CH - Morris County Fair Housing Council
V. Boonton Randolf

June 6, 1986
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Brief in opposition to Plaintiff's motion to impose conditions upon the transfer to the council on affordable housing

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MORRIS COUNTY FAIR HOUSING COUNCIL, et. al. Plaintiff vs. BOONTON TOWNSHIP, et. al. Defendant	SUPERIOR COURT OF NEW JERSEY MIDDLESEX/MORRIS COUNTIES Docket No. L-6001-78 P.W. Docket No. L-59128-85 P.W.
RANDOLPH MOUNTAIN INDUSTRIAL COMPLEX a New Jersey Partnership Plaintiff vs. THE BOARD OF ADJUSTMENT OF THE TOWNSHIP OF RANDOLPH, et. al. Defendant	Civil Action

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO IMPOSE CONDITIONS UPON THE TRANSFER TO THE COUNCIL ON AFFORDABLE HOUSING

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STATEMENT OF FACTS

For the purposes of this brief, the material facts in this case are as follows. Upon the invitation of the Supreme Court as set forth in The Hills case, The Hills Development Company v. Township of Bernards, (A-122-85)___ N.J.___1986, the Public Advocate filed a motion to join additional parties to the litigation and to impose conditions upon the transfer on or about March 21, 1986. Plaintiff, at the time, submitted nothing in support of his request, but requested that in addition to joining the Randolph Township Planning Board, Board of Adjustment, Municipal Utilities Authority and the Rockaway Valley Regional Sewerage Authority ("RVRSA"), that the Court place conditions upon the transfer of this litigation and impose such further interlocutory restraints against the parties pending the final disposition of this matter by the Council on Affordable Housing ("Council") as may be necessary or desirable and appropriate to preserve the ability of Randolph Township to meet its constitutional obligation to provide sufficient realistic housing opportunities for safe, decent housing affordable to lower income households for its own indigenous need and that of the region. Without any supporting documentation, it was impossible to respond.

By letter brief, dated April 17, 1986 and received on April 21, 1986, nearly one month to the day after the filing of the motion, the Advocate, for the first time in

writing set forth the scope of the conditions requested and the basis therefor. At that time, the Advocate essentially sought two conditions:

> 1. An injunction against the Planning Board and Board of Adjustment that no preliminary or final approval be given to any site plan or subdivisions for the development of vacant land for any purpose.
>
> 2. No additional connections be permitted into the public sanitary sewerage system nor any increased usage be permitted by any existing user unless the same was necessary to meet a compelling health or safety need and the residences were constructed and occupied as of the March 21, 1986 date of the application.

The Advocate also provided that exceptions may be granted from these conditions only for Mt. Laurel type developments with a 20% set-aside.

The Court bifurcated the motion and on May 14, 1986 heard oral argument on the issue of joinder of the Randolph Planning Board, Board of Adjustment, Municipal Utilities Authority and the RVRSA. The Advocate withdrew his request to join the RVRSA but pursued his request against the other entities. Over the objections of Randolph, the Court ordered the joinder of the Planning Board, Board of Adjustment and Municipal Utilities Authority in the case, with such formal order being entered on May 29, 1986.

At the same May 14, 1986 hearing, the Court gave the Advocate until May 23, 1986 to file any supplementary material which the Advocate had indicated was prepared. The

Defendant municipalities then had until June 11, 1986 to respond thereto with replies due on June 18, 1986.

The Advocate did not submit his supplementary material until June 9, 1986, 17 days beyond the deadline. Defendant requested a similar 17 day extension of the June 11, 1986 date but was granted instead an extension to June 20, 1986.

It must also be noted that the Advocate's sole support for his request for conditions comes from expert reports and data submitted by Randolph Township and is not based upon any independent allegations drawn on Plaintiff's own research or examination and analysis.

On June 11, 1986 the undersigned moved before the Appellate Division for leave to appeal this Court's joinder of the MUA, Planning Board and Board of Adjustment. Simultaneously therewith, on that same date, a motion for a stay of further proceedings pending the disposition of Defendants' motion before the Appellate Division was made. At the date of dictating this brief, no response has been received, from the Appellate Division. The lower court denied the stayon June 17, 1986 and Defendant is in the process of requesting a similar stay from the Appellate Division. This brief is being prepared in accordance with the instructions of the Court to have the same submitted by June 20, 1986.

