CH - UL v. Carteret (Cranbury, Monroe, Piscataway) Sept. 18, 1985

Urban League Plaintiffs' Memorandum of Law in Opposition to the Motions of Cranbury, Monroe and Piscataway to Transfer this Case to the Council on Affordable Housing and in opposition to Cranbury's Motion to Impose A Moratorium on Builder's Remedies

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SUPERIOR COURT
OF NEW JERSEY

URBAN LEAGUE OF GREATER
NEW BRUNSWICK, et al.,

Plaintiffs,

v.

THE MAYOR AND COUNCIL OF THE
BOROUGH OF CARTERET, et al.,

Defendants.

CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

NO. C-4122-73

(Cranbury)
(Monroe)
(Piscataway)

URBAN LEAGUE PLAINTIFFS' MEMORANDUM OF LAW

IN OPPOSITION TO THE MOTIONS OF

CRANBURY, MONROE AND PISCATAWAY

TO TRANSFER THIS CASE TO THE COUNCIL ON AFFORDABLE HOUSING

AND

IN OPPOSITION TO CRANBURY'S MOTION TO IMPOSE A MORATORIUM

ON BUILDER'S REMEDIES

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INTRODUCTION

This memorandum of law is submitted by the Urban League plaintiffs in opposition to the motions by the Townships of Cranbury, Monroe, and Piscataway to transfer this case to the Council on Affordable Housing, under Section 16(a)[1] of the Fair Housing Act, P.L. 1985, c.222.

At several points, the moving papers argue that transfer is necessary because there should be a uniform approach to fair share and other Mount Laurel issues, that the Supreme Court has frequently stated its preference for legislative and executive, rather than judicial, resolution of these difficult questions, and that the Legislature has now acted and directed the Council on Affordable Housing (hereafter the Council) to be the uniform decisionmaker. See, e.g., Cranbury brief, at 1-2, 5, 9-10; Monroe letter-brief, unnumbered Argument pages 4-5; Paley Certification, Para. 21.

In the abstract, these points are reasonable. The only problem is that they completely ignore the statute before this Court. The Legislature with crystal clarity has provided for two different kinds of decisionmakers -- administrative and judicial -- and established a complex set of rules, as set forth in detail below, to define how those two processes should interact. Some cases before the courts now will remain exclusively before the

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[1] In the official print of the statute, the second subsection of Section 16 is designated "b." but the first has no designation. For clarity's sake, however, we refer to the first subsection as "a" throughout this brief.

courts. Some cases now before the courts or to be commenced hereafter will be transferred to the administrative body, with the possibility of return either in the form of appeal from a final agency determination or by reversion to the trial court if the agency or the affected municipality fails to take or complete specified steps on time. Other disputes may be resolved entirely within the agency through mediation.

The Legislature expressly gave this court considerable discretion to decide whether cases, such as this one, filed more than 60 days before the Act's effective date, should be completed by the court or transferred to the Council. For all of the reasons set forth below, it is manifest that this Court must deny the motions here. Indeed, we submit that if the Urban League case can be transferred under the Act, there is no pending case that would not be transferred.

FACTS

A. Common Facts

The pieces of litigation sought to be transferred by these motions are part of the oldest Mount Laurel action still pending before the courts of this state.[2] On July 23, 1974, more than 11 years and 2 months before the return date of these motions, the Urban League of Greater New Brunswick and seven individuals sued, on behalf of themselves and others similarly situated, 23 municipalities in Middlesex County, including Cranbury, Monroe and Piscataway, claiming that each municipality was violating the Constitution in that its zoning ordinance failed to provide a realistic opportunity for the development of low and moderate income housing. Judge Furman certified the class and, after an evidentiary hearing, denied defendants' motion for a severance. An extensive trial in Spring 1984 led to a lengthy opinion on May 4, 1976 and an implementing Judgment on July 9, 1976, over nine years ago.

In his opinion, Judge Furman ruled:

> Cranbury's zoning ordinance permits no new multi-family housing, except conversions to two family....The Township is overzoned for industry by over 2,000 acres and over 500% of projected demand....

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[2] The original Mount Laurel case was settled on July 29, 1985. Home News, July 30, 1985. This Court decided the Bedminster case on May 1, 1985. The appeal in the Mahwah case has been withdrawn. The Oakwood at Madison case itself is in limbo, with no formal action having been taken by the Court since 1977, although the builder-plaintiffs there have been joined as defendants in the Old Bridge portion of the Urban League case to insure compliance with their obligation.

> Cranbury's present zoning ordinance fall short of the Mt. Laurel standard and must be struck down in view of available suitable acreage adjoining the village on which low and moderate-income housing may be built without impairing the established residential character of the village or interfering with present farm uses.
>
> ...
>
> Monroe's zoning ordinance prohibits new multi-family housing except in planned retirement communities, requiring various amenities, on lots of 400 acres or more. The vacant acreage exceeding 20,000 acres is virtually preempted by industrial and rural residential zones....The township is overzoned for industry by over 5,000 acres and over 400%.
>
> The township's present zoning ordinance is palpably deficient under Mt.Laurel. Its own planning expert conceded a need for multi-family residential zoning with densities and other provisions compatible with low and moderate-income housing opportunities.
>
> ...
>
> Piscataway's zoning ordinance inhibits appreciable further low and moderate-income housing opportunites....80% of its vacant residentially zoned land is zoned for single-family housing...and only between 1 and 2% is zoned for multi-family housing....A zoning revision is under study to rezone 300 acres or more for Planned Residential Developments as an alternative to single-family housing, with mandatory minimums of low and moderate-income units.
>
> Prior to such a revision, along with elimination of bedroom and other restrictions on multi-family housing, Piscataway's zoning ordinance must be held unconstitutional under Mt. Laurel as not providing adequately for prospective regional housing needs.

Urban League of Greater New Brunswick et al., v. Mayor and Council of Carteret et al., 142 N.J. Super. 11, 28-29, 31, 32-33 (Ch. Div. 1976), aff'd, 92 N.J. 158, 456 A.2d 390 (1983). The opinion and ensuing Judgment required rezoning for 1,351 units for Cranbury, 1,356 for Monroe, and 1,333 for Piscataway. The Judgment was stayed pending appeal by seven towns, including these three.

In its opinion affirming, the Supreme Court remanded to this Court not for trial on constitutional non-compliance "for that

has already been amply demonstrated" but solely for "determination of region, fair share and allocation and, thereafter, revision of the land use ordinances and adoption of affirmative measures to afford the realistic opportunity for the requisite lower income housing." Southern Burlington Cty. NAACP v. Mount Laurel Twp., 92 N.J. 158, 350-51, 456 A.2d 390, 488-89 (1983) (Mount Laurel II).

After remand, there were extensive pretrial proceedings, in which all three townships participated, leading to a full 18-day trial in April-June 1984 on region, regional need, fair share allocation, and validity of revised ordinances. As to Cranbury and Monroe, this Court issued a letter-opinion dated July 27, 1984 and an implementing Judgment on August 13, 1984, which determined the fair share of Cranbury to be 816 and the fair share of Monroe to be 774. The Court held the zoning ordinance and land use regulations in each town unconstitutional, directed rezoning of each town within 90 days of the July 27 opinion, and appointed Masters to assist the towns in the revision process. As to Piscataway, the Court did not resolve the fair share issues although it had participated fully in the trial, but ordered further proceedings set forth below.

B. Compliance Facts as to Cranbury

After holding extensive meetings at which developers made presentations and the Township extensively discussed the issues and after obtaining some extensions of the Judgment's 90-day

deadline for ordinance revision, Cranbury submitted at the end of December 1984 a 135-page "Mount Laurel II Compliance Program for Cranbury Township, New Jersey." The Court directed the Master to report on the Compliance Program, which he did in April 1985. At a prehearing conference on May 3, 1985, the Court established a 60-day discovery period for exchange of expert reports on the compliance plan, which was subsequently extended to July 24, 1985. By that date all reports were filed and the plaintiffs requested that the Court set a firm date for the compliance hearing. No date has yet been set. On August 19, the instant motion was served.

C. Compliance Facts as to Monroe

Monroe took substantially longer to produce a compliance plan and then proceeded to undermine its own plan. On January 28, 1985, after four months of meetings with the Master, the Council, retained an experienced planning firm to further examine its alternatives. After further meetings, Monroe's "Mt. Laurel II Compliance Program" was submitted to the Court on March 29, 1985 by a Council vote of 3-2. The Mayor did not act on the resolution of submission, although he voiced his strong opposition. Under the Township's form of governance, at least four votes are required to overcome a mayoral veto. The Mayor also refused to authorize payment of the Master, the retained planning firm, or the Township's own attorney for their services in preparing the compliance plan. As a result, the Court ordered that should the

Township Administrator refuse to endorse such payment, the President of the Council was ordered to effect it. That Order of May 13, 1985 has not yet been complied with although no stay was obtained when a notice of appeal was served by the Township on July 26, 1985. App. Div. Docket No. A-5394-84T1.

The compliance plan proposed a variety of projects including a five percent set-aside on an extension of the existing Concordia Planned Retirement Community (PRC) to be known as Whittingham, which was to produce 100 lower income units, and 466 lower income units on a proposed new PRC known as Balantrae. Compliance Program at 25, 28, 33. The Court directed the Master to review and report on the Compliance Program.

While the matter was under consideration by the Master, the Monroe Planning Board and Township Council voted to approve the Whittingham project for 2,400 units, without any set-aside. The Township's attorney refused to provide plaintiffs with information about these public meetings for some three weeks, citing the need for the Mayor's approval. See Willams Affidavit of July 18, 1985, submitted with Notice of Motion for Temporary Restraints, Paras. 7-14. Ultimately, the Council President confirmed to the Master that the project submitted as part of the Compliance program had been approved without a set-aside.

On July 25, 1985, this Court provided the Township with two options to save its own compliance plan. First, the Court gave the Council another opportunity to vote on the Whittingham extension, explaining that if it re-affirmed the project without

any set-aside, the compliance plan would be void and the Master would be directed to come up with her own plan. Second, the Court stated that it would reduce the Township's total fair share by 100 units (presumably, the amount that would be lost by the Whittingham extension without a set-aside) if it would voluntarily comply and not appeal. These directives were embodied in a written order ultimately signed on August 30, 1985. On August 2, 1985, the Township Council informed the Court in writing that it had unanimously rejected both options. By the terms of its oral order on July 25, confirmed by a separate order also entered on August 30, the Court found the Township's compliance plan inadequate and void and directed the Master to provide a compliance plan by October 7, a mere 10 days after the transfer motion is to be heard.

Meanwhile, on August 5, 1985, the Township Council adopted a major revision to its zoning ordinance, permitting substantial residential construction without a set-aside or development fee as an option within the general commercial zone, in response to a request by the developer of the Forsgate project. Home News, August 6, 1985. On August 26, the developer of the proposed Balantrae project appeared before the Monroe Board of Adjustment seeking a variance to build a 2,510 unit planned retirement community on the site. Thomas Farino, the former Township Attorney and now attorney for Stratford at Monroe, Inc., the Balantrae developer, was quoted as saying that the project "may include a 10 percent set-aside, but he added that the number had

not been finalized." Home News, August 26, 1985.

D. Compliance Facts as to Piscataway

During the Spring 1984 fair share trial, all parties agreed that, because of approvals granted during the eight years since Judge Furman's Judgment, Piscataway no longer had sufficient vacant developable land to accommodate the fair share that would be allocated that Township under the formula used by the Court. The Court therefore directed the Court-appointed expert to prepare an inventory of the available land that was suitable for multi-family development. The expert's report was submitted on November 10, 1984 and the plaintiffs' expert endorsed it without exception. The Township, however, contested each and every site recommended by the Court's expert.

