ML – Morris County Fair Housing Council v. Boonton — June 6, 1986

- Motion For Leave to Appeal, and Brief For Defendant Township of Randolph, Randolph Township Planning Board, Randolph Township Municipal Utilities Authority and Randolph Township Board of ~~Re~~ Adjustment.

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SUPERIOR COURT OF
NEW JERSEY

APPELLATE DIVISION

DOCKET NO. L-6001-78 P.W.
L-59128-85 P.W.

MORRIS COUNTY FAIR HOUSING COUNCIL, et. al.,

Plaintiffs

v.

BOONTON TOWNSHIP, et. al.

Defendant

RANDOLPH MOUNTAIN INDUSTRIAL COMPLEX, a New Jersey Corporation

Plaintiff

v.

THE BOARD OF ADJUSTMENT OF THE TOWNSHIP OF RANDOLPH, et. al.

Defendants

CIVIL ACTION

ON MOTION FOR LEAVE TO APPEAL FROM INTERLOCUTORY ORDER OF SUPERIOR COURT, LAW DIVISION MORRIS COUNTY/ MIDDLESEX COUNTY (MOUNT LAUREL II LITIGATION)

SAT BELOW

HONORABLE STEPHEN SKILLMAN

MOTION FOR LEAVE TO APPEAL, AND BRIEF FOR DEFENDANT TOWNSHIP OF RANDOLPH, RANDOLPH TOWNSHIP PLANNING BOARD, RANDOLPH TOWNSHIP MUNICIPAL UTILITIES AUTHORITY AND RANDOLPH TOWNSHIP BOARD OF ADJUSTMENT.

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MOTION FOR LEAVE TO APPEAL

TO: Elizabeth M. McLaughlin, Clerk
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Honorable Stephen Skillman
Middlesex County Courthouse
New Brunswick, New Jersey 08903

All Counsel on Attached List

Sir/Madam:

PLEASE TAKE NOTICE that the undersigned Attorney for Defendants Appellants Township of Randolph, Randolph Township Planning Board, Randolph Township Municipal Utilities Authority and Randolph Township Board of Adjustment hereby moves before the Superior Court of New Jersey, Appellate Division, for Leave to Appeal from the interlocutory order of the Honorable Stephen Skillman signed and filed on May 29, 1986 in the cases of Morris County Fair Housing Council et. al., v. Boonton Township, et. al., Docket No. L-6001-78 P.W. and Randolph Mountain Industrial Complex v. The Board of Adjustment of the Township of Randolph et. al., Docket No. L-59128-85 P.W.

In support of said motion the undersigned will rely upon the attached Brief and Appendix.

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BRIEF IN SUPPORT OF MOTION

PROCEDURAL HISTORY

On or about October 13, 1978, the Public Advocate of the State of New Jersey on behalf of himself and others filed an exclusionary zoning suit against Randolph Township and twenty-six other municipalities in Morris County. An unsuccessful appeal was taken by Randolph and several other Defendants in the case challenging the Public Advocate's involvement in the lawsuit. Morris Plains, et. al. v. Department of Public Advocate, 169 N.J. Super. 403 (App. Div. 1979), certif. den. 81 N.J. 411 (1979).

Subsequently, the Supreme Court stayed any further proceedings in this case pending their decision in several Mt. Laurel cases then before the Court. After the Supreme Court rendered its opinion in Mt. Laurel II, So. Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158 (1983), the stay was lifted and the case was assigned to the Honorable Stephen Skillman, the "Mt. Laurel Judge" for the northern part of the State. Further discovery took place and several settlements were tentatively effected, subject to subsequent judicial review and approval.

On July 2, 1984, the trial in the matter commenced against the Township of Denville, the Township of Randolph and the Township of Parsippany Troy-Hills on all issues relating to the calculation of a fair-share obligation. On or about July 20, 1984, the Township of

Randolph entered into a tentative settlement of the entire litigation, which settlement was never effectuated.