POINT I

PLAINTIFF'S MOTION TO IMPOSE CONDITIONS MUST BE DENIED BASED UPON ITS FAILURE TO MEET THE TERMS AND CONDITIONS OF THE HILLS DEVELOPMENT CO. SUPRA, AND PLAINTIFF'S MOCKERY OF THE JUDICIAL PROCESS ENVISIONED IN THE HILLS CASE.

Plaintiff's motion to impose conditions must be rejected by this Court based upon his mockery of the system for the imposition of conditions and his failure to meet the terms and conditions for the imposition of these conditions as set forth in The Hills Development Co., Supra.

Plaintiff's mockery of the system envisioned by the Supreme Court for the imposition of conditions is set forth in Footnote 1 on Page 10 of Plaintiff's April 17, 1986 brief. There, Plaintiff states:

> "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."

The primary underpinning of our adversarial system is that a party taking a certain position in a case, espouses the position taken. Plaintiff actually concedes in this statement that it does not feel that there are scarce resources in Randolph Township in relationship to the amount of vacant land nor on the issue of sewerage capacity. Yet, Plaintiff has the audacity to make this application and put

the wheels in motion for a lengthy and expensive proceeding even though he does not really believe in his position. This Court should not permit Plaintiff to make a mockery out of the system. Either Plaintiff believes that there are scarce resources which must be preserved in order to assure that Randolph will be able to satisfy its constitutional obligation or not. If Plaintiff believes that, then it should proceed with its application. Obviously, Plaintiff does not at all agree with that proposition, but yet is moving before this Court for the imposition of conditions. Judicial time and legal fees can be better spent elsewhere.

Never before,(and hopefully never again), has the undersigned ever been involved in such chicanery. The process envisioned by the Supreme Court was certainly not to be an exercise in futility where the party making the application does not really believe that scarce resources exist and that conditions should be imposed. To allow Plaintiff to pursue this matter under those conditions would make the Court a willing participant in a sham, a situation which the undersigned simply cannot believe will occur.

Plaintiff, in keeping with his position that there are not, in his view, scarce resources which must be preserved, submits nothing from his own experts in support of his position. Instead, he simply takes depositions out of context in an attempt to justify the claims that he really does not want to make. Why we are here is a mystery to me

and to the Township of Randolph and, it is respectfully urged, that this Court not allow the Plaintiff to use this forum as some type of academic exercise machine.

If Plaintiff does not really believe in the position he espouses and so states, why bring the motion at all? Is it a "knee-jerk" reaction that the juidicial control over the housing obligations of municipalities was slipping away and the Advocate had to do something before it was too late? Is it a last gasp of retribution? The motives are unimportant to the inquiry and one can only speculate as to their nature. The reality, however, is that Plaintiff is attempting to utilize this Court in a manner contrary to the intent and letter of The Hills case. Certainly, the Supreme Court envisioned a Plaintiff who had independently examined the situation with respect to a variety of potential "scarce resources" and came away with the view that there were indeed scarce resources which had to be preserved. It was under that type of proceeding where the Supreme Court felt that the trial court, until the Council becomes operative, should consider conditions to preserve those scarce resources. Where Plaintiff has neither done an independent study nor even espouses that there are such scarce resources, the Supreme Court certainly did not envision a proceeding on an application to impose such conditions, yet, here we are.

Despite the difficulty in doing so, Defendants will attempt to respond to the sham contentions that are being

made by the Plaintiff and, will convince this Court that conditions as sought by Plaintiff should not be imposed.

In summary, therefore, it is urged that this Court dismiss Plaintiff's application for the imposition of conditions, for to consider it will make all of us party to a sham transaction. The Plaintiff, in his own brief admits that he does not believe there are scarce resources in the Township which should be preserved and yet makes and pursues this application. Either Plaintiff believes there are scarce resources, or he does not. To argue on the one hand that there are scarce resources and yet to limit that position by stating that Plaintiff really does not believe there are scarce resources, makes a mockery of the adversarial system as we know it and this Court should simply not permit the same to happen.