Meanwhile, as a result of repeated Township efforts to approve development inconsistent with the Mount Laurel obligation on the dwindling supply of vacant land, the plaintiffs were forced to bring a number of motions for temporary restraints, beginning in May 1984. These resulted in a series of individual orders, culminating in the Order of December 11, 1984, which restrained approvals on any of the sites found suitable by the Court-appointed expert in her November 10 report, pending a full hearing on the report.

After some discovery was had, and a supplemental Court-appointed expert report was submitted on Janaury 18, 1985, the Court held an extended evidentiary hearing in February 1985 on

the suitability of each contested site. On May 16, 1985, the Court held a personal site inspection. On July 23, 1985, a full year after issuing its opinion as to the fair share for Cranbury and Monroe, the Court issued a letter-opinion agreeing with virtually all of the Court-appointed expert's site suitability conclusions, setting Piscataway's fair share at 2215 units, denying requested credits against the fair share, declaring the existing ordinances invalid, and requiring the Township to rezone within 90 days.

On September 17, 1985, after careful review of the Township's extensive objections, dated August 14 and September 9, to the form of Judgment, which was first served by the plaintiffs on August 7, the Court entered Judgment establishing the fair share, denying credits, holding the ordinance unconstitutional, appointing a Master, and directing rezoning by October 23, 1985, a mere four weeks after the return date of the transfer motion. The Judgment also continues the December 11, 1984 restraints as to all sites found suitable by the Court, which restraints the Township, by its transfer motion, seeks to dissolve, notwithstanding the continuing validity of the Court's fair share and other constitutional rulings even if the case were to be transferred.

ARGUMENT

As will be demonstrated below, existing caselaw on retroactivity and exhaustion, which employs the "manifest injustice" language, makes numerous factors relevant to this determination -- the age, complexity, and advanced stage of the litigation, the number and nature of previous determinations of substantive issues, the relative degree of administrative and judicial expertise on the remaining issues, whether there is a need for development of a substantial evidentiary record, the prior conduct of the defendant, the likelihood that agency determinations would differ from judicial determinations, the irreparable harm that might be occasioned by the inevitable delay attendant upon any new administrative process and that might occur in the absence of restraints on development of limited land resources, and, finally, the public interest in prompt resolution of litigation. Denial of these motions to transfer is not only consistent with the legislative intent, but necessary if it is to be given effect, for each of the relevant factors confirms that transfer here would be manifestly unjust to the plaintiffs and the lower income population it represents. The Legislature clearly intended that cases such as this should remain in the courts for prompt resolution of the very few remaining issues.

To assist the Court in the determination of these transfer motions, plaintiffs will initially outline how the statute intends the administrative process to work and to interact with

the litigation process. Then we will seek to explicate the consequences of a "transfer" under Section 16(a) and, as a result, the meaning of the "manifest injustice" standard. We will then argue why transfer of the litigation concerning Cranbury, Monroe, and Piscataway would be manifestly unjust. Finally, we will address the specific question of remedy as to Cranbury posed by the builder remedy moratorium in Section 28 of the Act.

I. THE STATUTORY SCHEME

A. The Administrative Process

The Fair Housing Act was enacted as "a comprehensive planning and implementation response" to the "constitutional obligation to provide a realistic opportunity for a fair share of the region's present and prospective needs for housing for low and moderate income families." Secs. 2(a),(c),(d). It calls for a centralized state-wide administrative process to determine housing regions, state and regional housing needs, and the adequacy of local authorities' fair share determinations and zoning policies to meet their constitutional obligation. Crucial to its interpretation is the clear legislative intendment that the Act be a "mechanism... which satisfies the constitutional obligation enunciated by the Supreme Court." Sec. 3. This statutory context is vital in light of some popular misreading of

the Act as "saving" municipalities from Mount Laurel II. If the Act truly did that, it would surely be unconstitutional.

To accomplish its stated goals, the statute creates a Council on Affordable Housing (hereafter Council), which is obligated to determine housing regions, estimate the present and prospective need for lower income housing on the state and regional level, adopt "criteria and guidelines" for determination of the municipal fair share of the regional need, and then review the adequacy of municipal "housing elements" proposed to meet the local fair share obligation. Secs. 7(a),(b),(c), 10, 14. The Council has no power to mandate municipal participation in the process. Rather, a municipality must first adopt a "resolution of participation." Sec. 9(a). It must then file a "housing element" and a "fair share housing ordinance ...which implements the housing element". Id. The housing element and ordinance may employ a number of techniques to satisfy the fair share obligation including high densities to support mandatory set-asides, donation of municipally owned or condemned land, tax abatements, use of state or federal subsidies, and a regional contribution agreement, by which the obligated township subsidizes the development of lower income units in another township in the region to satisfy up to one-half of the sending township's fair share. Secs. 11(a),(c),12.

Even after the township files a housing element, however, no action need be taken by the township or the Council. If the municipality chooses, however, it may, at any time during the

six-year period that a housing element is in existence, "petition the council for a substantive certification of its element and ordinances." Sec. 13. The Council has no power to require submission of such a petition. If no objection to substantive certification is filed by any person within 45 days of public notice of the petition, the Council must issue substantive certification if it finds that the fair share plan "is consistent with the rules and criteria adopted by the council and not inconsistent with achievement" of the regional low income housing need. Sec. 14(a). If the Council does not consider the plan satisfactory, it may deny the petition or approve it on conditions, in which case the municipality can refile its petition within 60 days and still obtain substantive certification. Sec. 14(b). Once certification is granted, the municipality has 45 days to adopt its fair share housing ordinance. Id.

If an objection is made to certification, the council shall engage in a "mediation and review process". Sec. 15(a). If mediation is unsuccessful, the matter is transferred to the Office of Administrative Law as a contested case. Sec. 15(c). The evidentiary hearing is to be held and the administrative law judge's initial decision is to be made within 90 days, unless the time is extended by the Director of Administrative Law for "good cause shown." Sec. 15(c). Thereafter, pursuant to the Administrative Procedure Act, objections to the initial decision

may be presented to the Council,[3] which must "adopt, reject or modify" the initial decision within 45 days or the initial decision automatically becomes the final decision of the agency. N.J.S.A. 52:14B-10(c).

B. Relation of Administrative Process to Litigation

The legislation recognizes both that the new administrative process will affect pending litigation and that administrative decisions will be appealed to the courts for review. It thus contains a complex series of provisions defining the interrelationship between this new administrative procedure and the existing judicial framework for resolving exclusionary zoning disputes.

1. If no litigation is pending.

If no case is pending, the town may choose either to adopt a resolution of participation or not, thereafter to file a housing element or not, and finally to petition for certification or not, as it wishes. If a town goes through the entire process and receives substantive certification, then in any subsequent court

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[3] Under the Administrative Procedure Act (APA), such an appeal goes to "the head of the agency." N.J.S.A. 52:14B-10(c). It is unclear whether under the Fair Housing Act the "head of the agency" would be the Council itself or the Executive Director of the Council. The APA indicates that a multi-person body could be the "head" because it refers to decisions by "the head of the agency or a majority thereof." Id.

proceeding the certification has a presumption of validity, and the complainant has the burden of proving by clear and convincing evidence that the local plan does not in fact provide the required realistic opportunity for the fair share. Moreover, in any such proceeding the Council is joined as a party with power to present to the court its reasons for granting certification. Secs. 18(a) and (c). If the town has not completed the certification process but has, before suit is instituted, adopted a resolution of participation in a timely fasion, i.e., within 4 months of the effective date of the Act, Sec. 9(a), or November 2, 1985, then a plaintiff must exhaust the review and mediation process of the Council. Sec. 16(b).

Although Section 16(b) says exhaustion is required before a litigant is "entitled to a trial on his complaint", the proper avenue for judicial review of a final administrative determination ordinarily is by appeal to the Appellate Division. N.J.S.A. 52:14B-14; Rule Governing Appellate Practice 2:2-3(a)(2). Trial will occur in court, then, only if the municipality or Council fails to meet deadlines for initiation or completion of the administrative process. For example, if the municipality does not adopt a resolution of participation on time, no exhaustion is required. Sec. 16(b). If the municipality has timely adopted a resolution of participation but fails to file the required housing element and fair share ordinance in a timely fashion, the exhaustion requirement automatically expires. Sec. 18. If the muncipality has filed on time both the resolution

of participation and the housing element, but the Council has not completed its review and mediation process within six months of receipt of a request by a party who has instituted litigation, the party may file a motion in court to be relieved of the exhaustion requirement. Sec. 19.[4] In cases where review and

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[4] It is not clear from Section 19 what parts of the process are included in the six-month limit. There are four steps in the statute's administrative process. First, Section 15(b) requires a meeting of the Council, municipality and any objectors to mediate the dispute. If that fails, Section 15(c) requires transfer to the Office of Administrative Law as a contested case, and hearing and initial decision within 90 days unless extended by the Director of Administrative Law for unspecified "good cause." Third, the Administrative Procedure Act sets a 45 day limit, again subject to extension, for "head of agency" review of the initial decision. N.J.S.A. 52:14B-10(c). See note 3 supra. Finally, Section 13(b) provides that "[i]n conducting its review" the Council may deny a petition for certification or condition it upon changes in the housing element or ordinances, and then the town has 60 days to refile its petition with the necessary changes in which case the Council may still grant substantive certification, although no time period is set for that review. It is unclear whether the six-month limit in Section 19 on the "review and mediation process for a municipality" refers only to the first step -- mediation; to the first three steps, in which case 45 days would be available for mediation; or to all four steps, which literally could not occur within 180 days.

This uncertainty arises because the version originally passed by the Legislature had defined a "review process" if mediation was not successful, but specified that the "review process" shall not be considered a contested case under the APA. The Governor, in his conditional veto, deleted that review process and explicitly added that if mediation fails the matter shall be referred to the Office of Administrative Law as a contested case. He did not, however, amend the wording of Section 19 which refers to the "review and mediation process." The task, then, is to give meaning to legislative intent in light of imprecise redrafting.

We believe that the second interpretation -- that "review and mediation process" encompasses the first three steps -- is the most plausible because "review and mediation" is more than simple mediation, the Administrative Procedure Act specifically directs the head of the agency to "review...the record submitted by the administrative law judge," N.J.S.A. 52:14B-10(c), 45 days seems a sufficient time to determine if mediation will be successful, town re-filing is optional and not part of the initial review process, and in any case the statute should not be

mediation requests are filed within nine months after the Act takes effect, i.e. before April 2, 1986, the six-month completion period does not begin to run until that date. Id. Finally, trial would occur in court if the Council denies substantive certification or grants it upon conditions that the municipality does not accept. Sec. 18.[5]

Clearly these provisions are designed primarily as a threat, much like the current builder's suit under Mount Laurel II -- of a court trial leading to a judicial ruling without a presumption of validity as to the local determinations -- to insure that appropriate steps are in fact taken in a timely fashion to resolve the dispute in the administrative forum. For this reason, the legislation expresses a "preference," but not an absolute requirement, for resolution of both present and future disputes

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construed to provide an unworkable or meaningless time schedule.

[5] The normal method for judicial review of a final administrative decision is, as noted in text, by appeal to the Appellate Division and ordinarily both parties to a proceeding have the same right. However, it appears that the Fair Housing Act denies municipalities the opportunity to go to the Appellate Division if certification is denied or conditioned, and instead requires reversion of the case to the trial court. Section 16 requires exhaustion of the review and mediation process before "being entitled to a trial on his[sic] complaint." Section 18 specifies two situations in which the exhaustion requirement imposed by Section 16 automatically expires. The second is "if the council rejects the municipality's request for substantive certification or conditions its certification upon changes which are not made within the period established in this act." Sec. 18. Thus, if exhaustion is not required, the litigant gets a trial on the complaint. This provision is in accord with the direction in Mount Laurel II that only fully adjudicated and compliant ordinances are appealable. 92 N.J. at 214, 290, 456 A.2d at 418, 458.

through the mediation and review process in the Act, rather than litigation. Sec. 3.