On July 2, 1985, Governor Thomas Kean signed Ch. 222 P.L. 1985, the Fair Housing Act ("Act") and on or about September 9, 1985, the Township of Randolph filed a Motion to transfer the cases sub judice to the Council on Affordable Housing pursuant to Section 16 of the Act. Oral argument was advanced before the Honorable Stephen Skillman on September 23, 1985 and on October 28, 1985 the Judge entered an order denying the transfer of these cases to the Council.

On or about November 8, 1985 the Defendant filed a motion for leave to appeal the said interlocutory order which was certified pursuant to R.2:12-1 to the Supreme Court by order dated November 13, 1985. Briefs were submitted and oral argument held by the Supreme Court on January 6 and January 7, 1986.

On February 20, 1986, the Supreme Court issued its opinion in this case and several other related cases under the name The Hills Development Co. v. Township of Bernards, (A-122-85)___N.J.___(1986) reversing the order of the Honorable Stephen Skilllman and transferrring the cases to the Council subject to such conditions as the trial court might impose in accordance with the terms of the opinion to conserve "scarce resources". Supra at 87.

On March 21, 1986 the Public Advocate filed a notice of motion to place conditions upon the transfer of the litigation which included a request to join the Randolph Township Planning Board, Board of Adjustment, Municipal Utilities Authority and the Rockaway Valley Regional Sewerage Authority ("RVRSA") as parties to the proceeding and to issue ". . .such further interlocutory restraints . . . to preserve the abilility of Randolph Township to meet its constitutional obligations to provide sufficient realistic housing opportunities. . . ." (Da-6a). No brief or supporting affidavit was filed with that motion.

Judge Skillman bifurcated the motion and first took briefs and heard oral argument on the issue of joining additional parties. At oral argument on May 14, 1986, the Advocate dropped his request to join the RVRSA. On May 29, 1986 the Honorable Stephen Skillman entered an order to join, among others, the Defendant Planning Board, Board of Adjustment and Municipal Utilities Authority. (Da-1a).

STATEMENT OF FACTS

The essential facts in this case are set forth in detail by the Supreme Court in The Hills Development Co. v. Township of Bernards (A-122-85) ____N.J.____(1986). The

history of this matter is long and tortured but for the purposes of this motion the following brief statement of facts is set forth.

In The Hills case, the Supreme Court while upholding the constitutionality of the Act, transferred the instant case, along with all other cases then before it to the Council on Affordable Housing. In transferring these cases to the Council the Supreme Court granted limited jurisdiction to the trial court to entertain applications to impose conditions on the transfer to preserve scarce resources. Supra at 88. Pursuant to said invitation, the Public Advocate on March 21, 1986 filed a motion to impose conditions, without detailing the types of conditions requested, to join to the action the Planning Board, Board of Adjustment, Township Municipal Utilities Authority and the RVRSA. (Da-5a, 6a). No supporting brief nor affidavit were annexed and there was no indication upon the filing of said motion the precise nature of the conditions.

On or about March 21, 1986 Plaintiff Randolph Mountain Industrial Complex filed a motion for leave to file an amended complaint naming the Randolph Township Municipal Utilities Authority as an additional Defendant and conditioning the transfer of the matter upon a requirement that the said Authority reserve sewerage gallonage treatment capacity for the Mt. Laurel housing as proposed by said Plaintiff. (Da-45a, 46a). A certification was annexed to the application. (Da-48a)

On or about April 17, 1986, nearly one month after the filing of the motion to impose conditions, the Advocate, for the first time in writing, submitted a letter brief with attachments in support of the joinder and detailing the restraints being requested. (Da-8a). On or about April 23, 1986 the undersigned filed a brief in opposition to Plaintiff's motion to join said additional parties. (Da-74a). On May 14, 1985 the Honorable Stephen Skillman heard oral argument on the joinder motions and ordered the joinder of the Planning Board, Board of Adjustment and Municipal Utilities Authority, which order was formalized on May 29, 1986. (Da-1a).

