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Joint Brief for Twp of Warren, Planning Board
+ ~~the~~ 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, vs. THE TOWNSHIP OF WARREN, a Municipal Corporation of the State of New Jersey, Defendant. Consolidated with TIMBER PROPERTIES, Plaintiff, vs. THE TOWNSHIP OF WARREN, THE PLANNING BOARD OF THE TOWNSHIP OF WARREN and THE WARREN TOWNSHIP SEWERAGE AUTHORITY, Defendants.	SUPREME COURT OF NEW JERSEY A-130 Docket No. 24,789 Civil Action (Mount Laurel II) ON APPEAL FROM ORDER OF LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY Sat Below: HONORABLE EUGENE D. SERPENTELLI Judge, Superior Court

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JOINT BRIEF FOR TOWNSHIP OF WARREN, WARREN TOWNSHIP PLANNING BOARD AND WARREN TOWNSHIP SEWERAGE AUTHORITY

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BRIEF

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER CITATIONS

I. PROCEDURAL HISTORY

The original complaint against Warren Township was that of plaintiff, AMG which was filed on December 31, 1980. The plaintiff, Skytop, was permitted to intervene in May of 1981. Plaintiff, Timber Properties, filed its complaint in July of 1981. The matter was originally tried before the Honorable Arthur S. Meredith, J.S.C., who rendered a decision on May 27, 1982, invalidating the zoning ordinance of the Township of Warren and directing rezoning.

In December of 1982, the Township adopted a new zoning ordinance. Plaintiffs, AMG and Skytop were granted leave to file a supplementary complaint challenging the new ordinance. Said supplementary complaint was filed on January 17, 1983. Shortly thereafter, the decision in So. Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) (hereinafter "Mount Laurel II"), was issued. This matter was then transferred to the Mount Laurel Judge assigned to Central New Jersey, Honorable Eugene D. Serpentelli.

The within case was the first Mount Laurel II matter to actually be tried: the trial commencing in January of 1984. On July 16, 1984, Judge Serpentelli issued an opinion in this matter, and on August 1, 1984, an interim judgment was entered. [Da3].[1] The interim judgment set fair share, ordered rezoning of the Township of Warren, and found plaintiffs to be entitled to a builder's remedy subject to the issues of suitability; that is, whether the land was appropriate for multi-family use based upon environmental and planning considerations.

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1. All "Da" references are the Appendix to Warren's brief submitted in support of the Motion for leave to appeal.

On July 2, 1985, the Fair Housing Act, (hereinafter "the Act") P.L. 1985, Chapter 222, [N.J.S.A. 52:27D-301, et seq.] was approved. On August 1, 1985, the Township Committee for the Township of Warren adopted a resolution which constitutes a "resolution of participation" under Article 9, Section A of the Act. The resolution authorized the preparation and submission to the Council of a "housing element" and the filing of a motion to transfer the within litigation to the Affordable Housing Council. Subsequently, the motion to transfer was filed with the Court.

On October 2, 1985, the Honorable Eugene D. Serpentelli heard oral argument from counsel along with counsel in other litigation, and denied all motions for transfer. On October 15, 1985, Judge Serpentelli entered the Order denying the motion for transfer. [Da97].

The Township filed a motion for leave to appeal on October 29, 1985. On November 13, 1985, the Supreme Court of New Jersey granted leave to appeal and certified the matter for hearing and decision directly to the Supreme Court.

II. STATEMENT OF FACTS

The matter before the Court has not reached the stage of "final" judgment as the same is defined in Mount Laurel II. The constitutionality of the Warren Township Ordinance and the determination of Warren's fair share were decided by the Honorable Eugene D. Serpentelli, J.S.C. on July 16, 1984, with an order being entered August 1, 1984. The parties have been involved in the compliance aspect of the case since the 1984 decision. Warren conducted the necessary hearings and submitted a proposed ordinance to the Court and the appointed Master, Philip Caton, on December 21, 1984. The report by Mr. Caton, in response to the ordinance, however, has not yet been filed.

Warren Township is located in Somerset County. Most of the municipalities which surround Warren are either presently involved in Mount Laurel litigation or have entered into settlements of their Mount Laurel cases. Warren has been named as a third party defendant in the case brought against one of the immediate neighbors of Warren, the Township of Green Brook. Top o' the World Corporation, et als. v. Township of Green Brook v. Township of Warren, et als., Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-068913-84. The entire Central New Jersey region is, in one form or another, involved in the process of guided growth, development, expansion and revitalization envisioned by the Mount Laurel doctrines. Older suburban centers such as Plainfield are feeling economic pressures from the loss of economic base, and newer suburbs are growing as both residential and commercial communities. Warren is not an isolated case. It is only one of the many municipalities in the region which are facing the onslaught of Mount Laurel cases brought by private developers.

