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Joint Responding Brief for Δ/Twp of Warren, Warren Twp Planning Board + Warren Twp Sewerage Authority

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AMG REALTY COMPANY, a Partnership organized under the laws of the State of New Jersey and SKYTOP LAND CORP., a New Jersey Corporation, Plaintiffs-Respondents, vs. THE TOWNSHIP OF WARREN, a Municipal Corporation of the State of New Jersey, Defendant-Appellant. Consolidated with TIMBER PROPERTIES, Plaintiff-Respondent, vs. THE TOWNSHIP OF WARREN, THE PLANNING BOARD OF THE TOWNSHIP OF WARREN and THE WARREN TOWNSHIP SEWERAGE AUTHORITY, Defendants-Appellants.	SUPREME COURT OF NEW JERSEY A-130 September Term, 1985 Docket No. 24,789 Civil Action (Mount Laurel II) ON APPEAL FROM ORDER OF LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY Docket Nos. L-23277-80 P.W. L-67820-80 P.W. Sat Below: HONORABLE EUGENE D. SERPENTELLI Judge, Superior Court

JOINT RESPONDING BRIEF FOR DEFENDANT/APPEALLANT, TOWNSHIP OF WARREN, WARREN TOWNSHIP PLANNING BOARD AND WARREN TOWNSHIP SEWERAGE AUTHORITY

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BRIEF

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I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Appellant relies on the Procedural History and Statement of Facts as previously presented in the initial Brief filed in this appeal.

II. LEGAL ARGUMENT

A. THE LEGISLATIVE STANDARD FOR STATUTORY CONSTRUCTION COMPELS THAT MANIFEST INJUSTICE BE CONSTRUED IN ACCORDANCE WITH THE TEST ESTABLISHED IN GIBBONS.[1]

The essence of the plaintiff's position with reference to the interpretation of "manifest injustice" in Section 16 of the Fair Housing Act [N.J.S.A. 52:27D-316] (hererinafter "Act") is that the Court should use a generally accepted meaning of that phrase. The plaintiff bases this on the legislative standard for construction of statutes as set forth in N.J.S.A. 1:1-1 which states:

> In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the Legislature or unless another different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning.

The plaintiff focuses on the portion of this statute requiring construction based upon a word or phrase's "generally accepted meaning." Plaintiff then refers to Webster's New Collegiate Dictionary, (Rev. 4th Ed. 1981) and Black's Law Dictionary, (Rev. 4th Ed. 1968) to define "manifest injustice" as being "an easily recognized unfairness." It is submitted, however, that the statute goes

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1. The Gibbon's test is as follows:

> The essence of this inquiry is whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively. [Gibbons v. Gibbons, 86 N.J. 515, 523-524, citations omitted]

further than merely requiring generally accepted meanings for construction of statutory words and phrases.

N.J.S.A. 1:1-1 also requires that words and phrases which have a "special or accepted meaning in law" should be construed in accordance with that meaning. Section 16 of the Fair Housing Act was not the first instance where the phrase "manifest injustice" has been utilized or defined in the law. Defendant/Appellant, Warren Township, (hereinafter "Warren") has presented the position that the test for "manifest injustice" which should be adopted by the Court is that enunciated in Gibbons v. Gibbons, 86 N.J. 515 (1981). [Db 7-18: 8-20]. In accordance with N.J.S.A. 1:1-1, Gibbons gives the phrase "manifest injustice" an "accepted meaning in the law" and; thus, pursuant to that statute, the phrase should be construed in accordance with that accepted meaning. Where the Court has previously given meaning to the phrase, it would be unreasonable to require the Court to revert to a definition or meaning based upon a word by word analysis grounded in dictionary definitions. Furthermore, since the issue in Gibbons was substantially similar to that in the present case -- retroactive application of a statute -- it is reasonable to expect that the term "manifest injustice" shall be similarly defined in both circumstances. If the Court were required to revert to the generally accepted meaning based on a mere dictionary definition each time a phrase is presented, then judicial construction would be rendered meaningless. It is, therefore, respectfully submitted that the statute cited requires application of the test in Gibbons v. Gibbons, supra, as the "special or accepted meaning in the law" for the phrase "manifest injustice".

B. THE FACTORS FOR DETERMINING "MANIFEST INJUSTICE" PRESENTED BY PLAINTIFF ARE INAPPROPRIATE.

Plaintiff presents seven factors for the Court's consideration in applying its test for "manifest injustice." Underlying the factors presented by the plaintiff is plaintiff's assumption that "manifest injustice" means "an easily recognized unfairness." Since the appropriate test is that set forth in Gibbons v. Gibbons, supra., the factors cited by plaintiff are inappropriate.

