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Danville

Plaintiffs letter brief in support of their application for imposition of conditions upon the transfer of this case to OAH

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State of New Jersey  
 DEPARTMENT OF THE PUBLIC ADVOCATE  
 DIVISION OF PUBLIC INTEREST ADVOCACY

CN 850  
 TRENTON, NEW JERSEY 08625

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

ALFRED A. SLOCUM  
 PUBLIC ADVOCATE

April 21, 1986 RECEIVED AT CHAMBERS

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Honorable Stephen Skillman  
 Superior Court of New Jersey  
 Middlesex County Court House  
 New Brunswick, N.J. 08903

JUDGE STEPHEN SKILLMAN

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

Dear Judge Skillman:

This brief is submitted by plaintiffs Morris County Fair Housing Council in support of their application for imposition of conditions upon the transfer of this case involving Denville Township to the Council on Affordable Housing. Plaintiffs seek interlocutory restraints against Denville Township and also against the Rockaway Valley Regional Sewerage Authority, the Denville Township Planning Board and the Denville Township Zoning Board of Adjustment. Pursuant to the procedures set forth in Hills Development Corporation v. Township of Bernards, Docket No. A-122-85 (February 20, 1986) (hereinafter Hills Development), plaintiffs seek through such restraints to preserve "scarce resources" pending the final disposition of this matter by the Council on Affordable Housing so as to "protect and assure the

municipality's future ability to comply with its Mount Laurel obligations." Hills Development, slip op. at 88.

Specifically, plaintiffs seek preservation of the following resources:

1. Vacant developable land
2. Public sewage collection
3. Public sewage treatment
4. Public water service
5. Municipal bonding capacity.

Denville Township has previously represented to the Court that the limited availability of each of these resources places constraints upon the municipality's ability to satisfy its constitutional obligations under the Mt. Laurel decisions. To preserve these resources, plaintiffs seek imposition of the following conditions upon transfer of this case to the Council on Affordable Housing:

1. Neither preliminary nor final approval may be given to any site plan or subdivision application for development of vacant land for any purpose (including, but not limited to, residential, commercial, industrial, public or nonprofit uses) or for redevelopment or conversion of any existing vacant or unused land or structures.

2. No additional connections into the public sanitary sewage collection system or increased usage by any existing user may be permitted, except by order of this Court to meet compelling health or safety needs of residents of dwelling units

X

which were existing and occupied as of the date of application by the municipality for transfer of this case to the Council on Affordable Housing.

3. No additional connections into the public sanitary sewage collection system or increased usage by any existing user may be permitted, except by order of this Court to meet compelling health or safety needs of residents of dwelling units which were existing and occupied as of the date of application by the municipality for transfer of this case to the Council on Affordable Housing.

4. Neither the municipality nor any agency or subdivision thereof may develop, dispose of, or encumber publicly owned land. Neither the municipality nor any agency or subdivision thereof may acquire vacant developable land for any purpose other than the provision of lower income housing.

5. Neither the municipality nor any agency or subdivision thereof may issue long-term bonds for any purpose, except by order of this Court to meet compelling public health and safety needs.

6. The Rockaway Valley Regional Sewerage Authority, if it does not adopt a regionwide system giving preference to residential developments which include lower income housing, must preserve a reasonable proportion of its sewerage capacity for the development of low and moderate income housing in Denville Township.

7. Exceptions may be granted from any of the above conditions only for residential developments in which at least 20 percent of the dwelling units are affordable to, and reserved for, low and moderate income households, of which at least half of the dwelling units are affordable to, and reserved for, low income households.

To the extent that effectuation of these conditions requires the action of public entities other than the Township of Denville, plaintiffs seek to join those entities as parties to this litigation and seek the imposition of interlocutory restraints against those entities.

Plaintiffs will first set forth the legal standards to be applied in this case and then will address each of the proposed conditions in turn.

