ML - Morris County Fair Housing Council v. Boonton (Denville) Aug 9, 1985

Brief in opposition to defendant's motion to transfer case to the affordable housing Council

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Plaintiff, Siegler Associates

Plaintiff MORRIS COUNTY FAIR HOUSING COUNCIL, et al *vs.* *Defendant* BOONTON TOWNSHIP, et al	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY *Docket No.* L-6001-78 P.W. *CIVIL ACTION*
Plaintiff AFFORDABLE LIVING CORPORATION, INC., a New Jersey Corporation vs. Defendant MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS/MIDDLESEX COUNTY Docket No. L-042898-84 P.W. CIVIL ACTION
Plaintiff SIEGLER ASSOCIATES, a partnership existing under the laws of the State of New Jersey vs. Defendant MAYOR AND COUNCIL OF THE TOWNSHIP OF DENVILLE	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS/MIDDLESEX COUNTY Docket No. L-029176-84 P.W. CIVIL ACTION

Plaintiff STONEHEDGE ASSOCIATES vs. Defendants THE TOWNSHIP OF DENVILLE, in the COUNTY OF MORRIS, a Municipal Corporation of the State of New Jersey, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF DENVILLE and THE PLANNING BOARD OF THE TOWNSHIP OF DENVILLE	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS/MIDDLESEX COUNTY Docket No. L-086053-84 CIVIL ACTION
Plaintiff MAURICE SOUSSA and ESTHER H. SOUSSA vs. Defendants DENVILLE TOWNSHIP, a Municipal Corporation of the State of New Jersey, situate in Morris County, and THE DENVILLE TOWNSHIP PLANNING BOARD	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS/MIDDLESEX COUNTY Docket No. L-38694-84 P.W. CIVIL ACTION

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO TRANSFER CASE TO THE AFFORDABLE HOUSING COUNCIL

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INTRODUCTION

Aside from the constitutional infirmities of the new Mount Laurel legislation [hereinafter the Fair Housing Act or the Act] upon which Denville Township relies, the very terms of the Act prohibit a transfer if such a transfer would cause a "manifest injustice". If there is any case in which it would be manifestly unjust to transfer the matter to the Council, this is that case. This case has reached the final steps in a process spanning almost seven years of litigation. Therefore, this Court should complete the process and thereby ensure that Denville Township satisfies its Mount Laurel obligation and that lower income housing at long last is built in this recalcitrant Township.

STATEMENT OF FACTS

There is no dispute as to the facts central to this dispute. On October 13, 1978 a Complaint in Lieu of Prerogative Writ was filed by the Department of Public Advocate on behalf of itself, the Morris County Fair Housing Council and the Morris County Branch of the National Association for the Advancement of Colored People against the Township of Denville. Following the Mount Laurel II decision, on January 20, 1983, this case was transferred to this Court, which held status conferences in the spring and summer of 1983. Defendant's brief at 1-2. On May 15, 1984, Siegler Associates brought a Mount Laurel action seeking a builder's remedy. Defendant's brief at 2. Thereafter, several additional plaintiffs brought suits seeking builder's remedies. In July, 1984, this Court tried the case. When Denville announced that it would probably agree to settle this matter, the Court suspended the trial on August 3, 1984 to give the parties the opportunity to settle the case. When settlement discussions failed to bear fruit, Siegler Associates moved and obtained summary judgment declaring Denville's zoning ordinances non-compliant. The trial to determine Denville's "fair share" resumed in January 1985 and the Court established Denville Township's fair share to be 924 units. Defendant's brief at 5-6.

On January 31, 1985, the Court appointed David Kinsey, Ph.D. to serve as the master. Beginning in May, 1985, the

master held a series of meetings in which all the parties attended. In those meetings, the master sought (1) to establish standards for evaluating the suitability of each site and (2) to evaluate the suitability of each site based on the standards developed. The master always stood ready to mediate between any plaintiff or other landowner in Denville and the Township, in an effort to reach a compromise that would result in a project consisting of a substantial amount of lower income housing. Throughout the proceedings, the master stood ready to assist the municipality in revising its regulations to satisfy Mount Laurel.

Despite the master's considerable efforts, despite the willingness of each builder to develop a project that would be attractive to the Township, and despite the considerable efforts of each builder in attending numerous meetings and hearings, the municipality ultimately submitted a compliance proposal to the master which was not only facially invalid, but also evidence of the bad faith of the municipality. See Exhibit A. That compliance package relied on a mandatory set aside wherein the owner was assured of losing more money by building under the set aside than by building in accordance with the existing zoning. Such a set aside mechanism hardly creates the type of incentives necessary to create a realistic opportunity. See Exhibit B at page 6 (explaining how the set aside creates disincentives to development). In light of the

Township's vast experience with Mount Laurel compliance mechanisms through years of litigation and through intensive negotiations with the Public Advocate, the Township's production of a compliance package which relied on such a set aside was not the product of the Township's naivete. Rather, the Township was continuing the pattern of delay and evasion which had typified its conduct throughout the proceedings.

It was obvious to all the parties to the proceedings before the master that the Township was not genuinely interested in satisfying its obligation. Instead, the Township's tactic was clear -- stall, in the hope that legislation would be enacted and that this case would be transferred to a legislative body, thereby delaying as much as possible the day when lower income housing would be produced in Denville.

Legislation was enacted on July 2, 1985. Almost immediately thereafter, on July 8, 1985, Denville filed its motion papers seeking a transfer to the Council on short notice. Should this Court permit Denville to do that which it seeks, this Court will have rewarded Denville for the game it has played so masterfully.

LEGAL ARGUMENT

POINT I

ASSUMING THE FAIR HOUSING ACT PASSES CONSTITUTIONAL MUSTER, UNDER THE TERMS OF THAT ACT, IT WOULD BE MANIFESTLY UNJUST TO TRANSFER THIS CASE AT THIS LATE DATE TO THE AFFORDABLE HOUSING COUNCIL

The Fair Housing Act provides the following:

> For those exclusionary zoning cases instituted more than 60 days before the effective days 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.

Fair Housing Act, Section 16 (emphasis added).

Thus, it is the clear legislative intent that a Court should not release a case to the Affordable Housing Council if it would be "manifestly unjust." Given the stage in the Mount Laurel process that this case has reached, it would be manifestly unjust to all the parties to eliminate all that has been accomplished thus far and to begin again at the first step before the Council. Furthermore, the need for the prompt, actual construction of lower income housing is such a part of the fabric of the Mount Laurel doctrine that a transfer would be manifestly unjust to ask the poor to wait still longer for the housing opportunities which Denville has denied them for so long.

A. The Defendant's Request Comes Too Late in the Proceedings

Of the several stages in the Mount Laurel process, we have now reached the final stages. To summerize, in the first step, the builder must seek to negotiate in good faith with the municipality in an effort to reach a Mount Laurel settlement without litigation. Mount Laurel II at 214. Second, the plaintiff may file his complaint if negotiations fail to bear fruit or if negotiations appear futile. J.W. Field v. Franklin Tp. at 15. Third, Mount Laurel II calls for "the strong hand of the judge at trial" to move the case through case management proceedings. Mount Laurel II at 292. Fourth, the trial begins. At trial, the Court initially must identify the municipality's obligation, and thereafter determine whether the municipality has satisfied its obligation. If the municipality fails to satisfy its obligation, the Supreme Court instructed each trial court to deem the municipality's regulations to be exclusionary and to give the municipality 90 days to satisfy its obligation. Mount Laurel II at 281. Following the 90 day revision period, the Supreme Court instructed the trial courts to hold a second compliance hearing wherein the constitutionality of the revised regulation would be tested once again. If the revised regulations again failed to pass constitutional muster, the Supreme Court permitted the trial courts to implement the "remedies for non-compliance." Mount Laurel II at 285. These "remedies" essentially give the Court

the power to do whatever is necessary to ensure that the municipality satisfies its Mount Laurel obligation, even if that means rewriting the municipality's land use regulations. Id.

