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Transcript of judge's decision

oct. 2, 1985

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

X - X

URBAN LEAGUE OF GREATER NEW BRUNSWICK,

Plaintiff,

vs.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET,

Defendant.

TRANSCRIPT OF

JUDGE'S DECISION

X - X

October 2, 1985
Toms River, New Jersey

B E F O R E :

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

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

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

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

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

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

A P P E A R A N C E S (Cont.) :

WILLIAM WARREN, ESQUIRE
For Garfield & Co.

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

STEWART M. HUTT, ESQUIRE
For Zirinsky

STEPHEN EISDORFER, ESQUIRE
Assistant Deputy Public Advocate
Amicus Curiae

CARMEN CAMPANILE, ESQUIRE
For Peter Saker

J. ALBERT MASTRO, ESQUIRE
Warren Township Sewerage Authority

JOHN COLEY, ESQUIRE
For Warren Township

WILLIAM LANE, ESQUIRE
For South Plainfield Board of Adjustment

MARIO APUZZO, ESQUIRE
For Monroe Township

RAY TROMBADORE, ESQUIRE
For Timber Properties

PHILIP PALEY, ESQUIRE
For Piscataway Township

EUGENE JACOBS, ESQUIRE
For Warren Township Planning Board

FRANK SANTORO, ESQUIRE
For Borough of South Plainfield

* * * *

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

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

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

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

judges.

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

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

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

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

And finally, as part of placing the issue in a proper perspective, something should be said about the emphasis by defendants on the oft-stated preference by the Court, our Supreme Court, and this Court, for whatever that is worth, that these matters, the housing matters, be left to the Legislature. 10

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

However, it must be noted that the Court's patience and the legislative default has created some circumstances in which it would no longer be 20 viable to vindicate the constitutional obligation by a total abdication of the legislative-executive process; and indeed, Section 16 of the Act recognizes that.

Now, preference for a legislative-executive

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

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

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

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

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

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

Now, it is to be noted that the pertinent section does not define transfer, it obviously doesn't define manifest injustice, and it doesn't define party. 10

The language I have quoted starting with the words, quote, "Any party to the litigation may file a motion with the Court to seek transfer," unquote, replaced a different standard in the prior draft of the Act which reads in part, and I quote: "No exhaustion of the review and mediation procedures established in Section 14 and 15 of this Act shall be required unless the Court determines that a transfer of the case to the Council is likely to facilitate and expedite the provisions of a realistic opportunity for low and moderate income housing." 20

Now, it is by no means clear what the

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

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

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

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

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

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

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

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

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

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

possible cost of relitigation might be reduced.

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

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

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

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

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

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

Some of the builders have stressed the manifest injustice of a transfer in part on the grounds that they have a vested right, in effect, to build homes for the poor. I think to that extent, they inadequately assert their representation of the poor in this litigation if they don't go beyond saying that. 10

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

Now, it should have long since been clear that the status of lower income households rises far above the category of hidden or third-party beneficiaries in Mount Laurel actions. Even where an Urban League or a Civic League, if that's the name now, or a civic group or another non-builder plaintiff is not involved, the lower income class must be considered a full party to this action. The prospect of the builder's remedy is offered as a 20

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

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

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

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

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

Developers and property owners are also

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Act.

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

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

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

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

Council to act on the requested certification.

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

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

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

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

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

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

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

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

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

The Act becomes silent as to what happens at that point, but the Administrative Procedure Act would then take over, I assume, and Section 1:1-16.5 would allow the Council forty-five days to act on the decision by accepting, rejecting, modifying, or remanding the initial decision to the Administrative Law Judge. 10

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

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

With respect to Warren, the AMG complaint was filed on December 31, 1980. Skytop was permitted to intervene in May of 1981, and Timber filed a complaint in July of 1981. 20

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

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

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

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

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

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

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

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

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

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

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

We then engaged in an eighteen-day trial. I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Furthermore, while the plan was being considered by the Court, the township approved a land parcel originally designated for Mount Laurel purposes to be used without set-asides; and therefore, a hearing had to be held on that issue. And what appears to be, in this interpretation of the Court's order, then occurred, as a I read it from the township, it appears as though the Court was bargaining with the municipality. 10

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

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

The township informed the Court in writing that it would do neither, on August 2nd, 1985. And 20 in an order dated August 30th, 1985, the Court confirmed what it had said at the hearing of July 25th, that the compliance ordinance would automatically become non-compliant, because by the township -- its admission, one of the parcels

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

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

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

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

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

Finally, the Piscataway timetable again

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

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

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

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

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

counsel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court, it must include all five here today.