There are seven factors presented by the plaintiff. They are: delay in implementation of the Mount Laurel objectives, dual cost of evidentiary hearings, costs incident to delay, loss of incentive to pursue public interest litigation, shifting of burden of proof, loss of builder's remedy relief and lack of participation in council processes. While some of these factors have been addressed in the initial Brief presented by Warren, each of these factors deserves some response herein.

1. Delay.

Warren's position with respect to delay has been previously set forth in its initial Brief filed in this appeal. [Db 11-3 to 14-2]. With respect to the sequence and timing of events under the Act as presented by the plaintiff, it is submitted that there are substantial unknowns which cannot be determined because the regulations have not as yet been promulgated by the Council on Affordable Housing. (hereinafter "Council"). While Warren does not have any substantial dispute with the timing set forth in plaintiff's initial Brief under the "best of circumstances" [Pb 13-50 to 15-35]; the factors which are presented by plaintiff as causing further delay must be addressed.

Overriding any analysis or consideration of actions of an administrative agency, it is necessary to assume that the administrative agency will create regulations to effectuate the goals established by the Legislature in the underlying statute. See, Lane v. Holderman, 23 N.J. 304, 319-320 (1957), Cammarata v. Essex County Park Commission, 26 N.J. 404, 410-411 (1958). Therefore, we must assume that the Council will create regulations to effectuate the goals of the Act and that, in turn, the goals set forth in the Mount Laurel decisions shall thereby be attained. Thus, many of the doubts or claimed deficiencies in the statutory process will likely be addressed and resolved through the administrative process. As was stated in Cammarata:

> Indeed, the function of promulgating administrative rules and regulations lies at the very heart of the administrative process. Through the entrustment of such powers, our lawmakers achieve expert and flexible control in areas where the diversity of circumstances in situations to be encountered forbids the enactment of legislation anticipating every possible problem which may arise in providing for its solution. Como Farms, Inc. v. Foran, 6 N.J. Super 306, 313 (App. Div. 1950); 42 Am. Jur., Public Administrative Law, §§4 and 35. [26 N.J. at 410].

Plaintiff first contends that there is no mandate that a resolution of participation be filed by a municipality under Section 9(a) of the Act. With respect to Warren, this is irrelevant inasmuch as Warren has prepared and submitted its resolution of participation. [Da 11, 12]. Furthermore, in the event a municipality fails to file such a resolution, an aggrieved party or concerned citizen may file the necessary action in a court of law which, undoubtedly, would spark a municipality into action under the Act.

As to plaintiff's complaint that the Act does not require a municipality to affirmatively seek substantive certification, it is submitted that this may be a subject addressed in the regulations to be promulgated by the Council.

This challenge, therefore, is premature. Furthermore, an aggrieved party or concerned citizen may also institute litigation in order to compel a municipality to seek substantive certification.

The third negative factor presented by the plaintiff, which appears to be a rather pervasive concern of the plaintiff, is that only a person who institutes litigation less than sixty days before the effective date of the Act may request mediation under the Act. [Pb 16-40 to 17-15 and 46-1 to 48-12]. While this, too, may be the subject of regulation, it is submitted that the simple resolution would be for the plaintiff or any aggrieved party to file a new action which would then put the plaintiff in a position of a party instituting litigation after the effective date of the Act and thus allowing for a mediation request. Again, subject to the creation of regulations by the Council this challenge is premature and without substantial basis.

As to the fourth and fifth concerns of plaintiff -- the potential unlimited time for mediation after request for substantive certification, and the refiling; these areas, too, will probably be addressed in the rules promulgated by the Council. In sum, whether the additional delaying factors cited by plaintiff shall, in fact, cause delay is at best questionable. Warren, however, maintains that any delay caused by the processes before the Council is no more than that which may be attributed to the normal litigation and appeals process; and further, that the damage which may result from hurried piecemeal planning is greatly outweighed by the benefit to the general welfare resulting from a carefully planned future for the State.

2. Dual Costs.

Plaintiff argues that it will suffer injustice because the $250,000.00 it has spent thus far will be essentially wasted because the transfer to the Council would not result in preservation of testimony and further that the law of the case would be essentially lost. As was presented below, Warren maintains that the cost factor presented by plaintiff is of minimal significance. Nevertheless, the transfer would not necessarily render the cost and expenses of the plaintiff worthless. Moreover, the transfer would most likely prove to be less expensive for the plaintiff than continuing through the judicial system.

