CH General 18-Dec-85

Letter Brief: re: the Attorney General's construction of the legislative standard adopted by the legislature must be rejected.

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

ALFRED A. SLOCUM
PUBLIC ADVOCATE

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

December 18, 1985

The Honorable Chief Justice and Associate Justices
New Jersey Supreme Court
Hughes Justice Complex
CN 920
Trenton, New Jersey 08625

Re: Morris County Fair Housing Council v. Boonton Township,
Docket Nos. A-125, A-128 and related cases on appeal
Docket Nos. A-122 to A-133

To The Honorable the Chief Justice and
Associate Justices of the New Jersey Supreme Court:

This letter-brief is submitted in accordance with the Court's directive of December 6, 1985, by plaintiffs-respondents Public Advocate of New Jersey, Morris County Fair Housing Council, and Morris County Branch of the NAACP in reply to the brief submitted by the Attorney General of New Jersey. The construction of L. 1985 c. 222, §16(a) urged by the Attorney General, which requires that all pending cases be transferred to the Affordable Housing Council, is based on a series of erroneous assumptions and represents a standard which the Legislature specifically rejected in adopting L. 1985 c. 222. For these reasons the Attorney General's construction of section 16(a) must be rejected. With regard to the constitutionality of L. 1985 c. 222, the Attorney General properly concedes that many of the provisions challenged by the Public Advocate require saving constructions. Finally, the Attorney General's defense of the judiciary's power to amend site specific remedies (§28) is based upon an artificial distinction between the issuance of a prerogative writ and relief on that writ, which has no basis in the constitution and must be rejected. We address these issues in turn.

I. THE CONSTRUCTION OF L. 1985 C. 222, §16(a), ASSERTED BY THE ATTORNEY GENERAL IS BASED ON ERRONEOUS ASSUMPTIONS AND REPRESENTS A STANDARD EXPRESSLY REJECTED BY THE LEGISLATURE

The Public Advocate analyzed the language, legislative history and constitutional background of L. 1985 c. 222, §16(a) in his prior brief and, based on that analysis, concluded that applications for transfer would result in "manifest injustice" to lower income persons where the effect of transfer is the perpetuation of the constitutional wrongs condemned by this Court in the Mt. Laurel decisions. The Public Advocate has identified four constitutionally-based criteria for assessing "manifest injustice" in the context of section 16(a):

1. Significant delay in the vindication of the constitutional rights of lower income persons.

2. Procedures that substantially increase the cost and burden of vindicating the constitutional rights of lower income persons through multiple, repetitious, or needlessly complex proceedings.

3. Diminished availability of effective mandatory remedies to vindicate the rights of lower income persons which significantly impedes the establishment of those rights or obliges lower income persons to rely for an additional period on voluntary compliance by the defendant municipality.

4. Less than full and proper vindication of the constitutional rights of lower income persons.

If transfer of a pending case meets any of these constitutionally-based criteria, transfer must be denied on grounds of "manifest injustice." The first two of these criteria encompass the factors utilized by the trial court below.

The Attorney General vehemently attacks this analysis.* He asserts that the Legislature identified only one factor to be considered by the courts in applying section 16(a), namely "the legislative preference for the transfer of exclusionary zoning cases to the Council on Affordable Housing." (AGb.25). The Attorney General contends that the Legislature rejected the notion that this consideration might be "balanced" against any other factors. (AGb.25). Hence, the Attorney General concludes, the courts are barred from considering any other factor. (AGb.21, 25). In particular, in the Attorney General's view, the Legislature rejected the consideration of what he characterizes as the mere "particular interest in a lawsuit" that lower income persons might have (AGb.21), and he asserts that the courts are therefore required to disregard any such interests. (AGb.25-27).

Hence, the Attorney General concludes, all cases must be transferred to the Affordable Housing Council, regardless of their past history or current status. (AGb.25, 31). To permit even "a few isolated cases" to remain in the courts would violate the intention of the Legislature and is therefore forbidden.** (AGb.28).

Based upon this analysis, the Attorney General urges that all lower court decisions denying transfer should be reversed and the cases remanded for further proceedings implementing the above standard. (AGb.31).