The Township of Randolph, and the newly joined Planning Board, Board of Adjustment and Municipal Utilities Authority jointly move before this Court for leave to appeal this interlocutory order joining said parties in this litigation.

POINT I

THE MOTION BY DEFENDANTS FOR LEAVE TO APPEAL SHOULD BE GRANTED IN THE INTEREST OF JUSTICE AS THE ORDER JOINING THE ADDITIONAL PARTIES IS BEYOND THE JURISDICTION GIVEN TO THE TRIAL COURT BY THE SUPREME COURT IN THE REMAND IN THE HILLS DEVELOPMENT CO. v. TOWNSHIP OF BERNARD (A-122-85) ___N.J.____1986.

In accordance with R.2:2-4, the Appellate Division may grant leave to appeal in the interest of justice from an interlocutory order of any court. The granting of leave to appeal is appropriate if after a balancing of the interests, justice suggests the need for review in advance of the final judgment. Appeal of Pennsylvania Railroad Co., 20 N.J. 398 (1956); Cardinale Trucking Corp. v. Motor Rail Co., 56 N.J. Super. 150 (App. Div. 1959). Although the power to grant interlocutory appeals is very sparingly exercised by the Court, it will be exercised when some grave damage or injustice may be caused by the Court below. Romano v. Maglio, 41 N.J. Super. 561, 567-568 (App.Div. 1956). In Romano, supra., the Appellate Division stated the proposition as follows:

> "We will not grant leave to appeal in order to correct minor injustices, such as those commonly attendant on orders erroneously granting or denying interrogatories or discovery. . .However, we may grant leave to appeal where some grave damage or injustice may be caused by the order below, such as may occur when the trial court grants, continues, modifies, refuses or disolves an injunction, appoints a receiver or refuses an order to wind up a pending receivership. . . .We may also be induced to grant leave where the appeal, if sustained, will terminate the litigation and thus very

> substantially conserve the time and expense of the litigants and the Courts, as in the case where the order attacked determines that the Court or agency below has jurisdiction of the subject matter or person." (Emphasis added). Id.

The issue in the instant case is of the magnitude suggested by the Appellate Division in Romano. If the appeal is successful, the Court below will not have the right to impose conditions on these additional Defendants and therefore the issue goes to the heart of the jurisdiction question.

Additionally, this action involves threshold questions that have developed under The Hills case, as well as under the Act. The issue in this case involves the scope of jurisdiction that was granted to the trial court by the Supreme Court and it is appropriate to have this Court as quickly as possible examine and resolve this jurisdictional question. Prior to The Hills case and the Act, the blueprint for the handling of exclusionary zoning cases was set forth in Mt. Laurel II, Supra. The Supreme Court in that case discouraged interlocutory appeals Id. 290, but nevertheless recognized the need to consider interlocutory appeals:

> "In the most unusual circumstances stays may be granted either by the trial or appellate courts and interlocutory appeals taken (or attempted); furthermore, there may even be circumstances in which the trial court declines to handle the litigation in one package. It may, for instance, enter a final judgment (upon certification pursuant to R.4:42-2) what would otherwise be an interlocutory order invalidating the ordinance before it." Id. at 158-159.

Thus, even in Mt. Laurel II, the Supreme Court recognized that although interlocutory appeals would not be favored, circumstances might dictate that leave be granted to consider interlocutory appeals of a magnitude which involve the very jurisdiction of the Court.

This concept was further confirmed in The Hills case where the Supreme Court, pursuant to R.2:12-1 directly certified the motion filed by Randolph Township for leave to appeal from the order denying the transfer of this matter to the Council The Supreme Court went on to grant such leave and proceeded to hear the case on January 6 and 7, 1986, recognizing the importance of determining both the constitutionality of the Act and the propriety of the lower court's denial of the transfer. The instant motion seeks leave to appeal again the jurisdiction afforded to the trial court by the Supreme Court in The Hills case to consider the imposition of conditions on the transfer. It is respectfully maintained that the trial court went beyond the said jurisdiction by ordering the joinder of additional parties to a case which has been pending for eight years and for which no previous application to join any additional parties had been made. It is certainly appropriate for this Court to determine whether the trial court has exceeded its jurisdiction prior to the trial court making determinations on conditions to be imposed upon newly joined parties.