Defendants will now proceed to respond to Plaintiff's sham contentions on the basis that Plaintiff actually believes them, for to do otherwise makes the task impossible.

POINT II

BASED UPON THE EVIDENCE PROFERRED BY PLAINTIFF, REASONABLE CONDITIONS AS ENDORSED BY THE SUPREME COURT IN THE HILLS CASE SHOULD NOT BE IMPOSED.

At the outset, it is worthwhile to review the section of The Hills case dealing with the imposition of conditions. The subject matter is contained at Pages 86 through 89 of the slip opinion and the Court begins its discussions 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 Mt. Laurel obligation."

First, it is important to note that the conditions are to be imposed against ". . .the applying municipality . . . ." and not on other entities in the municipal system. A municipal utilities authority is not a political subdivision of the municipality but instead one of the State. A board of adjustment and planning board are statutory boards whose powers are derived from the enabling legislation. This Court has no power beyond that which the Council would otherwise have. As succinctly stated by the Supreme Court:

> "Since the Council will not be able to exercise its discretion unless 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).

Accordingly, the Court's power is coincidental with the power granted to the Council and in order to ascertain the same, we must look at the scope of conditions which could be imposed by the Council upon the "applying municipality". Those conditions must first be "appropriate". The term "appropriate" was defined by the Supreme Court at Slip op. 87-88:

> "'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."

Plaintiff misunderstands the Supreme Court's edict. Plaintiff opines:

> "If the Court determines that it is 'necessary or desirable' to preserve 'scarce resources' but yet concludes that it is not practical to do so, then the Court is constitutionally obliged to deny transfer of the case to the Council on Affordable Housing. . . .This broad power necessarily includes the power to grant both relief against the municipality and against third parties." Plaintiff's brief April 17, 1986 at 8.

In the case at bar, the Supreme Court has already transferred this case and therefore the Court does not have the option of whether to deny the transfer. Yet, it is maintained, this Court does not necessarily have to impose conditions, for if it finds that the conditions are not "appropriate", as defined above, then conditions should not

be imposed. Plaintiff believes that if the conditions are not "appropriate" as above defined, the remedy of the Court is to deny the transfer and therefore that if the transfer is not denied, then conditions must be "appropriate". Such logic is elusive and inaccurate. The Supreme Court clearly envisions situations where cases would be transferred and scarce resources shown but yet conditions not imposed because the same would not be "appropriate". Although Plaintiff does not want to concede that point, the fact remains that the Supreme Court has so stated.

The Supreme Court recognized that the Council and thus the trial courts in these limited circumstances could well decline to impose conditions even though the existence of scarce resources was manifested. The Supreme Court envisioned that the Council and therefore this Court might not have the power to impose such a condition on the applying municipality or that to impose the same might be impractical. There is no alternative to the imposition of conditions. Plaintiff would have us believe that if conditions could not be imposed, then the matter would be transferred. A fair reading of The Hills case simply does not support that view.

In determining whether a condition should be imposed, the Supreme Court stated that a variety of factors would have to be considered, including the likelihood that the municipality would actively try to preserve or dissipate

such scarce resources. The Supreme Court noted that previous actions of the municipality and its officials should be considered in determining whether or not such conditions should be imposed. Plaintiff has failed to present any evidence that would indicate that the municipality and/or its officials have in the past attempted to dissipate any such scarce resources, nor has any other evidence been presented to indicate that the Township does not intend to satisfy its constitutional obligation as such is quantified by the Council, nor has there been any showing that the Township will not be able to satisfy its obligation as established by the Council. For example, if the Township were unable to support new construction to satisfy its obligation as determined by the Council because it has depleted these "scarce resources" allegedly existing, the Council could well require that the municipality transfer the excess obligation (up to 50%) to a receiving municipality under a regional contribution agreement. Were this to happen in Randolph, and given the immediate credits against the 452 unit number, the Township would only have to zone for 160 units.