The Fair Housing Act was created by the Legislature and approved by the Governor. The Act was created as a response to the New Jersey Supreme Court's decisions in Mount Laurel I and Mount Laurel II. The Act provides a means for addressing the constitutional problems which were sought to be resolved in the Mount Laurel decisions. Indeed, the Act provides a body for the handling of planning and dispute resolution which have evolved from the Mount Laurel doctrine, the Council on Affordable Housing [herinafter "Council"]. Section 16 of the Act provides a method by which existing disputes can be transferred to the Council. It is the contention of the Township of Warren that this case is an appropriate case to be,transferred to the Council for the reasons set forth in the proceedings below and the reasons set forth herein.

III. LEGAL ARGUMENT

A. THE DECISION OF THE TRIAL COURT SHOULD BE REVERSED AS NO PARTY SHALL SUFFER MANIFEST INJUSTICE IF THIS MATTER IS TRANSFERRED TO THE COUNCIL ON AFFORDABLE HOUSING

The primary issue before the Court is whether the various matters before it should be transferred from the courts to the Council. Section 16 of the Fair Housing Act (N.J.S.A. 52:27D-316) sets forth the basis by which a case such as the ones before the Court can be transferred to the Council. It states:

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

The question which was faced by the Courts below, and which is presented here on appeal, is whether any of the parties would suffer "manifest injustice" by a transfer of their case to the Council. The first inquiry, then, is what is "manifest injustice".

1. What is the meaning of "manifest injustice".

The best place to start any inquiry into the language of a statute is to review its legislative history. A review of the history of Section 16 reveals that it had been changed numerous times in the legislative process. The initial Bill, Senate Bill No. 2046, provided that the courts, in their discretion, could require parties in cases such as the instant case to exhaust the administrative procedures provided in the Act. The proposed section set forth several factors to be considered by the courts in making that determination.

The factors to be considered included the age of the case, the amount of discovery and pre-trial procedures, the likely trial date, the likely date for the completion of the administrative review process, and whether the transfer would be likely to facilitate and expedite the provision of the necessary housing.[2]

The transfer provision was changed when Senate Bill No. 2046 was combined with Senate Bill No. 2334. The resulting language provided that exhaustion of administrative procedures would not be required "unless the court determines that a transfer of the case is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing." That provision was finally amended by the Assembly to its final and present form which requires the court only to consider whether or not the transfer would result in a "manifest injustice" to any party. The language changes, more specifically the final change, it is respectfully submitted, does not necessarily demonstrate what "manifest injustice" is. It does, however, demonstrate what it is not. It is not meant to be only a determination of whether the transfer is likely to facilitate and expedite the provision of low and moderate income housing; that

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2. The Section stated:

> Any court of competent jurisdiction shall have discretion to require the parties in any lawsuit challenging a municipality's zoning ordinance with respect to the opportunity to construct low or moderate income housing, which lawsuit was instituted either on or before June 1, 1984, or prior to six months prior to the effective date of this act, to exhaust the mediation and review procedure established in section 13 of this act. No exhaustion of remedies requirement shall be imposed unless the municipality has filed a timely resolution of participation. In exercising its discretion, the court shall consider: (1) The age of the case; (2) The amount of discovery and other pre-trial procedures that have taken place; (3) The likely date of trial; (4) The likely date by which administrative mediation and review can be completed; and (5) Whether the transfer is likely to facilitate and expedite the provision of a realistic opportunity for low and moderate income housing. [Section 14(a) Senate Bill No. 2046.]

language was specifically excluded. The Assembly committee majority stated that the intent of the legislation was to focus on "whether or not a manifest injustice to a party to a suit would result, and not just whether or not the provision of low and moderate income housing would be expedited by the transfer." [Assembly Municipal Government Committee, Statement to Senate Committee Substitute for SENATE No's 2046 and 2334, February 28, 1985, par. 5].

Underlying all the provisions and changes in the legislation as it moved forward, it is important to keep in mind that the Legislature declared it to be the State's preference to resolve existing and future disputes involving exclusionary zoning by means of the review and mediation process set forth in the Act and not by litigation. N.J.S.A. 52:27-303.[3] The above-quoted statement indicates that the Legislature desires to have as many matters transferred to the Council as possible. The Act, further, must be considered to apply not only to cases which arise after the effective date of the Act or the sixty day pre-enactment cut-off, but also retroactively, subject to the "manifest injustice" provision. It is necessary, then, to determine the meaning of "manifest injustice."

It is Warren's position that the test for "manifest injustice" which is most appropriate for the situation before the Court is that enunciated in Gibbons v. Gibbons, 86 N.J. 515 (1981). In Gibbons, "manifest injustice" was discussed with respect to the retroactive application of an amendment to the divorce statute regarding equitable distribution. The Court stated that even if a statute may be subject to retroactive application, it must finally be asked

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3. See, also, Assembly Municipal Government Committee, Statement to Senate Committee Substitute for SENATE No's 2046 and 2334, February 28, 1985, par. 8

whether such application would result in "manifest injustice" to a party adversely affected. Id. at 523. The Court stated:

> 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. [Id. at 523-524, citations omitted].