I. THE COURTS HAVE THE POWER AND DUTY  
TO IMPOSE CONDITIONS UPON TRANSFER  
OF A CASE TO THE COUNCIL ON  
AFFORDABLE HOUSING

In Hills Development, the Supreme Court held that L. 1985 c. 222 §16(a) generally requires that pending exclusionary zoning cases be transferred to the Council on Affordable Housing on the application of any party. The Court, however, held that one exception to this general rule is constitutionally mandated:

There is one possible consequence of transfer, however, which we believe the Legislature did not foresee, one that it would have intended to constitute "manifest injustice," a consequence that

would probably be constitutionally impermissible. We refer to a transfer that does not simply delay the creation of a reasonable likelihood of lower income housing but renders it practically impossible. That result would warrant, indeed, require, denial of transfer. Hills Development, slip op. at 77.

The Court, however, noted that the scope of this exception was limited by the fact that the courts (and ultimately the Council itself, when it is fully operational) have broad powers to impose conditions upon municipalities that seek to invoke the jurisdiction of the Council on Affordable Housing. Specifically the Court held that the trial courts have the power and duty to impose conditions so as to "protect and assure the municipality's future ability to comply with its Mount Laurel obligations" during the pendency of proceedings. Id. at 86-88.

Under Hills Development, a trial court has the power and duty to impose conditions upon transfer if it finds that three criteria are met:

(1) There exists a scarcity of resources that may potentially limit the ability of the municipality to satisfy its constitutional obligations;

(2) It is "necessary or desirable" to preserve those "scarce resources" to "protect and assure the municipality's future ability to comply with its Mount Laurel obligations.";

(3) It is "appropriate" for the court to impose conditions to preserve those "scarce resources."

We shall first analyze the legal significance of each of these criteria and then demonstrate that they require the imposition of conditions in the present case.

1. Scarce Resources. The purpose of the imposition of conditions upon municipalities seeking to invoke the jurisdiction of the Council on Affordable Housing is to "preserve 'scarce resources.'" Hills Development, slip op. at 86. The Court has defined "scarce resources" as "those resources that will probably be essential to the satisfaction of [the municipality's] Mount Laurel obligation." Id. The Court gave examples of the types of "scarce resources" it had in mind: vacant land, sewerage capacity, transportation facilities, water supply and "any one of the innumerable public improvements that are necessary to the support of housing but are limited in supply." Id. at 86-87.

Availability of resources cannot be evaluated in the abstract, but only in terms of what is likely to be necessary to enable a particular municipality to satisfy its housing obligations under the Mount Laurel decisions. Until the Council on Affordable Housing itself formulates a statewide methodology for determining municipal housing obligations, Hills Development, slip op. at 40, the courts must determine for themselves what the municipality's obligation is and whether there is any likelihood that the scarcity of necessary resources may impair the ability of the municipality to satisfy that obligation. The Supreme Court specifically noted that one of the signal achievements of the trial courts under Mount Laurel II was the development of a

methodology for determining the housing obligations of municipality that is both generally consistent throughout the state and satisfies the requirements of the constitution. Id. at 91. See AMG Realty v. Township of Warren, 207 N.J. 338 (Law Div. 1984); J. W. Field Co. v. Township of Franklin, 206 N.J. 165 (Law Div. 1985); Morris County Fair Housing Council v. Boonton Township, Docket No. L-6001-78 P.W. (Law Div., Middlesex/Morris Ctys., Jan. 14, 1985). In determining whether the scarcity of resources may impair the ability of a municipality to satisfy its Mount Laurel obligations, the courts should look to determinations of municipal housing obligations made under this methodology.

Furthermore, in evaluating the possible scarcity of resources affecting a particular municipality, the factual representations previously made by the municipality concerning shortages of resources that place constraints upon its ability to provide lower income housing are highly probative and, in some cases, dispositive.

2. Necessity or Desirability of Imposing Conditions. The Court is required to determine if the imposition of conditions is "necessary or desirable" to "protect and assure the municipality's future ability to comply with a Mount Laurel obligation." Id. at 88. In making this determination, the Court must consider a variety of factors. Id. The Court must determine whether the availability of any necessary resource is likely to diminish during the pendency of the proceedings before



the Council on Affordable Housing and whether the diminution "is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." Id. at 87. The Court may also properly assess whether the municipality will "actively try to preserve" the necessary resources. Id. at 88-89. In considering this factor, the Court must also determine whether such municipal efforts are sufficiently likely to assure the provision of "realistic" opportunities for safe, decent housing affordable to lower income households and not mere hypothetical or theoretical opportunities. Mount Laurel II, 92 N.J. at 206-61.