It is clear from this recitation of the standard sequence of events in any Mount Laurel action that we have reached the last step in this long process. The Township has been deemed exclusionary, given more than ample time to revise its regulations and returned to Court with an outlandish compliance proposal. See Exhibit A. This Court is in a position where it must implement the "remedies for noncompliance" if lower income housing will ever be built in Denville Township. To suggest at this point that the Court tie its hands behind its back when it should be moving the proceedings forward would be to undermine the Mount Laurel procedure. The time has come to act -- not to turn this case over to a body which does not yet exist and thereby guarantee that nothing will be done for a long time to come.

Should this Court permit the Township to delay the production of housing by the transfer, this will severely impact upon the ability of the present developers to produce lower income housing. Not only will the carrying costs accentuate the difficulty of the builders in bearing the economic burden of providing lower income housing, but also the unavailability of sewerage is likely to become worse with time. Thus, delay could effectively foreclose many builders that are now ready and able to implement their Mount Laurel projects.

B. The Delay Caused By The Transfer Would Be Fundamentally Unfair To The Poor

The delay in the actual construction of lower income housing that would result from the transfer of this case to the Council would be manifestly unjust to the poor who have been denied housing in Denville for so long. This would be anathema to a principle that is a foundation to the Mount Laurel doctrine -- that there is a critical need for the prompt, actual construction of lower income housing and that the vast energy spent in litigating Mount Laurel matters in the past would be far better spent in constructing the lower income units. Mount Laurel 219-200, 210-11 n. 5,352. As evidence of the Court's concern for speed, note that the Court developed a very difficult standard for obtaining an interlocutory appeal, reasoning that:

> municipalities will not be able to appeal a trial court's determination that its ordinance is invalid, wait several years for adjudication of that appeal, and then, if unsuccessful, adopt another inadequate ordinance followed by more litigation and subsequent appeals. We intend by our remedy to conclude in one proceeding, with a single appeal, all questions involved.

Mount Laurel II at 290. The Court further demonstrated its concern for dispatch by instructing the trial courts to give the municipality in question only ninety (90) days from the moment the Court declares the regulations to be invalid to revise its regulations to comply with the Mount Laurel II man-

date. Mount Laurel II at 281. The Supreme Court tied together the many threads of its numerous new procedural laws in the following passage:

> We hope that individualized case management, the growth of expertise on the part of the judges in handling these matters, the simplification and elimination of issues resulting both from our rulings and from the active involvement of judges early in the litigation, and the requirement that, generally, the matter be disposed of at the trial level in its entirety before any appeal was allowed, will result in an example of trial efficiency that needs copying, not explaining."

Mount Laurel II at 293 (emphasis added). The Court emphasized trial efficiency so greatly because the Court recognized that the more energy spent in litigating, the less energy would be spent by builders and municipalities cooperatively working towards the actual construction of lower income housing.

Aside from the concern for speed demonstrated by the many procedural rulings in Mount Laurel II, the sense of urgency underlies the entire opinion. For example, the Supreme Court describes the conduct of Mount Laurel Township as follows:

> Nothing has really changed since the date of our first opinion, either in Mount Laurel or its land use regulations. The record indicates that the Township continues to thrive with added industry, some new businesses, and continued growth of middle, upper-middle, and upper income housing. As far as lower income housing is concerned, from the date of [Mount Laurel I] to today

> (as far as the record before us shows), no one has yet constructed one unit of lower income housing - nor has anyone even tried to. Mount Laurel's lower income housing effort has either been a total failure or a total success - depending on its intention.
>
> We realize that given today's economy, especially as it affects housing, the failure of developers to build lower income housing does not necessarily prove that a town's zoning ordinances are unduly restrictive. One might have expected, however, that in the eight years that have elapsed since our decision, Mount Laurel would have something to show other than this utter cipher. . .

Mount Laurel II at 396-97 (emphasis added). In light of Mount Laurel Township's conduct, it is understandable why the Supreme Court expended such great efforts to design procedural as well as substantive law that would provide housing quickly and thereby prevent history from repeating itself.

The Supreme Court's ruling with regard to the traditional exhaustion of administrative requirements is also telling:

> We comment here on defendants' claim that plaintiffs should have exhausted administrative remedies before bringing this suit. There is no such requirement in Mount Laurel litigation. If a party is alleging that a municipality has not meet its Mount Laurel obligation, a constitutional issue is presented that local administrative bodies have no authority to decide. Thus, it is certainly appropriate for a party claiming a

> Mount Laurel violation to bring its claim directly to court.

Mount Laurel II at 342 n. 73. By eliminating the exhaustion requirement, the Supreme Court ensured that law suits would proceed more expeditiously and that housing would be produced more quickly.

Finally, the Supreme Court's ruling with respect to the time of decision rule also evidences the Court's desire to get the plaintiff out of the courtroom and into the field building housing. In this regard the Supreme Court stated:

> Given the importance of the societal interest in the Mount Laurel obligation and the potential for inordinate delay in satisfying it, presumptive validity of an ordinance attaches but once in the face of a Mount Laurel challenge.

Mount Laurel II at 306 (emphasis added). The trial courts have similarly refused to allow municipalities to prolong the process by adopting a compliant regulation after the filing of the suit in order to defeat a builder's remedy. Van Dalen v. Washington Township, Docket No. L-045137-83 P.W. at 26 n.12. See also Orgo Farms v. Colts Neck, Docket Nos. L-3299-78 P.W., L-13679-80 P.W. and L-3540-84 P.W. Transcript (March 19, 1985). By preventing a municipality from circumventing a Mount Laurel challenger through a strict application of the time of decision rule, both the Supreme Court and the trial courts have eliminated a major weapon in the arsenal of delay

of municipalities. Again, the intent can only be to ensure that the housing is produced as quickly as possible.

In its decision regarding the case of Mount Laurel Township, the Supreme Court granted Davis a builder's remedy because:

> "We feel that after ten years of litigation it is time that something be built for the resident and non-resident lower income plaintiffs in this case who have borne the brunt of Mount Laurel's unconstitutional policy of exclusion."

Mount Laurel II at 308 (emphasis added). The case at bar is approaching the seven year mark, and after all this time, the most this Township is willing to do to provide for the needs of the poor is to provide a compliance package that creates the realistic opportunity for 12 units. See Appendix B, letter of Steven Eisdorfer to the master, David Kinsey. The creation of a realistic opportunity of 12 units is a far cry from the Township's obligation of 883 units.

Since the Affordable Housing Council does not yet exist and is not likely to be functioning effectively for a long time to come, Denville will probably become another Mount Laurel if this Court transfers this case. Surely, when considering the manifest injustice to the plaintiffs, this Court should consider the fundamental unfairness to those for whom these plaintiffs speak -- the poor. See generally Morris County Fair Housing Council v. Boonton (suggesting that builders derive their standing to sue because they represent

the interests of the poor). It is the poor who will again bear the brunt of municipal tactics of evasion and delay, if this Court permits a transfer. Such a result is wholly unconscionable.