In summary, it is respectfully maintained that Plaintiff has failed to proffer evidence to support his claim for the imposition of conditions. There has been no showing that the Township has in the past or intends to "dissipate" any scarce resources nor, for that matter, has there been any showing that there exists "scarce resources". There has been

no showing that the conditions are "appropriate" as such term is defined by the Supreme Court in The Hills case. For all of these reasons, it is respectfully maintained that Plaintiff's application be denied.

POINT III

PLAINTIFF HAS FAILED TO SUSTAIN HIS BURDEN OF PROOF WITH RESPECT TO THE REQUEST FOR CONDITIONS AND THEREFORE HIS APPLICATION MUST BE DENIED.

As stated earlier, Plaintiff has made no independent evaluation of the existence of "scarce resources" within the Township of Randolph. Instead, Plaintiff attempts to utilize depositions, affidavits, and reports on record in this case as his sole and complete authority and proof for the application presently before this Court.

Plaintiff has the burden of proof in this case and that burden is similarly applicable to motions being brought by Plaintiff for the relief sought herein. It is respectfully maintained that Plaintiff has failed to sustain his burden and therefore that the application must be denied.

First, no independent supporting affidavit or certification of Plaintiff or his experts has been attached. It is suspected this is so because Plaintiff concedes on Page 10 of his brief that he does not agree that there are scarce resources. Thus, Defendant is faced with arguing against itself which has not been unknown in this case in the past. Fortunately, Plaintiff's citations of support for his position from the words of Defendant are simply misplaced. It is important to look at each of the relevant supporting documents separately.

First, Plaintiff excerpts portions of a deposition of Adrian P. Humbert, Township Planner in the Township of Randolph, said deposition having taken place on January 3, 1984. Defendant excerpts Pages 52 and 53 from the deposition in an attempt to prove that Defendant believes that it has insufficient land, vacant and developable, to fulfill its obligation under Mt. Laurel. Unfortunately, the excerpt says nothing like that. The excerpt was read and reread by the undersigned and others and nowhere is that allegation made. The deposition is taken out of context but the relevant subject matter displayed on Pages 52 and 53 involve the alternative of the Township satisfying its obligation through the use of the mechanism known as the "conditional use". Mr. Humbert indicates that this is one possible way that might be explored to promote the construction of low and moderate income housing. Plaintiff then asks for the number of acres of land that would be required under the conditional use mechanism to satisfy an obligation of 719 units. Mr. Humbert responds that it would take between 500 to 1000 acres to support the 719 units if the conditional use were the sole and exclusive method of satisfying the Township's obligation. The Advocate then argues that since there are approximately 480 acres of vacant developable land within the growth area as determined under the State Development Guide Plan ("SDGP"), vacant developable land is a scarce resource in the Township. How one jumps from the response to a

question on the conditional use as the exclusive mechanism for the satisfaction of the obligation to the conclusion that the Township lacks sufficient vacant developable land is astounding.

Moreover, the 719 figure is a fiction. The Council on Affordable Housing has indicated that Randolph's fair share obligation, inclusive of its indigenous need is 452 units. From that, based upon the affidavit of Adrian P. Humbert attached hereto, the Township will receive a credit for 100 units of senior citizen housing and 32 units of family housing, to bring the obligation down to 320 units which must be satisfied presently. Assuming no further reductions, and furthermore utilizing a 20% set-aside as the sole method of satisfying the obligation, 1600 units would have to be constructed. At a density of 10 units to the acre, 160 acres would have to be utilized. That figure would be halved if 50% of the Township's obligation were transferred under a regional contribution agreement and would be further reduced if mechanisms other than a 20% set-aside were utilized. Thus, it is respectfully maintained that Plaintiff has failed, miserably, in attempting to prove that land is a scarce resource which must be preserved within Randolph Township if it is to satisfy its constitutional obligation.

