review to simply determine whether the factual findings have reasonably been made on sufficient evidence in the record. Jackson v. Concord Co., 54 N.J. 113 (1969). The Mount Laurel judges, while not administrative agencies, certainly possess expertise, specialization and comprehensive knowledge upon the issues and facts relevant to a determination of manifest injustice. As these factors warrant limited appellate review in the field of administrative law, they should similarly warrant limited appellate review of these decisions.

In an oft quoted discussion of the scope of appellate review in non-jury cases, Chief Justice Hughes stated broadly that the judgment and findings below:

> should not be disturbed unless "... they are so wholly insupportable as to result in a denial of justice," and that the appellate court should exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter. Greenfield v. Dusseault, 60 N.J. Super. 436, 444, 159 A.2d 433 (App. Div. 1960), aff'd o.b. 33 N.J. 78, 161 A.2d 475 (1960). ... Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence. New Jersey Turnpike Authority v. Sisselman, 106 N.J. Super. 358, 255 A.2d 810 (App. Div. 1969), certif. den. 54 N.J. 565, 258 A.2d 16 (1969). It has otherwise been stated that "our appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice," Fagliarone v. Twp. of No. Bergen, 78 N.J. Super. 154, 155, 188 A.2d 43, 44 (App. Div. 1963)....

Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). Such a scope of review, plaintiffs urge, would be the most appropriate on the issue of "manifest injustice".

Moreover, reversal is warranted only in the clearest cases of abuse. Schweizer v. McPhee, 130 N.J. Super. 123 (App. Div. 1974). Indeed, the decision under review must be both

clearly unreasonable in light of the surrounding and accompanying circumstances and be prejudicial to the rights of the complaining party, before a reversal will be decreed. Fotopak Corp. v. Merlin, Inc., 34 N.J. Super. 343 (App. Div. 1955). The latter aspect of this standard, prejudice to the complaining party, has been treated by the courts as that which results in a "manifest denial of justice." In re Presentment of Bergen Cty. Grand Jury, 193 N.J. Super. 2 (App. Div. 1984); Wasserstein v. Swern & Co., 84 N.J. Super. 1 (App. Div. 1964). An analysis of the trial courts' decisions clearly reveals that defendants have failed to show that those decisions were "clearly unreasonable in light of the accompanying and surrounding circumstances".

It is, therefore, respectfully submitted that in the absence of a clear showing that the denial of a transfer would be manifestly unjust to the municipality, the decision below should be affirmed.

B. THE MANIFEST INJUSTICE STANDARD

Judge Skillman and Judge Serpentelli rendered similar rulings regarding the circumstances under which a transfer would result in a manifest injustice - not only to the named plaintiffs, but also to the lower income population. Compare Morris County Fair Housing Council v. Boonton Twp. (Docket No. L-6001-78 PW), slip opinion at 47-48 (unreported) [hereinafter

"Morris County II"[5], with D/Ba90-93.

There can be no question that the rights of the poor warrant serious consideration in determining whether a transfer in any particular case would result in a manifest injustice.[6] It is inconceivable that the Governor and Legislature could have enacted the Fair Housing Act - legislation designed to protect the constitutional rights of the poor - without regard to whether a transfer would cause an injustice to that class of citizens. Morris County II at 6 citing Fair Housing Act, Section 2(a) (emphasizing that the Act's purpose is to implement the constitutional mandate). As noted by Judge Serpentelli:

---

[5] This 62-page opinion was also annexed to the Brief filed by Denville Township in support of its motion for leave to appeal the denial of its transfer motion. See D/Da4-65.

[6] This is especially so to the extent that builders derive their standing to bring Mount Laurel litigation because they are protecting the constitutional rights of the poor to obtain adequate housing. Morris County Fair Housing Council II at 37-48 citing Morris County Fair Housing Council v. Boonton Twp., 197 N.J. Super. 359, 365-66 (Law Div. 1984). See also D/Ba17-20.

> Our Courts have long been painfully aware that the fundamental rights of the poor to decent housing would never have been vindicated by the poor themselves due to their obvious inability to pursue such litigation against the firm resolve of exclusionary municipalities. Thus, the need exists to confer standing upon builder/developers and to encourage them to vindicate the rights of the poor. Urb. League New Bruns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11, 18 (Ch. Div. 1976); Mount Laurel II 92 N.J. at 326-27. J.W. Field, ___ N.J. Super. ___, (slip opinion at 3-4). Without builder plaintiffs and remedies, these constitutional rights would be irretrievably lost. Mount Laurel II, 92 N.J. at 279, 309 n. 58, 327 (wherein the Supreme Court expressly encouraged a substantial amount of Mount Laurel litigation).

> As a minimum test, the legislation must create the realistic opportunity for housing which is found to be the constitutional core of Mount Laurel II. The Court should, in interpreting the doctrine of manifest injustice, seek to help the legislation to meet that test.

D/Ba 84 (emphasis added).

The test for determining whether there exists a manifest injustice is, obviously, not conducive to a bright line standard, but rather, lends itself more appropriately to a balancing analysis, weighing a variety of factors which all relate to the fairness and equities of a transfer being ordered in any given case. Although the term "manifest injustice" has been used and interpreted in a variety of contexts,[7] the Legislature did not specify which, if any, of these interpretations was intended to guide the courts in considering transfer applications. See Morris County II at 44; see also, D/Ba85-89.

In their review of the pending transfer motions, the trial judges differed only slightly in their respective opinions regarding how the term manifest injustice should be applied.

---

[7] For example, a manifest injustice standard has been applied in a number of contexts: (1) when defendants have sought to withdraw guilty pleas and criminal cases; (2) when parties have sought to bar retroactive application of a statute; (3) when parties have sought to answer interrogatories late; and (4) when parties have sought to be excused from a requirement to exhaust administrative remedies. Morris County II at 45-47. See also Brief submitted on behalf of Helen Motzenbecker opposing transfer motion. (See Appendix Section A-1 at 12-13 n.6.).

Judge Skillman identified the following factors as relevant:

> 1. the delay and expense that would be created by requiring exhaustion as compared to the delay and expense that would result from the court completing the proceedings;
>
> 2. whether there existed a necessity for taking further evidence and making factual determinations thereon;
>
> 3. the nature of the agency and the extent of judgment, discretion and expertise involved; and
>
> 4. such other pertinent factors as may fairly serve to aid in determining whether, on balance, the interests of justice dictate the extraordinary course of bypassing the administrative remedies made available by the Legislature.[8]

Morris County II at 46-47.

In his oral decision, Judge Serpentelli weighed at least the following factors:

---

[8] "Such other pertinent factors" would include:

> (1) whether exhaustion would be futile;
>
> (2) whether a need exists for a prompt decision in the public interest;
>
> (3) whether the issues involve adminstrative expertise or discretion or whether a question of law is involved;
>
> (4) whether irreparable harm could otherwise result from denial of immediate judicial relief.

See also Morris County II at 47 (citing a long line of authority analyzing when exhaustion of administrative remedies would create a manifest injustice). Accord, Mount Laurel II, 92 N.J. at 342 n. 73.

1. the stage in the proceeding of the current litigation--i.e. had there been a finding of non-compliance or a determination of the municipality's fair share;

2. whether an immunity order had been entered insulating a given municipality from additional builder remedy litigation and the time within which such an order had been in effect;[9]

3. the expertise of the specialized trial courts relative to that of the newly formed Council.

D/Ba100-113.

As explained by Judge Serpentelli:

> At a minimum, the manifest injustice exception must contemplate that we avoid a circumstance in which transfer would seriously undermine the constitutional imperative which the legislation itself must satisfy if it is not to experience constitutional impairment. To that extent, the term "manifest injustice" should be interpreted in such a manner as to support the fundamental goal of the legislation, and that is to satisfy the constitutional mandate in a reasonable manner.

D/Ba83-84 (emphasis added). Similarly, Judge Skillman stated that:

> ... it is a responsibility of the courts to interpret this term in a manner which is

---

[9] Such immunity orders were routinely granted by Judge Serpentelli in an effort to protect a municipality that had conceded non-compliance with Mount Laurel and voluntarily undertook to adopt constitutional land use regulations. See J.W. Field, supra, ___ N.J. Super. ___ (slip opinion at 8).

With regard to the cases presently before this Court, at least one, the Borough of Bernardsville received such an order of immunity, which order remains in effect as of this writing.

> consistent with the overall intent of the Act and which will not undermine the constitutional rights protected by the Mount Laurel doctrine.