2. If litigation was pending less than 60 days before the effective date of the statute.

The Act treats very recently filed litigation the same as litigation filed after the effective date of the Act. Quite simply, if the municipality adopts a resolution of participation within four months of the Act's effectiveness, the recent litigant must exhaust the review and mediation process. Sec. 9(a). No exceptions are stated in the Act, although presumably the usual exceptions to the exhaustion requirement would be applicable in an appropriate situation. See the Supreme Court's most recent discussion of the exceptions to the exhaustion requirement in Abbott v. Burke, 100 N.J. 269, 297-300 (1985). See also Brief on Behalf of Intervenor State of New Jersey, Morris Cty. Fair Housing Council, et al. v. Boonton Twp. et al., No. L-5001-78 P.W. (hereafter Brief on Behalf of Intervenor State of New Jersey), at 69.

The rationale for this provision is, obviously, that litigation that was commenced because of the impending passage of the legislation, anticipated by all after the April 22, 1985 conditional veto message of the Governor, should not thereby avoid the intended administrative exhaustion requirement. This provision makes perfect sense because in no case would any determination of substance -- e.g., region, regional need, fair

share allocation, invalidity of current zoning ordinances, site suitability or remedy -- have been made within 60 days of filing. Indeed, it would be an advanced case if the Answer had been filed or initial discovery requests had been served within that time period.[6]

3. If litigation was pending more than 60 days before the effective date of the statute.

This brings us to the type of case before the Court now -- one in which the litigation was commenced prior to the eve of legislation. As to these cases, the statute simply states that:

> 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.

Section 16(a).[7]

The Act does not state precisely what is transferred (existing pleadings and record, prior rulings of court, power of court to issue interim relief, etc.) nor does it identify the procedural consequences of a transfer. Unfortunately, the

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[6] There could, of course, be a case where the township's delay in responding to a plaintiff's good-faith pre-litigation submission had delayed the filing and service of the complaint until the period specified in Section 16(b). In such instances, arguably, the muncipality should not be allowed to benefit from the more absolute terms of Section 16(b), but rather should be forced to prove that there would be no manifest injustice under Section 16(a) in requiring exhaustion of the administrative process.

[7] See note 1 supra.

provisions that do exist only tend to cloud and confuse the question.

The Act does not require a municipality in a transferred case to petition for certification, but simply states that if the municipality fails to file its housing element and fair share plan with the Council within five months of transfer or of promulgation of the Council's criteria and guidelines under Section 7, whichever occurs later, "jurisdiction shall revert to the Court." Sec. 16(a). Unlike Section 16(b), the Act does not specify that a party may or must file a notice to request review and mediation under Sections 14 and 15. Thus, it is unclear even whether the provision in Section 19, permitting a party to move for relief from the exhaustion requirement if the process is completed within six months of "receipt of a request of a party," is applicable. Thus as literally written, the statute only provides that by August 1, 1986,[8] more than 10 months after the return date of these motions, the Council must adopt its criteria and guidelines and that the muncipality must file a document with the Council by January 1, 1987, containing the matters specified

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[8] The statute literally provides that the Council must adopt criteria and guidelines within seven months after the confirmation of the last appointee or January 1, 1986 which is earlier. Sec. 7. However, the Governor failed to meet the first deadline in the statute and did not nominate the members of the Council until August 29, 1985, and it is anticipated that the Legislature will be in session only briefly between now and the election in November. Thus, it is most unlikely that all members will be confirmed by the end of the calendar year. We, therefore, proceed on the assumption that the Council's obligation will date from January 1, 1986, the later of the two days provided in the statute.

in Section 10.[9]

If the statute is read literally: a) nothing further happens unless within the next six years the municipality determines that it is in its best interest to petition for substantive certification; or b) the litigant files a new lawsuit as to which the right to request review and mediation under Section 16(b) and the right to move in court under Section 19 for relief from exhaustion if the administrative process is delayed clearly attach. It is hard to imagine that the Legislature intended that, after transfer and timely filing of a housing element and fair share plan, either nothing would happen or the litigant would be forced to file a brand new lawsuit with the attendant filing costs and service delays, not to mention possible loss of vested law-of-the-case adjudications.

The only possible ways out of this apparently inadvertent lacuna are:

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[9] It is not clear whether a litigant would be allowed to challenge in court the procedural adequacy of the submission in order to invoke the reversion provision of Section 16(a). For example, could a court decide that a 2-page municipal submission entitled "housing element" with single sentences under each heading called for by Section 10 and a fair share plan that simply states that no zoning ordinance revisions are necessary to achieve the fair share is a "failure to file a housing element and fair share plan" within the meaning of Section 16(b)? Some court review might be necessary to preserve the court's own jurisdiction, especially if the statute is construed not to require a town that gets a transfer to petition for substantive certification and not to permit a litigant to request review and mediation with the attendant time limit and avenue for relief under Section 19, issues discussed hereafter in text.

1) for the Court to construe a municipality's motion to transfer under Section 16(a) as rendering the timely filing of its housing element and fair share plan the equivalent of a petition for substantive certification of that element and plan;[10] or

2) to construe Section 16(a) as conferring upon the plaintiff in a transferred action the same right to request review and mediation as is explicitly afforded plaintiffs in Section 16(b).

The former approach seems less plausible because nowhere else does the Act mandate filing of a petition for certification or provide a penalty for not filing. The second approach makes more sense because the statute already explicitly grants a litigant who is forced to exhaust administrative remedies under Section 16(b) a right to request mediation -- indeed the Section requires such a request -- and provides a remedy if the mediation process is not completed in a timely manner. Sec. 19.

Moreover, the second interpretation has some textual support. Section 15(a) specifies that the Council must engage in the mediation and review process either if an objection is filed to a petition for certification or "(2)if a request for mediation and review is made pursuant to section 16 of this act." (Emphasis added.) The failure to limit the citation to 16(b) suggests that

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[10] In its brief in the consolidated Denville cases, received just before the filing of this brief, the Attorney General adopts this interpretation. Brief of Intervenor State of New Jersey, at 66.

the Legislature may simply have inadvertently omitted recitation in 16(a) of the right to seek mediation that is expresssly stated in 16(b). The Legislature's ability to make precise subsection citations is shown by the Assembly amendment to Section 16(b) itself. In addition, as noted earlier,[11] Section 16(a) is in fact listed simply as 16 in the enacted version of the statute.

Although the second approach -- reading Sections 15(a)(2) and 16(a) to give litigants in transferred cases the right to request mediation and review -- seems more logical, it would force the Court to confront a further interpretation problem created by the inconsistent timetables established by Sections 16 and 19. Under Section 7 and 16, the Council has seven months from the date of the last appointee's confirmation or January 1, 1986, whichever is later, to promulgate its criteria and guidelines and a municipality allowed to transfer a case must file its housing element and fair share plan within five months from that promulgation. Most likely, these dates would be August 1, 1986 for promulgation and January 1, 1987 for town filing.[12] If a request for mediation and review could then be immediately filed,[13] the Council would have at least six months, or until

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[11] See note 1 supra.

[12] See note 8 supra.

[13] Ordinarily, a town must provide public notice when filing a petition for certification and the Council must allow 45 days for objections to be filed. Sec. 14. It is unclear whether this additional 45-day delay would be required when a formal petition is not required and the Council already has an objector in the form of the transferred litigant. Under the Attorney General's view, see note 10 supra, there would be a 45-day publication period after the filing of a housing element in a transferred

July 1, 1987, to complete that process. See note 4 supra for the question of what parts of the administrative process are within the "review and mediation process" to which the six-month limit applies. But if Section 15(a)(2) and 16(a) were read to permit plaintiffs in transferred cases to seek mediation and review and then invoke Section 19 relief in case of delayed administrative processing, it would appear that the provision in Section 19, which specifies that the six-month period for relief from the exhaustion requirement begins to run nine months from enactment of the Act for cases in which the request is filed within that nine month period, should apply. If that were the case, a transferred plaintiff's motion for Section 19 relief from exhaustion could be filed by October 2, 1986, 15 months (nine months plus six months in the administrative process) from the Act's effective date, which would be almost a full three months before the town's housing element is even due to be filed under Section 16(a) and nine months before the Section 19 motion could even be brought under that approach.

Whatever the resolution of this quandary, one thing is quite clear -- the absolute minimum time that would be expended before any action is required before the Council for transferred cases is October 2, 1986, more than 1 year from when this transfer motion is to be heard. Even under that scenario, however, the court hearing the Section 19 motion would have discretion to deny

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case. Brief of Intervenor State of New Jersey, at 66-67.

relief from the exhaustion requirement, simply allowing more extended mediation and review proceedings, or, indeed, resolving the above quandary in the municipality's favor by allowing until July 1, 1987, 21 months from now, when the motion for Section 19 relief could be brought under the alternative timetable of Section 16(a). Even if the administrative process were completed in October 1986, but the Council denied or conditionally approved certification, the municipality would have another 60 days to refile and then the Council would have some unspecified additional time to review the new filing. Sec. 14(b). Thus, under any realistic view of this statute, a transfer now would mean a delay at least until some time in the first half of 1987.[14]

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[14] In its brief in the consolidated Denville cases pending before Judge Skillman, the Attorney General urges the Court simply to ignore the second sentence of Section 19 and to apply the longer Section 16 timetable to transferred cases. Because the State considers the bringing of a motion for transfer as the equivalent of petitioning for certification when filing a housing element, see note 10 supra, it adds the 45-day publication period in Section 14 to the Section 16 timetable. See note 13 supra. Under the State's view, then a Section 19 request for relief from a delayed administrative process could not even be brought until August 15, 1987, nearly two years from now.

II. THE CONSEQUENCES OF TRANSFER AND THE MEANING OF MANIFEST INJUSTICE

Even if it were clear what procedural steps could or would occur upon transfer, and under what time limits, it is important to consider what substantive proceedings would occur after transfer to determine whether the transfer would be manifestly unjust. Clearly, in a case brought within 60 days of the Act's effectiveness, in which exhaustion is always required and no substantive determinations have yet occurred, the entire case with all issues will be before the Council. But in older cases, where substantive determinations may already have occurred and substantial evidentiary records already compiled, one needs to determine what issues and materials would be before the Council upon transfer.[15]

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[15] We note that, in a technical sense, transfer is not literally possible at this time, because there is no Council, the Governor having only recently nominated and the Senate not yet having considered any members, and there are no offices available nor employees empowered to take custody of the materials, not to mention process the case. The motion to transfer the case is thus literally premature. If the Court had not deferred setting a date for the compliance hearing in Cranbury and if restraints were not in effect as in Piscataway, we would have urged the Court to deny the motion as premature and continue with proceedings in court until a Council that could act upon a transferred case exists. Under the circumstances, we agree that prompt determination of these motions is crucial.

Should the Court be inclined to grant transfer, however, we would argue that transfer could not take effect and, thus, that the Court would have continuing jurisdiction and an obligation to move forward with the normal proceedings until, at a minimum, the Council's members are all confirmed, employees appointed and offices established, and, thus, a transfer to the Council is at least literally feasible. Under this view, the compliance hearing in Cranbury should in any case go forward, the Master's report in Monroe would still be due on October 7, and Piscataway's compliance plan would still be due on October 23, for it would be

A. The Consequences of Transfer

Two major options exist: either the Council starts over and the Council redetermines everything without regard to the prior court record and the rulings that constitute the law of the case, or the Council is empowered only to deal with those issues in the case that remain unadjudicated at the time of transfer and to resolve them in light of the existing record and prior rulings. Plaintiffs do not think it crucial for the Court to decide this important statutory construction issue in this case because, as argued below, it is clear that a transfer of any part of this litigation would, under either view of the subsequent proceeding, be manifestly unjust to the class of lower income households which is the affected "party" to this litigation. Nevertheless, we believe that the history, structure and language of the Act, when read against existing law, indicate that if a case with prior substantive rulings could be transferred at all, the Council could determine only the issues remaining at the time of transfer.