Thus, in order to demonstrate "manifest injustice" a party must demonstrate both aspects of the test: that the party relied to its prejudice on the prior law, and that the consequences to it as a result of the reliance are deleterious and irrevocable.

While the question here is not whether the statute can be applied retroactively per se, the problem is substantially similar. Here the question relates to the effect of a new statute on an existing legal framework. In essence, the problems and issues are the same: should a new legislative scheme be applied to a case or situation which commenced prior to the enactment of the statute.

The facts to be considered, therefore, must be viewed in terms of the test presented in Gibbons. They are the factors from which it can be determined whether the transfer would result in consequences to the parties which are deleterious and irrevocable.

2. Factors to be considered in determining "manifest injustice".

The first and most important factor to be considered is whether the transfer would thwart the effort of the plaintiffs to obtain the constitutional goal of equity in housing. It is submitted that there can be no question that the Act seeks to provide the same relief as the Court sought to provide in the Mount

Laurel decisions: municipal zoning which provides a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families. See, N.J.S.A. 52:27D-302a. It is respectfully submitted that the Act does not attempt to interfere with the constitutional goals sought to be achieved in the Mount Laurel decisions. The primary effect of the Act is the means by which the end is attained. As shall be discussed more fully below, the methods created under Mount Laurel II were accomplished in lieu of legislative action and do not amount to a part of the constitutional obligation. The Legislature has not sought to affect the constitutional declarations of the decisions, it has only taken the cue from the Supreme Court by adopting an administrative scheme to foster compliance by the municipalities and to reduce or extinguish the interminable litigation which has been a significant by-product of the Mount Laurel cases. A transfer of this case, therefore, would not thwart the achievement of the ultimate goal of Mount Laurel litigation. Under this first factor, therefore, there would be no manifest injustice to the plaintiffs, whether they are named developer-plaintiffs or the non-plaintiff low and moderate income families.

A second factor which should be taken into account is whether the general welfare of the state would be negatively affected by a transfer to the Council. It should be first noted that general welfare does not only include the rights of the low and moderate income families of the State. The general welfare is

directed at all of the people of the State of New Jersey. The legislature has declared in the Act:

> The interest of all citizens, including low and moderate income families in need of affordable housing, would be best served by a comprehensive planning and implementation response to this constitutional obligation. [N.J.S.A. 52:27D-302b.].

The Court has also declared the importance of sound planning on a regional basis. 92 N.J. at 238. Therefore, a comprehensive planning mechanism is and should be preferred for the charting of the future of this State. This is what is offered by the Council. The Council provides a vehicle for the planning and allocation of distributive housing throughout the State. It is respectfully submitted that the Council is more preferable to the judicial system created under Mt. Laurel II because the Council must deal with the State as a whole, not one municipality at a time as each one is brought before the Court. It allows for a transfer of fair share within the region, among other things, which confirms the regional scope of planning. If the constitutional objective is viewed on the broad perspective, only then it is submitted, can the general welfare of the State be taken into account. Only by a careful, cohesive approach which deals with the State as a whole can we be sure that the product of our endeavors, to provide low and moderate income housing, are correct and enduring. It is respectfully submitted that a transfer does not negatively effect the general welfare; quite to the contrary, it would enhance it by ensuring that all the citizens of New Jersey are protected. Therefore, this factor further demonstrates that no "manifest injustice" would arise as a result of a transfer. Injustice, however, will occur on a failure to transfer as the general populous and all municipalities of the State would be deprived of the benefit of a unified

planning process to replace the present piece-meal process based on litigation and the adversarial process.

One factor which has been presented by all plaintiffs, and the only factor which was considered in the decision appealed from, is delay. The trial court contended that the provision of low and moderate income housing would be substantially delayed if the matters are transferred to the Council. Judge Serpentelli stated that he believes the proceedings on this, the AMG matter could be completed in approximately four months. [Da77-4[4]]. While that schedule is possible, it is respectfully submitted that the experience of Warren is that the schedules created by Judge Serpentelli have underestimated the actual time within which required tasks have actually been completed. For example, the decision in the AMG matter was rendered on August 1, 1984. Consistent with Mt. Laurel II Warren was ordered to amend its ordinance within 90 days. Despite the diligent and reasonable efforts of Warren to hold the necessary meetings to prepare the ordinance, the ordinance was not able to be prepared and forwarded to the Court until December 21, 1984. Almost one year has elapsed since that time and the Court and parties are still awaiting a response from the Court appointed master. Regardless of the reasons or causes for the delay, the fact of the matter is that progress has not been made in accordance with the schedule anticipated. Secondly, the four month schedule does not take into account the time consumed by the potential appeal from any determination which has been or