POINT II

THIS COURT SHOULD NOT TRANSFER THIS CASE TO THE AFFORDABLE HOUSING COUNCIL BECAUSE THE FAIR HOUSING ACT IS UNCONSTITUTIONAL

The Fair Housing Act raises significant questions as to its constitutionality. Had Mount Laurel II never been decided and had the specialized trial judges never expended such considerable effort to clarify the constitional obligation, it would be difficult to challenge the constitutionality of the Fair Housing Act. However, through Mount Laurel II and its progeny, the law has become relatively well settled, the constitutional obligation has been clarified and the yardstick against which the legislation must be measured has been established. Relative to this yardstick, the legislation clearly does not pass constitutional muster. Indeed, a close examination of the legislation reveals that, contrary to its stated intent, the Act seeks to undermine the constitutional obligation as set forth in Mount Laurel II and as clarified by its progeny.

The basic issues are the same in a Mount Laurel challenge, regardless of whether those issues are resolved in the context of the Fair Housing Act or in the context of Mount Laurel II and its progeny. To demonstrate how the Fair Housing Act undermines the Mount Laurel doctrine as established in Mount Laurel II and its progeny, it is necessary to show how the resolution of these issues in the legislative and judicial

contexts and to compare the results of those resolutions in each context.

The issues may be summarized as follows:

(1) What is the appropriate procedure to determine quickly and fairly the rights and duties of Mount Laurel challengers and municipalities?

(2) What is the appropriate methodology to determine what is the scope of the constitutional obligation of each municipality?

(3) What mechanisms are acceptable means for a municipality to satisfy its obligation?

(4) What rights do Mount Laurel challengers have to a rezoning of their particular parcels?

A. This Court Should Declare The Fair Housing Act Unconsitutional Because The Act's Procedures Delay The Production Of Lower Income Housing.

As explained above in full, the Supreme Court's interpretation of the constitutional obligation in Mount Laurel II reveals that the Supreme Court was not just concerned with the actual production of lower income housing. The Court was equally concerned with the production of that housing on a timely basis. This concern for timeliness is at the root of (1) the Court's creation of its many new procedural rulings, and (2) the Court's substantive decisions as to the time of decision rule, exhaustion of administrative remedies requirement and grant of a builder's remedy. See generally supra at 8-12.

Very often delay can result in the severe reduction of the amount of lower income housing that can be produced. As sewerage capacity is used up, as land suitable for Mount Laurel development is condemned for other purposes, and as site plan approval is given on other parcels, further obstacles to the production of lower income housing are created. The longer the municipality takes to revise its regulations, the greater the potential for the creation of such obstacles.

When examining the timing of the production of lower income housing pursuant to the Fair Housing Act, it is clear that the legislation is designed to slow the process which the judiciary designed to move quickly. The Act contemplates the existence of three categories of challengers:

> (1) Plaintiffs in Mount Laurel actions commenced before the sixty day period preceding the effective date of the Act (before May 2, 1985);
>
> (2) Plaintiffs in Mount Laurel actions commenced during the sixty day period preceding the effective date of the Act (between May 2, and July 2, 1985); and
>
> (3) Plaintiffs in Mount Laurel actions commenced after the effective date on the Act (after July 2, 1985).

See generally Fair Housing Act, Section 16.

In all three categories, rather than mandating that the municipality provide for its fair share of lower income

housing promptly, the Act establishes a series of dates by which time the municipality must take certain actions.

First, municipalities must adopt a "resolution of participation," no later than November 2, 1985. Fair Housing Act, Section 16.b. referring to Sections 9.a. A "resolution of participation" is a resolution by a municipality stating that the municipality intends to participate in the legislative process before the Affordable Housing Council. Fair Housing Act, Section 4.e.

Second, even if the municipality adopts a resolution of participation as late as November 2, 1985, the municipality may do nothing until June 1, 1986,* at which time the municipality must submit a "housing element." Fair Housing Act, Section 16.a. and 18. A "housing element" is a report submitted by a municipality to the Council in which the municipality presents an analysis of (1) what it perceives as its obligation and (2) how it plans to satisfy its obligation. Fair

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* The Act defines a timely period as "within five months after the council's adoption of its criteria and guidelines" for determining a municipality's obligation. Fair Housing Act, Section 9.a. The Council must develop its criteria and guidelines within "seven months after the confirmation of the last member initially appointed to the council or January 1, 1986, whichever is earlier." Fair Housing Act, Section 7. Since the Council can potentially establish its guidelines as late as January 1, 1986 and since five months thereafter would be June 1, 1986, the municipality in question may be permitted to file its housing element as late as June 1, 1986 without fear of being transferred back from the Council to the specialized trial court.

Housing Act, Section 10 and 11 (explaining, respectively what a municipality should include in its housing element relative to the identity of its obligation and the establishment of a compliance package).

Third, even if a municipality adopts its resolution of participation on November 2, 1985 and even if the municipality files its housing element on June 1, 1985, the actual production of lower income housing still will not begin. The party challenging the municipality's regulations must participate in the Council's review and mediation process. For all requests to review and mediate filed before April 2, 1986, the Council has until October 2, 1986 to complete mediation. Fair Housing Act, Section 19. For all requests to view and mediate filed after April 2, 1986, the Council has six months from the point of the request to complete review and mediation. Fair Housing Act, Section 19. Failure of the Council to complete its review and mediation within the six month period does not result in an automatic release of the challenger of the requirement that the challenger submit to mediation. Rather, the challenger must now seek the leave of a court of competent jurisdiction to be relieved of the obligation to exhaust. Id.

Fourth, if the mediation efforts fail to culminate in a settlement, the Act directs a Council to transfer the case to the Office Administrative Law for proceedings before an administrative law judge. Fair Housing Act, Section 15.c. The Act requires the administrative law judge to conduct a complete

Fourth, if the mediation efforts fail to culminate in a settlement, the Act directs a Council to transfer the case to the Office Administrative Law for proceedings before an administrative law judge. Fair Housing Act, Section 15.c. The Act requires the administrative law judge to conduct a complete evidentiary hearing within 90 days and to submit a preliminary decision to the Council within this 90 day period - "unless the time is extended by the Director of Administrative Law for good cause shown." Fair Housing Act, Section 15.c. If a specialized trial judge, well seasoned in the complexities of Mount Laurel litigation, cannot complete an evidentiary hearing and submit a decision within 90 days from the time the judge receives the case, certainly it is unrealistic to expect that the administrative law judge will be able to complete the proceedings with any degree of frequency within 90 days. Thus, one can reasonably expect that these proceedings will take substantially longer.

Fifth, the Act does not specify the time for action by the Council once it has received the recommendations of the administrative law judge to make a decision on whether to issue a substantive certification. Even if the Council issues a substantive certification, no housing will be built until the municipality adopts ordinances consistent with the housing element submitted to the Council. This best case scenario still contemplates that the municipality will have 45 days from the

evidentiary hearing within 90 days and to submit a preliminary decision to the Council within this 90 day period - "unless the time is extended by the Director of Administrative Law for good cause shown." Fair Housing Act, Section 15.c. If a specialized trial judge, well seasoned in the complexities of Mount Laurel litigation, cannot complete an evidentiary hearing and submit a decision within 90 days from the time the judge receives the case, certainly it is unrealistic to expect that the administrative law judge will be able to complete the proceedings within 90 days. Thus, one can reasonably expect that these proceedings will take substantially longer.

Fifth, the Act does not specify the time for action by the Council once it has received the recommendations of the administrative law judge to make a decision on whether to issue a substantive certification. Even if the Council issues a substantive certification, no housing will be built until the municipality adopts ordinances consistent with the housing element submitted to the Council. This best case scenario still contemplates that the municipality will have 45 days from the issuance of the substance certification to adopt such an ordinance. Fair Housing Act, Section 14. If the Council denies or conditions the issuance of the substantive certification, the municipality has 60 days to petition the Council to reconsider its denial or to satisfy the Council's conditions. Fair Housing Act, Section 14.b. Assuming that the Council either reverses its denial or that the municipality satisfies the con-

ditions, again the municipality has 45 days to adopt an appropriate ordinance. Id. If the Council denies certification and if the municipality fails to persuade the Council to reverse itself, then the municipality must appeal the refusal of the issuance of the substantive certification to an appellate court. Similarly, if the Council issues a substantive certification, the challenger must appeal to an appellate court.