Here, too, the previous factual representations previously made by the municipality concerning shortages of resources that place constraints upon its ability to provide lower income housing are highly probative and perhaps dispositive.

3. Appropriateness of Conditions. Finally, the Court must determine what conditions are appropriate to protect the scarce resource whose preservation has been determined to be necessary or desirable. Hills Development, slip op. at 87. The Supreme Court has ruled that "appropriate" in this context "refers not simply to the desirability of preserving a particular resource, but to the practicality of doing so, the power to do so, the cost of doing so, and the ability to enforce the conditions." Id. at 87-88.

If the Court determines that it is "necessary or desirable" to preserve "scarce resources" but yet concludes that it is not

practical to do, then the Court is constitutionally obliged to deny transfer of the case to the Council on Affordable Housing. Id. at 77. To avoid this outcome, the trial courts must be deemed to have the broadest possible power to grant interlocutory relief to preserve "scarce resources." This broad power necessarily includes the power to grant both relief against the municipality and against third parties. This view is consonant with previous holdings by the various Mount Laurel courts that they have the authority to grant interlocutory restraints against third parties to preserve their own power to vindicate the constitutional rights of lower income persons. See, e.g., Morris County Fair Housing Council v. Boonton Township, Docket No. L-6001-78 P.W. (Law Div., Middlesex/Morris Ctys., July 5, 1984) (interlocutory restraints against preliminary approval of site plans and subdivision applications by nonparty municipal planning board and board of adjustment in the face of municipal contentions that shortage of vacant developable land limited ability of municipality to satisfy housing obligations); Davis v. Mt. Laurel Municipal Utilities Authority, Docket No. C-635 (Ch. Div., Atlantic/Burlington Ctys., March 8, 1983) (interlocutory restraints against granting sewer connections by nonparty municipal utilities authority in the face of evidence that shortage of sewerage would limit ability of municipality to satisfy housing obligations). It is an application of the well-established principle that courts have broad powers to grant ancillary relief against third parties to preserve their

jurisdiction and their power to effectuate their decrees. See e.g., Fidelity Union Trust Co. v. Union Cemetary Association, 13 N.J. Eq. 254 (Ch. 1943), aff'd 134 N.J. Eq. 539 (Ct. of Err. & App. 1944).

Under R. 4:30, additional parties may be joined at any time on the motion of any party or the court itself. See Schnitzer and Wildstein, New Jersey Rules Service IV-1060-1063 (Sp. Reprint Ed. 1982). In appropriate cases, it is thus proper for the Court to join additional parties and enter interlocutory restraints against them to preserve "scarce resources."

In sum, where it is shown that (1) scarcity of resources may potentially limit the ability of the municipality to satisfy its constitutional obligations, (2) it is "necessary or desirable" that these resources be preserved, and (3) it is "appropriate" for the court to impose conditions to preserve these resources, the Court has both the power and duty to impose such conditions. As we will explain in the next section, the facts of this case provide a compelling basis for imposition of the conditions requested by plaintiffs.

II. CIRCUMSTANCES IN DENVILLE REQUIRE IMPOSITION OF CONDITIONS UPON THE DEVELOPMENT OF VACANT LAND, PUBLIC SEWER USAGE, PUBLIC WATER USAGE, AND MUNICIPAL BONDING

Denville has represented to the Court that the scarcity of five types of resources limit its ability to provide realistic opportunities for lower income housing. Each of these "scarce

resources"<sup>1</sup> is, according to documents filed by Denville, either already unavailable in sufficient supply to enable the municipality to satisfy its housing obligation as determined by this Court or is likely to diminish in its availability in the near future. Thus, it is "necessary or desirable" to preserve these resources to enable the municipality to satisfy its housing

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1. Plaintiffs do not concede that all of these resources are necessary, or even germane, to the provision of lower income housing. Nor do plaintiffs necessarily agree that these resources are limited in the manner that defendant claims. Plaintiffs expressly reserve the right to challenge these views in subsequent proceedings.