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4. Reference is to the portion of the decision in the appendix to the brief filed on behalf of the Township of Warren in support of motion for leave to appeal.

shall be rendered by the trial court.[5] It is respectfully submitted that it would be improper to permit any construction during the appellate process. Since issues on appeal would most likely include determinations of fair share, set aside, location of construction and phasing, the builders would not be able to properly plan development and the municipality would not be able to properly plan its allocation of resources. Furthermore, it would be difficult if not impossible to alter the construction or plans in the event the appellate court reverses or modifies the trial court's determination. In short, the mere fact that the trial court may be able to complete its phase of the litigation in four months does not mean, that construction shall commence immediately thereafter. Depending upon the date the trial proceedings are completed and upon the nature of any appeals or how far within the State and Federal system appeals can and shall be pursued, construction may not be able to be commenced for a substantial period of time. If, for example, the appellate process took six months to a year,[6] construction may not be able to commence until early to mid 1987. This time frame, it is submitted, is not any quicker than that which would result from a transfer to the Council.

The time which would be required to exhaust the administrative mechanism of the Council is not totally clear at present. The schedule prepared by Judge

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5. Since Warren contests the determinations by the trial court thus far, an appeal from any final determination is inevitable. In the event, however, the Court confirms the proposed ordinance, it is likely that plaintiffs, too, shall appeal.

6. It is submitted that this is at a minimum. The time required could possibly be substantially longer considering the time which would be required to obtain and review the voluminous technical transcripts, prepare briefs, and so forth. Further, depending on the results, an appeal to the Federal courts is also a possibility.

Skillman, it is submitted, appears accurate, except that it assumes a "worst case" scenario. The time schedule presented in the Act are maximums. Thus, the time could be substantially reduced depending on the Council. In any case, September 1, 1987, is an outside date. Thus, the time for conclusion of the process under the Act is consistent, if not shorter than it would be if it went through the judicial system; considering the time required for appeals. Furthermore, it is firm and not subject the delays of litigation and appeals.

Even if this matter could be concluded within four months, it is submitted that the shorter time does not create sufficient ground for the finding of "manifest injustice" to the named plaintiffs or non-plaintiffs. The problem which both the Mt. Laurel decisions and the Act seek to resolve is inequity in housing opportunities for low and moderate income families. The inequity which is sought to be resolved is purportedly a product of decades of exclusionary zoning.[7] In order to change the trend, to create and implement a fair housing plan, we must be careful not to rush into the first viable solution. As was stated above, the "general welfare" requires that the best interest of the entire state be addressed, not only the interests of low and moderate income families in need of adequate housing. By permitting the within matters to be transferred to the Council the planning will be able to be conducted in a more unified and cohesive fashion, thus benefiting the "general welfare" and allowing

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7. It is respectfully submitted, however, that housing inequity is a result of more than the exclusionary effects of modern zoning. It is also a result of developers seeking to maximize profits and years of social segregation on economic grounds. Indeed, this is not necessarily only the product of the rich trying to keep out the poor as is indicated by a California statewide referenda which reflected a desire to maintain discriminatory home sales. See, Baum and Mohn, Toward A Free Housing Market, 24 Rut. L. Rev. 712, 714 (1976).

each municipality to be planned and zoned under the same standards and in a equitable fashion.

Other factors as to injustice to the plaintiffs which may be considered are specific to each case, and the particular plaintiffs involved. With regard to the developer plaintiffs in this case -- A.M.G., Skytop and Timber Properties -- it is submitted that there is no basis for them to assert that they will suffer "manifest injustice" by the transfer. Even if the test were applied, it is respectfully submitted that there can not be any findings of "manifest injustice". First, the only actions of reliance by the developers would be the pursuit of the litigation. Their pursuit of this litigation, however, does not demonstrate that they relied to their prejudice on the pre-Fair Housing Act law. The only benefit they could have reaped in their actions was the builder's remedy award and the corresponding ability to maximize their profits. All developer plaintiffs herein, however, commenced these actions under Mt. Laurel I. At that time the builder's remedy was only to be used in rare circumstances. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 551, n.50 (1977). Therefore, it is difficult to see how they could assert that these actions were brought only because of the builder's remedy. Furthermore, it is clear that the builder's remedy is not a vested right; even under Mt. Laurel II. In the instant matter the developer's right to build multi-family housing on their property may be terminated upon Warren's demonstration that those lands are not suitable for such development for planning and environmental reasons. 92 N.J. at 279-280; AMG v. Warren, ___ N.J. Super. _____ (1984), (slip opinion 68, 70) Thus, these plaintiffs cannot demonstrate that they relied to their prejudice on the law in effect before the enactment of the Act. It must also

"rights" are at best secondary in Mt. Laurel cases. Developers have only been entitled to bring these actions in order to benefit the lower income people of this State, not to maximize their profits. The developer plaintiffs cannot satisfy the first portion of the "manifest injustice" test.