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* The Attorney General characterizes the Public Advocate as "view[ing] any transfer to the Council as being inappropriate." (AGb.8). This characterization bears no relationship to any position taken by the Public Advocate before the trial court or this Court. See PAb.74-80.

** The Attorney General acknowledges one conceivable exception to this standard, namely, "the egregious case where the movant's conduct demonstrates an utter lack of good faith and intent to use the Council proceedings simply to avoid or interminably delay satisfaction of the constitutional mandate for provision of low and [moderate(?)] income housing." AGb.31. The Attorney General apparently believes that something less than "a few isolated cases" (AGb.28) will meet this standard. He does not suggest that any of the cases currently before this Court meet this standard.

The standard which the Attorney General espouses is remarkable in two respects. First, it contradicts the language of the Act itself. The Legislature described its desire for administrative proceedings merely as a "preference," L. 1985 c. 222, §3, not as a categorical mandate, as asserted by the Attorney General. The Legislature expressly contemplated that some pending cases would remain in the courts. Section 28, which imposes a moratorium on builder's remedies, clearly assumes both that some cases filed prior to January 1983 and some cases filed subsequent to that date would be heard by the courts rather than being transferred to the Affordable Housing Council. The Attorney General's construction of the Act cannot be reconciled with these provisions.

Second, the standard espoused by the Attorney General is the very standard that was advocated by the legislative minority in the Assembly Municipal Government Committee and expressly rejected by that Committee and the Legislature as a whole. In its statement, the minority in the Assembly Municipal Committee complained:

> This bill does not prevent the courts from continuing in their current direction. Pending Mount Laurel cases may continue to be litigated . . . . The Republicans also offered an amendment that requires the courts to transfer all pending litigation to the Housing Council. The language, as amended, is a step in the right direction, but does not go far enough. [Assembly Municipal Government Committee Statement to Senate Bill Nos. 2046/2334 SCA at 2 (Feb. 28 1985)(Minority Statement)].*

While the Attorney General alludes vaguely to this legislative history (AGb.14), he does not quote the text of this report or explain to the Court that the standard which he urges was considered and rejected by the

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* This legislative history is analyzed in detail in the Public Advocate's brief. (PAb.51-55).

Legislature. Since this standard was rejected by the Legislature, it surely cannot properly be adopted by this Court.

Plaintiffs do not propose to respond point-by-point to the lengthy argument offered by the Attorney General in support of this standard. Plaintiffs do wish, however to draw to the Court's attention a number of faulty and unsubstantiated premises and assumptions urged upon the Court by the Attorney General.

1. Legislative Purpose. The Attorney General gives an incomplete and misleading account of the purposes expressed by the Legislature in adopting section 16(a). According to the Attorney General, the Legislature had one, and only one, overriding purpose: "the transfer of exclusionary zoning cases to the Council on Affordable Housing." (AGb.25). As evidence that this is the "first and foremost" legislative purpose, the Attorney General cites the following fragment from section 3 of the Act (AGb.14):

> The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this Act and not litigation.

It is clear, however, that this legislative "preference" is qualified by another legislative purpose of equal or greater importance, namely, ensuring that the constitutional rights enunicated by this Court are in fact implemented. This purpose is recited repeatedly throughout the legislative statement of purpose. L. 1985 c. 222, §§2(a), (b), (c), (d), 3. The full text of section 3 of the Act makes this clear:

> The Legislature declares that the statutory scheme set forth in this act is in the public interest in that it comprehends a low and moderate income planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunicated by the Supreme Court. The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that

> it is the intention of this act to provide various alternative to the use of the builder's remedy as a method of achieving fair share housing. (emphasis added.)

As this language plainly reveals, while the Act expresses a "preference" for resolution of existing cases through administrative proceedings, it does so in the context of, and is qualified by, a legislative intent to ensure that "the Constitutional obligation enunciated by the Supreme Court" is satisfied.

Hence, when the Attorney General asserts that the Legislature's preference for administrative proceedings is the only factor to be considered by the courts in applying section 16(a), he is not describing the expressed purposes of the Act.