Morris County II at 44 (emphasis added).[10]

While both trial courts agreed that the Act must be interpreted so as to ensure fulfillment of the constitutional obligation, Judge Skillman noted that the effect of granting a motion to transfer would be to force the plaintiff/transferree to exhaust the administrative remedies afforded by the Act. Since he presumed the Legislature to be familiar with R. 4:69-5 and the long established precedents regarding when a "manifest injustice" results from requiring the exhaustion of the administrative remedies, Quarenda v. Allan, 67 N.J. 1 (1975), Judge Skillman reasoned that the Legislature intended Section 16(a) to be interpreted in that context. Morris County II at 46.

By way of contrast, Judge Serpentelli refused to conclude that the Legislature intended "manifest injustice" to

---

[10] In this spirit, Judge Skillman cautiously analyzed the term "manifest injustice" within the context of the transfer motions, in an effort to preserve the constitutionality of the Act:

> if every party with a pending Mount Laurel case, including one close to conclusion, were required to exhaust the rather lengthy administrative procedures established by the Act, its constitutionality would be difficult to defend. However, the Legislature has not imposed such a requirement.

Morris County II at 18.

correspond to any existing line of authority, and instead interpreted that phrase "in such a manner as to best achieve the fundamental goal of the legislature and that is to satisfy the constitutional mandate in a reasonable manner." D/Ba83-84.

Regardless of whether this Court accepts the analysis of either Judge, or instead reaches its own conclusion concerning the parameters of "manifest injustice", it would seem self evident that the comparative delays that would necessarily be caused by a transfer should be given great weight where a case has already been partially or substantially resolved through litigation or settlement.

1. Comparative Delays

Both Judge Serpentelli and Judge Skillman estimated that in transferred cases, the municipality may not be required to adopt a compliant ordinance until September 1, 1987 - more than ten (10) years after this Court decided Mount Laurel I, and more than four (4) years since this Court decided Mount Laurel II. D/Ba26. Morris County II at 17 n.6.[11] In light of

---

[11] This interpretation of course presumes that a transferred case is treated no differently than a case in which a municipality voluntarily chose to participate before the Fair Housing Council and where there is an objector to the municipality's housing element. However, the express language of the Act does not necessarily compel such a result. A literal reading of the Act could readily support a conclusion that permitted a party to a trial on his complaint in the Superior Court following an unsuccessful "mediation and review." In such a case, a transferred matter would either be resolved or be returned to the trial court in a relatively short period of time largely minimizing the manifest injustice resulting from the delays inherent in pursuing the remainder of the administrative process. See discussion, infra, at pp. 19-20.

Judge Serpentelli's analysis, however, it would appear that the delay is apt to be substantially longer. D/Ba93-100.

The Legislature was undoubtedly aware of and, perhaps, even intended some of the delays inherent in the administrative review process. It is thus unlikely that the Legislature intended that these delays alone would result in the trial court's retaining all cases. However, in cases that have been partially or substantially tried or where key issues have been resolved, then the delays inherent in the Act become so offensive that a manifest injustice plainly results. Conversly, where little has occurred, the delay alone may not be dispositive of manifest injustice question. Indeed, in Rivell v. Tewksbury (#24,790,A-132), Judge Skillman granted the municipality's transfer motion because defendant moved for transfer at an early stage: major issues had not yet been resolved. Morris County II at 58-59.

In light of the foregoing, plaintiffs would urge adoption of a rule by this Court that the transfer of a case which has been partially or completely tried, per se constitutes a manifest injustice. Short of a trial, a manifest injustice should also be presumed if significant or key issues have been substantially resolved either through settlement, stipulation or adjudication. Under such circumstances, the burden of proof should be shifted to the municipality to demonstrate that a transfer would not cause an injustice.

Analogous support for such a proposed standard can be found in this Court's modified treatment, in Mount Laurel cases, of the presumption of validity that normally attaches to a municipality's land use regulations:

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

Mount Laurel II, 92 N.J. at 306 (emphasis added). Similarly, a builder that has tried all or part of an exclusionary zoning case, or has, through stipulation or adjudication resolved key issues relative thereto, ought not have to prove that the municipality was wrong a second time.

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

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

Interests of judicial economy and the Court's goal of minimizing litigation while maximizing the production of lower income housing lend still further support to the standard urged

by Plaintiffs. Were this matter to be transferred, the weeks of extensive preparation for and trial by counsel and this Court would all have been for naught.[12] To require a duplication of the same or similar efforts regarding the non-compliance of Bernardsville, Denville, Holmdel and Franklin, their respective fair shares, or the award of a builder's remedy, would be patently counterproductive because it would force time, energy and money to be channelled into further paper, process and appeals, instead of planning for and building lower income housing. Mount Laurel II, 92 N.J. at 199.

As noted by Judge Serpentelli:

> We're not looking at delay in a vacuum because, certainly, the Housing Council process must take some time....but in transfer cases we have to look at delay in relationship to the status of the case before the Court. Delay equates to postponing the day until the realistic opportunity is afforded and houses are built.

---

[12] Following two (2) years of litigation, case management conferences, and court approved settlement packages, it is fair to say that the three Mount Laurel judges have obtained the experience necessary to develop comprehensive and consistent solutions to many of the recurrent problems in Mount Laurel litigation. Mount Laurel II at 254-55, 293. Assuming the constitutionality of the Act, the Council may ultimately develop a level of expertise, which would increase its effectiveness in resolving the thorny issues that arise from the production of lower income housing. However, transferring a presently pending case to a Council that lacks familiarity with the specific facts of a case would, of necessity, create a substantial injustice to all involved due to the prolonged delay and increased expense.

D/Ba 110-111 and see generally, Morris County II at 48-62 (in which Judge Skillman evaluates the delays inherent in the Act in terms of how far each case has proceeded).

In addition to the unconscionable delay that would result from transferring a partially or completely tried case, the need to engage in additional proceedings before the Council will substantially intensify the expense of litigation. The Fair Housing Act conflicts so sharply with so many of the fundamental underpinnings of Mount Laurel II that innumerable legal issues will inevitably arise, each of which will undoubtedly require extensive litigation.[13] To force a plaintiff to pay twice for what has already been an expensive lesson, is unconscionable. The Legislature could not have intended so harsh a result, and this Court should not permit these municipalities to continue the procedure indefinitely.[14]

---

[13] Compare Mount Laurel II, 92 N.J. at 352 and AMG Realty Co. v. Warren Tp., ____ N.J. Super. ____ (Law Div. 1984) (slip opinion at 74, with, Fair Housing Act, Section 4.j. (wherein the Act undermines the Court's interpretation of what constitutes the prospective need). Compare Countryside Properties v. Borough of Ringwood at 15-16 with the Fair Housing Act, Section 7.c.(1) (wherein the Act again undermines any credit standard accepted by any court to date). Compare Mount Laurel II, 92 N.J. at 218-19 with Fair Housing Act, Section 7.c.(2)(b) and Section 23 (wherein the Act substantially dilutes the constitutional obligation established by Mount Laurel II through an established pattern defense and through a phasing provision). Compare Mount Laurel II, 92 N.J. at 263-64 and AMG at 70 with Fair Housing Act, Section 11.d (wherein the Act substantially reduces a municipality's obligation when that municipality seeks a reduced obligation based on lack of infrastructure).

[14] The law is well settled that if an overriding public interest exists calling for a prompt judicial decision, one

(continued on next page)

As the Court is well aware, a lengthy delay may very well encourage non-Mount Laurel development to flourish, which will, in turn, strain existing infrastructure and eliminate suitable lower income housing sites. Hence, the present need for housing will be further exacerbated since no new housing is being produced.

(continued from previous page)

need not exhaust his administrative remedies. N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); and Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super. 59, 64 (Ch. Div. 1974). In this case, as in any other Mount Laurel case, an overriding public interest calling for a prompt judicial decision clearly exists and would be unduly delayed were this Court to grant Defendants' motions. Mount Laurel II, 92 N.J. at 306-7.

The need for prompt, actual construction of lower income housing is part of the vary fabric of the constitutional obligation. It was precisely this sense of urgency that motivated the Supreme Court to develop innovative procedural devices to hasten the process and to ensure the early construction of lower income housing. Mount Laurel II, 92 N.J. at 293. In addition, the Supreme Court modified the traditional time of decision rule in the context of Mount Laurel litigation in order to expedite production of lower income housing. Id. at 306-7. Finally, the Court guaranteed that the housing would be produced more quickly by expressly eliminating any "exhaustion" requirement as a prerequisite to bringing a Mount Laurel lawsuit:

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

Id. at 342 n.73.