Much of the plaintiff's preparation for the trials will not be lost and will be available to the plaintiff for presentation to the Council in the mediation process or as may be allowed by the regulations developed by the Council. Furthermore, the Council is directed under Section 7 of the Act [N.J.S.A. 52:27D-307] "to give appropriate weight to pertinent research studies, government reports, decisions of other branches of government, implementation of the State Development and Redevelopment Plan ... and the public comment" in reaching its decision. As a result, much of the work, research, and the decisions of Judge Serpentelli, may be carried over and used by the Council in rendering their determination under Section 7.

As to the alleged additional cost, the administrative process may be less costly than an additional trial (relative to compliance questions), which is likely to result in the present litigation, numerous potential pretrial motions, and likely appeals. Thus, it is highly probable that the Council process may be less expensive to the plaintiffs than continuation of the litigation.

3. Cost Incident to Delay.

Plaintiff maintains that the developer will be injured as a result of the "prospect" of rising land costs, carrying charges, construction material and labor costs. At first it is evident that plaintiff does not present a justifiable basis for this argument. Effect on profitability, or profit motivation, should not be a factor in zoning in general or in the public interest issues presently before the Court. Assuming, however, that the rising costs are a fact, this increase will be made up by the increases in sales prices of the "non-Mount Laurel units" and any commensurate increase in value or cost of the "Mount Laurel units" as a result of potential increases in the levels which constitute low and moderate income.

4. Loss of Incentive to Pursue Public Interest Litigation.

Here, plaintiff presents the argument that if this case is transferred to the Council, it will leave a bitter taste in their (plaintiff's) mouths and the result would most likely deter others from attempting such litigation in the future. It is submitted, however, that the purpose of the Act is to attain the goals of Mount Laurel and to reduce interminable litigation generated by the Mount Laurel decisions. Again, many of the plaintiff's concerns and complaints may be addressed and redressed through the regulations promulgated by the Council.

5. Shifting Burden of Proof and Presumptions.

Plaintiff argues that since it obtained a "final judgment" in the decision of the Honorable Arthur S. Meredith, J.S.C., on May 27, 1982, the burden of proof as to the validity of the Warren Ordinance has shifted to Warren and the shift is an "inherent attribute" of the plaintiffs. It is submitted, however, that it is incumbent upon the municipality to prepare an ordinance which comports

with the regulations and requirements promulgated by the Council under the Act in order to obtain a substantive certification. [N.J.S.A. 52:27D-314] Thus, the municipality must satisfy the criteria in its ordinance in order to obtain substantive certification and all the protections that go along with it. Further, it is submitted that the "burden" is not a protected right of the plaintiff, but is, in fact, a burden placed on a municipality which contradicts the usual presumption in favor of a municipality's zoning.

Plaintiff's reliance upon the May 27, 1982 judgment of Judge Meredith is also misplaced. Plaintiff maintains that it is a "final judgment". In terms of the decision in Mount Laurel II, however, this judgment is not final, but would be considered merely an interim judgment. Judge Meredith's judgment declared the then zoning ordinance of Warren unconstitutional and required Warren to rezone in compliance with the principles of Mount Laurel. [Pa 23, 24]. Under Mount Laurel II, however, this Judgment is considered interim inasmuch as it required Warren to rezone and the Court retained jurisdiction in the matter much the same as it does via the present interim judgment entered by the Honorable Eugene Serpentelli. Another important factor is that the plaintiff has not relied upon the May 27, 1982 Judgment in any manner. The plaintiff filed a supplemental complaint under Mount Laurel II and completely relitigated the matter with respect to a different ordinance and obtained an interim judgment granting plaintiff a builder's remedy subject to the ability of Warren to demonstrate that the property of the plaintiff is not suitable for multi-family development for planning and environmental reasons. For the reasons set forth, it is submitted that any benefits or rights which the plaintiffs gained by means of the May 27, 1982 Judgment have essentially been extinguished

by the decision in Mount Laurel II, by the plaintiff's own action in relitigating under Mount Laurel II, and by the inherent nature of the judgment entered.

For these reasons, it is submitted that the plaintiff's concern with a shifting burden of proof is misplaced and should not be considered as a factor with respect to determining "manifest injustice."

6. Loss of Builder's Remedy.

The plaintiff expresses concern that it will have lost its "right" to a builder's remedy as granted in the Order of the Honorable Eugene D. Serpentelli [Da 3]. This issue was previously addressed in the initial Brief submitted by Warren. [Db 14-3 to 16-7 and Db 25]; and Warren shall rely upon the arguments presented therein.