The issues of what happens after transfer and what is manifest injustice precluding a transfer are obviously interwined. Plaintiffs believe that the caselaw compels the

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manifestly unjust to refer plaintiffs, especially ones on the verge of obtaining a final judgment after 11 years of litigation, to a nonexistent remedy.

conclusion that it would be unlawful and manifestly unjust to require a litigant, who has through extended and expensive litigation produced a substantial evidentiary record and secured settled rights through adjudication of key issues on liability or remedy, to begin anew before a newly created administrative tribunal. From this one could conclude either: a) that the statute bars transfer of any case in which adjudication of a key issue of liability or remedy, such as municipal fair share or ordinance invalidity, has been completed; or b) that transfer is not totally barred in such cases but upon transfer those rulings may not be reopened and the earlier record is controlling. If one adopts the latter view, then one must consider whether it would be manifestly unjust to transfer (with extended delays) such an extensively litigated case even though the new administrative agency would have very limited expertise and could address only unresolved disputes in light of the existing record and law of the case.

Resolution of these related issues depends primarily upon the interaction and impact of two strands of existing law that employ the "manifest injustice" standard -- the law on when new statutes may be applied retroactively and the law on exhaustion of administrative remedies in prerogative writ actions -- as well as the related law concerning primary jurisdiction.[16]

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[16] Although the law of primary jurisdiction does not directly use the language "manifest injustice," it is essential to consider it both because of its close relationship to the exhaustion requirement and because it is directly applicable to the situation before the court in a transfer motion, as explained below.

B. Caselaw Relevant to Manifest Injustice

1. Retroactivity law

"The courts of this State have long followed a general rule of statutory construction that favors prospective application of statutes." Gibbons v. Gibbons, 86 N.J. 515, 521 (1981). There are, of course, exceptions where the Legislature has expressly stated an intent to apply it retroactively, or where it has done so implicitly because "retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation." Id. at 522. Likewise, retroactive effect is generally given to a statute that is ameliorative or curative, for example, in reducing the maximum period of detention, or because of the reasonable expectation of the parties. Id. at 522-23. Finally:

> [E]ven if a statute may be subject to retroactive application, a final inquiry must be made. That is, will retroactive application result in "manifest injustice" to a party adversely affected by such an application of the statute? 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 523-24. Because of the preference for prospective application and the likelihood that retroactive application would prejudice settled expectations reasonably relied upon, courts

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generally apply procedural rules retroactively, but rarely apply substantive changes retroactively to disrupt vested rights. See, e.g., Farrell v. Violator Division of Chemetron Corp., 62 N.J. 111, 299 A.2d 394 (1973); Feuchtbaum v. Constantini, 59 N.J. 167, 280 A.2d 161 (1971); Townsend v. Great Adventure, 178 N.J. Super. 508, 429 A.2d 601 (App. Div. 1981); Newark v. Padula, 26 N.J. Super. 251, 97 A.2d 735 (App. Div. 1953); 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION Secs. 41.04, 41.06 (4th ed. 1973).

2. Exhaustion of Administrative Remedies

The Supreme Court has also clearly ruled that "the preference for exhaustion of administrative remedies is one 'of convenience, not an indispensable pre-condition.' ... In any case amenable to administrative review, however, upon a defendant's timely petition, the trial court should consider whether exhaustion of remedies will serve the interests of justice." Abbott v. Burke, 100 N.J. 269, 297 (1985). The interests furthered by an exhaustion requirement are:

> (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts.

Id. at 297-98. However, as the Court in Abbott and earlier exhaustion cases explained:

> [t]he exhaustion doctrine is not an absolute. Exceptions exist when only a question of law need be resolved ... when the administrative remedies would be futile ... when irreparable harm would result... when jurisdiction of the

> agency is doubtful... or when an overriding public interest calls for a prompt judicial decision.

Id. at 298.

The Supreme Court has summarized this set of doctrines concerning administrative exhaustion in a court rule regarding exhaustion in actions in lieu of prerogative writs, the form of action in which almost all Mount Laurel lawsuits have been brought:[17]

> Except when manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be undertaken as long as there is available a right of review before an administrative agency which has not been exhausted.

R. 4:69-5.

3. Primary Jurisdiction

Probably even more pertinent to the present situation than the caselaw on exhaustion of administrative remedies is the related doctrine of primary jurisdiction:

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency

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[17] By a fluke of history, this action, Urban League v. Carteret, was actually brought as an equity action in Chancery, rather than as an action in lieu of prerogative writ. Nevertheless, because almost every case since Mount Laurel II, and most before it, have been brought in the latter mode, it is reasonable to assume that the Legislature was thinking about the rules relevant to that mode in adopting the "manifest injustice" language. Of course, whatever interpretation of the "transfer" and "manifest injustice" provisions prevails, clearly it must apply to all pending actions without regard to the form in which they were brought.

> alone; judicial intereference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.'
>
> ... We do not imply that the agency may enlarge or contract the legal rights of the parties. When the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their rights. New Jersey Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982); cf. Farmingdale Realty Co. v. Borough of Farmingdale, 55 N.J. 103, 112-13 (1969)(taxpayer whose building had been taxed twice could recover refund without exhausting administrative remedies); Nolan v. Fitzpatrick, 9 N.J. 477 (1952)(exhaustion of administrative remedies not required when sole issue is county's legal duty to appropriate funds for commission).

Boss v. Rockland Elec. Co., 95 N.J. 33, 40 (1983).

In Boss, the Court found that the Board of Public Utility Commissioners had a direct statutory mandate and substantial administrative expertise on the very factual issue before the Court and that this issue required development of a substantial evidentiary record before determination. The Court thus directed the trial court to refer those factual issues to the Board, leaving undisturbed pending final disposition the trial court's previous preliminary injunction to preserve the status quo.

The approach taken in Boss is also consistent with the State Agency Transfer Act, N.J.S.A. 52:14D-1 et seq., which provides for inter-agency transfers. Indeed, the Act specifies that a transfer does not undo previous actions of the original decisionmaker: "The transfer shall not affect any order... made

...by the agency prior to the effective date of the transfer; but such orders.... shall continue with full force and effect until amended or repealed pursuant to law; ... nor shall the transfer affect any order or recommendation made by, or other matters or proceedings before the agency." N.J.S.A. 52:14D-6,7.

The doctrine of primary jurisdiction is more directly applicable here than that of exhaustion of administrative remedies for the simple reason that Section 16(a) expressly contemplates transfer of an existing action from a court, which the Act does not deny has had primary jurisdiction until now, to an administrative agency, and for reversion of jurisdiction to the court should the administrative process not be pursued or completed in a timely fashion. Section 16(b), in contrast, expressly refers to exhaustion of administrative remeides because it addresses cases not yet filed, or only filed in anticipation of the requirement's imposition. Indeed, as initially written, Section 16(a) required "no exhaustion of the review and mediation procedures" unless the specified determination was made, but the language was changed, pursuant to the Governor's conditional veto, to eliminate all references to "exhaustion" and the subsection now speaks only of "transfer".

C. <u>The Meaning of Manifest Injustice</u>

It is against this substantial background of well-established law that one must view the statutory language barring

"transfer" of a "case" that would cause "manifest injustice."

1. Cases in which substantive determinations have already been made.

First, it seems clear that the Legislature did not intend retroactive impairment of vested substantive rights. The statute does not directly determine regions, regional need, municipal fair share, or the adequacy of compliance plans. Rather, it creates a procedure, with a few basic guidelines, and directs the Council to come up with criteria to be used to gauge municipal determinations. It does not reject any particular court ruling or definition of fair share. It does not purport to impose a new one. It does not require all pending cases to be sent to the Council for such a determination, but only those brought on the eve of legislation -- in which almost certainly no substantive rulings will have been made. Rather, it clearly leaves jurisdiction in the court to exercise discretion as to which cases that are older, including those that have already been partially adjudicated by the Court, are to be transferred. In exercising this discretion, courts should look to the long-standing rule that statutes are generally not to be applied retroactively and especially not to disrupt vested rights to the prejudice of parties who have reasonably relied on existing law. Likewise, under the doctrine of primary jurisdiction "when the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their

rights." Boss, supra, 95 N.J. at 40. Thus, plaintiffs submit that Section 16(a) must be construed to bar transfer of any case in which judicial determination of litigants' rights have been made -- i.e. law of the case created -- as to any of the key issues -- region, regional need, fair share allocation methodology, municipal fair share, invalidity of existing zoning ordinance, site suitability, or overall remedy.

This conclusion is bolstered by Rule 4:25-1(b), the rule concerning pretrial orders, which is one of the few other places in which the civil law in New Jersey relies on the "manifest injustice" standard.[18] The rule provides:

> When entered, the pretrial order becomes part of the record, supersedes the pleadings where inconsistent therewith, and controls the subsequent course of action unless modified at or before the trial or pursuant to R.4:9-2 to prevent manifest injustice.

Clearly the purpose is to insure that no new claims or defenses are raised once the trial is underway. Rule 4:9-2 simply permits issued not raised by the pretrial order that "are tried by consent or without the objection of the parties" to be treated as if they were raised in the pretrial order. Thus, as in retroactivity and exhaustion law, the "manifest injustice" standard is meant to prevent forcing a party to relitigate or to

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[18] The term is also used in Rule 3:21-1, concerning withdrawal of guilty pleas, and in caselaw construing 3:22-1 relating to petitions for post-conviction relief. See, e.g., State v. Cummins, 168 N.J. Super. 429, 433 (Law. Div. 1979). Because of the substantially different policies and consequences applicable in the criminal context, we do not believe that the use of the term in that context has much significance for the issues before this Court.

litigate additional issues once the case has been defined and adjudicated. Quite simply, transfer of cases already tried is fundamentally and manifestly unjust.

Indeed, this interpretation is directly consonant with the primary purpose of the Fair Housing Act -- to permit municipalities to comply voluntarily with their constitutional obligations, thereby maximizing respect for local home rule decisionmaking, with the threat of judicial intervention should they fail. Yet before cases, certainly those as complex as this one, are tried, there is always a substantial opportunity for negotiation, settlement and hence voluntary compliance on terms within the towns' control. This Court has already twice stated in print that it will be flexible in its fair share number and in phasing, and will temporarily stay builder remedy suits, if a township would voluntarily settle before or immediately after suit. J.W. Field Co., Inc., et al. v. Township of Franklin, et al., No. L-6583-84 PW (Jan. 3, 1985), slip op. at 8-12; The Allan Deane Corp. v. Township of Bedminster, No. L-36896-70 P.W. (May 1, 1985), slip op. at 4-5. Indeed, this Court has already demonstrated just such flexibility with regard to other towns in this litigation which were interested in settling. But, once a town has foregone the opportunity for voluntary settlement and proceeded to trial, there is no reason to transfer the case so that it can try voluntary compliance.

In the alternative, if the Court were to reject this view and find that transfer is permitted even though substantive

determinations have been made, any transfer must, to prevent impairment of vested rights, be expressly limited to determination of the issues remaining unresolved at the time of transfer, in light of the existing record and prior court rulings.[19]

If one adopts the latter approach -- that the transfer of cases with substantive adjudications is permitted by Section 16(b), although limited to the resolution of the outstanding issues in light of the existing record -- the Court would still have to consider whether it would be manifestly unjust to apply the new administrative procedure to the few remaining issues in old and mostly adjudicated cases.