Despite these factors, the injustice that might otherwise result from a transfer could be somewhat minimized, to the extent that this Court took certain other protective steps.

First, where issues had either been resolved or were on the verge of being resolved and were allowed to be completed, a collateral estoppel effect in proceedings before the Council might minimize the magnitude of harm that would be caused in a given case.[15]

Second, the irreparable harm to plaintiffs could also be minimized if this Court interprets the Act so as to compel a transfer for the purposes of review and mediation, only such that failure to successfully resolve the dispute in mediation would result in a reversion to the trial court for further proceedings. Such a reading is fully supported by the express language of the Act.

Section 15(c) requires that when the Council's mediation efforts are unsuccessful, the matter must be transferred to the Office of Administrative Law as a "contested

---

[15] Certainly, if modifying the principles of res adjudicata and granting six years of "repose" to municipalities is appropriate, then applying collateral estoppel to save the time and expense of relitigating identical issues, thereby minimizing the injustice of a transfer may similarly be warranted. Mount Laurel II, 92 N.J. at 291-92. Of course, if the Council were deemed to lack authority to grant a builder's remedy, and was not required to grant a builder's remedy based on the standards articulated by the courts, then giving a collateral estoppel effect would not minimize to any degree the irreparable harm and injustice that would result to builder/plaintiffs.

case" as defined in the Administrative Procedure Act. However, Section 15(c) seems to refer back to the former section, 15(b), which deals solely with mediation at the request of an objector to a petition for substantive certification. See Morris County II at 16, n.5. Moreover, under Section 16(b), if a municipality has adopted a timely resolution of participation, a person who has instituted exclusionary zoning litigation less than 60 days before (or after) the effective date of the Act is required to exhaust the Council's review and mediation process before being entitled to a "trial on his complaint" (emphasis added).

The reference to "trial on his complaint," may reasonably be deemed to refer to judicial proceedings since one's administrative hearing before an A.L.J. or a State Agency is not commonly referred to as a "trial on his complaint." If such party must appeal a Council decision to the Appellate Division, the language entitling a person to a "trial on his complaint" would appear to be superfluous. Thus, the plain language of the Act suggests that if mediation is unsuccessful, the party may resume its litigation at the trial level, further review by the Office of Administrative law not being required. If this reversion to the trial court is available under 16(b), fairness and logic would dictate that the same opportunity be afforded to a party which has been transferred to the Council pursuant to §16(a). Cf. Morris County II at 16, n.3.

This interpretation of the Act would also serve to expedite the Council's administrative review process and thereby minimize the potential harm to a transferred party caused by delay. The intent of the Legislature to minimize delay caused by transfer is also found in Section 19 of the Act which requires the Council to complete its review and mediation process within six months of a request by a party which has instituted litigation or risk transfer back to the trial court. Moreover, the mediation process by the Council need not await submission of either the municipality's housing element or indeed the Council's determination of housing regions and needs. While prior versions of the Act contained such a requirement, these provisions were deleted in the Act as enacted. (See former Senate, No. 2046, introduced 6/28/84, Sec. 13(a) which had required that the Council's mediation and review process shall commence as soon as possible after the filing of the housing element and former Senate Committee substitute for 1985 Senate Nos. 2046 and 2334, Sec. 15(d) which had required that in the review and mediation processes for transferred cases, the "mediation process shall commence as soon as possible after the request for mediation and review is made, but in no case prior to the council's determination of housing regions and needs..."). See, Morris County II at 16, n.3.

2. Early Immunity

Plaintiffs strongly urge that where a municipality has obtained an order of immunity[16] in exchange for a commitment to enact a compliant ordinance, this factor should weigh heavily against a transfer.

In exchange for immunity from builder litigation, the municipality voluntarily relinquished its right to litigate the issue of whether the municipality's regulations were compliant, and committed itself to enact a compliant ordinance. To permit a municipality which availed itself of this protection to transfer not only encourages delay, but more significantly, effectively "pulls the rug out" from under the poor.

Having received the obvious benefit of such a protective order, the municipality should be compelled to finish that which it started without further delay and without the disruption of a shift to a new tribunal where the process will begin yet again under a new set of undefined rules.

3. Futility

Considerations of justice should also relieve a party from exhausting the administrative review and mediation process

---

16 For a more detailed explanation of how, and under what circumstances a municipality might have obtained such an immunity order, see J.W. Field, ____ N.J. Super. ____, (slip opinion at 8) in which Judge Serpentelli explained that where a municipality has conceded non-compliance and voluntarily undertook to resolve fair share through settlement, thereby freeing the court and the parties to refocus their energies away from litigation and towards planning for the housing needs of the poor, an order precluding further builder's remedy lawsuits was warranted. See also, D/Ba109.

contemplated by a transfer where such participation would likely prove futile. See generally, N.J. Civil Service Ass'n. v. State, 88 N.J. 605, 613 (1982); Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975); Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super. 59, 64 (Ch. Div. 1974).

Futility appears to exist in both legal and factual settings. Legal futility exists where the remedy sought cannot be said to be "certainly available, clearly effective, and completely adequate to right the wrong complained of." Patrolman's Benev. Assoc. v. Montclair, 128 N.J. Super. 59, 64 (Ch. Div. 1984). See also Brief submitted on behalf of Rakeco Developers Inc. opposing transfer motion. See Appendix, Tab 7 at 14-15. Factual futility exists where the past conduct of the municipality reveals that the mediation and review process afforded by the Act is not likely to result in a conciliatory resolution to the dispute. Morris County II at 50-51, 56.

As to legal futility, if this Court concludes that the Council is not required to award a builder's remedy in connection with its ability to "condition" its grant of substantive certification,[17] then a per se futility situation exists.

As to factual futility, the parties should not be compelled simply to go through the motions where to do so would

---

[17] This of course, assumes the builder is otherwise entitled to such an award by virtue of his having satisfied the three (3) elements of the remedy as described in Mount Laurel II, 92 N.J. 279-80.

pointless. Not only would such a requirement fly in the face of fundamental principles of equity, but requiring exhaustion under these circumstances adds unnecessary delay which benefits no one.

In summary, the following factors are clearly worthy of consideration in one form or another in assessing whether a transfer would result in manifest injustice:

(1) Whether the delay and expense that would be created by requiring a transfer significantly exceeds the delay and expense that would result from the trial court completing the proceeding it has started;

(2) Whether there is a need for taking further evidence and making factual determinations thereon;

(3) Whether the municipality has obtained an immunity order before achieving compliance and, if so, how long has the municipality enjoyed the benefits of early immunity without paying the proper price for that early immunity;

(4) Whether the Council has the expertise necessary to handle the cases as expertly as the trial court;

(5) Whether the builder would be required to perform a futile act by exhausting the administrative procedures established by the Act.[18]

---

[18] There may, of course, be other factors which should also be weighed in the balance. For example, both Judges Serpentelli and Skillman refused to consider the conduct of the parties in deciding whether to transfer the case. D/Ba106-107; See also, Morris County II (where a plaintiff, Rivell, alleged that

(footnote continued on next page)

As to the relative weight to be given to these factors, the comparative delay and expense based upon the stage of the case and the need for taking further evidence clearly represent important considerations. The poor have waited long enough for the barriers of exclusionary zoning to be broken down. The prospective need, which increases every day, should be satisfied as promptly as practicable. Landowners, builders and developers should not be deprived of the favorable market conditions that exist today -- market conditions which presently ensure that a Mount Laurel remedy will result in the actual construction of lower income housing.

If the municipality has obtained the benefits of early immunity through the procedure established by Judge Serpentelli, plaintiffs strongly urge this Court to give this factor substantial weight as well. Not only should such municipalities be held to their "commitment" to comply, but plain-

---

(continued from previous page)

Tewksbury had exhibited bad faith). Plaintiffs contend that this Court can easily affirm the trial courts' decision without addressing the conduct of the municipality. However, plaintiffs strongly urge that whether a municipality has, in fact, acted in bad faith may, and should properly be considered, in determining whether a case should be transferred. And, where a finding of bad faith is made by the trial court, the transfer should be denied.

If a recalcitrant municipality is rewarded the effects will be to punish those municipalities which voluntarily complied, whose elected and appointed officials will, in retrospect, be perceived in a bad light by the electorate for having embraced Mt. Laurel.

tiffs should be excused from relitigating issues such as non-compliance or fair share, to the extent previously resolved.