The point of tracing the laborious exercise is to illustrate the attenuated procedures established by the Act which will substantially delay the day when lower income housing is produced. This result is most offensive in the context of suits involving plaintiffs that had filed suit before May 2, 1985. If the defendant prevails, it is possible for a municipality on the brink of settling on July 1, 1985 to now successfully petition the specialized trial court for a transfer and thereby substantially delay the day that lower income housing is produced.

As frustrating as the procedure may be, even the time frames established by the Act are not likely to be satisfied. The Act substitutes a totally inexperienced Council and administrative law judge for the specialized judiciary, which the Supreme Court designed to be a model of "trial efficiency". Once the Council is established, it will have to determine the procedural rules that will govern it as well as numerous guidelines relating to issues involving the identification of the

obligation and the determination of compliance with that obligation. Fair Housing Act, Sections 7 and 8. Similarly, the administrative law judge is to take elaborate proofs within a 90 day period regarding various compliance packages and proposals for Mount Laurel projects. There remains a litany of delay inducing factors, all similarly frustrating.

This raises yet another factor that is critical in this diagnosis of delay. The Act does not specify what happens if deadlines are not met. For example, within 30 days from the enactment of the Fair Housing Act, the Governor was to nominate the nine members to the Council. Fair Housing Act, Section 5.d. Already the 30 day mark has passed and no such nominations have been made. However, the Act specifies no consequences for the tardiness. What should happen if the Legislature refuses to approve the Governor's appointments. Or, what if the Council fails to establish the rules that will govern its procedures or if the Council fails to establish appropriate fair share guidelines. The point is that the Act's failure to identify specific consequences for satisfying deadlines creates a series of unanswered questions, which will only lead to more litigation, which in turn will lead to further delay.

Our Supreme Court described procedure under Mount Laurel I as follows:

> The deficiencies in its applications range from uncertainty and inconsistency at the trial level to inflexible review at the appellate

> level. The waste of judicial energy involved in every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue.

Mount Laurel II at 200. This passage aptly describes the procedure created by the Fair Housing Act. Thus, the Act frustrates the ultimate goal of Mount Laurel II the refocusing of the litigation on the actual and prompt construction of lower income housing. The Mount Laurel obligation was designed to provide a realistic opportunity for housing, not litigation. Mount Laurel II at 352. The Act will achieve just the reverse - more litigation and less housing.

B. The Act Substantially Dilutes The Constitutional Obligation Of The Municipalities Of Our State To Provide Lower Income Housing.

Mount Laurel II did not set forth the specific methodology by which the obligation of each municipality would be identified. Rather, Mount Laurel II set forth some broad guidelines ostensibly with the hope that the specialized judiciary it created would find a means of resolving the most troubling and vexing issue in all of Mount Laurel litigation - the fair share issue. Mount Laurel II at 248. In AMG v. Warren Twp., Docket Nos. L-23277-80PW and L-67820-80PW (Law Div. 1984) (unreported), Judge Serpentelli accepted the

Supreme Court's challenge and issued an elaborate opinion specifying a methodology which could be utilized to identify with precision the obligation of each municipality in the State. That opinion also set forth in detail the specific reasons for each step in the methodology as well as the justification for the methodology as a whole. This Court, with equal rigor, has developed alternative methodologies in Countryside Properties v. Borough of Ringwood, Docket No. L-42095-81 (1984) (unreported) and Van Dalen Associates v. Washington Tp., Docket No. L-045137-83P.W. Whether applying the AMG methodology or any variation of the AMG methodology, the estimates of the need for lower income housing across our state are very close.

When evaluating the standards set forth in the Fair Housing Act relative to the existing standards, it becomes clear that the Fair Housing Act's standards do not measure up. Indeed, the standards are little more than a transparent attempt to dilute the constitutional obligation and save suburban municipalities from the more substantial obligations that would be produced by the existing standards.

The definitions that form the vocabulary of the Act are themselves exclusionary when viewed in light of the standards developed by the specialist trial courts. "Housing region" is defined as a configuration of between two to four contiguous counties "which exhibit significant social, economic and income similarities, and which . . .". Fair Housing Act, Section 4.b. By grouping counties with similar social and eco-

nomic conditions to form a region, the Act tends to preserve exclusionary patterns. The emphasis on smaller regions tends to ensure that many municipalities will be better able to exclude from their region Essex County in which Newark is located and Camden County in which Camden is located. The presence of these two cities in a municipality's region tends to increase a municipality's obligation because these cities contain substantial numbers of substandard units, thereby raising the present need of the region and the obligation of any municipality in that region. The AMG methodology deliberately established an expansive present need region for Warren Township to ensure that there would be adequate land resources in the outlying counties to address the tremendous need for lower income housing generated by the urban core areas surrounding Newark, AMG at 32-34.

In a similarly exclusionary fashion, the Act states that "prospective need" is to be based on the development and growth which is likely to occur in a region or municipality. In this regard, the Council is to consider the approvals of development applications. Fair Housing Act, Section 4.j.

In the AMG case, Warren Township proposed a similar argument in an attempt to persuade the Court to reduce the Township's obligation. More specifically, the defendant argued that if one were to compare (1) the number of units that would have to be built across our state to satisfy the obligation of

each municipality as derived from a strict application of the AMG methodology to (2) the number of units that are likely to be built across the state based on the greatest number of units that have been produced in the state in any given year, one reaches the conclusion that the statewide obligation will never be satisfied because there never will be enough units built in any given year. Therefore, defendant argued that the obligation of each municipality should be reduced to reflect what the market will bear. This argument misunderstands a fundamental principle in the law concerning fair share and compliance. The Supreme Court deliberately urged its specialized trial courts to establish the obligation of any given municipality in the ideal and to let the marketplace determine whether or not that ideal would be satisfied. AMG at 73-74 citing Mount Laurel II at 352. By arguing that courts should consider the maximum number of units built in the past, or the approvals of development applications as in the Fair Housing Act, municipalities are asking the courts to account for the marketplace in establishing the obligation. Thus, if there had been few approvals issued in a region because of widespread exclusionary practices, the municipalities in that region are likely to be rewarded for the exclusionary practices. Id.

As with the above definitions, the guidelines which the Act directs the Council to formulate for purposes of evaluating housing elements submitted by municipalities are similarly designed to facilitate the dilution of the constitutional

obligation. Fair Housing Act, Sections 7.c., d. and e. For example, any municipality may argue that the Council should permit it to accept a lower obligation because (1) the municipality is entitled to credits; (2) the municipality lacks adequate vacant developable land; (3) the municipality lacks adequate infrastructure; or (4) the municipality has a sensitive environment. Fair Housing Act, Sections 7.c.(1), 7.c.(2)(f), 7.c.(2)(g) and 7.c.(2)(a).

While all of these defenses appear to be available to a municipality before a specialized trial judge, the Fair Housing Act would have the Council not only adopt particularly lenient standards for these defenses, but also provide additional defenses.