7. Lack of Participation in the Council Process.

As stated above, this appears to be the continuing concern of the plaintiff. It is again submitted that the participation of a pre-Act litigant will likely be addressed in the rules and regulations promulgated by the Council. Furthermore, as stated above, if the plaintiff may not participate under the rules and regulations promulgated by the Council, an additional action may be filed to make the plaintiff a post-Act litigant which would allow a request for mediation and therefore participation in the Council process. Finally, and most importantly, we must presume that the Council shall take all reasonable actions to produce and attain the Mount Laurel goals. There is no basis to challenge this assumption or to assert that the Council shall in any way attempt to pervert the goals of Mount Laurel. The Fair Housing Act clearly adopts, and seeks to provide, the relief the Court sought through the Mount Laurel decisions. See, N.J.S.A. 52:27D-302a. All the concerns presented by the plaintiff with

respect to the detailed problems of the Act or the failure of the Act to resolve each and every potential circumstance, are problems often inherent in legislation which delegates powers to administrative agencies. The Act sets forth the goals and the basic framework for the actions by the Council and leaves the Council to prepare and promulgate regulations to "achieve expert and flexible control in areas where the diversity of circumstances in situations to be encountered forbids the enactment of legislation anticipating every possible problem." Cammaratta v. Essex County Park Commission, supra. at 410.

C. MEDIATION PROVISIONS OF THE ACT ARE CONSTITUTIONAL

As has been previously noted, Plaintiff maintains that the Act is unconstitutional because it does not provide a process by which a "pre-Act litigant" can request mediation at the outset of the Council process. As has been stated previously herein, plaintiff's problem may be resolved through the Council's regulations and/or by refiling to become a post-Act litigant.

Assuming that the Council shall act to preserve the intent and purpose of the Act -- giving judicial deference to the will of the lawmakers whenever reasonable men might differ as to whether the means devised by the Legislature serve a public purpose and conforms to the Constitution -- it is submitted that the presumption of validity of legislative enactment should be applied thus allowing the court to construe the Act to avoid constitutional defects. See, New Jersey Board of Higher Education v. Shelton College, 90 N.J. 470, 478 (1982), Schulman v. Kelly, 54 N.J. 364, 370 (1969). It is, therefore, submitted that the plaintiff has not been denied equal protection as a result of the mediation provisions, because of its ability to obtain mediation through other means. Further, it is submitted that this challenge is premature inasmuch as the rules and regulations to be promulgated by the Council may resolve any apparent infirmity in the statute.

a microcosm of the entire State than a portion of a cohesively planned region. Dual approaches of litigation and mediation and review will create irreconcilable methods of approaching and resolving the controversies within any single region. Any inconsistencies should be avoided where a reasonable result, which comports with the clearly identified purpose of the Act, can be made possible. See, City of Clifton v. Passaic County Board of Taxation, 28 N.J. 411 (1958); Elizabeth Federal Savings and Loan Association v. Howell, 24 N.J. 488 (1957). It is, therefore, submitted that as many matters as possible should be transferred to the Council. Where there is doubt, such as where there are Section "16" and "16(b)" plaintiffs, the intent of the legislature must control and the matter should be transferred.

D. BUILDER'S REMEDY MORATORIUM APPLIES IN ALL CASES[2]

As previously stated, the Act creates an administrative skeleton to direct the Council in its implementation of the constitutional obligations delineated in Mount Laurel II. The Legislature clearly contemplated that it would take some time for the Council to organize and carry out its duties. It, therefore, imposed rigid time schedules for determining the housing regions, estimating present and prospective need for low and moderate income housing at the State and regional levels, and adopting criteria and guidelines to permit municipalities to prepare and file housing elements and adopt appropriate ordinances for submission to, and review by, the Council. [N.J.S.A. 52:27D-307 and 309]. A moratorium upon builder's remedy "in any exclusionary zoning litigation which has been filed on or after January 20, 1983" was imposed to coincide with the time within which a municipality must prepare and file its housing element. [N.J.S.A. 52:27D-328]

The Legislature has the power to impose a moratorium where there is a substantial relationship to the public welfare. Cappture Realty v. Board of Adjustment of Elmwood Park, 133 N.J. Super. 216, 221 (App. Div. 1975). Measures which restrict development and preserve the status quo so that agencies may organize and implement administrative remedies have been held to be appropriate instances for imposition of a moratorium. Toms River Affiliates v. Department of Environmental Protection, 140 N.J. Super. 135 (App. Div. 1976). The

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2. Warren did not address this point in its inital brief due to the fact that the provision in question did not effect Warren. Inasmuch as the plaintiff has addressed this issue, Warren has determined that it would be appropriate to address the same herein despite the fact that it is irrelevant to this particular case.

moratorium imposed by Section 28 of the Act falls into the category set forth above. It is both reasonable and rational to impose such a moratorium in order to achieve legislative goals. See, Schiavone Construction Company v. Hackensack Meadowlands Development Commission, 98 N.J. 258, 264-265 (1985). It is reasonable because it coincides with the anticipated time needed to allow the Council to start functioning and to permit the municipalities to file housing elements. Further, it is reasonable because the moratorium provides a mechanism to enable municipalities to meet their constitutional obligations in an orderly manner, fair to the low income persons to be housed, to the general welfare and to the municipalities involved.