Moreover, the Supreme Court afforded the trial court not only a limited scope of jurisdiction but a limited time

period within which to exercise the same. Thus, the Supreme Court has stated:

> "Since the Council [on Affordable Housing] will not be able to exercise its discretion until it has done the various things contemplated in the Act, for which a period of seven months has been allowed, we believe the Act fairly implies that the judidiciary has the power, upon transfer, to impose those same conditions designed to conserve scarce resources that the Council might have imposed were it fully in operation." Supra at 87.

The Council is now fully operational and has promulgated procedural guidelines as contained in the April 21, 1986 edition of the New Jersey Register (N.J.A.C. 5:91-1 et. seq) and substantive guidelines in the June 2, 1986 edition of the New Jersey Register. If this Court does not hear the appeal of the issues raised herein at this time, the issues might never reach this Court as the Council will soon be "fully operational".

In conclusion, therefore, it is respectfully requested that this Court grant leave to the Defendants herein to file an appeal from the order granting the joinder of these additional parties. The granting of such a motion will permit the Appellate Division to determine the scope of the Supreme Court's grant of jurisdiction to the trial court in The Hills case and resolve the issue once and for all as to whether the trial courts should continue to be involved in these exclusionary zoning controversies beyond the explicit grant of jurisdiction order by the Supreme Court. The granting of this motion will

provide the Appellate Division with a unique opportunity to afford the trial court guidance in assessing the various motions which have been made under the Supreme Court decision in The Hills case. Finally, the denial of this motion might well result in the Defendants being denied any opportunity for review of the trial court's joinder order since by the time the matter is resolved at the trial court level, the Council will most likely be fully operational and the trial court would lose its jurisdiction. Granting the leave to appeal now would also avoid a potential confrontation between the Council and the judiciary on the ability to modify orders which had previously been granted by the trial courts.

POINT II

THE TRIAL COURT LACKED JURISDICTION TO JOIN ANY PARTIES AS THE SAME IS OUTSIDE THE SCOPE OF JURISDICTION CONFERRED ON THE TRIAL COURT BY THE SUPREME COURT IN THE HILLS CASE.

Typically, there is little need to review the scope of jurisdiction of a trial court in a motion to join parties. The Court, without doubt, has that jurisdiction and all one needs to do is to comply with the requirements set forth in the Rules. In the instant case, however, thE lower Court does not have general jurisdiction. Instead, the Supreme Court has removed jurisdiction over this matter by the lower Court except in a very narrow area. Thus, the Supreme Court in The Hills case stated:

> "We hold that the Act is constitutional and order that all of the cases pending before us be transferred to the Council. Those transfers, however, shall be subject to such conditions as the trial courts may find necessary to preserve the municipality's ability to satisfy their Mt. Laurel obligation." (Slip op. at 30).

In concluding, the Supreme Court stated:

> "All cases are hereby transferred to the Council subject to such conditions as the trial courts may hereafter impose all in accordance with the terms of this opinion." (Slip op. at 93).

In specifying the limited jurisdiction retained by the trial court, the Supreme Court stated:

> "As to any transferred matter, any party to the action may apply to the trial court (which shall retain jurisdiction for this limited purpose) for the imposition of conditions on the transfer." (Slip op. at 88).

Thus, it is beyond cavil that the jurisdiction afforded to the trial court was solely for the purpose of imposing conditions on the transfer. That jurisdiction does not extend to the joinder of additional parties. What can be more ironic than the expansion of a judicial action when the entire tenor of the Supreme Court's determination in The Hills case is a reduction of the Court's jurisdiction? It is clear throughout the Supreme Court's opinion and even in their earlier opinions on the issues that the judicial involvement would shrink in direct proportion to the expansion of the involvement of the Executive and Legislative branches of government. The Supreme Court in The Hills case found that the field is now

substantially occupied by the Legislative and Executive branches and that it would, true to its past exhortations, remove itself from the field of exclusionary zoning.