2. Interests of Lower Income Persons. The Attorney General assumes, without analysis, that the only possible interest lower income persons have in opposing transfer of cases to the Affordable Housing Council is mere avoidance of "temporary delay."* As set forth in the Public Advocate's prior brief, transfer to the Affordable Housing Council potentially impairs vindication of the constitutional rights of lower income persons in at least four other ways.

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* The Attorney General treats the more-than-two-year delay that will result from transfer of cases to the AHC as being of no real significance to lower income persons. For the reasons set forth in the Public Advocate's brief (PAb.60-65), this is an unsupportable assertion. It should be remembered that this delay permits municipalities which have successfully resisted the requirements of the Constitution for ten years to continue to do so freely and openly for at least two more years, while they allow every other type of development to consume or exhaust the finite resources of developable land and infrastructure that will ultimately be necessary for the development of lower income housing.

The Attorney General also asserts that the Legislature expressly rejected this delay as a consideration under section 16(a). He cites no additional basis in the statute or legislative history for this assertion. Indeed, the Statement of the Assembly Municipal Government Committee, which the Attorney General quotes, but passes over without comment (AGb.12-14), expressly recognizes that "whether or not the provision of low and moderate income housing would be expedited by the transfer" is one of the elements of manifest injustice, though not the only one. (PAb.53).

1) It imposes on them the enormous expense and burden of relitigating matters which they have spent many years and great expense litigating before the courts. (PAb.65-68).

2) It deprives them of meaningful remedies for municipal violations of their constitutional rights. (PAb.33-37, 68-72).

3) In cases in which builders are the only plaintiffs -- which include all but two cases in the state -- transfer to the AHC is likely to deprive lower income persons of any advocate. (PAb.31-32, 69).

4) The Act requires the AHC to approve municipal housing plans which provide for less than the municipality's fair share of the regional housing need. (PAb.14-20, 72-74). Thus, transfer of a case to the AHC means that lower income persons will be provided fewer housing opportunities, even under the most favorable circumstances, and will not have their constitutional rights fully vindicated. (PAb.15-20, 72-73).

These interests are of great practical significance to lower income persons and are of constitutional dimensions. Contrary to the claims of the Attorney General, they cannot be treated as wholly nonexistent.

3. Significance of Builder Litigation. The Attorney General assumes, without analysis, that the only interest affected by the denial of relief to builder-plaintiffs is the private interest of the builder himself. (AGb.28-30). This assumption ignores the essential role builder-plaintiffs play in vindicating the rights of lower income persons. (PAb.23-26, 31,33). In the Mt. Laurel II decision, this Court provided for site-specific relief to builders out of recognition that builders are the only parties with the means and incentive to assert the rights of lower income persons. Mt. Laurel II, 92 N.J. at 279. If builders do not assert the rights of lower income persons, there will rarely be anyone else to do so. (PAb.31-33, 69). Hence, contrary to the assumptions of the Attorney General, the impact of transferring cases to the Affordable

Housing Council, falls not merely upon the builders themselves but upon the lower income person who are the ultimate beneficiaries of the litigation.*

4. The Purported "Comprehensive" and "Self-Enforcing" Character of the Act. The Attorney General's entire argument is premised on his assertion that L. 1985 c. 222 is both "comprehensive" and "self-enforcing." (AGb.16, 27). For this reason, the Attorney General implies litigation is no longer necessary to enforce the constitutional rights of low income persons. He condemns the lower courts for "ignoring" this fact. (AGb.18). This, presumably, is the basis for the implication throughout the Attorney General's brief that litigation seeking to vindicate the rights of lower income persons is merely an impediment to the statutory scheme and should be given no weight by the courts.

This assertion, however, misrepresents the purpose and language of L. 1985 c. 222.

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* The Attorney General suggests that builders will be better off if their cases are transferred to the AHC than if they remain before the courts because the statutory moratorium on judicially ordered builder's remedies does not apply to the AHC and because the AHC might conceivably award a builder's remedy. (AGb.29-30).