The moratorium in question is reasonable in duration and is consistent with the overall objectives of the Act and the Mount Laurel decisions. It is also rationally related to achieving the overall Mount Laurel objectives without depriving any party of its rights. The legislative intent must therefore be recognized in the moratorium. See, Schiavone Construction Company v. Hackensack Meadowlands Development Commission, supra.

Trial

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December 11, 1985

Keith M. Endo, Deputy Clerk
New Jersey Supreme Court
Hughes Justice Complex
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Trenton, NJ 08625

Re: AMG Realty, et al. vs. Township of Warren, et al.
Supreme Court of New Jersey, A-130
Docket No. 24,789

Dear Mr. Endo:

Please find enclosed nine (9) copies of a Responding Brief of the Township of Warren, Warren Township Planning Board and Warren Township Sewerage Authority pursuant to the Court's letter of instructions. Pursuant to my conversation with you, it is my understanding that appellants are to use white covers in the reply briefs. Therefore, I have used a white cover in lieu of the buff as required by Rules of Court for reply briefs.

Very truly yours,

KUNZMAN, COLEY, YOSPIN & BERNSTEIN

Steven A. Kunzman

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encs.
HAND-DELIVERED

E. TRANSFER APPLICATIONS UNDER SECTION 16 SHOULD BE TREATED CONSISTENTLY TO EFFECTUATE THE LEGISLATIVE INTENT[3]

Disputes encompassed within Section 16B of the Act are to be resolved pursuant to the mediation and review process. As was argued in the initial Brief submitted by Warren, [Db 5-18] cases covered under the first portion of Section 16 should also be transferred unless the plaintiff can demonstrate "manifest injustice" under the test developed in Gibbons v. Gibbons, supra. It is submitted that the clear intent of the legislation is to resolve as many disputes as possible under the mediation and review process before the Council in order to create a complete and cohesive plan for the development of the State of New Jersey consistent with the general welfare.[4] To permit both the Courts and the Council to resolve Mount Laurel disputes will only produce inconsistent results due to the different approaches employed and the different criteria and guidelines followed by each tribunal. As an example: the determination of housing regions by the Council under Section 7A of the Act, and the factors to be utilized in adopting criteria and guidelines under Section 7C are not required to be considered or utilized by the Court. The likely result shall be different municipal fair share numbers and thus inconsistent planning and zoning within a region. Municipalities zoned under the Court Rules will tend to be more of

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3. Warren did not address this point in its inital brief due to the fact that the provision in question did not affect Warren. Inasmuch as the plaintiff has addressed this issue, Warren has determined that it would be appropriate to address the same herein despite the fact that it is irrelevant to this particular case.

4. The State Legislature clearly intended to resolve existing and future disputes involving exclusionary zoning through the mediation and review process provided in Section 14 and Section 15 of the Act, not through litigation. N.J.S.A. 52:27D-303, Assembly Municipal Government Committee, Statement to the Senate Committee Substitute for SENATE Nos. 2046 and 2334, February 28, 1985. Par. 8.

III. CONCLUSION

For the reasons stated above, along with those stated in the initial Brief filed on behalf of the Township of Warren, the Planning Board of the Township of Warren and the Warren Township Sewerage Authority, it is submitted that the Fair Housing Act is, in all respects, constitutional. It is further respectfully submitted that the Legislature intended as many cases as possible to be transferred to the Council so that they may be handled under the provisions of the Fair Housing Act in order to promote the cohesive and consistent planning of all the regions of the State of New Jersey for the benefit of the general welfare. It is further submitted that no party shall suffer "manifest injustice" under the test enunciated in Gibbons v. Gibbons, supra. as applied to this case and that "manifest injustice" will occur to the defendant if the matter is not transferred. The within matter must, therefore, be transferred to the Council on Affordable Housing.

Respectfully submitted,

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on behalf of the Township of Warren,
The Planning Board of the Township of
Warren and The Sewerage Authority of
the Township of Warren

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