The factors relating to futility and the relative expertise of the court to the Council are also important, although perhaps, less so than where a case is near completion, or where there exists an immunity order. By transferring a pending case to the newly formed Council, delays would be accentuated and the injustice would be heightened. A similar result would likely occur where the dispute between the plaintiff and municipality has been so bitter that little prospect of reconciliation exists in the mediation process.

One final, yet vitally important consideration in analyzing the manifest injustice issue is the ability of the Act to realisticaly provide for municipal compliance. The opportunity for actual construction of lower income housing is obviously not realistic without the ability of sewer and water service. Unless there is an ability to insure that these essential utilities will be provided to a potential development, lower income housing cannot be built. The Fair Housing Act does not empower Council to compel a municipality or a utility authority to make its services available to a new inclusionary developments. The Act merely provides municipalities with the opportunity to select an administrative forum instead of a court room for consideration of the substantive content of its zoning ordinance. Morris County II at 6. Municipal uti-

lity authorities are independent and free from municipal control. Thus, years of effort before the Council may produce nothing more than an inclusionary zoning ordinance that is incapable of being implemented without further litigation against a municipal utility. Although not expressly cited by the Act, this issue should be addressed in the context of any transfer motion. Clearly, to transfer a case under these circumstances would seem pointless.

C. APPLICATION OF THE BALANCING TEST

(1) Motzenbecker v. Bernardsville

At the time it filed its motion to transfer, the Borough of Bernardsville had already developed a proposed compliance package and had submitted that package for review by the Court and the Master. The Mayor had not only approved the fair share number proposed by the Borough, but also he had substantially approved the manner in which the fair share would be satisfied. D/Ba29. Thus, if the trial court retained the case, a compliance hearing could have been completed as scheduled months ago - on September 10, 1985. Id. Once the compliance package receives the court's approval, actual construction of lower income housing can begin immediately.

In stark contrast, if this Court directs a transfer of this case to the Council, the Borough will be able to further delay the day when lower income housing will become a reality.

Given the fact that almost all issues - including the remedy - have already been resolved at the trial level, it would be patently absurd to relitigate any or all of the same issues before the Council.

Of equal significance, Bernardsville requested immunity was granted almost a year ago in exchange for its commitment to enact a constitutional zoning ordinance. As a matter of equity and fairness to this plaintiff and the poor represented thereby, the Borough should be required to honor its commitment.

In fact, after consenting to the award of a builder's remedy over a year and a half ago, the Borough precluded plaintiff from implementing that remedy. First, the Borough announced its intent to condemn plaintiff's parcel, creating a "cloud" against the property that has substantially prevented the plaintiff from completing joint-venture negotiations to develop this parcel. Second, the Borough moved to vacate plaintiff's builder's remedy -- even though the trial court has twice entered orders granting plaintiff its remedy. Finally, as the Borough itself acknowledges, it does not seek a transfer because it desires to proceed before the Council, but rather because it believes the builder's remedy can be vacated in the process of transfer.[19]

---

[19] The municipality's obstructionist tactics brings to light yet another critical factor -- that, as a factual matter the prospect of obtaining the relief sought through the administrative proceedings is patently futile.

Finally, the Borough's consent to plaintiff's builder's remedy has resulted in a vesting of her right to that remedy. If this Court permits the Borough to divest the plaintiff of her builder's remedy, then every single Mount Laurel settlement between a builder and a municipality would be jeopardized. Thus, to the extent Mount Laurel II has succeeded in creating adequate incentives to create settlements that would result in the actual construction of lower income housing, those settlements should not be rendered meaningless by empowering municipalities to use the Fair Housing Act to undo them. Plaintiffs strongly urge that this Court send out a clear signal to municipalities across this state that it will not permit the Fair Housing Act to become a tool for destroying existing agreements.

For all these reasons, as well as the reasons set forth in the trial court transcript and Helen Motzenbecker's briefs below, plaintiff strongly urges this Court to uphold the decision of the trial court.

(2) Siegler Associates v. Denville Township

The Denville Township cases have had "a long and tortured history" (Morris County II at 48) and have only now reached the final stages of litigation. The fair share has been established. Id. at 49. The Township has been given more than ample time to revise its regulations to comply. The compliance package submitted was deemed to have been inade-

quate, thereby necessitating the Court to direct the master to develop a compliant ordinance for the Township. Id. at 50. In short, it has come time for Denville Township to comply with its obligation.

If this Court upholds the trial court's denial of transfer, a compliant ordinance "probably can be brought to final judgment in a few months." Id. at 51. If this case is transferred, the seven years of non-compliance will in all likelihood turn into nine years of non-compliance. Id. at 17, n.6. The poor have endured the long and arduous proceedings. Further proceedings before the Council will create only more delay and result in considerable additional expense.

The trial court fully realized that the "use of the mediation process established by the Act would be unlikely to result in a settlement and hence would be futile". Id. at 48, 50-51. The injustice of a transfer in these circumstances to the poor and the plaintiffs could not be more manifest.

(3) New Brunswick Hampton v. Township of Holmdel

The posture of this case is virtually identical to that of the Franklin Township case. Following a trial which began on October 15, 1984 and which spanned approximately two (2) weeks, the trial court, on November 9, 1984, appointed Richard Coppola, A.I.C.P., to be a special master.[20] Judge

---

[20] Prior to trial, Holmdel Township had conceded the invalidity of the zoning ordinance in effect at the time the Mount Laurel complaints were filed. D/Ba 108.

Serpentelli tried the same issues in this case that he tried in the Franklin Township trial - namely, the fair share obligation. Thus, the refinements to the fair share methodology as set forth in the Franklin Township fair share opinion render the identification of Holmdel Township's fair share a mere mechanical exercise. D/Ba 104-105. Indeed, Judge Serpentelli has indicated that "it is likely" that the Township could have a compliant ordinance adopted "within a six-month period or less." Id.

Given that the trial proceedings are near completion, to transfer the case and keep the poor waiting still longer would be unconscionable. It is equally unconscionable to force New Brunswick Hampton, which has litigated such a substantial portion of this case, to confront the numerous newly created legal issues that will inevitably arise from implementation of the Act and thereby endure considerable additional expense on top of further delays. The Legislature could hardly have intended so harsh a result.

Finally, as noted by Judge Serpentelli, Holmdel has chosen the litigation "route" and done all within its powers to vigorously contest every issue - even those previously adjudicated in prior cases. D/Ba 109-110. The motion to transfer represents yet another manisfestation of the Township's utter resolve to "fight Mount Laurel". In light of this resolve, it is not reasonable to expect that the mediation and review pro-

cedure in Holmdel would be fruitful. Compare, Morris County II at 50-51, 56 (wherein the trial court acknowledges that in the Denville and Washington Township cases the mediation and review process of the Council would likely prove futile in light of the past conduct of the municipalities).

Accordingly, New Brunswick Hampton strongly urges this Court to uphold the trial court's denial of the transfer motion.

(4) JZR Associates, Inc., Flama Construction Corp. and Rakeco Developers, Inc. v. Township of Franklin

Following a trial which began on September 10, 1984, and which spanned approximately three (3) weeks, the trial court appointed on October 12, 1984 Richard Coppola, A.I.C.P. to be a special master.[21] On January 3, 1985, the trial court issued a written decision articulating a methodology for assigning priorities for builder's remedies to the multiple plaintiffs. J.W. Field, et al v. Tp. of Franklin, et al, ____ N.J. Super. ____ (Law Div. 1985). Those builders entitled to a builder's remedy were thus identified. On October 7, 1985 the trial judge issued a second opinion regarding Franklin Township's fair share obligation.[22] At present, virtually no

---

[21] The Township had conceded the non-compliance of its zoning ordinance prior to trial.

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

impediment exists to the enactment of a revised, compliant zoning ordinance. In light of the near completion of trial proceedings, the actual construction of lower income housing was on the verge of being achieved, albeit by court decree. To transfer even a portion of this case, for even a minimal period of time would not only be pointless but would be so inconsistent with the spirit and promise of Mount Laurel II that a more egregious result would be hard to imagine.[23]

What actually could be anticipated if these cases were transferred at this stage of the litigation? All of newly created legal issues that will inevitably arise from implementation of the Act will each have to be resolved - undoubtedly through extensive litigation. To force the plaintiffs to pay yet again and suffer yet additional delays would simply be unconscionable. The Legislature could not have intended so harsh a result, and this Court should not permit the procedure to endure indefinitely.