The Gibbons standard of manifest injustice used by the Fair Housing Act explicitly contemplates that injustice and unfairness can flow from procedural delay as well as substantive changes in the rules. One of the prominent cases relied upon by Justice Pashman in Gibbons to describe manifest injustice in the setting of retroactivity was Kruvant v. Cedar Grove, 82 N.J. 435 (1980), a land use case very similar to some of the experiences in the Urban League litigation. In Kruvant, a variance had been sought for a multi-family development in a single family zone that the court found to be unsuitable for single family development. After

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[19] This interpretation coincides with the common sense meaning of transfer. When referring to transfer of a case, one does not normally think of merely transferring an empty file folder but rather of transmitting all documents in the record. See also N.J.S.A. 52:14D-8("All files, books, papers, records... are transferred to the agency to which such transfer is made.")

eight years, four trials, and three ordinance amendments that the trial court characterized as "repeated improper zoning," id. at 444, 414 A.2d at 13, the Supreme Court concluded that the municipality simply did not want this multi-family housing and that the trial court properly ignored yet another zoning amendment, which had been adopted after the expiration of a 90-day deadline set by the trial court for final municipal action. The Court noted that normally the time of decision rule requires courts to apply the law in effect at the time of the judicial hearing if the Legislature indicated that the modification was to be applied retroactively to pending cases. Id. at 440. But the Court explained:

> However, the principle is not inexorable. . . . Where a court has set a reasonable time limitation within which a municipality must act and that condition has not been met, a municipality may not simply ignore a court order and interfere with the judicial process. . . . In view of the extended proceedings, the unquestioned propriety of the trial court's 90-day restriction, and the property owner's satisfaction of the requirements for a variance, the equities warrant and judicial integrity justifies the inapplicability of the time of decision rule. Cf. Oakwood at Madison v. Madison Tp., 72 N.J. 481, 549, 550 (1977).

Id. at 442, 445, 414 A.2d at 12-13, 14.

Thus, it is clear that the defendant's conduct in the period preceding the transfer motion, including particularly delays needlessly incurred and court orders improperly ignored, must be considered by the court in determining whether the equities and judicial integrity justify imposition of a newly enacted procedure upon a protracted and nearly completed action.

2. Cases in which development restraints will be needed pending final determination.

In addition to considering the problem of existing substantive adjudications and defendant conduct and delay, a court deciding whether transfer would be manifestly unjust in a particular case must consider the various other factors addressed in determining whether to excuse exhaustion or avoid transfer to an administrative agency with primary jurisdiction: whether the administrative agency has particular expertise concerning the issues to be resolved, whether the agency decision may satisfy the parties and thus obviate resort to the courts, whether only questions of law remain to be resolved, whether there is a need to create a substantial evidentiary record and make extensive findings of fact for appellate review, whether the administrative remedies would be futile under the circumstances, whether jurisdiction of the agency is doubtful,[20] whether an overriding public interest calls for a prompt judicial decision, and whether irreparable harm would result.

Before seeking to apply these factors to Cranbury, Monroe, and Piscataway, it is important to explicate one aspect of the last factor -- the risk of irreparable harm during the administrative process. Mount Laurel courts have recognized that, at times, the dwindling supply of vacant land or of sewerage

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[20] See pp. 34-39 supra for discussion of whether the Council has any jurisdiction over court cases in which substantive rulings have already been made.

capacity requires interim restraints to insure that the municipality will be able to implement the compliance remedy ultimately ordered by the Court, that is, to prevent irreparable injury to plaintiff's probable right to rezoning of sufficient land to insure a realistic opportunity for construction of lower income housing. In this very action, for example, this Court has entered such restraints in Piscataway and South Plainfield and, to a lesser degree, in Old Bridge. Should the Court conclude that transfer of this or any similar litigation were appropriate in general under the standards set forth by the retroactivity and exhaustion caselaw, it would still have to determine whether the court retains jurisdiction to continue its restraining order pending final administrative determination.

Courts hearing appeals from final administrative determinations clearly have power to provide interim relief pending the conclusion of the judicial review process. Rule 2:9-7 specifically grants such power to the Appellate Division both in appeals as of right from final agency decisions, governed by Rule 2:2-3(a)(2), and in cases in which permission is sought to appeal interlocutory administrative decisions under Rules 2:2-4 and 2:5-6. See also Sampson v. Murray, 415 U.S. 61, 73-74 (1974); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942). In addition, in extraordinary cases, a court may enjoin an administrative proceeding. Rule 4:52-6 and Mutual Home Dealers Corp. v. Comm'r of Banking and Ins., 104 N.J. Super. 25 (Ch. Div. 1968). The rules do not directly address, however, whether courts

may enjoin defendants to maintain the status quo pending completion of an administrative process.

Both logic and caselaw indicate that courts should have the power to do so. If a reviewing court can grant interim relief pending its review of a final or interlocutory administrative decision, to insure that its final decision will be effective and meaningful to the prevailing party, then it would appear logical that it should also have power to grant such relief pending completion of the administrative process. If the municipality does not file its housing element and fair share plan on time or the review and mediation process takes too long or if the Council denies or conditions certification, a transferred case will revert to the trial court.[21] Thus, it would appear logical that the trial court should have authority to issue temporary restraints to prevent irreparable harm to the plaintiff obligated to exhaust the new administrative remedy.

In Boss v. Rockland Electric Co., supra, the New Jersey Supreme Court expressly left in effect, pending completion of administrative factual determination of the scope of an electric utility's easement, a trial court's preliminary injunction against the removal of trees from the affected property that had been issued 3 1/2 years before the Supreme Court's opinion. 95 N.J. at 33, 37, 42-43. Likewise, the federal Supreme Court, in FTC v. Dean Foods Co., 384 U.S. 597, 599-601 (1966), held that

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[21] See discussion at pp. 16-18 supra.

the court with ultimate jurisdiction to review the agency's orders had power to grant a temporary injunction to prevent disappearance of one of the entities whose merger the agency sought to challenge, because the disappearance would have rendered the agency and the court "incapable of implementing their statutory duties by fashioning effective relief." Sampson v. Murray, 415 U.S. 61, 76-77, 84 (1974).

The Fair Housing Act does not directly address the point and it appears to have intended that transfer divest a court of all jurisdiction.[22] But the fact that the administrative process was designed as "a comprehensive planning and implementation response to this constitutional obligation," Sec. 2(c), suggests that the statute could be read to permit such court restraints if transfer were imposed.

However, court restraints against any construction on most vacant sites pending conclusion of a two-year administrative process could raise significant "taking" questions. The landowners would be unable to take advantage either of permitted uses under the existing zoning or of the proposed rezoning to comply with the constitutional obligation. Having no economically meaningful option for the land, they would be able to argue that the regulatory process had amounted to a taking of their land. See, e.g. Lomarch v. Township of Englewood 51 N.J. 108, 237 A.2d

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[22] Section 16(a) states that if the municipality fails to file its housing element on time, "jurisdiction shall revert to the court."

881 (1968)(one year public reservation of sites within development amounts to a compensable taking of an option to build). Yet a court injunction creating a compensable taking would appear inconsistent with the direct legislative mandate that "Nothing in this act shall require a municipality to raise or expend municipal revenues in order to provde low and moderate income housing." Sec. 11(d).

To avoid the risk either of irreparable harm to the plaintiff and nullification of the agency's mandate or of creating a compensable taking through an extended moratorium on construction, the court should rule that transfer is always barred if a temporary restraint against development is in effect or would be required pending completion of the administrative process.

III. IT WOULD BE MANIFESTLY UNJUST TO TRANSFER THE CRANBURY, MONROE OR PISCATAWAY PORTIONS OF THIS 11-YEAR OLD CASE, BECAUSE THE SUPREME COURT HAS ALREADY AFFIRMED THE RULING OF LIABILITY, THIS COURT HAS CONCLUDED ALL BUT THE FINAL STEPS IN DETERMINING THE PROPER FORM OF ZONING ORDINANCES NEEDED TO COMPLY, AND THE SUBSTANTIAL DELAY NECESSARY FOR ADMINISTRATIVE RESOLUTION OF THE REMAINING ISSUES WOULD SERIOUSLY JEOPARDIZE THE VESTED RIGHTS OF THE PLAINTIFFS AND NEEDLESSLY PROLONG BROAD-SCALE RESTRAINTS IN PISCATAWAY

A. Manifest Injustice Relevant to all Towns

Based upon the interpretation of the statute set forth above, the Court should deny the motions to transfer outright for two separate reasons. As argued above, no case in which judicial adjudications of liability or remedy have already been made and no case in which interim restraints against development must be continued or imposed pending the extended administrative process may be transferred under Section 16(a) of the Fair Housing Act. Here, the Court has already adjudicated plaintiffs' rights as to region, regional need, fair share, ordinance invalidity, and as to Piscataway, site suitability and appropriate densities for rezoning. Moreover, because of the limited vacant land remaining in light of Piscataway's actions since the July 1976 Judgment, the Court has already found it necessary to restrain development in Piscataway and continuation of such restraints would be essential to preserve any Mount Laurel opportunity.

There is, moreover, a third reason peculiar to this litigation. The "case" in which the litigation concerning Cranbury, Monroe and Piscataway has occurred, Urban League, et

al. v. Mayor and Council of Carteret, et al., No. C4122-73, is a single judicial action involving originally 23 municipal defendants and at present eight, including Cranbury, Monroe and Piscataway, as to which no final judgment has been entered. Although the statute expressly permits "any party to the litigation" to file a motion, the transfer is of "the case," not just some part of, or a few litigants in, the case. The Legislature, in drafting that language, clearly was contemplating litigation against a single town, even if involving consolidated actions brought by more than one builder, a form common to all post-Mount Laurel II litigation. Thus, the court should rule that transfer of a multi-municipality Mount Laurel action is not possible under 16(a).[23]

If transfer of this case were considered possible, then the Court would have to consider, and allow the plaintiffs to address, the manifest injustice factors as to all eight remaining townships, including those that are not seeking or planning to seek transfer, some of which might well consider transfer a manifest injustice to themselves.[24] In addition, the Court would have to hear from and consider the impact upon the numerous other parties whose litigation has been consolidated with the Urban

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23 It is possible that this case is the only remaining multi-defendant Mount Laurel action. We understand that only Denville is still an active defendant in the Public Advocate's Morris County suit which originally included some 27 municipalities.

24 To date, only Cranbury, Monroe, Piscataway, and South Plainfield have sought transfer; some town councils have already affirmatively decided not to seek transfer.

League case and thus would be transferred under the "fusion" doctrine of consolidation. PRESSLER, Current N.J. COURT RULES, Comment R. 4:38-1. Alternatively, the Court would have to construe the statute to allow transfer of portions of a litigation relating to several municipalities if the Court considers severance of all the other cases and of co-defendants to be appropriate at the time of the transfer motions. Judge Furman, after an evidentiary hearing, already denied defendants' motion for severance before the first trial in this case. This Court had given no consideration to severance, and no defendant had sought it, prior to this motion, presumably because of the accumulated familiarity and expertise that this Court has developed concerning this case and because of the potential interrelationship of compliance plans in neighboring towns.[25] In any case, we believe severance of Cranbury, Monroe and Piscataway is inappropriate for all the reasons set forth below, which establish that transferring the litigation as to them would be a "manifest injustice."

There are, as noted, numerous factors relevant to a determination of "manifest injustice," almost all of which apply

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25 For example, neighboring towns may have concerns with the impact of high density developments along common roads or adjoining neighborhoods. If litigation concerning two such towns were severed through transference of one to the Council, either the other town would be prejudiced by judicial inability to consider such factors, or the transferred town would have to seek intervention in the litigation or the litigating party would have to seek intervention before the Council, thereby needlessly burdening the two decisionmaking forums and defeating the purpose of severance/transfer.

to these three municipalities, as set forth individually below. But these individual discussions must be viewed in the context of two overriding common factors: the age, complexity and present stage of the litigation, and the delay necessarily attendant upon

In comparison to cases more recently filed, the Urban League litigation has been at the leading edge of every legal development in the field of exclusionary zoning, both before and after Mount Laurel II, and it has been concomitantly complex, time-consuming and expensive. In Kruvant, supra, the Supreme Court recognized that after eight years of intransigent resistance to implementation of an altogether reasonable trial judgment, further delay would in effect defeat plaintiff's meritorious claim. The Urban League litigation has involved much more difficult legal issues than Kruvant, and its extended history has allowed the municipalities, particularly Piscataway, much greater opportunity to "win" by irretrievably altering its land use patterns to perpetuate exclusion. Moreover, as in Kruvant, this case has "been tried to the point of exhaustion." 414 A. 2d at 3. A fortiori, there would be manifest injustice in allowing the 11 years of Urban League litigation against these three towns, which can come to an end shortly, to stretch for years more in the Affordable Housing Council.