This suggestion is disingenuous, to say the least. As the Attorney General notes elsewhere in his brief (AGb.87), the moratorium on judicially imposed remedies, will, by its terms, expire long before the AHC decides its first case under the statutory timetable. Transfer thus guarantees a longer bar to relief than judical proceedings, even if the moratorium is given its full effect.

Moreover, while the AHC, if it adopts the Attorney General's interpretation of its powers, might conceivably condition approval of municipal housing plans upon rezoning of a builder's site, it is not obliged to do so and can only do so by disregarding the express intention of the Legislature. L. 1985 c. 222, §3. Even if the AHC were to impose such a condition, it could not enforce it, since the municipality remains free to decline to comply with any condition imposed by the AHC. L. 1985 c. 222, §14.

L. 1985 c. 222 is not, and does not purport to be, a statute that mandates the creation of a comprehensive plan for meeting New Jersey's low income housing needs. It does not require any state agency to systematically allocate housing obligations to municipalities nor does the Act impose a uniform methodology for municipal determination of their own housing obligation.* Rather, the Act directs the AHC to formulate "criteria and guidelines" for municipalities to develop their own methodologies for determining their own housing obligations. L. 1985 c. 222, §7(c).** Each municipality is then free to choose whether it wishes to determine its share of the regional housing need and, if so, how it wishes to do so. If the municipality does choose to develop a fair share methodology and determine its fair share obligation, it may choose whether to submit a plan to meet that fair share to the AHC. If the municipality chooses to devise a methodology to determine its own housing obligation and to develop a plan to meet that obligation, it may choose whether or not to file it with the Affordable Housing Council. If it chooses to file with the Affordable Housing Council, it may choose whether to request that the AHC actually review its fair share determination and compliance plan. §13. If it does so and the AHC approves the plan, the municipality is free to implement the plan or not. If the AHC disapproves the plan, the municipality is free to modify its fair share determination and plan to meet the AHC's objections or not. The statutory role of the AHC throughout the process is passive, reactive, and ad hoc. It has no

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* L. 1985 c. 222 should be contrasted with the New Jersey Housing Allocation Report (1978), which represented an allocation of housing obligations to all municipalities in the state. Governor Kean rejected this approach and revoked this plan in Executive Order No. 6 (1982). See Mt. Laurel II, 92 N.J. at 259-60.

** Unlike the AHC's procedural rules, the AHC's "criteria and guidelines" are not even required to be promulgated in accordance with the Administrative Procedure Act. Compare L. 1985 c. 222, §7(c) with L. 1985 c. 222, §8.

more influence than municipalities accord it. In no event does it engage in the systematic determination of the allocation of housing, as the Attorney General implies.

The Attorney General relies on three features of the Act for his assertion that the Act is a "comprehensive" and "self-enforcing" system for implementation of the constitutional rights of lower income persons.

First, the Attorney General suggests that municipalities will be induced to submit plans to the Affordable Housing Council for its review so as to secure the benefits of the substantive certificate of compliance which the AHC may issue. The only value of a substantive certificate of compliance, however, is as a defense to a subsequent lawsuit. This is only an inducement to those municipalities that fear the consequences of an exclusionary suit. Since fewer than 25 percent of municipalities have been subject to such litigation, this is no inducement to the overwhelming majority of municipalities in New Jersey. Indeed, only about one-fifth of all municipalities filed resolutions of participation with the AHC under L. 1985, c. 222 §17.

Moreover, the Act permits municipalities to protect themselves against lawsuits without submitting housing plans to the AHC for its approval. Under section 13 of the Act, a municipality may prepare a compliance plan and file it with the AHC without petitioning for substantive certification or actually implementing the plan. Once the municipality has done this, any party challenging the municipality's ordinances on grounds of exclusionary zoning must proceed under the AHC's mediation and review procedures. L. 1985 c. 222, §§16(b), 18. A builder, however, has no incentive to bring such a proceeding, for even if he succeeds in proving that both the existing municipal ordinances and the unimplemented municipal compliance plan on file with the AHC violate the AHC's "criteria and guidelines," he has no assurance of receiving any economic benefit, since he is not entitled to site-specific relief.

Thus, municipalities have no incentive to petition the AHC for certification of their housing plans or to implement them.