In supplement to Plaintiff's April 17, 1986 papers, a brief and additional documentation was submitted by cover

letter of June 6, 1986. There, Plaintiff attaches excerpts from the 1985 master plan revisions for the Township of Randolph. He points to the fact that the population in Randolph has increased in the decade between 1970 and 1980 by 34% and that the Township will experience "rapid population growth" to 24,400 persons by the year 2000. Other sections of the master plan update are cited but nowhere is there an indication either in the master plan update or in Plaintiff's letter brief that there appears to be a lack of vacant developable land in the Township. As earlier stated, there are approximately 480 acres of vacant developable land in the growth area which is more than 3 times the amount of land which would be necessary to satisfy the Township's obligation as determined by the Council on Affordable Housing, with reductions only for two projects, one of which is nearing completion, and previously accepted by the Public Advocate as being counted toward Randolph's obligation as determined in the tentative settlement. Accordingly, it is respectfully maintained that Plaintiff has failed to sustain his burden of proof that there is insufficient vacant developable land within the Township of Randolph to satisfy its obligations.

Moving now to the public sanitary sewer issue, Plaintiff, in his initial filings attached an affidavit submitted by C. Thorsten Nelson, then Executive Director of the Randolph Township Municipal Utilities Authority, dated

December 8, 1983. The affidavit outlines the existence of the building ban and the expansion of the new treatment facility. The affidavit concludes with the statement:

> "It is expected that the 1986 additional gallonage will serve only a portion of Randolph's present need for sewers."

From that affidavit, Plaintiff wants this Court to conclude that sanitary sewerage is a "scarce resource" and that it is appropriate to prevent its use for almost any other purpose. It is urged that this Court reject such a position based upon that evidence.

Again, in supplement to Plantiff's initial package, the June 6, 1986 correspondence contained attachments of submissions made by the Randolph Township Municipal Utilities Authority ("RTMUA") to the RVRSA outling gallonage needs. A critical examination of those documents, however, reveal that of the 325,540 GPD allocated to Randolph from the new treatment plant for new construction, only 105,660 constitutes units or development which has been approved by the Planning Board but not yet constructed. The balance is simply projections of gallonage which included Mt. Laurel development. Thus, there is in excess of 200,000 gallons available for new construction which would include Mt. Laurel development.

More importantly that the numbers, however, is the fact that Plaintiff has failed to produce any evidence to show that public sanitary sewers are a necessity for the

construction of higher density housing. The reason that Plaintiff has been unable to submit that data is that it simply is not so. In fact, as set forth in Point IV of this brief, Plaintiff's own experts allege that public sanitary sewers are not a necessity for the construction of Mt. Laurel housing and Plaintiff has over the years, since the inception of this litigation, taken the position that the lack of public sanitary sewers is an insufficient and unacceptable defense to the inability of the Township to satisfy any obligation that it might have as there are alternatives available, including on-site systems.

The Advocate has taken the position that an on-site septic system cannot be constructed to handle the flow from high density development. Such a statement is accurate but unless one reads it carefully, one could gloss over the fact that the key term in the statement are the words "septic system". Under N.J.A.C. 7:9-2.9 there is set forth limitations on the type of systems which would otherwise be considered septic systems under N.J.A.C. 7:1-2.7. It is stated in 7:9-2.9 that ". . .when the volume of flow exceeds 8,000 gallons per day. . .3. . ., then a sewerage treatment plant approved by the Department (NJDEP pursuant to N.J.A.C. 7:14A-19) pursuant to law must be provided." Thus, if the flow will exceed 8,000 GPD, we are not dealing with a septic system under the definition, but instead a sewerage treatment plant. Such treatment plants can be constructed, provided

that the necessary approvals from the NJDEP and other governmental entities having jurisdiction thereover is secured. N.J.A.C. 7:14A-2.1(f)2 provides that any person planning to undertake any activity which will result in a discharge covered by the Chapter shall apply for a New Jersey Pollution Discharge Elimination System Permit ("NJPDES Permit") in accordance with N.J.A.C. 7:14A-7.2 at least 180 days prior to constructing the facility. N.J.A.C. 7:14A-2.1(j) provides that certain endorsements must be requested by the applicant, including a request for an endorsement by the local municipality and the sewerage authority affected by the discharge. The Section goes on to provide:

> "Although the applicant must submit a request for an endorsement to the municipality and affected sewerage authority, an endorsement is not required for a Department determination of whether to issue a draft permit in accordance with N.J.A.C. 7:14A-7.6."