Moreover, Franklin Township has steadfastly sought to prevent the plaintiffs from obtaining builder's remedies even after admitting non-compliance. Indeed, this transfer motion is simply one more attempt to delay implementation of plain-

---

[23] Indeed, the original complaint challenging Franklin Township's land use regulations was filed by J.W. Field Co., Inc. on May 25, 1979. An amended complaint was filed on January 27, 1984 in order to render it more consistent with this Court's decision in Mount Laurel II. Multiple complaints thereafter followed in relatively short order.

tiffs' remedies. Given these circumstances, the mediation procedure before the Council would surely be futile.

JZR Associates, Flama Construction Corp. and Rakeco, strongly urge this Court to uphold the trial court's denial of the transfer motion.

II. THE MORATORIUM SHOULD NOT CONSTRAIN THE TRIAL COURT FROM AWARDING A BUILDER'S REMEDY IF IT IS ULTIMATELY DETERMINED THAT THE TRIAL COURT PROPERLY DENIED THE TRANSFER MOTION.

A. THE LEGISLATURE INTENDED TO RESTRAIN THE COURTS FROM AWARDING A BUILDER'S REMEDY EVEN IN THOSE CASES WHERE THE COURT PROPERLY DENIED THE MOTION TO TRANSFER.

Fair Housing Act, Section 28, imposes a moratorium, which restrains the courts from awarding a builder's remedy for as long as eighteen months. Morris County II at 21. Section 28 specifies only two circumstances under which the moratorium will not apply. First, it is inapplicable to cases filed before January 20, 1983. Second, the moratorium does not apply to cases in which there has been a "final judgment."[24]

The Act is conspicuous by its failure to permit the trial courts to award builder's remedies in cases in which the trial court has properly denied the transfer motion. Thus, even in those prerogative writs that the Legislature has directed the judiciary to retain, the trial court is precluded from awarding the specific remedy. While defendants might

---

[24] The only case that possibly qualifies as a "final judgment," and thus excepted from the provisions of the moratorium, is Motzenbecker v. Bernardsville (A-123). In this case, plaintiff's rights have vested, as evidenced by the existence of two consent orders awarding the plaintiff a builder's remedy. See Plaintiffs' Appendix, TAB No. 4, Exhibits A and C. In short, the plaintiff sought a builder's remedy and obtained her objective. Thus, the judgment awarding the remedy should be deemed final on this issue.

suggest that a useful purpose is served in cases transferred to the Council, such that the Council has time to promulgate its rules, no discernible purpose exists for a moratorium where the trial court has properly retained the case. Indeed, the perceived impact is harmful to the poor, who will be forced to wait longer still for adequate housing.

B. THE MORATORIUM IS UNCONSTITUTIONAL

This Court should not give effect to the moratorium provision because the moratorium provision is unconstitutional on at least two grounds. First, the moratorium violates the due process and equal protection mandates of the New Jersey Constitution Article 1 Paragraph 1. Second, the moratorium clearly constitutes a legislative interference with a judicial remedy secured by Article VI Section [illegible], Paragraph 4 of the New Jersey Constitution.

1. The Due Process And Equal Protection Violation

This Court has made it absolutely clear that the right of low and moderate income households to be free from exclusionary municipal land use regulations when seeking housing is a fundamental right. Mount Laurel II 92 N.J. at 208-9. The existence of a fundamental right plays a weighty role when testing the constitutionality of the moratorium provision under

the State's constitutional requirement of substantive due process and equal protection.

Recently, this Court identified three factors that must be balanced when analyzing constitutional claims made under the State Constitution:

> (1) the nature of the affected rights;
>
> (2) the extent to which the governmental restriction intrudes on the affected rights; and
>
> (3) the public need for the restrictions.

Greenberg v. Kimmelman, 99 N.J..552, 567 (1985). The moratorium provision of the Act fails to pass this constitutional test.

The Nature Of The Right Affected

Since a lower income household's right to be free from the artifical constraints of exclusionary regulations rises to the status of a fundamental right, the Court must examine with particular attention the moratorium provision.

The Extent To Which Governmental Restriction Intrudes On The Affected Right

Since the right created is not only the right to housing, but also the right to housing in a timely fashion, the moratorium, which may be as long as 18 months from the effective date of the Act (Morris County II at 21), constitutes a direct infringment on the right created. Moreover, to the extent that the delay results in the diminution of lower income housing opportunities, the intrusion on the fundamental right affected is even more severe.

The Public Need For The Restriction

Finally, no legitimate public purpose is served by the moratorium. Indeed, the moratorium obstructs rather then promotes the Act's stated purpose--the provision of lower income housing opportunities. Morris County II at 6. If a court concludes that a builder is otherwise entitled to a builder's remedy, the only effect of the moratorium is to delay construction of lower income housing without any offsetting benefit to the public. By way of contrast, the delay creates a variety of problems for the developer which may jeopardize the economic feasibility of the entire project.[25]

2. The Legislature Interference With A Judicial Remedy Violation

Judicial remedies are secured against legislative interference by (Article VI) of the 1947 New Jersey Constitution. Hager v. Weber, 7 N.J. 201 (1951).

---

[25] As also pointed out in Morris County II at 22, n. 10, if this Court were to interpret the definition of "builder's remedy" as set forth in Fair Housing Act, Section 28 as referring only to the property owners who had brought a Mount Laurel suit, rather than every other property owner in the municipality that might be rezoned for Mount Laurel purposes, this interpretation raises additional due process and equal protection concerns by placing the entire onus of the moratorium on the party that brought the Mount Laurel action. For this reason, the moratorium on builder's remedies must be interpreted to apply not only to the plaintiff builder but also to any other landowner that might be rezoned for Mount Laurel. This expanded interpretation of the meaning of the moratorium on builder's remedies magnifies the damage that the moratorium provision will cause if not declared unconstitutional.

Article VI, Section 5, Paragraph 4, of the New Jersey Constitution of 1947 expressly states:

> Prerogative writs are superceded and, in lieu thereof review, hearing and relief shall be afforded in the Superior Court on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary.

This constitutional restraint is thus applicable by action in lieu of prerogative writs challenging the validity of municipal zoning ordinances.

In Fischer v. Twp. of Bedminster, 5 N.J. 534 (1950), the Court reviewed a statute which attempted to limit the time within which a party could challenge the constitutional sufficiency of a zoning ordinance. The Township argued that under the statute, inaction by the landowner for thirty days after the cause of action arose barred an action challenging the zoning ordinance. Therefore, the Superior Court had no jurisdiction.

The Court held the statute was without efficacy since it purported to bar the "review, hearing and relief" power of the Superior Court contrary to Article VI, Section 5, Paragraph 4 of the Constitution of 1947. Fischer, supra, p. 538. The Court stated:

> By the clearest language, the Constitution commits to the Supreme Court the regulation of the new remedies provided in lieu of prerogative writs. Review, hearing and relief shall be had on such terms and in such

> manner as the Supreme Court alone may provide by rule. In the administration of these remedies, there is to be no division of authority. It may well be that the framers of the Constitution were guided by what they considered the lessons of experience; but, whatever the reason, the provision is to be read and enforced in accordance with the plain terms of the grant. No distinction is made between the substantive jurisdiction to afford the relief theretofore available through the prerogative writs and the mode and manner of the exercise of the power. The whole is within the exclusive jurisdiction of the Supreme Court. Neither the exercise of the power inherent in the old Supreme Court by means of the prerogative writs nor the regulation of the remedy is subject to legislative control. 5 N.J. at 541.

Section 28 defines a builder's remedy "a court imposed remedy for a litigant.[26] This remedy requires a municipality to utilize "zoning techniques such as mandatory set-asides or density bonuses." in affecting a recovery of the property of a successful plaintiff. As noted by Judge Skillman, regardless of how Section 28 is ultimately construed, it appears to impose an absolute prohibition upon the award of certain judicial

---

[26] The prohibition on awarding a builder's remedy will continue until the expiration of the filing period in Section 9(a) for a municipality to file its housing element with the Council. The filing period deadline is five months after the Council adopts criteria and guidelines. See Section 9a. The deadline for the Council to adopt criteria and guidelines is seven months after the confirmation of the last member initially appointed to the Council or January 1, 1986, whichever is earlier. In effect, the prohibition on awarding a builder's remedy can continue through January 1, 1987.

remedies contrary to Article VI of the Constitution. See Morris County II at 22-28.