Any case transferred now would face substantial delay, for delay is not only an inherent part of any new system and but is mandated here by the statutory structure. In addition, the Affordable Housing Council will likely be confronted with a large

initial docket of cases, both transferred and new, which will create an instant backlog and make even further delays all but inevitable. Whatever the equities in requiring substantial delays in other cases, it cannot be that the oldest, largest, most complex and most extensively litigated of the remaining cases should be subjected to yet another round of delay.

B. Manifest Injustice in Transferring Cranbury

Application of these standards requires denial of Cranbury's motion to transfer. The Cranbury "case" has been fully tried twice, once 9 years ago, leading first to a Judgment unanimously affirmed as to liability by the state Supreme Court nearly three years ago, and then to a second Judgment over a year ago confirming that the Township's post-affirmance revision of its zoning ordinance was unconstitutional and setting a 90 day deadline for compliance. The Township filed its compliance plan nine months ago, the Master reported five months ago and the expert reports were all filed and the entire matter was ready for the final hearing concerning the suitability of the sites of the two contested builder-remedy plaintiffs and the phasing of the fair share before the motion to transfer was even filed.

Transfer would needlessly delay and potentially undermine the various plaintiffs' vested legal rights. At the best the Council when constituted, staffed and housed, would get to consider this matter a year from now. More realistically, the

matter would stretch until at least August 1987. The Council has currently no expertise in site suitability and fair share phasing matters and is unlikely to accumulate much in the coming year, as it will first have to concentrate on issuing procedural rules and substantive criteria and guidelines and then will presumably be spending most of its initial efforts on evaluating fair share methodologies and allocations. Moreover, Cranbury presents some quite unique issues and, thus, whatever general expertise the Council might develop in the next 18 months is unlikely to provide special insight into the Cranbury situation. The Court and its Master, by contrast, have extensive familiarity not just with site suitability problems in general, but with the very sites at issue here, which have already been inspected in person four months ago. Whatever justification there might be to defer to fact-finding expertise and ability of an administrative agency in other contexts is wholly inapplicable here.

More importantly, delay will risk substantial deferral of the plaintiffs' established entitlement to construction now of lower income housing. There are three ready, willing and able developers who would be able to construct most of the required units in the coming years. As Mr. Mallach's Affidavit confirms, the last few years have been an extraordinarily favorable period for housing construction in New Jersey. This will almost certainly not last. Pushing back construction for two building seasons, the almost inevitable consequence of a transfer, may well mean that very few of the anticipated lower income units

will go up in the present fair share period. It is true that Mount Laurel promised only a "realistic opportunity", not a guarantee of construction. But, the Court must, under Section 16(a), consider the economic realities in deciding whether transfer of a particular case would at the time of the motion prejudice any party.[26]

C. Manifest Injustice in Transferring Monroe

All factors point towards denial of transfer here. In addition to the basic problems of delay and prejudice noted above, Monroe Township has acted in less than good faith towards the Court and its Master, not to mention the plaintiffs. After asking the Master to participate in numerous, extended meetings in order to prepare the Court-ordered compliance plan, the Township refused to pay her for her services, even after a formal Order was entered. Moreover, after proposing a compliance plan and while the Master, who helped the Township develop that plan,

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26 Quite amazingly, Cranbury's brief in support of its transfer motion states "Any delay with regard to the Civic League will not delay the construction of affordable housing in Cranbury since the Civic League does not propose any housing." P.4. In 1975 Judge Furman granted the then Urban League's motion for certification of a class of lower income households. That class is the "party" affected by transfer. In 1984 this Court granted that class a right to a realistic opportunity for construction of 816 lower income units. Delay in granting a final remedy will mean denial of that opportunity. Given the availability of a number of ready, willing and able developers, delay of the Civic League's final remedy will clearly mean delay in construction of housing for the class before this Court.

was reviewing it at the instruction of the Court, the Township expressly approved development of a major site without the set-aside requirement which the Township had proposed for that very site and developer in the plan. The Court gave the Township another chance, allowing it to reconsider its approval, but warning that reaffirmance of the initial approval would void the entire compliance plan. The Council unanimously voted to affirm and the Court has by oral order on July 25 confirmed by written Order dated August 30, 1985 voided the original compliance plan and ordered the Master to come up with her own recommended compliance plan. A town which has not only rejected all opportunities for voluntary compliance, both before and after trial, but has undermined its only submission to the Court for compliance should not now be given yet another chance to come up with a voluntary compliance plan.

Moreover, transfer would substantially and needlessly delay the final remedy. The Master is under Court order to submit her plan a mere 10 days after the transfer motion will be heard. At that point, the burden will be on the Township to show why the Master's proposal does not provide a realistic opportunity for development of the required fair share, a burden it will almost certainly be unable to meet, given the large available acreage and the large number of willing and able developers with suitable land. The Council will certainly not be ready to receive, not to say consider, any substantive matters for at least a year after the Master's plan is due. A town that has been found by the

Supreme Court to be in violation of the Constitution and has repeatedly flouted this Court's authority has no claim to renew its contemptuous stalling tactics before another body.

D. Manifest Injustice in Transferring Piscataway

Piscataway directly poses the question of whether transfer is possible, legally or practically, if restraints have been in place and will be necessary to ensure compliance with any plausible fair share. There is no question that restraints will be necessary. Even if Piscataway were to succeed in transferring its piece of this case and the statute were to allow the Council to ignore this Court's ruling and redetermine the fair share ab initio under the statute and its criteria, it is apparent that Piscataway would have a substantial fair share requiring preservation of most of the remaining vacant land.

The statute has two relevant provisions concerning determination of the municipal fair share of primary importance to Piscataway. In Section 7(c)(1), the statute authorizes a "credit" against the municipal fair share for "each current unit of low and moderate income housing of adequate standard." In Section 7(c)(2)(f), the statute authorizes "adjustment" of the fair share determined in 7(c)(1) whenever "[v]acant and developable land is not available in the municipality." As Mr. Mallach's Affidavit points out, a literal reading of the credit provision -- one credit for each existing housing unit meeting

building standards that is currently occupied by a low or moderate income housing -- would lead to the absurd result of more credits than the state-wide or regional need under any of the existing formulae. It is inconceivable that the Legislature intended this absurd result and thus the section must be read in a manner consistent with both its language and the constitutional obligation to satisfy unmet housing needs. We believe that the proper interpretation of the credit for "each current unit" is that it applies only to those units constructed or made affordable to the affected population during the current fair share. Thus, the provision credits not all such units currently in existence but only those that were currently developed. The Court's letter-opinion of July 23, 1985 with regard to Piscataway establishes that no such units exist. Thus, Piscataway would get no credits under the statute, even if the Council could redetermine fair share.

However, even if the absurd reading of the statute were employed, Piscataway would have a fair share comparable to its present 2215. The AMG methodology would have produced a fair share of 3744. Letter-opinion at 1. Even if could get the 1492 credits that would result from the literal, but inconceivable, application of the Section 7(c)(1) credit provision, it would end up with a fair share equal to about 2252. And, of course, a town cannot then seek further adjustment in light of limited available land if the land could accommodate the 7(c)(1) fair share. The "credits" must be against the actual need, and the result can be

modified downward only if the land is insufficient to meet that need. In Piscataway's case, the fair share resulting from either the limited land or the credit provision, literally applied, happens to work out to slightly above 2200 units.

Even a lower fair share would require restraints. It is clear that Piscataway will have to produce thousands of new units. It is clear that the Council process will take 1 1/2 to 2 years. Looking at any two years of the Piscataway's record prior to the 1984 restraints of this Court, one can readily determine that much of the remaining land will be committed to corporate parks and other projects by the time the Council finds Piscataway's housing element unsatisfactory (the more likely scenario given Piscataway's past and present positions on both fair share, credits, and compliance) and the case returns to this Court, or substantive certification is granted.

Fairness to landowners, not to mention constitutional taking doctrine, would require that the Court use the most, rather than the least, expeditious manner of resolving the litigation so that the restraints can be lifted. We doubt that Piscataway, so hesitant to comply with its constitutional obligation to date, would wish to aggravate its obligation by creating compensable takings. Yet by its motion to transfer, Piscataway is necessarily asking this Court to extend restraints, needlessly given the options, for an indefinite period, certain to be no less than 1 1/2 years. If it complied with the Court order, by rezoning the sites already found suitable at densities already found

appropriate, Piscataway could get the restraints lifted a matter of days after October 23, or less than a month from the hearing of this motion. Although the affected landowners are not "parties" to this action in the formal sense, the Court may certainly consider their interests, as well as the manifest injustice to the class of plaintiffs who have already waited 11 years for their remedy, in deciding to deny the requested transfer and the attendant continuing restraints. As the Court has already ruled in its letter-opinion of July 23, "it would be unfair and inappropriate" to grant extensions for compliance to Piscataway.

If "manifest injustice" means anything -- as it must -- then it must mean that there would be manifest injustice in transferring the Cranbury, Monroe and Piscataway portions of this case.

IV. THE COURT HAS THE AUTHORITY AND OBLIGATION, UNDER THE FAIR HOUSING ACT AND THE CONSTITUTION, TO PROCEED FORTHWITH TO DETERMINE THE SUITABILITY OF THE THREE BUILDER-PLAINTIFFS IN CRANBURY AND TO ENTER AN APPEALABLE COMPLIANCE JUDGMENT AS TO CRANBURY

Section 28 of the Fair Housing Act imposes a moratorium on the award of builder's remedies that will last, in applicable cases, until January 1, 1987, under the more plausible timetable for completion of the Council's criteria and guideline drafting.[27] The validity of this section is very questionable and it bears importantly on the transfer issues now before the Court.[28]

The issue arises as follows. One of the key bases for the Urban League's opposition to transfer of these cases is the argument that transfer will engender extended delay, depriving plaintiffs of the remedy to which they are constitutionally entitled, without any offsetting gain to the public good that can be achieved by such delay. The argument based on delay would become somewhat attenuated as to Cranbury, however, if the effect of a moratorium would be to delay for a roughly similar period the resolution of the cases even if they remain before this

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27 See note 8 supra.

28 The issue of the moratorium is also directly raised by Cranbury's Notice of Motion which seeks transfer, or alternatively, a moratorium on builder's remedy. Although the Court has informed the parties that it will not hear the alternative branches of the motion on the transfer motion's return date (September 27), we submit this argument now because, as explained in text, the question also bears upon the transfer issue.

Court. Thus it becomes important for the Court to determine now what effect the moratorium will have should the Cranbury portion of this case not be transferred.[29]

As a first step, the rights of the Urban League plaintiffs must be determined vis-a-vis Cranbury, which also faces builder-remedy claims by builder-plaintiffs. It is elementary that Mount Laurel rights can be vindicated by individuals and groups who are not builders, such as the Urban League plaintiffs. It is also elementary that in such suits, the non-builder plaintiffs can obtain site-specific rezoning of tracts that will result in a realistic opportunity for the satisfaction of the municipality's fair share, even though non-plaintiff builders and landowners also may be benefitted by such relief.[30] If a site is otherwise suitable for Mount Laurel purposes, the fact that a builder could have been awarded a builder's remedy is irrelevant, and it is

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29 In Piscataway, where there are no builder-plaintiffs seeking the builder's remedy, the Urban League plaintiffs have nevertheless identified numerous sites that the Court has now ruled are suitable for Mount Laurel housing. And in Monroe, where Monroe Development Associates seeks a builder's remedy, the Urban League plaintiffs will independently seek rezoning of the Monroe Development site even if the developer is held to be subject to the moratorium, because the site is a highly suitable one and is controlled by a developer likely to begin construction as soon as the litigation is ended. As to these two defendants, therefore, the moratorium is irrelevant to the interests of the Urban League plaintiffs, and largely irrelevant to the interests of the builder-plaintiff in Monroe (although we recognize its interest in being heard directly by the Court rather than indirectly through the advocacy of the Urban League plaintiffs).