Nonetheless, for purposes of this proceeding, it is appropriate for this Court to accept at face value defendant's representations as to the nature and extent of the limitations upon its ability to provide lower income housing and the expert testimony which defendant has offered in support of these claims. The Court must assume that these representations were made in good faith before this Court, that they embody the municipality's best judgment as to the extent of its resources, and that the municipality will make these same representations to the Council on Affordable Housing.

In addition, the Court's obligation in this proceeding is to determine what conditions are "necessary or desirable" to "protect and assure the ability of the municipality to satisfy its Mt. Laurel obligations." Hills Development, slip op. at 86-87. In such a determination, the risks all lie on the side of preserving too little, of permitting essential resources to be exhausted or dissipated during the pendency of proceedings before the Council on Affordable Housing, and thereby denying low income persons the opportunity to vindicate their constitutional rights. Under such circumstances, it is proper for the Court to err, if err it must, on the side of protecting too much rather than protecting too little. It is therefore appropriate for the Court to accept for purposes of this proceeding the representations of the municipality as the scarcity of essential resources, even if these representations ultimately prove to be somewhat exaggerated.

obligations. Finally, it is feasible and within the power of the Court to impose effective restraints to preserve these scarce resources, either through the imposition of conditions on Denville or through restraints against third parties.

We address each of these "scarce resources" in turn.

1. Vacant Developable Land - According to documents prepared by municipal planner Russell Montney, which Denville has filed with the Court and submitted to the special advisory master, there are only 1169 acres of vacant land in the municipality in tracts of five acres or more. (Montney report, June, 1984, Exhibit A). Most of this land is not suitable for residential development. Mr. Montney concluded that five categories of land must be excluded as unsuitable for development - land affected by high water tables, stream overflow areas, assorted wetlands, critical ground water resource areas, and land affected by slopes in excess of 15 percent. Excluding these categories of vacant land, only 332 acres of vacant developable land remain. (Id.).

If developed in accordance with the highest densities proposed in the compliance plan submitted by Denville Township to this Court (7 dwelling units/acre with a 30 percent setback for lower income housing) (Denville Compliance Plan, Exhibit B), this land could accommodate no more than 697 units of lower income housing. If developed at densities and setbacks which are more typical of inclusionary zoning in Morris County (10 dwelling units/acre with a 20 percent setback), this land would support

only 664 lower income units. Both of these figures are substantially below the unmet need of 883 units determined by this Court.

Moreover, subsequent to the submission of Mr. Montney's report, Denville submitted a draft report by environmental and planning consultant Curt Velsor to the special advisory master. Mr. Velsor identified additional categories of land which are unsuitable for development. For example, all lakes and hilltops in Denville are of "historical significance" and cannot properly be subject to any alteration. (Velsor, Draft Report, at I(f)3.2, Exhibit C). Hilltops and ridgelines, areas visible from major highways, and skyline trees are areas of "aesthetic significance" which cannot properly be developed. (Id. at I(f)3.3) Areas in which residential development is incompatible with surrounding uses, e.g., where development would "lessen the inherent natural or cultural resources of the adjacent properties," are not suitable for development. (Id. at I(f)3.1) Mr. Velsor would seemingly also exclude land which is not on existing public transit lines or within a mile of shopping and major employment areas. (Id. at I(f)2.3) While Mr. Velsor has not quantified these additional categories, clearly they substantially further reduce the availability of vacant developable land.

In light of Denville's factual representations, conditions and restraints on the development of vacant land are essential to preserve and assure the ability of Denville to satisfy its Mount Laurel obligations.

The analysis by Mr. Montney focused on tracts of five acres or more. Denville's proposed compliance plan, however, relies primarily on smaller tracts. The largest component of this plan involves placing a general mandatory setback on all vacant land in the municipality zoned for residential uses, which assertedly will produce 384 units of lower income housing upon full buildout (Compliance Plan, Exhibit B). To the extent that such a mechanism is relied upon, every undeveloped acre is critical. Any residential development which takes place without such setbacks diminishes the ultimate ability of the municipality to provide housing opportunities for lower income households.