Second, the Attorney General places great emphasis on the fact that section 29 of the Act requires municipalities starting in 1988 to adopt housing elements as part of their master plans. This is the provision the Attorney General stresses when he asserts that "the Act, and related legislation, oblige all municipalities to account for their Mt. Laurel obligations." (AGb.16).

Section 29 does require that a municipality that wishes to exercise zoning powers must adopt a housing plan element in accordance with section 10 of the Act. The housing element, however, need not satisfy the criteria and guidelines promulgated by the Affordable Housing Council pursuant to L. 1985 c. 222, §7. Nor need the municipal housing element be submitted to the AHC for its review. Indeed, the municipality is not required to implement the plan at all. It need merely be on the books. Finally, the municipality may, by majority vote, lawfully adopt a zoning provision which conflicts with any or all of the terms of the housing element. L. 1985 c. 222, §29.

While this provision may well be a desirable one on its own terms, it does not convert the Act into a "self-enforcing" system.

Finally, the Attorney General stresses the economic advantages which municipalities secure by obtaining certificates of compliance. This purported economic advantage is in the form of access to state funding for housing subsidies. These funds fall into three categories: (1) setaside by the New Jersey Housing and Mortgage Finance Agency (NJHMFA) of 25% of its housing bond authority. L. 1985 c. 222, §21. (2) A one-time fiscal year 1986 appropriation of $17 million, with $15 million to go to NJHMFA and $2 million to go to the Department of Community Affairs (DCA). (3) Dedication of a portion of the realty transfer tax for the Neighborhood Preservation Program operated by DCA. L. 1985 c. 222, §20. The Governor has estimated the setaside

NJHMFA bond authority at $100 million and the annual revenues dedicated to the Neighborhood Preservation Program at $8 million. (Conditional Veto Message at 3).

None of these funds represent an affirmative economic inducement to municipalities. At best, they enable municipalities which choose to adopt housing plans to somewhat reduce the municipal cost or burden of implementing such plan. Municipal officials who have resisted compliance with the constitution for ten years are not going to run to comply because of the availability of these funds.

In sum, nothing in the Act makes it the "comprehensive" and "self-enforcing" system which the Attorney General suggest.

5. The Act and the Constitution. The Attorney General's argument that the courts may consider only those factors which the Legislature endorse and must disregard any factor which the Legislature did not mention (AGb. 21, 25) is premised on the notion that the holdings in Mt. Laurel II do not embody any constitutional standard (AGLDiv.b.4), but are merely "interim devices for achieving compliance" which evaporate upon the enactment of legislation (AGLDiv.b.12, AGb.4-5).

This clearly is not what this Court said it was doing in the Mt. Laurel II decision. The Court opened its opinion with an explanation of its purpose:

> We intend in this decision to strengthen [the original Mount Laurel doctrine], clarify it, and make it easier for public officials, including judges to apply it. 92 N.J. at 199.

While the Court expressed both a preference for "significant legislation enforcing the constitutional mandate," 92 N.J. at 212, and regreted that it was obliged by the absence of executive and legislative action to reach the many constitutional issues posed by the six cases on appeal, it saw itself as having

no choice but to decide those issues so as to "give meaning to the constitutional doctrine in the cases before us. . . ." 92 N.J. at 213.

Nor is the Attorney General's view consistent with the content of the Mt. Laurel II opinion. The Court reviewed the evolution of the relevant constitutional doctrine and the history of noncompliance with that doctrine. Based upon that review, the court condemned a variety of shortcomings in previous formulations of the doctrine that had permitted the emergence of "widespread noncompliance with the constitutional mandate," set out a new, clearer and more detailed formulation of the constitutional doctrine, and then applied that new formulation of the doctrine to the cases before it.

Clearly, the Court hoped that the Legislature would adopt "significant legislation enforcing the constitutional mandate" that would limit the need for the judiciary to elaborate the constitutional doctrine or to play any large role in its implementation. In just this manner adoption of civil rights legislation has permitted most racial discrimination cases to be resolved without constitutional decisions by the federal courts. There is nothing in the Court's expression of this preference that suggests that the constitutional rulings in the Mt. Laurel II themselves dissolve upon the enactment of legislation.