Perhaps the best illustration of the Supreme Court's intention of removing the judiciary from the field is its ruling with respect to the issue of res judicata and collateral estoppel. The Court raised the issue as to whether the Council on Affordable Housing would be bound by any orders entered in any of the judicial matters which were being transferred to the Council on Affordable Housing in The Hills case. The Supreme Court stated at 82:

> "Where no final judgment has been entered, we believe the Council is not bound by any orders entered in the matter, all of them being provisional and subject to change, nor is it bound by any stipulations, including a municipality's stipulation that its zoning ordinances do not comply with the Mt. Laurel obligation." (Slip op. at 82).

The Supreme Court in The Hills case went on to elaborate on the basis for such a conclusion, stating:

> "The administrative remedies, and the administrative approach to that subject [Mt. Laurel obligations] may be significantly different from the Court's. Fair share rulings by the Court, provisional builders' remedies, site suitability determinations -- all of these may not be in accord with the policies and regulations of the Council. Similarly, stipulations in Mount Laurel matters were undoubtedly based on the assumption that the issues would be determined by the Court in accordance with Mount Laurel II. They presumably represented the litigant's belief that what was being stipulated would be adjudicated in any event. It is not only, in a sense, unfair to the litigant to be bound by these interim adjudications and stipulations, it would also be inconsistent with the purposes of the Act, for these determinations and stipulations may be inconsistent with the

comprehensive plan of development of the state and the method of effectuating it."

Thus, the intent of the Supreme Court was to give the municipalities the ability for a fresh start in terms of compliance with the Mount Laurel obligation as that obligation is quantified by the Council on Affordable Housing, not as based upon the Court's previous actions. To now permit the addition of parties to the litigation will not foster that result, but instead continue to place the judiciary into the midst of determinations now to be made by an administrative body under rules, regulations and guidelines adopted by them.

Indeed, the concerns that the Council might adopt regulations which differed from those applied by the judiciary have been realized. The Council has reduced by 100,000 units the Mt. Laurel needs for the State and has promulgated a modified formula for determining a municipality's fair share obligation. Randolph was required under the Court's formula to provide for 872 units while under the Council's formula it has been reduced almost 50% to 452. (Da-102a)

Moreover, the limited involvement of the judiciary was necessary to add legitimacy to the Mount Laurel doctrine. The Supreme Court understood, in The Hills case, the effect of a judicial promulgation of zoning by stating, "We understand that

no one wants his or her neighborhood determined by judges." Slip op. at 90.

In removing itself from this area, the Supreme Court understood the efficacy of the legislative remedies:

> "The Fair Housing Act has many things that the judicial remedy did not have: . . . it has the kind of legitimacy that may generate popular support, the legitimacy that comes from enactment by the people's elected representatives; it may result in voluntary compliance, largely unachieved in a decade by the rule of law fashioned by the Courts. . . and it has all of the advantages of implementation by an administrative agency instead of by the Courts, advantages that we recognized in our Mount Laurel opinions." (Slip op. at 58-59). (Emphasis added)

For the trial court to order the addition of parties under the guise of the imposition of conditions is totally inconsistent and diametrically opposed to the Supreme Court's lucid understanding and clear declaration of the importance of having the constitutional obligation implemented through a body subject to the electorate, portraying the kind of legitimacy that can only be manifested by activity promulgated by the elected representatives of the people.

In conclusion, therefore, it is respectfully submitted that the trial court lacked the jurisdiction to consider the motion to join additional parties. The jurisdiction conferred upon the lower court by the Supreme Court was solely to consider the imposition of conditions to preserve a scarce resource. Joinder motions and any other motions which would otherwise be permitted under the Rules are outside of the scope of jurisdiction of this Court. A fair reading of The Hills case must result in the conclusion that the intent of the Supreme Court was to have the judiciary removed from Mount Laurel actions, except to the extent that a condition must be imposed to preserve a scarce resource. Therefore, this Court must reverse the order of the trial court joining the additional Defendants.