As an example of leniency, the Act calls for the municipality to receive a full credit towards its obligation for each standard unit occupied by a lower income household. Fair Housing Act, Section 7.c.(1). According to this credits standard, the date the lower income unit came into existence is not relevant nor is it relevant whether there are any re-sale or re-rental controls to ensure that the lower income unit remains affordable to a lower income household.[6] The disregard for the lack of re-sale and re-rental controls results in a municipality receiving a full credit for a unit if an upper income household purchases the lower income unit the day after the Council issues a substantive certification. The disregard for

the date the lower income unit came into existence results in a municipality receiving full credit for a unit even if the unit was never part of the municipality's indigenous need to begin with because the unit was rehabilitated before 1980 - the date upon which the data is based which is used to calculate the indigenous need. Since a municipality automatically receives credit for lower income units rehabilitated before 1980 by having a lower indigenous need, the Act promotes a double counting of credits by granting a municipality an additional credit for the same unit. For precisely this reason, this Court rejected the Borough of Ringwood's request to obtain credits for units rehabilitated before 1980. Countryside Properties at 15-16.

Estimates contained in a book published by the Center for Urban Policy and Research in 1983, entitled "Mount Laurel II-Challenge and Delivery of Low-Cost Housing" reveal the severest flaw in the Act's credit standard. The authors of this book estimated that 960,080 units in New Jersey would satisfy the type of credit standard promulgated by the Act. Id. at 142. The authors also estimated that the state has a present need of 120,160 units. Id. Since the supply of lower income housing far outweighs the need, application of the Act's credit standard leads to the conclusion that there is an overabundance of lower income housing in our state.

As an example of new defenses, the Council is instructed to accept a lower obligation for any given municipa-

lity if the preservation of historically or important architecture may be jeopardized by the provision of the full obligation. Fair Housing Act, Section 7.c.(2)(a). If "the established pattern of development in the community would be drastically altered," again the Council should permit a reduction in the obligation. Fair Housing Act, Section 7.c.(2)(b). Thus, an exclusionary municipality which has succeeded in depressing the intensity of development through exclusionary practices could obtain a lower obligation as a direct result of these exclusionary policies because in such a municipality any intensive high density development for Mount Laurel purposes would tend to drastically alter the established pattern of exclusionary development. A municipality may also assert that it wishes to preserve farmlands or open space to justify a reduced obligation. Fair Housing Act, Sections 7.c.(2)(c) and (d).

Under the standards set forth in this Act, a municipality would be unimaginative indeed not to find a way to substantially reduce its obligation. In the event that a municipality is unimaginative, however, the Act provides additional mechanisms designed to ensure a substantial reduction of a municipality's obligation. For example, the Act calls for a phasing of the issuance of final approvals for units in Mount Laurel housing projects based upon the size of a municipality's obligation. Fair Housing Act, Sections 7.c.(3) and 23.

Furthermore, the Council may establish caps for the obligation of any municipality based on the number of jobs in the municipality or "any other criteria ...which the council deems appropriate." Fair Housing Act, Section 7.e.

C. This Court Should Declare The Fair Housing Act Unconstitutional Because The Act Promotes The Use Of An Unconstitutional Compliance Mechanism.

In the spirit of Mount Laurel II, the specialized trial judges have been extremely willing to entertain the use of new compliance mechanisms. Mount Laurel II at 265-66. However, to date, no court has permitted a municipality to comply by transferring its obligation to other municipalities. Nonetheless, the Fair Housing Act has created precisely this type of new compliance mechanism.

This new compliance mechanism would permit a municipality to transfer up to half of its obligation to another municipality within its region by entering into a contractual agreement with the receiving municipality. Fair Housing Act, Section 12. For example, if municipality A, a suburban municipality, had an obligation of 500 units, municipality A might provide the opportunity for 250 lower income units within its borders and 250 lower income units within the borders of Municipality B, an urban municipality, by making monetary contributions to Municipality B in such amounts that Municipality B could produce lower income housing either through rehabilitation of existing substandard units or through the development of new units. Fair Housing Act, Section 12.f.

This mechanism tends to ensure that Municipality A will remain an enclave of affluence contrary to the intent of our Supreme Court. Mount Laurel II at 211.

D. This Court Should Declare The Fair Housing Act Unconstitutional Because The Act Eliminates The Builder's Remedy.

In contrast to Mount Laurel II, in which the Supreme Court deliberately urged the trial courts to liberally grant builders' remedies, the Fair Housing Act just as deliberately seeks to preclude builders' remedies. Indeed, the Act states:

> "it is the intention of the act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing."

Fair Housing Act, Section 3. Consistent with this objective, the Act directs municipalities, when designing their housing element, to include:

> "[a] consideration of lands that are most appropriate for low and moderate income housing...including a consideration of lands of developers who have expressed a commitment to provide low and moderate income housing."

Fair Housing Act, Section 10.f.(emphasis added).

In further support of the proposition that the Act seeks to eliminate the builder's remedy, an examination of the Act reveals that nowhere in the elongated process does any entity have the authority to award a builder's remedy. Thus, in the first step of the Act's new procedure, the Mount Laurel challenger must submit to mediation before the Council.

However, the Council only has the authority to grant, deny or condition the issuance of a substantive certification to the municipality. Fair Housing Act, Sections 14. and 15. The Council does not have the authority to issue a builder's remedy to the challenger. Similarly, if the Council's mediation efforts fail and if the challenger now finds himself before an administrative law judge, the judge may not grant a builder's remedy. Rather, the administrative law judge may only submit his recommen dations and conclusions of law and fact to the Council. Fair Housing Act, Section 15.c. The Council is free to reject the judge's recommendations even if the judge were to recommend rezoning the challenger's parcel.*

Assuming the Council issues a substantive certification, the final stage in the Act's new procedure is an appeal to an appellate court. In this proceeding, the plaintiff must meet the heavy burden of demonstrating that there was no basis as to the Council's factual conclusions or that the Council was arbitrary and capricious as to its legal conclusions. See generally New Jersey Standards For Appellate Review at 12-14 (1982) In short, it is clear that the plaintiff challenging the issuance of a substantive certification at the appellate level has an extremely difficult burden. Even if the plaintiff overcomes this burden, it is not clear that the

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* Assuming the Council were to accept a recommendation, even then the Council would continue to lack the authority to grant a builder's remedy.

plaintiff's victory renders him a "successful" plaintiff entitled to a builder's remedy upon satisfaction of the remaining two elements of the test for a builder's remedy. Mount Laurel II at 279-80.

In sum, in contrast to the certainty created by the test for a builder's remedy set forth in Mount Laurel II, the Fair Housing Act renders the builder's fate uncertain in those municipalities that have elected to participate in the Act's legislative procedures. It is entirely possible for the builder to go through a process that is longer and more arduous than the Mount Laurel II process and to be denied a Mount Laurel rezoning in the end.

The Supreme Court created the builder's remedy because these remedies are (i) essential to maintain a significant level of Mount Laurel litigation, and the only effective method to date of enforcing compliance. Mount Laurel II at 279. Therefore, elimination of the remedy in municipalities participating in the Act's procedures will remove the builders' desire to participate in the process. This, in turn, will eliminate the pressure on exclusionary municipalities to do any more than necessary to satisfy the Council. The Act establishes such lenient standards for fair share and compliance purposes that one can hardly expect that the Council will demand as much as is necessary to ensure constitutional

satisfaction.* History has demonstrated that the tribunal must be steadfast if lower income housing opportunities will ever be produced. Thus, Mount Laurel II repeatedly calls for the "strong hand of the judge at trial". Mount Laurel II at 199,292. The Act appears to replace the strong hand of the trial judge with the weak hand of the Council in municipalities participating in the legislative process. Thus, to the extent that a significant number of municipalities elect to participate in the procedures before the Council, the Act ensures that there will be fewer housing opportunities for lower income households-especially in the suburbs. Mount Laurel II expressly sought to open the doors of suburban municipalities to the poor. Mount Laurel II at 210-11 n.5.