The Legislature has crossed the boundary line separating the powers of the Legislature and the Judiciary.[27]

These developer-plaintiffs have always been ready, willing and able to provide low and moderate income housing consistent with sound land use planning principles.[28]

The statewide resistance to implementation of the constitutional mandate has delayed construction of housing for low and moderate income families long enough. It was because of such delays by municipalities that the Supreme Court in Mount Laurel II instituted the builder's remedy. Further delay would simply compound the unconstitutional deprivation of the rights of the poor.

---

[27] Article III, Section 1 of the New Jersey Constitution of 1947 reads:

> "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."

[28] Indeed, when plaintiff JZR applied to Franklin Township for the necessary variances and approvals, to build a project containing lower income housing, it met a wall of opposition. Only after many attempts to amicably resolve the situation with the Township, did plaintiff JZR institute suit. Even though Frankin Township conceded the invalidity of its zoning ordinances, change has been resisted.

III. IN CONSOLIDATED SUITS WITH MULTIPLE PLAINTIFFS, THE COURT SHOULD RETAIN ALL CASES IF TRANSFERRING ANY INDIVIDUAL CASE WOULD CREATE A MANIFEST INJUSTICE

This Court raises the question of what a trial court should do if confronted with two lawsuits against the same municipality in which one filed suit before the 60 day mark preceding the effective date of the Act and one did not.

Judge Skillman faced precisely this issue in the Denville and Randolph Township cases. In the Denville and Randolph Township cases, Plaintiff Cali and Plaintiff Randolph Mountain filed suit against these respective Townships within the 60 day "window" period, even though the original complaint had been filed against those municipalities by a public interest plaintiff over seven years ago.

As to the impact in the context of a transfer motion, Judge Skillman concluded that:

> Section 16 should be construed to permit all consolidated cases against a municipality to be heard by the court if manifest injustice would be caused by transfer of any one of the cases.

Morris County II at 55.

Plaintiffs agree this logical, common sense conclusion. Any other result would cause two proceedings to be brought in two separate forums against the same municipality--the trial court and the Council. Both would be charged with

the responsibility of determining (1) what the Township's fair share is; (2) whether the municipality has satisfied its fair share and (3) whether any builder plaintiffs are entitled to a site specific rezoning. The potential for inconsistent results created by such a dual procedure should be avoided if at all possible.[29]

When the subject municipality ultimately is required to rezone to meet its constitutional obligation, which of two inconsistent directives will it abide? Does a rezoning to accommodate the Council's determination of fair share bind the court?

It is rather doubtful that the Legislature intended to provide for simultaneous litigation of the same issues before the court and Council. Given the distinct probability of inconsistent determinations Section 16 of the Act should be construed to avoid such results. It is therefore respectfully submitted that Section 16 of the Act should be construed to require the court to retain jurisdiction over all consolidated cases against a municipality where a transfer would cause manifest injustice to any party, notwithstanding that some actions were commenced within sixty (60) days of the Act's effective date or thereafter.

---

[29] For obvious reasons of judicial economy and efficiency in litigation, one tribunal should handle both cases.

IV. THE FAIR HOUSING ACT IS CONSTITUTIONALLY DEFICIENT[30]

A. TO THE EXTENT THAT THE ACT FORECLOSES AN AWARD OF A BUILDER'S REMEDY IN ACTIONS HEARD BY THE COUNCIL, IT IS INVALID

1. The Act Is Unconstitutional Because It Creates A Per Se Futility Situation In Proceedings Before The Council And Administrative Law Judge

On its face, the Act appears to require a "transferred" plaintiff to exhaust the administrative process embodied therein. Thus, the transferee must participate in the review and mediation process before the Council. Morris County II at 16 n. 3. Thereafter, the transferee may be required to participate in a hearing before an administrative law judge if the mediation fails to culminate in a settlement.[31] Section 15(c).

---

[30] Although it would appear that the Act can, in a number of instances, be interpreted so as to preserve, for the time being, its constitutionality (see e.g., Judge Skillman's written opinion in Morris County II), a decision by this Court directing a transfer of any of the pending cases will require disposition of this threshhold issue. Moreover, in light of the specific facts in the Bernardsville case -- notably, the Borough's interest in vacating or otherwise rendering meaningless the non-appealable consent ordered builder's remedy -- the constitutionality of the Moratorium (Section 28) may also be addressed by this Court. Accordingly, to this extent and for these purposes, plaintiffs have articulated arguments that the Fair Housing Act fails to pass constitutional muster.

[31] This, of course, assumes that this Court rejects the alternative interpretation discussed supra, where it was suggested that the requirement of plaintiff to review and mediate prior to having a "trial on his complaint" authorized a return to the trial court following an unsuccessful attempt at mediation.

Under the Act, neither the Council nor the administrative law judge appear to have any express authority to grant a builder's remedy. The Council's authority includes only the power to grant, deny or conditionally approve a municipality's housing element in response to a municipality's request for substantive certification. Section 14. Similarly, in accordance with this Statute (and the Administrative Procedures Act), the administrative law judge is empowered only to make recommended findings of facts and conclusions of law. See, Fair Housing Act, Section 15(c); see also, N.J.S.A. 52-14B et seq.

Although the Council can affirm, reverse or modify the recommendation of the Administrative Law Judge, the Council itself lacks the express power to award that which the Supreme Court deemed essential to achieve the goals of Mount Laurel II. Requiring exhaustion under such circumstances would obviously be futile, per se. See Patrolmen's Benevolent Association v. Montclair, 128 N.J. Super. 50, 63 (Ch. Div. 1974) (defining a situation to be futile unless the remedy is "certainly available, clearly effective, and completely adequate to right the wrong complained of."). Inasmuch as the builder's remedy is clearly unavailable in a transferred case, there can be no doubt as to the futility of such administrative procedures.[32]

---

[32] A plaintiff may also be excused from exhausting an otherwise available administrative remedy where "an overriding
(continued on next page)

2. The Act Is Unconstitutional Because It Fails To Create A "Realistic Opportunity" For The Production Of Lower Income Housing Throughout The State.

While one may reasonably argue that the Constitution of New Jersey does not mandate one specific "fair share" methodology for calculating a municipality's obligation, no one can reasonably argue with the proposition that the Constitution requires municipalities to create a "realistic opportunity" for the construction of lower income housing. Mount Laurel II, 92 N.J. at 220-22, 352. Any legislation adopted to satisfy the lower income housing needs of our State must, therefore, create a realistic opportunity on a statewide basis. Any less stringent standard would ignore this Court's own interpretation of the demands of the Constitution.

An examination of the Fair Housing Act regrettably reveals that it has not been designed to achieve this salutary

---

(continued from previous page)

public interest calls for a prompt judicial decision." N.J. Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); see also R. 4:69-5. Given the emphasis in Mount Laurel II on expeditiousness, and given the importance of the housing needs of the poor, the need for the prompt, actual construction of lower income housing, ought to qualify as an overriding public interest. Cf. Mount Laurel II, 92 N.J. at 306-7.

This creates a separate constitutional dilemma. Since an overriding public interest may be perceived to exist in every Mount Laurel case, a legislative enactment mandating exhaustion of administrative remedies upon transfer will itself result in a direct conflict between the Act and R. 4:69-5. Where a clear conflict exists between a procedural rule of the court and a statute, the legislative enactment must fall as an impermissible infringement upon the power of the Supreme Court to promulgate and enforce its own rules of procedure.

goal. Instead, as demonstrated infra, it inevitably will fail to produce the realistic opportunities mandated by the Constitution. This conclusion becomes evident when comparing the "incentives" provided by Mount Laurel II to those provided (or missing) in the Fair Housing Act.

Mount Laurel II created the builder's remedy, essentially the Supreme Court's promise to the building community that builders will be able to build at higher densities without having to adhere to cost-generating municipal restrictions if (1) the project contains a substantial amount of lower income housing; (2) the proposed project is suitable from a planning perspective; and (3) the challenger demonstrates that the municipality is exclusionary. Mount Laurel II, 92 N.J. at 279-80. Since a builder obtains no benefit if he fails to establish a municipality's exclusionary character, an incentive exists for voluntarily compliance. Just as the builder's remedy operates as an incentive to bring Mount Laurel litigation, a fear of the builder's remedy operates as an incentive to compliance.