POINT III

REASONABLE CONDITIONS ENDORSED BY THE SUPREME COURT IN THE HILLS CASE DO NOT INCLUDE THE JOINDER OF ADDITIONAL PARTIES.

Viewing the issue from another perspective, the subject which must be considered is whether the conditions referred to by the Supreme Court could reasonably include the joinder of additional parties. A critical examination of that portion of The Hills case involving the imposition of conditions must lead one to the conclusion, however, that the term "conditions" cannot be so expanded.

The subject of conditions is dealt with in detail by the Supreme Court at 86 through 89 of the Slip Opinion. The Court begins with the statement:

> "We have concluded that the Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate measures to preserve 'scarce resources', namely, those resources that will probably be essential to the satisfaction of its Mount Laurel obligation."

It is interesting to note that the Supreme Court refers to the ability of the Council to impose conditions on the ". . .applying municipality. . . .", not on any political subdivision of the State or of the municipality, including a Planning Board, Board of Adjustment, or a Municipal Utilities Authority. In granting the lower court the ability to impose conditions, the Supreme Court did not confer upon it any more power to impose those conditions than the Council was granted. As specifically stated by the Supreme Court:

> "Since the Council will not be able to exercise its discretion until it has done the various things contemplated in the Act, for which a period of seven months has been allowed, we believe the Act fairly implies that the judiciary has the power, upon transfer, to impose those same conditions designed to conserve scarce resources that the Council might have imposed were it fully in operation." (Slip Op. at 87). (Emphasis added).

Thus, to ascertain the scope of conditions which can be imposed by the judiciary, we must look to the scope of conditions which can be imposed by the Council. There can be no doubt that the Council on Affordable Housing lacks the power to

bring additional parties before it in its entertainment of an application for substantive certification. The Act directs itself to the municipality which possesses the ability to exercise zoning power. Since the Council lacks the power to impose conditions which would add parties to the substantive certification process, the Court is similarly constrained.

This position is further bolstered by the elaboration of the Supreme Court on the issue of conditions. After deeming it "unwise" to impose "appropriate conditions" in the cases before it, the Supreme Court detailed what it meant by an "appropriate" condition:

> "'Appropriate' 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 condition." (Slip op. at 87-88).

Thus, although the Court recognized that the Council and thus the trial court in these limited circumstances could consider the imposition of conditions to preserve scarce resources, even if the need to preserve the same was manifested, a condition might not be appropriate. Accordingly, if the trial court otherwise lacked the power to do so, it could not impose a condition even though the need to preserve a scarce resource existed. If it was impractical to do so or if the cost of doing so was so great or if the trial court lacked the ability to enforce the condition, the condition would no longer be appropriate. It is maintained that the concept that the Court had the power on an application for the imposition of conditions

to add parties to the litigation and then enjoin the exercise of their statutory powers is so far beyond that which the Supreme Court intended.

In summary, therefore, it is respectfully maintained that "reasonable" conditions endorsed by the Supreme Court to preserve scarce resources does not include the addition of parties to this litigation. It cannot be challenged that the Council lacks the ability to bring before it other municipal bodies, agencies or political subdivisions of this State in conjunction with an application for substantive certification filed by a municipality. The Supreme Court has indicated in The Hills case that the limited jurisdiction conferred upon the trial court in the instant case was to consider the same types of conditions which the Council could otherwise impose were it fully operational. The Court, in this case, possesses no greater power than the Council and therefore lacks the power to add parties to the litigation. For these reasons, the interlocutory order entered by the Honorable Stephen Skillman joining the additional Defendants must be reversed.