The Supreme Court also created the builder's remedy because "these remedies are required by principles of fairness to compensate developers who have invested substantial time and resources in pursuing such litigation." Mount Laurel II at 279. The Act's elimination of the builder's remedies in municipalities participating in the legislative process is fundamentally unfair. If equity required the trial court to reward builders efforts under the favorable procedural and substantive law of Mount Laurel II, then certainly equity

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* In contrast to the specialized trial judge who can award a builder's remedy or implement the remedies for noncompliance, the Council can only grant, conditionally grant or deny a request for a substantive certification.

should require the Council, administrative law judge or appellate court to reward the builder under the law established by the Act, which does nothing more than create a series of obstacles for the builder.

Finally, the Supreme Court created the builder's remedy because "these remedies are the most likely means of ensuring that lower income housing is actually built." Mount Laurel II at 279. Elimination of the builder's remedy destroys the surest source of lower income housing. All other sources are speculative, relative to the builder that stands before the court claiming readiness and waging the expensive legal battle necessary to obtain the right to a Mount Laurel rezoning. Mount Laurel II at 249 citing Oakwood at Madison, Inc. v. Tp. of Madison, 72 NJ 481,499(1977).

CONCLUSION

Notwithstanding our Court's clear mandate to municipalities in Mount Laurel I that these municipalities have a constitutional obligation to use their powers to regulate the use of land to provide lower income housing opportunities, few municipalities took the Court's demand seriously and little lower income housing was produced. Mount Laurel II ended the reign of municipal complacency. However, Mount Laurel II left critical issues unresolved. For example, what was a municipality's "fair share" of the regional need? When did a municipality in fact create a "realistic opportunity"? When was a builder's site "suitable" for a rezoning? In less than two years from the date of their appointment, the specialized trial judges have largely resolved these critical issues and the law is relatively well settled. As a result, municipal energy that once was used to delay and avoid the constitutional obligation is now being used to develop creative means to comply. Similarly, the tremendous amount of builder time and resources that once were directed towards fighting a seemingly endless battle are now being used to build the lower income housing.

On this judicial landscape, the Fair Housing Act emerged. The Act created a procedure that invites municipalities to play the delay game once again. The Act substantially dilutes the obligations of municipalities relative to the constitutional mandate. The Act enables exclusionary suburban

municipalities to transfer half their obligation to other municipalities and thereby remain enclaves of affluence. Finally, the Act eliminates builder's remedies in those municipalities that elect to participate in the legislative process and the Act imposes a moratorium on the builder's remedy in those municipalities that remain under the jurisdiction of the specialized judiciary.

In short, the Act is nothing more than an attempt to undermine the Mount Laurel doctrine. It was precisely because Mount Laurel II was so effective in producing the lower income housing it promised that the political pressure was created that gave birth to the Act. Therefore, whatever lofty ideals the Act purports to promote, the above examination demonstrates that the Act is designed to delay the process, reduce the obligations of suburban municipalities, maintain these municipalities as enclaves of affluence, and eliminate the builder's remedy - which is the fuel that propels the whole process.

Respectfully submitted,

GREENBAUM, ROWE, SMITH, RAVIN,
DAVIS & BERGSTEIN

By: Jeffrey R. Surenian
Jeffrey R. Surenian

DATED: August 9, 1985

SCHEDULE A

DENVILLE TOWNSHIP
MOUNT LAUREL II COMPLIANCE PROGRAM DATE: 6-12-85

II. FAIR SHARE COMPLIANCE

A. INTRODUCTION

Denville Township already has a significant stock of low and moderate income housing. As shown by the 1980 census, Denville has over 400 units of housing affordable to low and moderate income people. Twenty-six percent of the Township's households are low and moderate income households as defined in the Mount Laurel II decision.

The Township acknowledges that homes for low and moderate income people should continue to be made available in Denville. Denville believes that this can best be accomplished by a coherent and coordinated program designed, controlled and implemented by the Township itself. The social, environmental and economic health of the community must be carefully preserved if Denville is to continue to provide affordable low and moderate income homes.

The helter-skelter, immediate force-fit approach must be avoided, because Denville Township cannot survive the introduction of a large number of new residents without adequate environmental review and prior development of adequate infrastructure. In the interest of orderly progress and preservation of community character, Denville's fair share should be provided at a pace consistent with the overall development of the community.

B. COMPLIANCE PROGRAMS

Denville Township will provide its fair share of affordable housing through five principal mechanisms:

1. Rehabilitation of existing substandard housing with assistance from the Morris County Department of Community Development.

2. Conversion of existing structures to create affordable rental units within them.

3. Construction of publicly subsidized affordable senior citizen housing.

4. High density development of approximately 60 acres of land appropriate for such development to provide additional affordable housing.

5. Creation of an overlay zone requiring that all developers provide affordable low and moderate income housing within their developments.

1. Rehabilitation

Denville has already received a one for one compliance credit for 41 housing units rehabilitated by the Morris County Department of Community Development as of July 1984. Department director Grace Brewster reports that twelve Denville households were assisted or found eligible for assistance between August 1984 and May 1985. Ms. Brewster anticipates completing 50 to 60 additional cases in the next five years, making a total of 62 to 72 units beyond the 41 for which Denville has already received credit. Thus, the Township can be expected to satisfy at least 62 units of its fair share obligation by continuing to encourage and support housing rehabilitation.

2. Accessory Conversion

In the spring of 1984 the Township proposed and was prepared to adopt an ordinance providing for and encouraging accessory conversions. A full year has been lost because this approach to implementing fair share was not agreed to at that time. Now, more than a year later, Denville Township again proposes to adopt an accessory conversion ordinance allowing homeowners to create apartments within or, where appropriate, as additions to their homes.

Accessory apartments in Denville must meet the following criteria:

1. The unit must be rented to a low or moderate income household.

2. The rent, including utilities, must be no more than 30% of the income of a low or moderate income household.

3. The owner must agree to comply with the New Jersey Law Against Discrimination, NJSA 10:4-1 et seq.

4. The unit must be subject to controls administered by the Denville Affordable Housing Board to ensure that it is rented by and affordable to lower income households for a reasonable period of time.

Based upon citizen response, the Township believes that accessory conversion will be a very active program. For the purpose of estimating the number of potential conversions, it should be noted that Denville contains about 4,500 single-family detached housing units, of which about 3,200 have three or more bedrooms. Conversion of as little as 3% of the 3,200 larger homes would provide about 100 Mount Laurel units, while a more realistic 5% conversion rate would provide 160 Mount Laurel units.

3. Senior Citizen Housing

With a large and rapidly increasing older population, Denville is particularly concerned about providing additional housing for senior citizens. Denville proposes to build (150) units of publicly subsidized senior citizen housing. This housing will be administered by the Denville Affordable Housing Board. Units will be rented or sold to senior citizens of low and moderate income. Sites should be selected for their proximity to existing adequate infrastructure, public transportation and community services. Possible sites include a 21 acre tract between the end of Luger Road and the Parsippany Troy Hills border and the 19 acres owned by the township on Vanderhoof Avenue.

4. High Density Development

To implement the immediate development of low and moderate income housing, Denville will rezone a limited area of the Township for well-planned high density development. This zone will provide for an initial maximum of (60) acres with densities between 7 and 10 units per acre depending on environmental and infrastructural constraints and community resources. In areas judged by the Township Planning Board to have only minor constraints, densities of 7 units per acre will be sought. In areas with significant constraints densities of up to 10 units per acre of suitable land will be allowed depending on the developer's efforts to minimize impacts to the environment and to contribute to infrastructural improvements. In all cases, site selection and development criteria must be compatibility with existing uses, adequacy of existing infrastructure, environmental constraints and access to public transportation and community services.