The developers cannot satisfy the second portion of the "manifest injustice" test either. If it is or can be determined that the developers did rely on the pre-Act law to their prejudice, it is submitted that the consequences of this reliance are not so deleterious and irrevocable that it would be unfair to apply the Act. First, as stated above, the essential aspects of the Act comport with that of the Mt. Laurel cases. Provision for low and moderate income housing will be provided: possibly on the various developer's parcels, possibly not; possibly at the densities they desire, possibly not. In any case, the right to develop land in a certain way is never vested; it is always subject to the police power and the general welfare. Zoning has never been governed by the right to the highest profit and there is no reason that it should be now. From the first major decision on zoning, it has been clear that one only has a right to a use of the property, not to reap the most profit. See, Euclid v. Ambler Realty, 272 U.S. 365 (1926) and Bern v. Fair Lawn, 65 N.J. Super. 435 (App. Div. 1961). Here the plaintiff developers will not be prevented from developing their property; they just may not be allowed to develop it the way they want to or the way they deem to be most profitable. From the standpoint of the law and issues which are before the Court arising from both the Act and the Mt. Laurel cases, the effect of the transfer would not be very serious, deleterious, or irrevocable. The ultimate goals of both shall be attained if the case is transferred to the Council and the "general welfare" of all the residents of

transferred to the Council and the "general welfare" of all the residents of New Jersey shall be protected in the process. The consequences of the transfer, therefore, are not deleterious or irrevocable with respect to the Mt. Laurel goals -- indeed, the goals would not be altered. The effect on the developer would only be with respect to the degree of profit they may reap from developing the properties, a benefit which has never amounted to a right. Therefore, the second aspect of the Gibbon's test can also not be sustained as to the developers.

In addition to the factors set forth above, the courts should also consider whether any "manifest injustice" would result to the defendants if this matter is not transferred. The Act contains certain provisions and directions for the actions and determinations of the Council. It is submitted that unless this case is transferred to the Council, Warren, its residents, and other similarly situated municipalities and their residents will be deprived of certain rights and benefits which will be available to others who have not had the bad fortune of being sued earlier. The result would be inequities in the determination of various factors including fair share, set aside, and phasing. This will result in unbalanced planning within regions which would contain "Mount Laurel II communities" and communities planned under the Act. This would defeat the stated preference for sound and comprehensive planning on a regional basis. See, 92 N.J. at 238, and N.J.S.A. 52:27D-302b.

One section of the Act which illustrates the problem is section 7c [N.J.S.A.27D-307c]. That section requires the Council to adopt criteria and guidelines for the determination of a municipality's fair share; adjustment of fair share based upon vacant developable land, infrastructure, or environmental or historic preservation factors; and phasing. The regulations adopted by the

Council may differ from those adopted by the Courts and may, therefore, result in substantial inequities between various municipalities in the same region.

Another area of concern is the regional contribution agreements allowed under Section 12. [N.J.S.A. 52:27D-312]. Under this section a municipality may propose the transfer of up to fifty percent of its fair share to another municipality in its housing region. This is only available to municipalities involved in exclusionary zoning litigation upon receipt of permission by the court. If the court believes the request reasonable, it must have the proposal reviewed by the Council. In the event the Council has not fully promulgated its rules and regulations or sufficiently analyzed the region in question, the municipality's effort would be futile. The municipality would, therefore, suffer unequal treatment, unequal protection, and therefore, "manifest injustice".[8]

A final, yet fundamental concern, is whether the courts or the Council are better equipped to handle the issues and decisions. While the courts are not lacking in ability, the Council, it is submitted, is more attuned to the problems due to its make up, and can conduct its hearing and deliberations without the burdens of the adversarial system. The Council, unlike the courts, is not merely an arbitor of the dispute, but is, in essence, an active participant in the planning process. This, too, it is submitted, will allow for the uniform and cohesive approach requested by both the Court and the Legislature.

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8. If the Court determines that it would be inappropriate to allow the Council to make the determination the trial court's four month projection for completion may also be affected. Since it is submitted that it would be unfair to deprive a municipality of the ability to transfer a portion of its fair share, any delay accorded to the request must be allowed. In short, this further demonstrates problems with the efforts of the trial courts to dispose of these matters as

In summary, the test which should be applied in determining whether to transfer a matter to the Council is that which is set forth in the Gibbons decision. Inasmuch as the transfer is beneficial to the general welfare, would not result in any substantial delay (although any delay would not, in effect, be detrimental to the goals of Mt. Laurel and the general welfare) and since a transfer would result in "manifest injustice" to Warren, it is respectfully submitted that this matter should be transferred to the Council on Affordable Housing and that the decision of the Court below should be reversed.

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(CONT.) soon as possible.