POINT IV

THE CONSTITUTIONAL OBLIGATION TO PROVIDE A REALISTIC OPPORTUNITY FOR THE CONSTRUCTION OF LOW AND MODERATE INCOME HOUSING RELATES TO THE EXERCISE OF THE POWER TO ZONE POSSESSED BY MUNICIPALITIES AND IS INAPPLICABLE TO THE EXERCISE OF OTHER POWERS BY A MUNICIPALITY, A PLANNING BOARD, A BOARD OF ADJUSTMENT, AND A MUNICIPAL UTILITIES AUTHORITY.

In Mount Laurel I, South Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 174 (1975) the Supreme

Court of New Jersey declared that every developing municipality, must, by its land use regulations presumptively make realistically possible an appropriate variety and choice of housing. The underpinning of the Court's opinion was the New Jersey Constitution which authorized the Legislature to enact laws to permit a municipality to enact zoning ordinances. The Court found that the exercise of this zoning power had to meet the requirement of substantive due process and that the use of the power must protect the general welfare which the Court found to include adequate and sufficient housing. Nearly eight years later, in Mount Laurel II, South Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158, 214-215 (1983), the Supreme Court again opined that every municipality's land use regulations must provide a realistic opportunity for decent housing for its resident poor who occupy dilapidated housing and in addition, those municipalities in a growth area must provide a realistic opportunity in their zoning ordinances for their fair share of the region's present and prospective low and moderate income housing needs.

The Mount Laurel cases are clearly land use cases involving the municipality's exercise of its constitutional power to zone. It has been found that the Mount Laurel doctrine is inapplicable to other areas in which a municipality may exercise its powers. For example, in All People's Congress of Jersey v. Jersey City, 195 N.J. Super. 532 (Law Div. 1984), the issue was raised as to whether the Mount Laurel II doctrine was

applicable to a municipality's enactment of a rent-leveling ordinance. The Honorable Stephen Skillman declined to entertain the case on the basis that the same involved an attack upon a rent-leveling ordinance as distinguished from a zoning ordinance. Judge Skillman further indicated that if the Complaint were amended to include a challenge to the Jersey City zoning ordinance, a reconsideration would have to take place. Based upon such a determination, Judge Young opined:

> "This court determines that the Mount Laurel II doctrine is not applicable to the rent control ordinance represented by ordinance MC-451. The Mount Laurel II doctrine is applicable to review the exercise of a municipality's constitutional power to zone, more particularly when the power is invoked to create exclusionary zoning. Exclusionary zoning is the mischief which both Mount Laurel I and Mount Laurel II were designed to remedy. Indeed, an analysis of the Mount Laurel II opinion discloses that its lietmotif is the scope of the exercise of the power to zone. The essence of the opinion is stated in the passage here quoted:
>
> > "'That is the constitutional rationale of the Mount Laurel doctrine. The doctrine is a corollary of the constitutional obligation to zone only in furtherance of the general welfare. The doctrine provides a method of satisfying that obligation when the zoning in question affects housing. [92 N.J. at 209].'" 195 N.J. Super. 532, 540.

The Mount Laurel obligation as set forth in the trilogy of Mount Laurel cases and furthermore as legitimatized in the Fair Housing Act, Ch. 222 P.L. 1985 relates to a municipality's exercise of its zoning power. There is absolutely no basis in law to support the proposition that a municipal planning board, a municipal board of adjustment, or a

municipal utilities authority, possesses such an obligation. That those entities lack the power to zone is incontrovertible. And to even consider the expansion of the doctrine at the point in time when the Legislature has enacted the Fair Housing Act to legitimatize the obligation as it relates to municipalities, is both unwise and unwarranted.*

Without belaboring the point, it is clear that the Mount Laurel doctrine is inapplicable to Planning Boards and Boards of Adjustment to the extent that they exercise their statutory powers, except as it relates to the powers which were recently included as part of the Fair Housing Act. Municipal Utilities Authorities are likewise not subject to the Mount Laurel Doctrine which is bottomed in the exercise of a municipality's zoning power. The addition of these parties is simply without support and precedent and should be reversed.