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

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

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

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

Most importantly, and indeed of predominant

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

As the facts which I have recited show, each of the cases before this Court are near completion. The Court's best estimate is that they could be done in anywhere from a month to six months. And even if that estimate is overly-optimistic, the time span is significantly shorter than the approximate nearly two-year process through the Council. 10

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

Now, avoidance of delay at all costs should never be the goal. No one has demonstrated that the Court does not have the expertise to handle these matters and to meet the special issues involved. 20

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

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

In Cranbury, the Court has and will make every effort to evaluate Cranbury's claim of environmental and agricultural preservation. The site inspection was aimed at that goal in part, and the Master's report was sensitive to it. And it is simply incorrect to suggest that the Court cannot or will not deal adequately with the issue. 10

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

In Piscataway's case, the Court has gone through a time-consuming and painstaking process, through an individual site inventory, a personal inspection, a prolonged case -- site-by-site hearing, in order to ensure a fair treatment in the town, and will extend that into the next compliance hearing. 20

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: All right. Mr. Neisser.

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

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

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

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

hearing.

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

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

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

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

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

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

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

THE COURT: Not the sales.

MR. NEISSER: The stay.

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

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

MR. SANTORO: Bidding permits were. We are talking now about the completion of transactions of land sales involving borough land that was not included in the Mount Laurel inventory. 10

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

On his behalf, I would ask that at least his application, which he by letter had renewed for that particular parcel, be disposed of relatively 20 expeditiously.

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

MR. PALEY: Thank you, Your Honor.

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

(End of proceedings.)

* * * *

C E R T I F I C A T E

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

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

Date: 10-18-85

McDONOUGH, MURRAY & KORN
A Professional Corporation
555 Westfield Avenue
P. O. Box "O"
Westfield, New Jersey 07091
(201) 233-9040
Attorney for Plaintiffs AMG Realty Company and Skytop Land Corp.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NO. L-23277-80 P.W.
L-67820-80 P.W.

AMG REALTY COMPANY and SKYTOP LAND CORP., Plaintiff	Civil Action
JOAN H. FACEY, et als., Intervenors,	ORDER DENYING TRANSFER TO COUNCIL ON AFFORDABLE HOUSING
vs. THE TOWNSHIP OF WARREN, Defendant,	
CONSOLIDATED WITH TIMBER PROPERTIES, Plaintiff,	
vs. THE TOWNSHIP OF WARREN, et als., Defendant.	

This matter having been presented to the Court upon the application of the defendant, Township of Warren, for a transfer of the case to the Council on Affordable Housing pursuant to the Fair Housing Act (N.J.S.A. 52:27D-301 et seq.), with John E. Coley, Jr., Esquire, appearing on behalf of Warren Township, J. Albert Mastro, Esquire, appearing on behalf of the Warren Township Sewerage Authority, Eugene W. Jacobs, Esquire, appearing on behalf of the Warren Township Planning Board, Joseph E. Murray, Esquire, appearing on behalf of AMG Realty Company and Skytop Land Corp., and Raymond R. Trombadore, Esquire, appearing on behalf of Timber Properties, Inc., and there being no appearance by or on behalf of any other party herein, and the Court, having considered the certification and briefs filed on behalf of the Township of Warren as well as the certification and brief filed on behalf of AMG and Skytop as well as the argument of counsel, and, based thereon the Court, for the reasons set forth in its oral opinion rendered on October 2, 1985, having determined that such motion for transfer should not be granted;

It is on this 15 day of October, 1985, ORDERED that the application of the Township of Warren for transfer of this case pursuant to Section 16 of the aforesaid Fair Housing Act (N.J.S.A. 52:27D-316) is denied.

Eugene D. Serpentelli

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

PAPERS CONSIDERED:

( ) Notice of Motion
( ) Movant's Affidavits
( ) Movant's Brief
( ) Answering Affidavits
( ) Answering Brief
( ) Cross-Motion
( ) Movant's Reply
( ) Other_____