30 Indeed, this is precisely the remedy that was allowed to the Urban League plaintiffs by the Supreme Court when this case was before it as part of Mount Laurel II, since there were at that time no builder-plaintiffs involved in the litigation.

equally irrelevant that under Section 28 of the Fair Housing Act a builder cannot seek relief directly.[31]

In Cranbury, three builder-plaintiffs (Garfield, Zirinsky and Cranbury Land Company) have viable builder-remedy claims, subject to the Court's ultimate ruling on suitability.[32] In addition, two non-plaintiff landowners (Applegate and Silbert) have been designated in the town's compliance proposal for Mount Laurel development.

The township has proposed that Garfield, Applegate and Silbert, all of which are on adjoining sites east of Route 130, be rezoned, and it opposes the award of builder's remedies to either Zirinsky or Cranbury Land, whose sites are, respectively, north and southwest of Cranbury village, on grounds that development of these sites would impact adversely on the town's historic and agricultural districts. The Master recommended

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31 As the Urban League plaintiffs have pointed out on previous occasions, there is an important distinction to be drawn between the builder's remedy on the one hand and a remedy which allows a builder to build on the other. The latter is an inevitable result of any successful Mount Laurel suit and does not require that the builder have participated in the litigation in any way. The former, by contrast, is a special remedy created by Mount Laurel II and available only to prevailing plaintiffs who meet the criteria established by Mount Laurel II. See 92 N.J. at 279-281. The importance of the builder's remedy, as opposed to the remedy that merely includes builders, is that the builder-remedy plaintiff acquires priority over other potential Mount Laurel builders and need satisfy a less stringent site suitability evaluation than the others. See generally J.W. Field Co., Inc., et al. v. Township of Franklin, et al., **********.

32 A fourth builder-plaintiff, Toll Brothers, is still technically before the Court as a builder's remedy claimant, but it has not opposed the Master's recommendation against its site and thus is effectively eliminated.

against the Cranbury Land site and in favor of a scaled down development on the Zirinsky site. The Urban League plaintiffs have urged that the Cranbury Land site also be included in the rezoning, if it is properly scaled down. The effect of either the Master's or the Urban League plaintiffs' recommendations would be to diminish or eliminate the use of the Applegate and Silbert sites.

There is general agreement that Garfield is entitled to a builder's remedy in any event, subject to continuing dispute over an appropriate density, because it was first to file and controls a suitable site. It is also generally agreed that the Applegate and Silbert sites are appropriate for development after all valid builder-remedy claims have been satisfied. Finally, there is general agreement that Cranbury's Mount Laurel development will have to be phased over a significant period of time (the exact period is in disagreement) because of Cranbury's small present population.

At the time of the filing of this transfer motion, the parties were ready for a hearing on the issues of site suitability and phasing, as a result of which the scope of the builder's remedies to be awarded would have been determined. As indicated above, the Urban League plaintiffs are not precluded from pursuing site specific relief in Cranbury, even if the builder-plaintiffs are prevented from doing so immediately by the Section 28 moratorium. However, the absence of builder-plaintiffs might materially affect the site-specific remedies that the Urban

League can request.

Under this Court's ruling in The Allan-Deane Corp. v. Township of Bedminster, Docket No. L-36896-70, decided May 1, 1985 (unreported), the municipality may come into compliance in the absence of a builder's remedy by rezoning any suitable sites which provide a realistic opportunity for meeting the fair share obligation, without regard to whether alternate sites might be regarded as superior or "more realistic" in some respect. Id. at 13.[33] Because there is general agreement that the Applegate and Silbert sites are suitable and realistic in the sense of the Bedminster holding, and because there is a sound planning rationale for concentrating all higher density development in Cranbury east of Route 130, the Urban League plaintiffs would be hard put to oppose the site selection portions of the township's compliance plan under the Bedminster ruling, if builder's remedy claims must be disregarded.[34]

These claims, however, may not be disregarded. Although the Fair Housing Act attempts to impose a time-limited moratorium on award of a builder's remedy, it does not attempt to prohibit use of the remedy for all times and all purposes. Builder's remedies

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33 Rezoning is not the only technique which a municipality may use to come into compliance with Mount Laurel II, but it is the technique which Cranbury has chosen to rely upon.

34 In light of the potential impact of the statutory moratorium if applied in this context, the plaintiffs might ask the Court to reconsider its Allan-Deane ruling on this point if it concludes that transfer should be denied but the moratorium applies to this case.

may still be awarded in actions filed prior to January 20, 1983 and they may be awarded in later-filed cases after the moratorium expires. Indeed, because the builder's remedy is an important aspect of the Supreme Court's constitutional requirement that effective mechanisms be created to enforce the right to housing opportunities in growth area municipalities, it is unlikely that the remedy could have been successfully abolished even if the Legislature had attempted to do so.

From this perspective, the Urban League plaintiffs submit that if the moratorium applies to the Cranbury litigation, which it quite apparently does not for two independent reasons discussed below, then it would be unconstitutional. Moreover, even if the moratorium applies and were constitutional as applied, procedures must be structured so that the opportunity of the builder-plaintiffs ultimately to claim their builder's remedy is not rendered moot.

A. The Moratorium on Builder Remedies in Section 28 of the Act Does Not Apply to A Consolidated Action in Which the First Complaint was Filed Prior to January 20, 1983

The Urban League is entitled to a remedy now. Section 28 does not affect the Urban League's entitlement to proceed to a judicial remedy for two distinct reasons. First, the section expressly defines the affected "builder's remedy" as a court imposed remedy "for a litigant who is an individual or a profit-making entity," and the Urban League is neither. Second, and more

importantly, the section only affects plaintiffs in exclusionary zoning litigation "filed on or after January 20, 1983." This provision was added by the Governor in his conditional veto to prevent "an unconstitutional intrusion into the Judiciary's powers." Conditional Veto Message, at 2. The Urban League case was filed 7 1/2 years before the cut-off date.

Moreover, this provision does not affect the ability of this Court to grant a builder's remedy to the three builder-plaintiffs still before the Court in Cranbury. The Garfield, Cranbury Land and Zirinsky complaints were consolidated by this Court with the Urban League case by Orders dated December 15 and 30, 1983, in response to the Township's motion for consolidation. The legislation expressly contemplates such consolidated multiple actions against a single town being treated as one for moratorium purposes. Section 28 defines "exclusionary zoning litigation" as "lawsuits filed in courts of competent jurisdiction in this State challenging a municipality's zoning and land use regulations ..." The separate use of "litigation" and "lawsuits" must have some meaning; the only practical meaning is that "litigation" encompasses consolidated actions against the same town, a situation certainly brought to the Legislature's attention during its consideration of this bill. The moratorium only purports to delay builder's remedies in "exclusionary zoning litigation ... filed after January 20, 1983." But this "litigation", that is this set of "lawsuits" challenging "a municipality's" zoning and land use regulation, was filed on July 23, 1974. Thus Section 28

does not prevent this Court from granting Garfield, Cranbury Land, or Zirinsky a builder's remedy now.

This conclusion is supported not only by the express language of this Section, which was carefully reworked by the Governor to avoid constitutional problems, but also by the existing Court rules and caselaw on the effect of consolidation. Rule 4:38-1(c), concerning further proceedings in consolidated cases, expressly provides:

> Unless otherwise ordered by the court, the action first instituted shall determine which party shall have the privilege to open and close and in other respects shall govern the conduct of subsequent proceedings. Upon a consolidation the court may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(Emphasis added).

Caselaw confirms that consolidation leads to a "fusion" of the previously independent actions and, therefore, bestows substantive rights that would not otherwise have been available. For example, in Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 477-79, 251 A.2d 278 (1963), the Supreme Court, after reaffirming the "fusion" doctrine, allowed one defendant to appeal a judgment NOV granted to the defendant in a second consolidated action, although the first defendant would clearly have had no such right had the two cases been tried separately. Likewise in R.L. Mulliken, Inc. v. City of Englewood, 59 N.J. 1 (1971), the Court permitted the plaintiff to amend a complaint originally brought in county district court to seek damages in excess of that court's jurisdiction after consolidation with a Superior Court

action, even though the statute of limitations had run on the claim filed in county court. See also Lawlor v. Cloverleaf Memorial Park, Inc., 56 N.J. 326, 266 A.2d 569 (1970). Thus, courts have regularly extended rights to litigants in consolidated litigation that would not have been available otherwise.[35] Presumably the Legislature and Governor wrote the carefully drafted Section 28 with the established law of consolidation in mind. Because this fused action was filed years before the cut-off date in that Section, the moratorium does not apply to the action.

B. The Section 28 Moratorium on Builder Remedies Does not Apply to Cases in which a Transfer Motion has been Denied and the Court will Adjudicate the Remainder of the Action

Even if the Court were to consider the moratorium applicable to those complaints filed after the deadline that had been consolidated with an older case, as here, the moratorium would be inapplicable even to those later filed complaints once the Court denies the transfer motion.

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35 The Rule says that the first case governs "Unless otherwise ordered by the Court." Although such an order might otherwise be permissible, it clearly cannot be where the Legislature has directly addressed the issue. Moreover, the subsequent sentence clarifies that such court orders are only designed to avoid unnecessary costs or delay. Here an order failing to let the first filed case govern the consolidated cases in this respect would only increase costs and delay, to the point of potentially undermining existing vested rights.

The language, history, and purpose of Section 28 confirm its inapplicability to cases where transfer has already been denied. As enacted, the moratorium does not have a definite duration but rather is tied to "expiration of the period set forth in subsection a. of section 9 of this act for the filing with the council of the municipality's housing element." Clearly that timeframe has no meaning for a municipality which will never be filing a housing element with the Council because it has been denied transfer and thus the Court will be determining its fair share and compliance plan. In contrast, when originally adopted by the Assembly in February 1985, Section 28 specifically said that a moratorium would be in effect "[f]or a period of 12 months following the effective date of this act." The Governor consciously reworked that language to avoid constitutional problems. Conditional Veto Message at 2.

Clearly the purpose of this section, as revised, is to permit an orderly development by the Council of its procedures, criteria, and guidelines and sufficient time for the affected municipalities to make a comprehensive and meaningful submission under a new and complex statute. In his veto message explaining his revision, the Governor stated:

> It is essential that the temporary moratorium on the builder's remedy be constitutionally sustainable in order to enable municipalities to take advantage of the procedures in this bill....A moratorium for the planning period in this bill is needed.

Id. at 2. Likewise in its defense of the constitutionality of this provision before Judge Skillman, the state, through the Attorney General explained:

> The "freeze" is clearly related to a rational legislative purpose: the orderly implementation of an administrative mechanism to enable municipalities to meet their constitutional obligation under the Mt. Laurel cases.... Similar to the moratorium imposed by the HMDC and upheld in Meadowlands Regional Development Agency, supra, the freeze at issue herein was provided by the Legislature to enable the administrative process to address a complicated issue in a comprehensive and orderly manner.
> ...
> By imposing a temporary moratorium on the award of a builder's remedy in Section 28, the Legislature attempted to provide time for the administrative system to work. As in those cases regarding the imposition of a moratorium on development generally, to allow for comprehensive planning, the Legislature here sought to afford municipalities an adequate opportunity to undertake such action as may be necessary to achieve voluntary compliance with their constitutional obligations under the Council's organizational period.