B. THE SCOPE OF REVIEW BY AN APPELLATE COURT OF THE TRIAL COURT'S DETERMINATION IS WHETHER THE THE TRIAL JUDGE PROPERLY CONCEIVED OF APPLICABLE LAW AND WHETHER HE PROPERLY APPLIED THE LAW TO THE FACTUAL COMPLEX.

The statutory segment which is the subject of the Court's review is Section 16 of the Act. [N.J.S.A. 52:27D-316]. As discussed above, the Act establishes that cases, such as the within, can be transferred to the Council after considering whether or not the transfer would result in "manifest injustice" to any party to the litigation. In making its determination the trial court was required to take into account certain facts and the Court was required to exercise its discretion as designated under Section 16 of the Act. In reviewing the exercise of discretion, the Appellate Court should be concerned with whether the trial judge properly conceived of the applicable law, and whether the trial judge properly applied the law to the facts of the case. In re Presentment of Bergen County Grand Jury, 193 N.J. Super. 2, 9 (App. Div. 1984); Cavanaugh v. Quigley, 63 N.J. Super. 153, 157 (App. Div. 1960). In the event the trial judge misconceives or misapplies the law, or if the factual findings are inconsistent or unsupportable, then the appellate tribunal can adjudicate the controversy anew. In re Presentment of Bergen County Grand Jury, supra., Rova Farms Resort, Inc. v. Investors Insurance Company, 65 N.J. 474, 483-484 (1974).

In the present matter, it is respectfully submitted that the trial court not only misconceived and misconstrued the law, but did not properly apply the law to the factual complex. Although Judge Serpentelli presented numerous factors to be considered in making the determination as to whether or not the party would suffer "manifest injustice" as a result of a transfer, the only

take into account the full factual complex. In light of the above, it is respectfully submitted that the Court may review the determinations of the trial court, adopt the standards for "manifest injustice" as set forth herein, and, after considering the factual complex presented. In conducting this review it is respectfully submitted that the Court must reverse the determination of the trial court and allow this matter to be transferred to the Council on Affordable Housing.

C. THE FAIR HOUSING ACT IS CONSTITUTIONAL BOTH ON ITS FACE AND AS TO ANY PART TO BE APPLIED TO THE WITHIN MATTER.

1. Facial Validity.

The Legislature enacted the Fair Housing Act in response to the Mount Laurel I and Mount Laurel II decisions of the New Jersey Supreme Court. The mere fact that the Legislature has enacted a statutory scheme to effectuate the Mount Laurel doctrine which is, in some respects, different from the compliance mechanism created by the Supreme Court in Mount Laurel II, does not make the statute unconstitutional. The compliance mechanism is not what is constitutionally required by the Supreme Court. The constitutional directive requires municipalities to zone to provide a realistic opportunity for the fair share of a region's present and prospective need of housing for low and moderate income families. It is respectfully submitted that the goals of the Act are consistent with the decisions of Mount Laurel I and Mount Laurel II. The language of the Supreme Court in Mount Laurel II makes it clear that the Court only molded the mechanism for implementation of the Mount Laurel directive due to the absence of the legislative action. 92 N.J. at 212. For example, with reference to the determination of whether a municipality is required to adhere to the doctrine the court dropped the "developing municipality" criteria and replaced it by using the determinations of growth areas in the State Development Guide Plan. In doing so, the court stated:

> Clearly, however, the method adopted was simply a judicial remedy to redress a constitutional injury. Achievement of the constitutional goal, rather than the method of relief

selected to achieve it, was the constitutional requirement. [92 N.J. at 237].

Again, the mere fact that the legislative scheme forcing the Mount Laurel obligation differs from that which was developed by the Supreme Court does not render the Act unconstitutional. The Supreme Court time and again throughout Mount Laurel II noted that it preferred legislative action in the area and that it was only acting in absence thereof. Presented with the challenge the Legislature created the Act in order to provide an administrative mechanism which would allow for the attainment of the Mount Laurel goal in the way it deemed most fit and appropriate. In lieu of perpetuating an adversarial system which was the natural result of Mount Laurel II, and in an effort to create compliance, the Act provided a vehicle for consensual compliance with Mount Laurel which would avoid trials and would result in construction of housing for low and moderate income persons as soon as possible providing, however, that the planning and development could be done in a cohesive and unified manner under the direction of a single body, the Council on Affordable Housing.