If the Planning Board determines that high density development should be allowed such development must provide a significant proportion of the Township's fair share of low and moderate income housing. Denville Township has determined that a 30% set-aside of low and moderate income housing should be mandatory in such high density developments.

It is anticipated that the Nuzzo and Stonehedge tracts may be suitable for a high density approach. Development of these tracts at 7 units per acre with a 30% set-aside could provide approximately 122 units of low and moderate income housing.

5. General Mandatory Set-Aside

To provide additional affordable housing as the Township develops, Denville will prepare an overlay zone requiring that at least 30% of all newly constructed housing units within a subdivision of five or more building lots be affordable to and reserved for persons of low and moderate income. Construction of low and moderate income units will generally be allowed at a

density four times the zoned density. Because small subdivisions will not contain enough market rate units to subsidize development of low and moderate income housing on the site, subdivisions of less than five building lots will have the alternative of paying a fee to the Denville Affordable Housing Board. The Township will specify the structure of this fee after further economic analysis. The Affordable Housing Board will use the proceeds to supplement other sources of financing for the senior citizen housing and accessory conversions discussed in sections 2 and 3 above.

Under this plan, development of all residentially zoned vacant land in the Township would provide about 386 units of Mount Laurel housing.

C. SELECTION OF BUYERS AND RENTERS

All low and moderate income housing units produced under the programs outlined above will be sold or rented to persons of low and moderate income.

The Denville Affordable Housing Board will select buyers and renters from among the income eligible applicants in accordance with the following priority list:

1. Residents of Denville who have lived in the Township for at least one year and who are living in shared or deficient housing.

2. Employees of Denville Township, Denville Township School District, or other public agencies or educational facilities located within the Township who are living in shared or deficient housing.

3. Other persons employed in Denville who are living in shared or deficient housing.

4. Residents of Denville Township not included in (1), (2), or (3) above.

5. Persons employed in Denville Township and living more than 20 miles from their place of work in the Township or living in any urban aid municipality within the Township's Mount Laurel II prospective housing need region.

6. Persons employed within ten miles of the municipal boundary of Denville Township and living in shared or deficient housing.

7. All other persons living in shared or deficient housing within Denville Township's prospective need region, with preference given to those living in designated urban aid municipalities.

8. All others.

In all categories, preference will be given to former residents of Denville over persons who have never lived in the Township.

(302/2)

EXHIBIT B

State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
CN 850
TRENTON, NEW JERSEY 08625

AMY PIRO,
ACTING PUBLIC ADVOCATE

RICHARD E. SHAPIRO
DIRECTOR
TEL: 609-292-1693

June 20, 1985

David Kinsey
252 Varsity Road
Princeton, New Jersey

Re: Morris County Fair Housing Council v.
Boonton Township - Docket No. L-6001-78
P. W. (Denville Township)

Dear Mr. Kinsey:

Plaintiffs, Morris County Fair Housing Council, et al., have reviewed the attached proposed compliance plan submitted by Denville Township on June 14, 1985, in the above entitled matter.

The plan unfortunately does not correspond in specificity to the "revised ordinance" called for by the Supreme Court, Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158, 284 (1983), or even the detailed written plan promised by the municipality. It contains major gaps and is sketchy or unclear in a number of major areas. As a result, analysis of some aspects of the plan is difficult or impossible at this time. We can, however, offer some preliminary comments.

In general, any plan for compliance must be evaluated in terms of the standards enunciated by the Supreme Court: does it create a "realistic opportunity" for creation of sufficient safe, decent housing affordable to low and moderate households to satisfy the municipality's indigenous housing need and its fair share of the regional housing need. 92 N.J. 214-15. The opportunity must not be merely hypothetical or theoretical. It must be "realistic", i.e. designed and actually result in provision of housing. 92 N.J. at 260-61. In the context of a remedial proceeding such as this, the result must be that "the opportunity for low and moderate income housing found in the new ordinance [is] as realistic as judicial remedies can make it." 92 N.J. at 214. It is in this context that we offer the following comments on the various components of the Denville plan.

1. Rehabilitation of Existing Units (II-2)

Denville seeks credit for anticipated rehabilitation by Morris County using Community Development Block Grant funds of 62-72 substandard units occupied by lower income households between July 1984 and 1990. As noted in our letter of May 8, 1985, plaintiffs support the concept of rehabilitation of existing substandard housing, provided the program is in fact designed to provide realistic housing opportunities for lower income households.

The Denville proposal, however, has two serious deficiencies. First, it is inconsistent with the determination by Judge Skillman as to the number of substandard lower income units in Denville. At Denville's urging, Judge Skillman deviated from the so-called consensus methodology to find that Denville has only 92 substandard and overcrowded units occupied by lower income households. Of these, 53.8 percent, a total of 46, are physically substandard. Denville received credit for rehabilitation of 41 of these units in the Court's order of January 31, 1985. Thus, any credit for rehabilitation of substandard units must be limited to no more than 5 units.

While there may well be more physically substandard lower income units in Denville-a matter as to which Denville has submitted no data - any additional such units would have to be added to Denville's constitutional housing obligation. Rehabilitation of such units, although highly desirable, cannot logically result in a net credit against Denville's housing obligation.

Second, exclusive reliance on county expenditure of federal Community Development Block Grant funds does not create "realistic" housing opportunities. Morris County is not legally or contractually bound to fund this program. There are many demands on these scarce funds and there is no assurance that the County will not direct them to some other worthy project next year or at any time between now and 1990. Moreover, this year, as in every year since 1980, President Reagan has sought to reduce or eliminate funding for the federal Community Development Block Grant program. See 12 Housing and Development Reporter 829 (March 25, 1985). There is no assurance that this program will survive even one more fiscal year.

In light of this uncertainty, the municipality cannot properly rely on the Morris County housing rehabilitation program in the absence of a fully developed municipal backup plan that

would satisfy the standards described in our letter of May 8, 1985, and would go into effect whenever the county program drops, for whatever reason, below the anticipated rate of rehabilitation.

For these reasons, Denville's rehabilitation plan does not create realistic housing opportunity for 62-72 lower income households as claimed.

2. Accessory Conversions (II-2)

Denville proposes to adopt a permissive accessory conversion ordinance which, it claims, will create realistic housing opportunities for 100 to 160 low income households. The municipality also proposes to impose affordability standards to ensure that newly created accessory units will in fact be affordable to, and occupied by, lower income households.

The municipality, however, offers no evidence to suggest that its housing stock lends itself to accessory conversions. Nor does it offer any evidence to suggest that any significant number of homeowners desire to construct accessory units under the standards proposed by the municipality. Indeed, in presenting this plan on June 14, 1985, counsel for the municipality acknowledged that the "citizen response" cited in the report, consisted of persons expressing support for the concept of conversions rather persons expressing a desire personally to construct apartments for lower income families in their homes.

There is no evidence at this point to support the claim that permissive accessory conversions will create any significant stock of housing affordable to lower income households. After reviewing extensive testimony, Judge Smith rejected municipal claims that accessory conversions would create more than a negligible quantity of lower income housing in the Mahwah litigation.

As noted in my letter of May 8, 1985, it may well be that the municipality could create a subsidy or grant program that would make development of low income accessory units sufficiently attractive to make accessory conversions a "realistic" source of lower income housing. In the absence of such subsidies, Denville's proposal cannot be considered to create "realistic" housing opportunities.