Brief on Behalf of Intervenor State of New Jersey in Morris Cty. Fair Housing Council v. Boonton Twp., et al., at 23, 27.

The moratorium in Section 28, then, is clearly designed to stay a court's hands in cases already filed, to permit the towns currently in litigation to make the transfer motion and, if the motion is granted, to give those towns and the Council the full time established in the statute to make and review the complex submissions without needless constraints and pressures. This Court has already afforded Cranbury time to make the transfer motion in a deliberate and comprehensive manner by not even scheduling the long-planned hearing on the builder-remedy issues until the transfer motion is decided. But there is no sense in, nor legislative intent for, a stay on court action once the court decides that a particular town will not be allowed to use the new administrative mechanism but will have its compliance obligations

determined by the court. There is no need for the town to develop a housing element and certainly no need to wait for the Council's criteria and guidelines if the Court is to resolve the matter anyway. Indeed, one of the major reasons for denying transfer is that the extended delay which the administrative process would impose is prejudicial and unjust to a party already long delayed in obtaining its remedy. It would not only be ironic, but would blatantly ignore the Legislature's decision to allow some cases to remain in court for resolution to rule that parties as to whom the administrative delay is manifestly unjust may be asked to wait the same period to await completion of the administrative process as to others. Indeed, as set forth below, such an interpretation would clearly render the provision unconstitutional.

C. If Section 28 were Construed to Apply to this Case after Transfer is Denied, the Provision would be Unconstitutional

A moratorium is not per se unconstitutional under New Jersey law, but the courts have been very sensitive to the requirement that any such suspension of property rights be carefully tailored to meet reasonable and achievable objectives. A moratorium which fails to do so risks violation of the takings clauses of the state and federal constitutions.

Thus, the courts have sustained moratoria where the purpose was to permit development of new permanent regulations, so long

as there was a showing of a need for the regulations, good faith progress towards developing them, their nearness to completion and the likelihood of their ultimate passage. In Toms River Affiliates v. Department of Environmental Protection, 140 N.J. Super. 135, 152, 355 A.2d 679, 689 (App.Div., 1976), for instance, it was said of a CAFRA "freeze" to permit development of regulations that:

> Such 'stop gap' legislation is a reasonable exercise of power to prevent changes in the character of the area or a community before officialdom has an opportunity to complete a proper study and final plan which will operate on a permanent basis.

See also Orleans Builders and Developers v. Byrne, 186 N.J. Super. 432, 448, 453 A.2d 200, 208-09 (App.Div. 1982); Cappture Realty Corporation v. Board of Adjustment of Elmwood Park, 133 N.J. Super. 216, 336 A.2d 30 (App.Div. 1975)(flood plain zoning); Meadowlands Regional Development Agency v. Hackensack Meadowlands Development Commission, 119 N.J. Super. 572, 293 A.2d 192 (App.Div.), certif. denied, 62 N.J. 72, 299 A.2d 69 (1972)(integrated regional development plan). See generally Payne, Survey of Eminent Domain Law, 30 Rutgers L.Rev., 1111, 1199-1202 (1977).

In keeping with this approach, where it appeared that good faith progress could not or would not take place towards solution of the problem which justified the moratorium in the first place, the Supreme Court has not hesitated to hold that the moratorium could be invalidated on takings grounds. See Deal Gardens,

Incorporated v. Board of Trustees of Loch Arbour, 48 N.J. 492, 500, 226 A.2d 607, 611-12 (1967); cf. Sciavone Construction Company v. Hackensack Meadowlands Development Commission, 98 N.J. 258, 486 A.2d 330 (1985)(possibility that 19-month moratorium could constitute a taking). And in Mount Laurel I, the Supreme Court recognized explicitly that a moratorium, even if otherwise permissible, should be evaluated with particular care in instances where it would operate to delay or deny construction of low and moderate income housing. 67 N.J. at 188n.20, 336 A.2d at 732n.20; but cf. Golden v. Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

Section 28 of the Fair Housing Act does not fit comfortably into this well-established doctrinal scheme. It is true that the moratorium will run, at most, until January 1, 1987, a total maximum period of eighteen months.[36] It is also true that the Council will have extensive amounts of planning and regulation-writing to do during that period. The crucial fact, however, is that none of this time-consuming preparation for the future administration of the Mount Laurel doctrine in New Jersey by the Council has anything to do whatsoever with the resolution of the Urban League case that is the subject of these transfer motions.

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36 The period is indeterminate at this point since the members of the Affordable Housing Council have not been confirmed. The moratorium expires twelve months after that event, or on January 1, 1987, whichever comes earlier. L.1985, ch.222, Secs. 28, 9(a) and 7(c), in that order, for computation of the moratorium period. The minimum period is thus approaching 15 months. As to moratoria of this length, see Sciavone Construction, supra.

Once this is understood, the essential rationale for allowing any moratorium disappears.

If, as the Urban League plaintiffs urge, the case is not transferred, the Affordable Housing Council obviously has no jurisdiction over Cranbury, and any "planning" that the Council may legitimately do with respect to other cases has no bearing on the outcome of the Urban League action. Even in the unlikely event that the case was otherwise suitable for transfer under the manifest injustice standard, the Urban League plaintiffs think it is clear that it must be transferred with the law of the case intact, requiring the Council to preserve the substantive determinations that have been made up to this point in the judicial proceedings. Because the Council will have no "instant expertise" with respect to these matters and because, as explained above, the Urban League plaintiffs are entitled to immediate relief in any event, with or without the builder-plaintiffs, there is little reason to transfer the case for the small amount of remedial work that remains, particularly since the Court is intimately familiar with these towns and has ample basis to rule without extensive additional preparation. In this instance, even a balancing process favors not transferring the cases, and again results in the moratorium serving no useful purposes vis-a-vis these proceedings.

The only situation in which the moratorium could possibly have a bearing on these cases would be if they were transferred to the Council, the Council concluded that it had statutory

authority to award the builder's remedy, and it required time to develop substantive rules to evaluate which builder's sites were suitable under the criteria of Mount Laurel II. The Section 28 moratorium might conceivably be sustained under this rationale, but only if the Court finds unequivocably that the legislation permits (indeed requires, in an appropriate setting) the award of a builder's remedy.

Even then, the moratorium provision would be dubious, because Mount Laurel II has already established the legal criteria, see 92 N.J. at 279-81, and the essence of "planning suitability" is a factual inquiry guided by individualized expert testimony, rather than detailed administrative rules. As noted by the Supreme Court in Mount Laurel I, supra, special care must be taken not to unnecessarily burden property-owner's rights to proceed with affordable housing.

In any event, the immediate purpose of analyzing the moratorium provision is to demonstrate its effect on cases that remain in this Court, not cases that are transferred. And as to the former, the unconstitutionality is plain.

D. If the Builder-Plaintiffs are Subject to the Moratorium After Transfer and the Moratorium is Constitutional as So Construed, the Immediate Remedy Allowed to the Urban League Plaintiffs Must Leave Room for the Builder's Claims to be Effectively Revived After the Moratorium Expires, By Including a Determination Now of the Suitability of the Affected Sites and Entering an Appealable Compliance Judgment.

As noted above, the Urban League plaintiffs are entitled to proceed immediately to a compliance remedy even if the builder-plaintiffs are temporarily barred by Section 28, and they are further entitled to seek rezoning of sites that could have been the subject of a builder's remedy claim. In doing so, however, the Urban League plaintiffs would be bound both by this Court's holding in Bedminster, supra, subject to its reconsideration, and by the obligation to sustain the constitutional importance of the builder's remedy procedure established by Mount Laurel II.

As a first step, if the Cranbury portion of the case is not transferred but the builder-plaintiffs are held to be temporarily barred, the Court should find immediately that the Garfield site is suitable for Mount Laurel compliance purposes and that, since it is preferred by the municipality, it meets the Bedminster test. See, in this regard, defendant's Brief in Support of the Motion to Limit Builder's Remedies, at 40, wherein Cranbury "requests" award of a builder's remedy to Garfield and Company. The Court should further determine an appropriate phasing schedule, and it should then authorize immediate phased development on the Garfield site and only the Garfield site during the period of the moratorium.

As to the rest of the fair share, the Court could proceed in one of two ways. The preferred way would be for it to conduct the compliance hearing as it planned prior to the Fair Housing Act, making findings on site suitability and consequent entitlement to the builder's remedies for all remaining builder-

plaintiffs. Builders found not entitled to the builder's remedy could then know where they stood and decide whether to withdraw. As to builders found entitled to the builder's remedy, the Court could establish phasing schedules that would allow building to begin after the expiration of the moratorium. The alternative to this immediate hearing and determination is to leave the substantive hearing on suitability of the other sites until the expiration of the moratorium, thereby leaving the builder-plaintiffs and the Township uncertain as to their ultimate status.

Under the first of these approaches, there would be a final, and therefore appealable, judgment, so that any issues the parties seek to appeal could be presented and hopefully resolved by the end of the moratorium period. The ability to use the moratorium period to resolve any such appeals is a major advantage of this first approach. If the second approach were chosen, however, the Urban League plaintiffs would urge the Court to direct final judgment as to the resolved claims, under Rule 4:42-2, or we would support an application for leave to file an interlocutory appeal. See Mount Laurel II, 92 N.J. at 290-91. The objective under either approach would be for Cranbury to be in a position to move promptly to compliance as soon as possible after the moratorium has expired.

This overall approach to the moratorium, if one is necessary, as plaintiffs have already contended it is not, would reconcile several potentially conflicting objectives. It would

honor the legislative moratorium, insofar as there is any dispute between the parties as to appropriate awards of the remedy, if the moratorium were applicable. It would honor Cranbury's oft-repeated concern that any remedy be phased so as not to be overwhelmed with development immediately. And, most importantly, it honors the still-valid, constitutionally important principle that the builder's remedy be available as a reward and a stimulus, both for litigation and for housing production.

Nevertheless, it is an imperfect, and needlessly imperfect remedy because, if the Court proceeds to plenary consideration of compliance with the builders before it now, we believe that the necessary phasing can be adjusted so that all three builders are allowed to proceed simultaneously, thus providing a more immediate economic return and surer protection against future turns of the housing economy. A phasing schedule that allows Garfield more up-front building while postponing Zirinsky and Cranbury Land until 1987 or later is surely an inferior remedy from the perspective of the public interest, but it is, in turn preferable to one that allows the fair share to be provided no earlier by non-plaintiff builders, such as Applegate and Silbert.[37]

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37 The rationale for allowing all builders to proceed simultaneously, if possible within the confines of the phasing schedule, applies principally to builder-remedy plaintiffs. Thus, if non-plaintiffs such as Applegate or Silbert were to be included in the compliance plan, the Urban League plaintiffs would argue that they should be phased in only after Garfield's project was accommodated to the maximum extent possible.

Long before the Fair Housing Act and its moratorium took form, the builder-plaintiffs in this case were actively involved in the complicated but vitally important process of giving meaning to Mount Laurel II's mandates. These plaintiffs and their planning experts played a significant role in the development of the AMG/Urban League fair share methodology, and in the general fashioning of post-Mount Laurel II doctrines. Whatever their private motivations, they have served the public good in the way that the Supreme Court envisioned in Mount Laurel II and, if they can otherwise satisfy Mount Laurel II's criteria, they are entitled to their remedy.

CONCLUSION

For all the reasons stated herein, the Urban League plaintiffs respectfully submit that the Court must deny the motions of Cranbury, Monroe and Piscataway to transfer this case to the Affordable Housing Council and the motion of Cranbury to apply a moratorium on builder's remedies.

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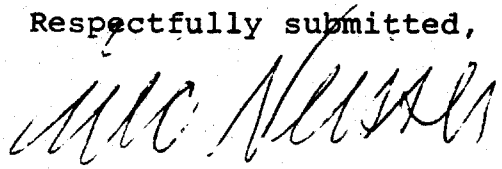
Respectfully submitted,



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