Hence, L. 1985 c. 222, both must be measured against the constitutional standards enunciated in the Mt. Laurel II decisions, and, insofar as possible, must be construed and implemented so as to meet those constitutional standards. Mt. Laurel II condemned the "interminable" delay in enforcement of the constitutional rights caused by endless proceedings and appeals. L. 1985 c. 222 must be construed and administered, if possible, so as not to further perpetuate and extend the delay. Therefore, it is patently inappropriate for the courts to ignore delay in the vindication of constitutional rights on the grounds that the Legislature did so, as the Attorney General now argues. (AGb.21, 25).

Similarly, the Court in Mt. Laurel II concluded that effective remedies were required to ensure vindication of the constitutional rights of lower income persons. While legislation need not adopt exactly the same remedies as outlined in the Mt. Laurel II decisions, the remedies must be at least as effective in compelling municipal compliance with the Constitution. It simply is not sufficient to deprive lower income persons of the remedies provided in the Mt. Laurel decisions and leave them to rely on mere voluntary compliance by the municipal defendants.

6. The Decision of the Trial Court. The Attorney General premises his argument for reversal of the trial court decisions on the assertion that the trial court below gave no weight to the preference of the Legislature for administrative proceedings. (AGb.32). The Attorney General offers no citation to the written opinion of Judge Skillman to support this assertion. No such citation is possible, for the Attorney General's characterization of that decision is inaccurate. The trial court decision presents a detailed description of the Act and account of the legislative history of section 16(a). The trial court expressly noted the strong legislative preference for administrative proceedings rather than litigation (slip op. at 44) and formulated a standard that a determination of whether the cumulative weight of five factors which might contribute to manifest injustice to lower income persons outweighs the legislative preference in favor of administrative proceedings. (Slip op. at 50-52.) Using this approach, the trial court granted some applications for transfer and denied others, depending upon the circumstances of each case. This was entirely proper and should be affirmed.

Had the trial court adopted the position of the Attorney General and treated the preference of the Legislature for administrative proceedings as the single dispositive consideration, it would have violated the langauge and intent of the statute, as well as the dictates of the Constitution.

In sum, the construction of L. 1985 c. 222, §16(a) urged by the Attorney General is contrary to the language and express intent of the Legislature and is based on an argument that is honeycombed with false assumptions. This construction should therefore be rejected.

II. SECTION 16(a) DOES NOT INCORPORATE THE CONSTRUCTION OF "MANIFEST INJUSTICE" UTILIZED BY THE COURT IN GIBSON V. GIBSON

The Public Advocate agrees with one point in the Attorney General's analysis, namely, that the term "manifest injustice" as used in section 16(a) cannot properly be construed simply by transplanting the construction given that phrase in some other context. In particular, the suggestion made by defendant municipalities in several of the appeals before this Court that section 16(a) embodies the construction of "manifest injustice" utilized in Gibson v. Gibson, 86 N.J. 515, 523 (1981), is unsound.

In Gibson v. Gibson, supra, this Court dealt with the question of the proper standard for determining whether a statute that changed the substantive rights of the parties should be applied retroactively. The Court held that one of the criteria to be considered in making this determination is whether retroactive application of the statute would "result in 'manifest injustice' to a party adversely affected by such application." 86 N.J. at 523. In this context, the Court declared:

> [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. 86 N.J. at 523-24 (citations omitted).

Accord, Department of Environmental Protection v. Ventron, 94 N.J. 473 (1983).

L. 1985 c. 222, unlike the statutes considered in Gibson and Ventron, does not involve a change in the substantive law. It involves radical changes in procedure and remedies, but the same substantive constitutional standard must ultimately apply to all cases, whether litigated in the courts or before the Affordable Housing Council under L. 1985 c. 222, §16(a). Thus, Gibson v. Gibson does not apply to the interpretation of the Act and the construction of "manifest injustice" utilized in Gibson is not directly relevant to the construction of that term as it appears in section 16(a).