Available vacant developable land continues to diminish. Although development in Denville has been sharply limited by the court-imposed ban on new connections with the public sewer system, building permits were granted for 64 new single family units in 1984, the last year for which full data is available (N.J. Dept. of Labor, N.J. Residential Building Permits - 1984 Summary, p. 32, Exhibit D). In 1985 (for which only partial data is available at this time) building permits were granted for another 35 dwelling units (N.J. Dept. of Labor, Residential Building Permits, Feb., Dec. 1985, Exhibit E). If the sewer connection ban is lifted, as is likely in the next several months, development can be expected to accelerate rapidly.

Municipally owned land is a resource of special significance for the provision of low income housing in two distinct respects. A key element of Denville's draft compliance plan is the

construction of lower income housing on municipally owned land (Compliance Plan, Exhibit B). Thus, vacant developable land owned by the municipality is an important limited resource for the provision of lower income housing. Diminution of this resource through development, sale, or encumbrance potentially diminishes Denville's ability to comply with its Mt. Laurel obligations. At the same time, however, Denville has submitted to the special advisory master a report by Mr. Velsor which calls for the municipality to engage in a systematic effort to acquire privately owned vacant developable land and dedicate it for park and recreational uses prior to permitting the development of lower income housing. (Velsor Report, at §I(f)(5)) Implementation of this plan would systematically diminish the municipality's ability to satisfy its Mt. Laurel obligations. Thus, preservation of the ability of the municipality to comply with its constitutional obligations requires the imposition of conditions upon both the disposition and encumbrance of vacant land now owned by the municipality and also upon future acquisition of developable land by the municipality.

The Court can preserve this scarce resource only by (1) enjoining the issuance of preliminary or final site plan or subdivision approvals and use variances; (2) enjoining the disposition or encumbrance of municipally owned land; and (3) enjoining acquisition by the municipality of vacant developable land for any purpose other than the provision of lower income housing.



2. Public Sewerage Collection - A report prepared by municipal engineering consultant Lee T. Purcell Associates and submitted by the municipality to the special advisory master indicates that limitations in Denville's public sewage collection system restrict the ability of the municipality to provide opportunities for lower income housing. (Purcell Sewer Report, Exhibit F). Specifically, Mr. Purcell asserts that the sewer lines and pumping stations that serve portions of Denville south of Rte. 10 only have the capacity to serve 358 existing dwelling units which have not yet been connected to the system. The system does not have the capacity to absorb any significant number of new units without several million dollars in improvements (Purcell Sewer Report at 11-15, Exhibit F).

Availability of public sewage collection is essential to the construction of lower income housing. By law, multifamily developments cannot utilize septic systems. N.J.A.C. 7:9-2.9. If they cannot be connected to public sewerage treatment facilities, they cannot be constructed. If additional connections are permitted to the existing collections system, the opportunity for connecting lower income housing in the future correspondingly diminishes.

The Court can preserve existing capacity by enjoining the municipality from allowing any further connections, except to meet compelling health and safety needs.

2. Public Sewage Treatment - Denville has repeatedly represented, both to this Court and to the Supreme Court, that

scarcities in sewage treatment facilities limit its ability to provide housing opportunities for lower income persons. (Purcell Sewer Report pp. 23-25, Exhibit F; Brief of Denville Township in Morris County Fair Housing Council v. Boonton Township, Docket No. A-125-85 (N.J. Sup. Ct. at 45, Exhibit G).

Most of Denville is in the service area of the Rockaway Valley Regional Sewerage Authority (RVRSA). RVRSA has recently constructed a new 12 million gallon per day (mgd) sewage treatment plant that will serve nine municipalities, including Denville. The new RVRSA plant was designed to accommodate population growth permitted by the zoning in effect in 1980.<sup>2</sup> No provision was made for the possibility of additional population growth as a result of zoning amendments or variances. Similarly, no provision was made for the possibility that 1980 municipal zoning might be found to represent unconstitutional exclusionary zoning.