3. Senior Citizen Housing (II-3)

Denville proposes to construct 150 units of subsidized lower income housing. This proposal is unimpeachable in concept. In its present form, however, it is entirely speculative and unrealistic.

First, Denville identifies no source of subsidy funds. It suggests no existing state or federal program which is likely to provide funds and does not propose a municipal appropriation or issuance of municipal bonds.

In addition, the so-called Luger Road site is relatively inaccessible and located in an area of heavy industry. There are serious questions as to its feasibility and suitability as a senior citizen housing site.

For these reasons, the senior citizen housing proposal is, at best, theoretical and not "realistic" as required by the Supreme Court.

4. Rezoning for "High Density" Development (II-4)

Denville proposes to rezone two sites, known for purposes of this litigation as the Nuzzo and Stonehedge sites, totaling 60 acres, for residential development at densities of 7 to 10 units per acre with mandatory setasides of 30 percent lower income units. Owners of both sites have indicated a willingness to construct at densities of 10-15 units per acre with 20 percent lower income setasides,but have asserted that development on the terms proposed by the municipality is not economically feasible.

As the Supreme Court noted, a purported lower income housing opportunity is not realistic if the rezoning does not create an economic incentive (i.e. the likelihood of securing a favorable economic return) for the property owner to construct that housing. Experience in northern New Jersey now suggests that rezoning for a 20 percent lower income setaside at densities of 10-15 units per acre provides such an incentive. While there may be special market circumstances in particular communities or exceptional characteristics of particular sites that would support a slightly higher setaside or slightly lower densities, Denville has offered no demonstration of such special market circumstances or exceptional site characteristics. In presenting the plan, counsel indicated that Denville had no such information. It should be noted that Judge Skillman declined to approve a 25 setaside in Montville Township as part of a negotiated settlement.

In the absence of any such extraordinary showing, this rezoning cannot be deemed a realistic means of providing lower income units.

5. General Mandatory Setaside (II-4)

Denville proposes imposition of a requirement in all residential zones that all residential development be subject to a 30 percent lower income setaside. In developments of less than five units, the municipal plan suggests this setaside could be satisfied by the property owner paying an unspecified sum to a municipal entity. Lower income units could be constructed at a density four times greater than the prevailing density in the zone. Denville seeks credit for 386 lower income units under this proposal. This figure, according to counsel, is based on full buildout of all existing residential zones.

For purpose of this analysis, we assume that this zoning is not barred by the Municipal Land Use Law or other statutory or constitutional requirements.

This proposal has several critical defects. First, the proposed rezoning does not contemplate removing any existing cost-increasing features. To the contrary, it preserves all existing densities and design requirements for the conventional units. Even as to lower income units, the proposal does not remove any cost-increasing features except for the limited increase in density. For example, 18 percent of all vacant land* zoned for residential uses in Denville is in the C zone, which permits construction only of single family detached housing of at least 1,500 square feet in floor area on lots of 81,000 square feet (approximately 2 acres). Under Denville's proposal, lower income units would have to be built in this zone as single-family detached houses with at least 1,500 square feet of floor space on lots of at least half an acre.

Similarly, approximately 58 percent of the vacant land zoned for residential purposes is located in the R-C and R-1 zones which permit construction only of single family detached houses with at least 1,200 square feet of floor area on lots of 40,250 square feet (approximately one acre) or more. In this zone, lower income units would have to be built as single family detached

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* Land in tracts of eight acres or more. Montney, Denville Township Revised Vacant Land Analysis, (May 1984).

houses with 1,200 square feet of floor area on lots of a quarter acre or more. These densitites and design requirements are very similar to those struck down ten years ago by the Supreme Court in Mt. Laurel I, 67 N.J. 155, 183 (1975).

Second, Denville's proposal does not create economic incentives for production of lower income housing. The density increase is limited to lower income units. It does not provide any increased income to offset the losses in the lower income units, much less profit to encourage development of such units. Indeed, the proposal has the contrary effect. On a hypothetical 100 acre tract currently zoned at one unit to the acre as in Denville's R-1 and R-C zones, a developer would be able to construct 129 units, of which at least 39 would be required to be lower income and 90 could be conventional units. The proposal thus increases the developer's costs by requiring him to construct 29 lower income units at a maximum density of four units per acre and to market them at a loss while simultaneously reducing his income by reducing by ten the permitted number of conventional units.

Denville offers no analysis to show what the effect of this rezoning would be on the incentive for property owners to build. It can hardly be doubted, however, that, even if property owners can derive an economic return under this ordinance (a question which we cannot answer at this point), their incentive to construct housing is very dramatically reduced. Indeed, this proposal would appear to function more as a device to discourage residential development than a device to foster development of lower income housing.

Third, as noted above, the claim that this proposal will produce 386 units, ispremised on full buildout of all vacant land zoned for residential uses in Denville. In none of Denville's planning documents has it been suggested that this is likely within the next six years. To the contrary, this proposal virtually guarantees that construction of these units will stretch out over a very long period of time.

Finally, while the proposal suggests that this general mandatory setaside will also generate funds from developments of five acres or less, none of the details of this aspect of the proposal have been spelled out. It is therefore impossible to evaluate this aspect of the proposal at this time.

6. Selection of Buyers and Renters (II-5)

Denville proposed an elaborate array of selection criteria for prospective buyers and renters. These critieria would create an unlimited and unconditional legally mandated preference for present residents and employees of Denville, former residents of Denville, and persons living in the immediate vicinity of Denville.

These criteria are inconsistent with the municipality's duty to meet its fair share of the regional housing need as well as the needs of its indigenous poor. In addition, they have a disparate impact on racial minorities. The population of New Jersey is 13 percent black. The population of northeastern New Jersey is 14 percent black. The population of Denville, by contrast, is 0.34 percent black. In the past, its black population has been even lower (0.13 percent in 1960 and 0.27 percent in 1970). Morris County, which would encompass most of the 20 mile radius in Denville's fifth rank of preference, has a population which is only 2.5 percent black. These criteria would thus appear to represent a prima facie violation of the Title VIII of the Civil Rights Act of 1964, as amended. See Metropolitan Development Corporation v. Village of Arglington Heights, 558 F.2d 1283 (7th Cir. 1977) cert. denied, 434 U.S. 1025 (1978).

Several matters are conspicuous by their absence from Denville's plan.

a) Overzoning - Denville seeks credit for 122 units of lower income housing on two sites to be rezoned for lower income housing. It cannot and does not assert that the owners of these properties are ready, willing, and able to build under the terms of its proposed rezoning. Even if its proposed rezoning were otherwise unimpeachable, overzoning would be virtually mandatory under these circumstances to ensure that realistic housing opportunities are in fact created.

b) Affordability - The plan is generally silent on measures to ensure affordability. In particular, it does not specify what proportion of all units created by the plan would be affordable to low income households.

In sum, none of the components of the proposed plan appear to create realistic opportunities for provision of

significant quantities of safe, decent housing affordable to lower income households. The only aspect of the plan that appears both workable and nonspeculative is the 12 units of substandard housing which Morris County has agreed to rehabilitate.

Plaintiffs recommend therefore that you report to the Court that Denville has not proposed a realistic plan for compliance and that you proceed to formulate such a plan. In our letter of May 8, 1985, we outlined what we believe to be a reasonable and realistic plan for compliance. We are prepared to amplify and elaborate on that plan to ensure a workable and realistic program for compliance by Denville with its constitutional obligations.

Very truly yours,

Stephen Eisdorfer
Assistant Deputy Public Advocate

SE:cc
Enclosure
cc: All Counsel
Hon. Stephen Skillman, J.S.C.