The general principals which govern judicial consideration of any attack upon the constitutionality of legislation is that every possible presumption should favor the validity of an act of the legislature inasmuch as the Legislature is composed of popularly elected representatives. Judicial deference has always been to the will of the lawmakers whenever reasonable men might differ as to whether the means devised by the Legislature to serve a public purpose conforms to the constitution. New Jersey Sports and Exposition Authority v. McCrane, 61 N.J. 1, 8 (1972). The Courts have held, in accordance with the "presumption of validity of legislative enactments" that a challenged statute will be construed, where possible, to avoid constitutional defects if it is reasonably

possible to do so. New Jersey Board of Higher Education v. Shelton College, 90 N.J. 470, 478 (1982); Schulman v. Kelly, 54 N.J. 364, 370 (1969). Where a statute is capable of either being found unconstitutional or valid depending on its construction, the one which will uphold its validity, it has been held, should be adopted. Ahto v. Weaver, 39 N.J. 418, 428 (1963). It has also been held that a Court may strike out unnecessary provisions or narrow construction of a statute to preserve its constitutionality. Town Tobacconist v. Kimmelman, 94 N.J. 85, 104 (1983); New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Commission, 82 N.J. 57, 75 (1980).

It is therefore, respectfully submitted, that the statute in question, the Fair Housing Act, is constitutional, or, if there are any portions which may render it unconstitutional, that they can be adjusted or narrowed so that this Act may be considered constitutional.

2. Builder's Remedy.

Although the moratorium on builder's remedies is not an issue in the Warren Township case, the issue of builder's remedy has been presented below as a basis for "manifest injustice" which would be suffered by the developer plaintiffs in the event the matter is transferred to the Council. Plaintiffs contend, in essence, that upon a transfer they would lose their "right" to the builder's remedy obtained in the interim judgment. Since this matter has been dealt with previously under the first segment of this brief, it will be dealt with only briefly herein. Inasmuch as the Act does not appear to allow a prior decision of builder's remedy via an interim judgment to follow a matter which may be transferred to the Council, and since the builder's remedy does not amount to a "right" as set forth above, an unconstitutional situation is not created. As has been stated, the right to develop a parcel for the highest profit, or for any particular purpose, has never been considered vested under zoning law. While it is possible that the transfer does not preclude the Court designating that the builder's remedy should follow a transfer, it is submitted that it need not and that this would not cause the Act or any part of it to be unconstitutional.

3. Requirement for Exhaustion of Administrative Remedies and Rule 4:69-5.

Rule 4:69-5 provides that except where it is manifest that the interest of justice requires otherwise, actions under that Rule shall not be maintainable as long as there is a viable right of review before an administrative agency which has not been exhausted. While the courts have a right to dispense with the said exhaustion of administrative remedies in certain matters, it is submitted that this conflict does not create an unconstitutional dilemma. While the court may have a right under the Rules to make this the determination, the matter has been designated by the Legislature under section 16 of the Act to be judged by the test of "manifest injustice." This test provides a basis for the courts to make a determination as to whether the matter can be transferred to the Council or should remain with the courts. The Legislature has not attempted to totally preclude the courts from retaining jurisdiction in certain matters, and has not endeavored to affect any right the court may have. The Legislature has provided a basis for the court's determination. The test which the court should follow has been set forth above as the test outlined in Gibbons v. Gibbons, supra. Furthermore, the various factors which the court may take into account in making its determination have also been set forth above. It is therefore respectfully submitted that the portion of the Act which provides the test for determination as to whether the Court may retain jurisdiction or whether the court should transfer the matter so that the administrative remedy can be exhausted is not unconstitutional and should be allowed to stand.

4. Region.

Section 4(b) of the Act defines "housing region" as:

> A geographic area of no less than two no more than four contiguous, whole counties which exhibits significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas as defined by the United States Census Bureau prior to the effective date of this Act.

It is respectfully submitted that the fact that the definition provided may be at variance with prior decisions of the courts, does not cause this 1
determination or the Act as a whole to be unconstitutional. As Judge Skillman has stated, "there is an element of arbitrariness in any method of delineating housing regions for the purpose of determining a municipality's regional fair share obligation." Morris County Fair Housing Council v. Boonton Township, ____ N.J. Super _____ (at Law Div. 1985) (slip opinion at 27). There have been numerous alternatives presented throughout the history of Mount Laurel. Although commuter shed regions have generally been approved, these too have a question as to whether thirty minutes or forty-five minutes or some other commuting time should be used to delineate the region. As a result of all the varying opinions and theories which have been developed and used for delineation 2
of the regions, it is submitted that every approach creates certain practical and conceptual problems. As the trial court in this matter noted, "while the finding of regions is of a paramount importance in designing a method to distribute fair share, it is only a vehicle toward accomplishing the ultimate goal -- satisfaction of the constituional obligation." AMG Realty, et al. v. Warren Township, supra -- (slip opinion at 28). The question, therefore, is whether the constitutional obligation as developed through the Mount Laurel decisions can be met through the establishment of regions in accordance with

Section 4(b). Inasmuch as the methodology provided under the Act appears to be consistent with the regions proposed by the Center for Urban Policy Research (fixed regions composed of no less than two and no more than four whole counties which are to a substantial extent congruent with PMSAs) the adoption by the Council appears to have a reasonable basis and is not arbitrary or a reason to render the Act unconstitutional.