RVRSA now projects that existing users will exhaust all but 3.7 mgd of the capacity of the new plant. (RVRSA Resolution, Exhibit F). Of this, RVRSA views .91 mgd as already committed through prior court orders and connection approvals already granted by RVRSA. This leaves 2.79 mgd for connections by new users and expansion of use by existing users.

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2. The design capacity of the plant was determined by calculating the total population that would reside in the RVRSA service area if all vacant developable land were fully developed in accordance with the then existing zoning.

Connections to the RVRSA facility are currently regulated by court orders issued in Department of Health v. City of Jersey City, Docket No. C-3447-67 (Ch. Div., Morris Cty.), which ban all connections except to meet compelling health and safety needs. Judge Gascoyne has advised the parties that this ban will be lifted in May 1986 or shortly thereafter. If the ban is lifted without conditions, the remaining capacity will, under existing agreements, be available to all potential users in the service area on a first-come, first-serve basis. RVRSA estimates that existing short term demand exceeds available treatment capacity by 2.53 mgd (Id. at Schedule A).

Thus if the ban is lifted without conditions,<sup>3</sup> it is clear that little or no treatment capacity will be available for the development of lower income housing by 1988. In that event, it is essential that this Court issue restraints against RVRSA to enjoin it from permitting additional connections without reserving adequate capacity for lower income housing in Denville.

RVRSA, in response to an invitation by the court in the Jersey City case, has recently proposed a plan for allocation of available sewage treatment capacity among member municipalities.

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3. Plaintiffs, over the opposition of defendants in this matter, have intervened in the Jersey City litigation for the purpose of urging the court to act aggressively to preserve sewerage capacity for lower income housing. A copy of plaintiffs' brief has been submitted to this Court under separate cover. Obviously, the proper course of action by this Court will depend upon what steps Judge Gascoyne takes.

(Id.). This plan would allocate 1.6 mgd for municipal growth in the nine member municipalities. This gallonage would be allocated among the nine municipalities by a complicated formula. The formula does not purport to reflect the relative additional need for sewage treatment arising from constitutional obligations of municipalities to provide lower income housing and does not in fact do so. (Id.). Under this plan, Denville would be allocated 215,547 gallons per day (gd) for additional connections (in addition to 353,687 gd for connection of existing units which are on septic systems in areas which are unsuitable for such system, and 29,687 gd for new users who have already received RVRSA approval or are entitled by previous court orders to connect). Using the standards for household sewage flow set forth in the Purcell report, this would permit connection of only approximately 560 additional residential units throughout Denville Township. By contrast, this Court has determined that Denville's unmet housing obligation to 1990 is 883 units, which, if it were satisfied through inclusionary zoning, might entail the construction of 4415 additional units.

Thus, if RVRSA and the court in the Jersey City litigation follow this course, it is critical that Denville and RVRSA be enjoined from permitting additional connections in Denville Township, except to meet compelling health and safety needs.

4. Public Water System - Denville has also represented that scarcities in its public water system limit its ability to providing housing opportunities for lower income households.

According to a report prepared by Denville's engineering consultant, Lee T. Purcell Associates, and submitted by Denville to the special advisory master (Purcell Water Report, May 23, 1985, Exhibit I), Denville has limitations as to both its water supply and its distribution system. It has available public water supply to accommodate only 1200 to 1933 additional dwelling units in the municipality (Purcell Water Report at 18, Exhibit I). In addition, water service to the southern part of Denville is limited to existing users by pumping station and water main limitations. (Purcell Water Report at 7-16, 28-19, Exhibit I).

Preservation of this scarce resource requires the imposition of restraints barring further connections or expansion of use by existing users, except to meet compelling health and safety risks.

5. Municipal Bonding Capacity - Denville has represented that limitations on its ability to incur debt through the sale of municipal bonds constrain its capability to provide lower income housing. In a report prepared by environmental and planning consultant Curt Velsor, which was submitted by the municipality to the special advisory master, Mr. Velsor concluded that the municipality would have to float more than \$12 million in municipal bonds to satisfy its housing obligations as determined by this Court. (Velsor Report at I(f)5, Exhibit C) Mr. Velsor concluded that the necessary bond issues would exceed Denville's legal debt limit, be impossible to sell, and would be fiscally unsound. He therefore concluded that it was not feasible for

Denville to satisfy its housing obligations as determined by this Court.