Moreover, as discussed in greater detail in the Public Advocate's prior brief (PAb.44-58), the injustice which the Legislature was seeking to avoid with section 16(a) is not reliance on prior substantive law -- since L. 1985 c. 222 makes no change in the substantive law -- but rather perpetuation of violations of the constitutional rights of lower income persons that might result from transfer to the Affordable Housing Council. "Manifest injustice" must therefore be given a construction which reflects this context.

For these reasons, section 16(b) may not properly be construed as incorporating the standard used in Gibson v. Gibson, supra.

III. CERTAIN PROVISIONS OF L. 1985 C. 222 ARE FACIALLY UNCONSTITUTIONAL. THE UNCONSTITUTIONAL PROVISIONS CAN, HOWEVER, BE SEVERED OR RECONSTRUED TO PRESERVE THEIR CONSTITUTIONALITY AND THE FACIAL CONSTITUTIONALITY OF THE ACT AS A WHOLE

The Public Advocate in its prior brief addressed the facial constitutionality of eight provisions and features of the Act.* The Attorney General has not responded to arguments concerning two of these provisions and features: 1) the absence of the power and duty of the AHC to require that a municipality conform its housing element to conditions imposed by the AHC and to require that municipalities actually implement housing elements which have received AHC approval, and 2) the absence of any power or duty in the AHC to impose interlocutory restraints on development. Although a third issue -- mandatory downward adjustments of municipal fair share housing obligations (§7(c)(2)) -- is addressed by the Attorney General, he does not discuss it in terms of the type of constitutional challenge made by the Public Advocate in the trial court and this Court. As to several other provisions and features, however, the Attorney General goes at least part of the way toward conceding the necessity of saving constructions.

1. Arbitrary Credits Against Municipal Fair share Housing Obligations for Existing Housing (§7(c)(1)).

The Attorney General, concedes that this section must be construed so as not to "dilute" a municipality's Mt. Laurel obligation and that credits cannot be taken against a municipality's share of the unmet regional houisng need.** (AGb.50-51).

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* All of these were challenged by one or more parties at the trial level.

** In discussing this provision, however, the Attorney General fails to distinguish between existing units which create realistic continuing opportunities for safe, decent, affordable housing for lower income households and those that are merely occupied by lower income households at any given moment and may not continue to be affordable or available to them.

2. Prohibitions On Requirements By The AHC That A Municipality Raise Or Expend Municipal Revenues (§11(d)).

The Attorney General concedes that section 11(d) must be construed so as to permit the AHC to "condition certification of a municipality's housing element upon the requirement that it utilize one or more of the affirmative measures set forth in section 11, (including those which may impose a financial obligation on a municipality) in meeting its constitutional obligation" even if not to impose a requirement that a municipality "directly finance the actual construction of low and moderate income housing units." (AGb.58).

3. Deeming Settlements Not Approved By A Court And Not Necessarily Providing For Lower Income Housing To Be The Equivalent Of Substantive Certification (§22).

The Attorney General concedes that this provision must be construed to limit its effect to settlements which have received court approval embodied in judgments of compliance. (AGb.66).

4. Absence Of Express Power Or Duty In The AHC To Require That Favorable Treatment Be Given to Builders Who Vindicate The Rights of Lower Income Persons By Filing And Prosecuting A Request For Mediation And Review Or An Objection To A Petition For Substantive Certification

The Attorney General concedes that the AHC has the power to award favorable treatment to builder-litigants (AGb.30), but does not concede that the AHC ever has the duty to grant such treatment. For the reasons set forth in the Public Advocate's prior brief (Pab.31-33), the absence of such a duty would make the Act a mechanism for impeding vindication of constitutional rights rather than a mechanism for promoting vindication of those rights.

IV. SECTION 28 OF THE ACT IS UNCONSTITUTIONAL

The Attorney General continues to defend the moratorium on builder's remedies set forth in section 28 of the Act and appears to urge a more sweeping

construction of that moratorium than adopted by the court below.*

Plaintiffs do not propose to respond point by point to the Attorney General's argument but will rely on their prior brief on this issue. Four points, however, deserve some comment.