It is respectfully submitted that the regions proposed under the Act are consistent with the objectives of Mount Laurel and therefore are not unconstitutional nor should they affect the constitutionality of the Act.

5. Delay.

As stated in the first portion of this brief, it is submitted that there will be no substantial delays as a result of any transfer to the Council as respects this matter. Nevertheless, in the event that the court finds that there will be some delay, it is respectfully submitted that any delay in the enforcement of the constitutional obligation does not create grounds for determining the unconstitutionality of the Act in whole or in part.

Both the Act and the Mount Laurel decisions seek the same goal. They both seek to resolve inequities in housing opportunities for low and moderate income families. As was stated above, "general welfare" requires that the best interest of the entire state be addressed in implementing the Mount Laurel obligation. Therefore, it is submitted that the vehicle for planning which is most cohesive and all encompassing is preferable. It is submitted that the Council is the appropriate body to enact the Mount Laurel directive. By permitting the within matter to be transferred to the Council, the planning will be able to be conducted in a more unified and cohesive fashion, under a consistent set of rules, regulations and criteria that will be applied equally to all municipalities. It would therefore benefit the "general welfare" and allow each municipality to be planned and zoned within its region and not to be a mere microcosm of the entire State. See, 92 N.J. 238. The mere fact that a delay may be caused does not render the Act unconstitutional on its face. As was observed in Robinson v. Cahill, 69 N.J. 449 (1976) at 474-475:

> In the area of judicial restraint and moderation there is room for accommodation to the exigencies of government, as pointed out by Judge Conford, in the consideration of practical possibilities of accomplishment. Brown v. Board of Education of Topeka, 349 U.S. 294, 300-01, 75 S.Ct. 753,

> 756, 99 L.Ed 1083, 1106 (1955). This court has exercised restraint in the timing of required accomplishment of a constitutional goal, without abandoning its eventual enforcement.

Thus, it is submitted that the court must allow the legislature the opportunity to enact a method of resolving the constitutional dilemma. Indeed, the court in Mount Laurel II consistently indicated its preference for legislative action in this field. Now that the Legislature has acted it is submitted that the court should defer to the legislative scheme as much as possible so long as the scheme allows for the accomplishment of the constitutional goal.

6. Prospective Need.

Section 4(j) of the Act provides a basic definition for "prospective need" as being:

> A projection of housing needs based on development and growth which is reasonably likely to occur in a region or municipality, as the case may be, as a result of actual determination of public and private entities.

Inasmuch as the Legislature only requires that consideration be given to development applications, there is no facial invalidity in this provision. It should be noted that the Council has also required the taking into consideration and "shall give appropriate weight to pertinent research studies, government reports, decisions of other branches of government, implementation of the State development and redevelopment plan ..." Section 7(e). Thus, there are a variety of factors which the Council should be taking into consideration depending on the matters to be determined. All the information presented is not required to be given a specific weight, but is merely required to be considered. Therefore, it is respectfully submitted that there is no basis for finding that the determination of prospective need as set forth in the Act is in any way unconstitutional or would in any way void any portion of the Act or cause the Act in itself to be unconstitutional.

7. Severability.

Section 32 of the Act provides that if any part of the Act is considered by the Court to be invalid, that the remaining portions of the Act shall not be affected thereby. It states:

> If any part of this Act shall be held invalid, the holding shall not affect the validity of remaining parts of this act. If a part of this act is held invalid in one or more of its applications, the act shall remain in effect and all valid applications that are severable from the invalid application.

It is submitted that this Section in unambiguous and gives rise to a strong presumption that the Legislature did not intend the validity of the Act as a whole, or any part of the Act, to be affected depending on whether any particular provision of the Act was invalid. See, Inganamort v. Borough of Fort Lee, 72 N.J. 412, 422 (1979); Brunetti v. Borough of New Milford, 68 N.J. 576, 600 n.23 (1975). The clear and unequivocal language of the Act demonstrates that the Legislature intended that the Act would survive a finding that one of its provisions was unconstitutional. This being the intent of the Legislature, if any portion of this Act is deemed to be unconstitutional, it is submitted that it may either be excised or read to allow for the remainder of the Act to retain its constitutionality.

IV. CONCLUSION

It is respectfully submitted that for the reasons set forth above, the Fair Housing Act is, in all respects, constitutional. It is respectfully submitted that the Legislature intended that as many cases as possible should be transferred to the Council so that they may be handled under the terms and regulations as adopted by the Council on Affordable Housing. It is further submitted that under the test enunciated in the Gibbons v. Gibbons, supra., for "manifest injustice" as applied to this case demonstrates that this matter should be transferred to the Council on Affordable Housing. Inasmuch as the court below failed to properly enunciate the test, and failed to properly apply the test to the factual complex, and for the reasons stated herein, it is respectfully submitted that the decision below should be reversed and this matter should be transferred to the Council on Affordable Housing.

Respectfully submitted,

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