The Fair Housing Act destroys the builder's remedy virtually in toto. As discussed above, it appears to preclude a plaintiff from obtaining a builder's remedy from either the Council or the administrative law judge. Even if a builder's remedy is attainable from the appellate courts, a plaintiff's burden will be extremely difficult. Absent clear direction from this Court to the contrary, it is unlikely that builders

would continue to invest the substantial time and expense necessary to pursue a case through the administrative process. This will have one readily predictable side effect -- with no builders, municipalities have no incentive to comply voluntarily.[33]

---

[33] From an historical perspective, it is apparent that absent such a remedy, few, if any, municipalities would have voluntarily amended their ordinances "in the spirit we have suggested." Mount Laurel II, 92 N.J. at 295. Indeed, this Court's belief "that there is widespread non-compliance with the constitutional mandate of our original opinion in this case" would seem to have inspired Mount Laurel II - an opinion intended to ensure, insofar as possible that actual construction of lower income housing could be achieved. Id. at 199, 352. Thus, this Court stated:

> There being a constitutional obligation, we are not willing to allow it to be disregarded and rendered meaningless by declaring that we are powerless to apply any remedies other than those conventionally used.

Mount Laurel II, 92 N.J. at 287. See also 92 N.J. at 220 (wherein this Court abandoned a numberless approach that depended upon the bona fide efforts of the municipality).

V. SPECIFIC ASPECTS OF THE ACT ARE CONSTITUTIONALLY FLAWED

A. Any Housing That Might Be Provided Through The Fair Housing Act Would Be Substantially Delayed.

The delays affect not only cases transferred to the Council, but also cases retained by the Court. No one could reasonably dispute the fact that the moratorium (created by Section 28) causes substantial delay. This is especially so when reviewed against the favorable market condition presently existing which could be irretrievably lost. Morris County II at 26. Nor could one reasonably disagree that a municipality intent on delay could, without much difficulty, wait until at least September 1, 1987 before adopting a compliant zoning ordinance. Plaintiffs respectfully submit that such delays, when compared to the conviction of this Court to achieve timely compliance, so seriously undermine the constitutional underpinnings of Mount Laurel II that even considerable judicial surgery may be unable to save the Act. Morris County II at 13.

In his Morris County II opinion, Judge Skillman has either conducted the necessary "surgery" or has suggested the extent to which such surgery would be required if the issues were properly before him. While straining to avoid resolving the constitutionality of Section 28, Judge Skillman expressed severe doubts that this section would ultimately survive constitutional scrutiny. Morris County II at 20-26, 22 n. 10.

B. Definition Of Region

In the cases pending before Judge Skillman, certain plaintiffs challenged the constitutionality of the Act because of the mandatory definition of a "region" which, as defined:

> (1) limits housing regions to between two and four counties; and
>
> (2) requires significant social, economic and income similarities within the region.[34]

Section 4(b). Morris County II at 27.

In response to these challenges, Judge Skillman stated that:

> ...the general legislative directive that counties within a region "exhibit

---

[34] The Legislature's intent to treat urbanized, high growth counties as regions, distinct from rural areas is, by definition, an intent to promote exclusionary practices. Not only does the Act's definition of region promote exclusionary ends, but by treating urbanized, high growth counties as regions, it is possible for a significant amount of the need in the region to be lost simply by virtue of the definition of region. For example, Essex and Hudson County might be grouped together as a region because (1) these particular counties exhibit significant social, economic and income similarities and (2) this regional configuration would satisfy the Act's requirement that a region consist of two to four counties. In the event that the Council establishes such a region, the need for lower income housing in this region would in all likelihood far exceed the land capacities of the component municipalities needed to develop lower income housing.

It is because a "wall" has been created around the urban core areas such as Newark and Camden via exclusionary zoning that this Court sought to create housing opportunities in the suburbs. Through the creation of incentives for municipal compliance, this Court intended to enable those households heretofore locked in the urban areas to have access to the expanding employment opportunities found in the surburbs. Mount Laurel II, 92 N.J. 210-11 n.5; cf. Id. at 278.

> significant social, economic and income similarities" neither compels the inclusion of multiple urban counties in a single region nor prohibits the combination of urban and suburban municipalities.

Morris County II at 30. The basic thrust of his analysis was to determine whether it would be possible for the Council to establish regions in accordance with Section 4(b) which would satisfy the constitutional obligation. If so, the validity of this Section of the Act could be preserved.

Should this Court decline to take the step requested below, plaintiffs strongly urge this Court to issue a clear directive that any use of a definition of region that results in a portion of the State's needs for lower income housing being ignored will not be tolerated.

C. Prospective Need

Plaintiffs also challenged the legislative directive that in making a projection of housing needs as defined in Section 4(j) the Council is required to consider "approvals of development applications, real property transfers and economic projections prepared by the State Planning Commission . . ."

This directive would appear to be inconsistent with the Supreme Court's specific instruction that the trial courts should disfavor:

> formulas that have the effect of unreasonably diminishing the share because of a municipality's successful exclusion of lower income housing in the past.

Mount Laurel II, 92 N.J. at 256. Any use of the number of approvals granted in a particular municipality would have predictable consequences. Exclusionary municipalities would be rewarded with reduced fair share obligations. Cf. Mount Laurel II, 92 N.J. at 256 (citing approvingly Judge Furman's basic premise that the impact of past exclusionary zoning must be ignored in determining factors such as region).

Even absent exclusionary zoning practices, the number of applications granted in a given municipality or region constitutes nothing more than a measure of the level of activity in the marketplace at that particular moment. However, such market considerations are wholly irrelevant to the municipality's obligation.[35]

---

[35] The trial court in AMG addressed and rejected the proposition that market considerations should be a factor in identifying prospective need, AMG at 74, based substantially on this Court's statement that:

> The provision of decent housing for the poor is not a function of this Court. Our only role is to see to it that zoning does not prevent it, but rather provides a realistic opportunity for its construction as required by New Jersey's Constitution. The actual construction of that housing will continue to depend, in a much larger degree, on the economy, on private enterprise, and on the actions of the other branches of government at the national, state and local level. We intend here only to make sure that if the poor remain locked into urban slums, it will not be because we failed to enforce the Constitution.

Mount Laurel II, 92 N.J. at 352 (emphasis added).

Ignoring market considerations when identifying prospective need is also sound as a matter of public policy, giving effect to the distinction between the magnitude of the need and the satisfaction of that need. If, for example, 5,000 lower income households are projected to move into a given region during the next six years, that prospective regional need exists irrespective of whether that need can be satisfied through the marketplace, court ordered compliance mechanisms, or the Fair Housing Act.

Judge Skillman concluded that the issues raised by these arguments were not yet ripe, since the Council has been instructed only to "consider" development approvals. In his view, it was technically possible for the Council to "consider" the development approvals in such a fashion so as to not inappropriately reduce the obligations of the various municipalities. See, Morris County II at 32.

In light of the history leading to the enactment of the Fair Housing Act, Judge Skillman's cautious approach seems unreasonable from a practical perspective.

In the Governor's annual message to the New Jersey State Legislature in January, 1985, Governor Kean emphasized that:

> According to a recent study by the Center for Urban Policy Research at Rutgers University, under current formulas, the Mount Laurel directives of the courts could yield over 900,000 housing units in the next six years. That is more than twice as many units as has ever been built

> in the state in a decade - including the high growth years of the 1950's and the 1960's. And, according to the study, that far exceeds the state's needs for housing - 'affordable' and/or otherwise.

Subsequently, Governor Kean's conditional veto of an earlier version of the Fair Housing Act stated:

> A definition of a municipality's and region's "prospective need" as a projection of housing needs designed to eliminate, as far as possible, speculative and theoretical numbers.

Office of the Governor News Release at 3 (April 22, 1985) (emphasis added).

Finally, in his letter to the Senate, Governor Kean noted:

> One key element in determining a municipality's "fair share" of low and moderate income housing is the estimate of "prospective need" in the region and municipality. This bill requires the Council to estimate the prospective need for the State and regions and to adopt criteria and guidelines for municipal determination of prospective need. When preparing its housing element, a municipality must determine its fair share of prospective and present need. Its housing element must provide a realistic opportunity for the provision of this fair share. Despite its importance, nowhere in the bill is a definition of "prospective need" provided. Accordingly, I am inserting such a definition which is designed to help assure that the prospective need numbers are realistic and are not based on theoretical or speculative formulas.

Governor's Veto Message, April 26, 1984 at p. 4.