First, as the Public Advocate has noted above, the real impact of the moratorium on builder's remedies is upon lower income persons, because it denies them any effective relief from adjudicated violations of the constitution. The Attorney General argues that the power of the court to order relief other than inclusionary zoning remains intact. (AGb.93-94). None of those alternative judicial remedies, however, produce housing. In the real world, the power of the court to order rezoning for increased densities with mandatory set-asides is the only judicial remedy that actually vindicates the constitutional rights of lower income persons. As the trial court noted:

> Every plan for compliance with Mount Laurel whether by court order or in settlement, has included mandatory set-asides. . .[T]he availability of builder's remedies and the imposition of mandatory set-asides have been the cornerstones of achieving compliance with Mount Laurel through litigation. Slip op. at 21. (citations omitted).

Barring this remedy thus denies any meaningful relief to lower income persons.

Second, the Attorney General argues that the major justification for the moratorium is that it is designed to give municipalities time to take advantage of the newly legislated means for meeting their Mt. Laurel obligations.

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* The Attorney General appears to construe section 28 as barring any rezoning for inclusionary development of any profit-making litigant, even when ordered as part of a court-imposed comprehensive rezoning of the municipality rather than as a special preference for a succesful litigant. This construction places builder-plaintiffs in a worse position than all other property owners in the municipality. The Public Advocate submits that this construction would violate the constitutional guarantees of both due process and equal protection of the laws.

Neither section 28 nor any other provision of the Act, however, requires municipalities to use the moratorium period for that purpose. Municipalities are free simply to treat the moratorium period as legislatively sanctioned eighteen month exemption from the constitution. They may use this period merely to promote development of vacant land for other purposes, exhaust existing infrastructure, refine their legal defenses, and hope that mounting carrying costs and litigation expense will discourage plaintiffs.

Third, the Attorney General draws a distinction between the judiciary's power to issue prerogative writs, which he conedes is protected by the constitution, and the judiciary's power to grant relief, which, he claims, is not protected. (AGb.100). The constitution, however, makes no such distinction. Article VI, section 5, paragraph 4 of the New Jersey Constitution states in relevant part:

> [p]rerogative writs are superseded and, in lieu thereof, review, hearing, and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right. . . (emphasis added).

Nor do any of the authorities cited by the Attorney General support such a distinction. Were such a distinction permitted, the Legislature would be free to immunize unconstitutional action by local and state agencies from meaningful judicial review under the Prerogative Writ Clause.

Fourth, the Attorney General analogizes elimination or postponement of builder's remedies to moratoriums upon development of land. This analogy is based on the Attorney General's faulty characterization of what is at stake when builder's remedies are eliminated or postponed. As discussed above, the issue is not merely whether a builder-plaintiff is permitted to develop his property; the issue is whether the courts are to be deprived of the ability to grant timely relief to lower income persons from adjudicated unconstitutional municipal practices. The New Jersey Legislature can no more eliminate or post-

pone the power of the courts to grant timely relief from violation of constitutional rights declared by the Supreme Court in the Mt. Laurel decisions than it could postpone or eliminate timely relief from violation of constitutional rights of freedom of speech or religion.

For all of these reasons, as well as those set forth in the Public Advocate's prior brief, section 28 must be held facially unconstitutional.

CONCLUSION

For all the foregoing reasons, as well as those set forth in plaintiffs' prior brief, the Public Advocate urges that this Court affirm the decision of the lower court denying the applications of Denville and Randolph Townships for transfer to the Affordable Housing Council. Further, the Public Advocate urges this Court to establish clear standards for transfer of other cases to the Affordable Housing Council, and to impose certain conditions upon cases transferred to the Affordable Housing Council to protect the constitutional rights of lower income persons. Finally, the Public Advocate urges the court to retain jurisdiction, appoint the members of the Affordable Housing Council collectively as special master in this matter, and direct them to submit to the Court for its review proposed policies on the major constitutional issues before the Council.

Respectfully submitted,

ALFRED A. SLOCUM
Public Advocate of New Jersey
Attorney for Plaintiffs Morris County
Fair Housing Council, et al.

By: Stephen Eisdorfer
STEPHEN EISDORFER
Assistant Deputy Public Advocate

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