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[1] A more complete analysis of the inapplicability of the Mount Laurel doctrine to municipal utilities authorities is contained in "The Impact of Mount Laurel II on Municipal Utilities Authorities", 115 New Jersey Law Journal 317 (March 21, 1985).

POINT V

EVEN ASSUMING ARGUENDO THAT THE COURT BELOW POSSESSED THE JURISDICTION TO CONSIDER THE JOINDER OF PARTIES, THE MOVANT FAILED TO FULFILL THE REQUIREMENTS OF R.4:28-1 AND THEREFORE THE GRANTING OF THE JOINDER MOTION MUST BE REVERSED.

Although not stated anywhere in Plaintiff's moving papers (Da-5a to 44a), it is assumed that the motion to join parties was brought pursuant to R.4:28-1 involving joinders of persons needed for just adjudication. The Rule provides in pertinent part:

> "A person who is subject to service of process shall be joined as a party to the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest in the subject of the action and is so situated that the disposition of the action in his absence may either (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already party subject to a substantial risk of incurring double, multiple or other inconsistent obligations by reason of his claimed interest. If he has not been so joined, the Court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant."

It is respectfully suggested that the second category of joinder is inapplicable to the instant matter since it would involve an application by that third party to join the action. The only basis upon which the motion could have been made was 4:28-1(a)(1) where a claim is being made that complete relief cannot be accorded among those already parties without the addition of the parties requested to be joined.

The problem that arises, however, is that the trial court will grant no relief to the parties to this action. The instant matter has been transferred to the Council by the Supreme Court in The Hills case. The relief that will be accorded in this case will be through that administrative body which has already promulgated both procedural and substantive rules, regulations and guidelines. Thus, it is respectfully maintained that Plaintiff failed to satisfy his burden of proof in regard to his motion.

Moreover, the relief that can be afforded to an interested party by the Council is relief against the municipality and the exercise of its zoning power. The Fair Housing Act, Ch. 222 P.L. 1985 makes that perfectly clear in Section 2 wherein the Legislature recognizes that the Supreme Court through its Mt. Laurel rulings

> ". . .has determined that every municipality in a growth area has a constitutional obligation to provide through its land use regulations a realistic opportunity for a fair share of its region's present and prospective needs for housing for low and moderate income families." (Emphasis added).

Thus, the relief that can be afforded by the Council to an interested party is with respect to a municipality's exercise of its land use regulations not against a Planning Board's exercise of its statutory jurisdiction nor that of a Board of Adjustment, nor that of a Municipal Utilities Authority.

In spite of all of the foregoing, perhaps most illustrative of the absurd and bizarre nature of Plaintiff's

motion and the lower court's concurrent in it is the fact that the litigation, prior to its being transferred to the Council, had been pending for almost eight years. Throughout that period, never did the Plaintiff move to add any parties to the action, let alone, the specific parties now added. This is a case which was tried for almost two weeks without any of the now joined parties, tentatively settled, and brought before the Supreme Court on an appeal of a denial of a motion to transfer, and transferred to the Council. At no time during those 7 1/2 years did Plaintiff move to join these parties. Now, when the Court lacked jurisdiction in the case, Plaintiff brought a motion to add parties, taking the position that in the absence of these parties, complete relief cannot be accorded among those already parties. This position is simply without basis and must be rejected.

In summary, therefore, it is submitted that the lower court's grant of Plaintiff's motion to join the Planning Board, Board of Adjustment, Municipal Utilities Authority and Regional Sewerage Authority must be reversed because of Plaintiff's failure to fulfill the requirements of R.4:28-1.

CONCLUSION

In light of the foregoing reasons, it is respectfully requested that this Court grant the motion of Defendants for leave to appeal the interlocutory order of the Honorable Stephen Skillman entered May 29, 1986 joining the the Randolph Township Planning Board, Randolph Township Board of Adjustment and furthermore to reverse said order making such joinder.

Respectfully submitted,

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By _____
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