In light of this background, there can be no serious question that the Act was specifically intended to accomplish that which plaintiffs criticized below. This Court properly identified three critical steps in determining the fair share for any "growth area" municipality:

> (1) identifying the region within which the municipality is located;
>
> (2) defining the present and prospective need for lower income housing within that region; and
>
> (3) equitably distributing the present and prospective regional need to growth area municipalities.

Mount Laurel II, 92 N.J. at 248. To alter these basic steps by ignoring the actual need and by rewarding exclusionary municipalities, will result in a substantial dilution of the constitutional mandate that lower income housing opportunities.

Plaintiffs therefore urge this Court to send a clear signal to the Council that the Act's definition of prospective need will be sustained only if it is applied reasonably and in a manner consistent with this Court's prior rulings.

D. The Credit Defense

Plaintiffs also challenged as flawed, the "credit" standard contained in the Act, Section 7(c), which enables a reduction in a municipality's fair share obligation in a manner

not authorized by Mount Laurel II.[36]

Under the Act, a municipality can receive a "credit" against its fair share where an otherwise affordable housing unit is purchased and occupied by an upper income household the day after substantive certification is issued. A municipality can also receive a full credit for rehabilitating a unit that was not ever included in that municipality's indigenous need figure. If a dilapidated unit was rehabilitated before 1980 (the end date through which the Census data is calculated) that unit was not part of municipality's indigenous need in the first place. The municipality has in effect, already received a credit for such rehabilitated units in the form of a lower indigenous need. To give a credit under these circumstances improperly promotes a "double counting" of credits.[37]

As noted by Judge Skillman, the net effect of a literal interpretation of the Act's credit standard literally could be "that regional present and prospective need would be

---

36 As pointed out by Judge Skillman:

> The part of the Act relating to fair share obligation which raises the most serious Constitutional problems is its treatment of credits for existing lower income housing.

Morris County II at 34-35.

37 In fact, in Countyside Properties v. Borough of Ringwood, ___ N.J. Super. ___ at 15-16, Judge Skillman rejected the Borough of Ringwood's specific request to obtain credits for units rehabilitated before 1980 for precisely this reason.

offset completely by credits and that indigenous needs would be minimal." Morris County II at 36.[38]

In an effort to preserve the constitutionality of this provision, Judge Skillman stated that the phrase "current unit of low and moderate income housing of adequate standard" could

> "be construed to include only units occupied by low income families for which housing cost are not disproportionate to income and which are subject to appropriate controls upon rent or sales price."

Id. at 36.[39] Morris County II at 34-35.

Judge Skillman's concerns regarding the constitutional infirmities of this section were well founded. There is no ambiguity in the Act. The municipality receives a credit for each unit "of low and moderate income housing of adequate standard." Fair Housing Act, Section 7(c)(1). No other

---

[38] As noted by Judge Skillman, if the credits section of the Act were interpreted as suggested above, "its constitutionality would be difficult to sustain." Morris County II at 36.

[39] The legitimacy of the credit standard will depend in large part on how "present need" is ultimately defined. Although the Act is silent on the subject, Judge Skillman assumed that:

> "the Council will develop a methodology for determining the present need for lower income housing which is compatible with the methodology it uses for determining credits....."

Morris County II at 35.

requirements are imposed. As such, this Court should either invalidate this section or direct that this section be interpreted consistently with prior decisional law.

E. Adjustment Of Fair Share Due To Lack Of Infrastructure

Plaintiff's also challenge Section 7(c)(2)(d) because it encourages municipalities with infrastructure limitations to use those limitations to reduce their fair share obligations. Accord Fair Housing Act, Section 11(d). The creation of this infrastructure defense would seem to conflict squarely with the constitutional mandate as articulated in Mount Laurel II and as interpreted in its progeny. In Mount Laurel II, trial courts were instructed to direct a municipality

> [i]n addition to adopting "appropriate zoning ordinance amendments," to take "whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing [as might be] necessary and advisable." (emphasis added).

Mount Laurel II, 92 N.J. at 263 quoting Mount Laurel I, 67 N.J. at 192. See also, Id. at 264 (providing that "[w]here appropriate, municipalities should provide a realistic opportunity for housing through other municipal action inextricably related to land use regulations.") And see also, AMG vs. Warren, slip opinion at 70 (providing that the Township was expected to "do whatever is necessary to help the plaintiffs obtain modifications of existing limitations.")

Judge Skillman rejected this argument essentially because "the Council has not adopted criteria and guidelines" implementing [this section]" and because "no municipality has submitted a fair share housing plan which contains an adjustment of its fair share." Morris County II at 33. Furthermore, in light of the significant role assigned "growth area" description under the State Development Guide Plan (SDGP), Judge Skillman reasoned that the Supreme Court may have indirectly contemplated infrastructure limitations in calculating fair share obligations.

As an examination of the SDGP reveals, a substantial amount of "growth area" is fully developed such that it is not possible to construct any additional lower income housing in those areas. Witness, for example, Newark and the vicinity. Although the entire area is designated "growth", the Housing Allocation Report discloses that no significant vacant developable land remains within Essex and Hudson Counties. In order to satisfy housing needs, land resources, which exist predominently in the suburbs, are obviously required. These communities may not have the available infrastructure. However, such suburban municipalities should not be able to accomplish indirectly that which they could not directly accomplish - that is, an evasion of their constitutional obligations.

Plaintiffs therefore strongly urge this Court to declare the contemplated "adjustments" due to the lack of

infrastructure to be invalid. Alternatively, this Court is urged to send a clear signal to the Council that this provision cannot be interpreted so as to permit a dilution of the statewide need.

F. The Established Pattern Defense

Plaintiffs also challenged Section 7(c)(2)(b) for enabling an adjustment to the municipality's obligation if

> [t]he established pattern of development in the community would be drastically altered.

Mount Laurel II contemplated that provision of a realistic opportunity might result in immediate construction of lower income housing in such quantities as would radically transform the municipality overnight. Id. at 219. Under those circumstances, the Court enabled the trial courts to moderate the impact by phasing over a period of time. Id. The court did not, however, anticipate that the established character of the community would itself justify a reduction in the obligation. Yet, this is precisely what the Act's "adjustment" factor is: a reduction in its "established pattern of a development . . . would be drastically altered."

Whereas Mount Laurel II calls for the trial judge to exercise his power to phase

> sparingly ... with special care to assure that further postponement will not significantly dilute the Mount Laurel obligation,

the Act seems to contemplate not only a downward adjustment of the fair share obligation, but an almost automatic phasing of building permits in inclusionary developments as well. Compare Mount Laurel II at 219 with the Fair Housing Act, Section 23. Thus, the Act encourages a substantial dilution of the Mount Laurel obligation - not just "merely" a postponement of construction. Furthermore, the Act benefits those exclusionary communities that successfully prevented residential development other than on large lots. In such a community even moderate densities would disrupt the "established pattern."

Although Judge Skillman perceived the issue as not yet being ripe, since the Council has not adopted "criteria and guidelines" regarding the established pattern defense, (Morris County II at 33), it would seem unlikely - if not impossible - to construe the provision of Section 7(c)(2) in any manner that could be reasonably consistent with Mount Laurel II.

Should this Court decline to address this issue until the Council has had an opportunity to "interpret" this section, plaintiffs again urge this Court to send a clear signal to the Council articulating the parameters of its discretion.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully urge this Court to affirm the trial courts' denial of the motions to transfer.

GREENBAUM, ROWE, SMITH, RAVIN, DAVIS & BERGSTEIN
Gateway One
Newark, New Jersey 07102
Attorneys for Plaintiffs
Helen Motzenbecker, Siegler Associates, Rakeco Developers, Inc. and New Brunswick Hampton, Inc.

By: Douglas K. Wolfson
Douglas K. Wolfson

Douglas K. Wolfson and Jeffrey R. Surenian
On the Brief

LANFRIT & LINNUS
Tall Pine Center
15 Cedar Grove Lane
Somerset, New Jersey 08873
Attorney for Plaintiff
JZR Associates, Inc.

By: Francis P. Linnus
Francis P. Linnus

Francis P. Linnus and Mark A. Razzano
On the Brief

MEZEY & MEZEY
93 Bayard Street
New Brunswick, New Jersey 08901
Attorneys for Plaintiff
Flama Construction Corp.

By: Frederick C. Mezey
Frederick C. Mezey

Frederick C. Mezey and Jeffrey L. Shanaberger
On the Brief