Denville has represented that municipal bonding authority is scarce resource which limits its ability to provide lower income housing, and that all of its legal available bonding authority will be required for it to satisfy its housing obligations. Therefore, it is both necessary and feasible for the Court to enjoin issuance of any long-term municipal bonds, except to deal with immediate health or safety problem, so as to preserve the ultimate ability of the municipality to comply with its Mt. Laurel obligations.<sup>4</sup>

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4. Denville has represented that a variety of other constraints on existing municipal infrastructure - including public schools, roads, open space, and police and fire protection - also limit its ability to provide lower income housing. For example, Mr. Velsor in his report submitted by Denville to the special master asserted that the ability of Denville to provide housing opportunities is limited by the existing capacity of its schools. He estimated that there remains unused capacity in the district elementary school system for only 557 additional students. He estimated, however, that provision of lower income housing through inclusionary zoning will require that the schools absorb 960 additional children. (Velsor Report at I(f)5, Exhibit C). Velsor similarly concluded that Morris Knolls Regional High School, which serves Denville, has a capacity to accommodate only 100 additional students. Provision of lower income housing through inclusionary zoning would add 240 high school students to this school's rolls. (Velsor Report at I(f)5; Exhibit C).

Velsor also concludes Denville's police and fire services are now "barely adequate." Provision of additional lower income housing will deprive Denville of adequate police and fire protection. (Id.)

These facilities and services are already assertedly scarce resource. Any further burden upon them further limits the ability of the municipality to meet its Mt. Laurel obligations.

(Footnote continues on next page)

In sum, Denville satisfies all the criteria for imposition of conditions upon the transfer of this case to the Council on Affordable Housing. The scarcity of vacant developable land, sanitary sewage collection capacity, sanitary sewage treatment capacity, public water services, and municipal bonding capacity (as well as other municipal infrastructure and services), and their potential impact on Denville's ability to provide lower income housing, have been strenuously asserted by defendant and must be taken as admitted for purposes of this proceeding. Preservation of each of these resources is desirable, indeed necessary, to protect and assure the ability of the municipality to satisfy its constitutional obligations under the Mt. Laurel decisions. Each of these resources can be preserved through appropriate court orders. In some instances, the orders will have to be directed towards third parties. Restraints upon approvals of site plan and subdivision applications must be imposed upon the Denville Planning Board and the Denville Zoning Board of Adjustment as well as upon the municipality. Restraints

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(Footnote continued from previous page)

However, it appears that these scarcities can be adequately addressed by the conditions proposed above, without more specific conditions. Plaintiffs, however, reserve the right to seek further conditions should it appear in the future that these resources are not being adequately preserved.

to preserve sewage treatment capacity must be imposed upon the Rockaway Valley Regional Sewerage Authority. These restraints are both necessary and appropriate to "protect and assure the municipality's future ability to comply with its Mt. Laurel obligation." Hills Development, slip. op. at 87.

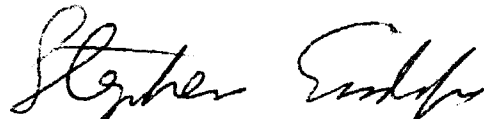
CONCLUSION

For all the foregoing reasons, this Court should grant plaintiffs' application to join the Denville Township Planning Board, the Denville Township Zoning Board of Adjustment, and Rockaway Regional Sewerage Authority as parties in this matter. Additionally the Court should enter the interlocutory restraints set forth in this letter brief to preserve scarce resources in Denville Township.

If the Court determines that restraints to preserve scarce resources are necessary or desirable but are not "appropriate," the Court should deny Denville's application to transfer this case to the Council on Affordable Housing.

Respectfully submitted,

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

BY:   
STEPHEN EISDORFER  
Assistant Deputy Public Advocate

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cc: All Counsel