The Section goes on to elaborate upon the details of the endorsement by a municipality and sewerage authority. The endorsement is to be done by resolution and inserted on the CP-1 form.

N.J.A.C. 7:14A-2.1(j)4 sets forth the results of a lack of endorsement. First, it is explained that if the municipality or sewerage authority fails to respond to the application or submit comments within sixty (60) days of the request for endorsement or within any extended period of

time, the Department shall begin the application process without the endorsement. If the affected sewerage authority or municipality denies the endorsement of a project, it is required to state all reasons for rejection or disapproval in a resolution and to provide a copy of that resolution to the Department, certified to be true. The regulations provide:

> "Where the municipality or affected sewerage authority denies an endorsement or does not issue an endorsement, the Department shall review the reasons for denial of the endorsement or any comments received concerning the application for the NJPDES permit. These reasons and comments shall be considered by the Department in a tentative determination of whether to issue a draft permit in accordance with N.J.A.C. 7:14A-7.6"

In addition, the proposed treatment facility must comply with the requirements of subchapter 12 which set forth additional requirements for approval of the system by the NJDEP. N.J.A.C. 7:14A-12.1 et. seq. In reviewing an application for the construction of such treatment works, the Department shall issue approval of building, installing or modifying the treatment works, if and only if certain conditions are met:

> "1. A professional engineer has certfied the facility in accordance with N.J.A.C. 7:14A-12.12; and
> 2. The Department has determined that the proposed treatment works have the potential for preventing, abating or controlling water pollution; and
> 3. Where applicable, the request for endorsement of the treatment works has been submitted to the affected sewerage authority and municipality in which the project will be located except as provided by N.J.A.C. 7:14A-12.9; and

4. The treatment works comply with the rules and regulations for the preparation and submission of plans for sewer systems and wastewater treatment plants, N.J.A.C. 7:9-1 where applicable; and
5. The treatment works conform to the applicable facility's basin and areawide plans; and
6. The applicant otherwise satisfies the requirements of this subject chapter."

Thus, it can be seen in all cases that an endorsement from both the municipality and the affected authority is to be requested by the applicant. The denial of the endorsement is not necessarily fatal to the application itself.

The point is that an applicant who desires to construct high density housing need not do the same only under public sewers. Perhaps the most illustrative factor on that issue is right in Randolph Township where the 100 unit senior citizen complex was built not on a public sewer system but on a private septic system. In that case, gallonage was requested for the facility but denied because the Authority did not have sufficient gallonage to handle the flow. Nevertheless, the facility was constructed.

Based upon the foregoing, it is respectfully maintained that Plaintiff has failed to fulfill his burden of proof in connection with sustaining his position that public sanitary sewers constitute a "scarce resource" for the construction of the higher density units. In order for a resource to be scarce under the terms of the Supreme Court decision, the unwritten prerequisite is that the resource is

necessary for the construction of the housing. Nothing has been shown by the Advocate to justify that the only way a municipality can satisfy its obligation is through the utilization of a public sanitary sewer system in this higher density development. Accordingly, Plaintiff's application for conditions on that basis must be rejected.

Finally, and most importantly, the attempt to have this Court allocate gallonage in a particular manner is a veiled attempt by the Advocate to appeal Judge Gascoyne's decision in Department of Health, State of New Jersey, et. al. v. City of Jersey City, et. al., Docket No. C-3447-67 to this Court. Randolph Township has obtained its gallonage not as a result of an administrative order of the RVRSA, but instead, by order of the Honorable Jacques H. Gascoyne. If the gallonage for new construction is going to be subject to conditions, the same type of conditions which were sought before Judge Gascoyne and rejected, then the Advocate's sole remedy is to appeal Judge Gascoyne's decision to the Appellate Division. The Advocate has no right to appeal Judge Gascoyne's decision to your Honor, the comments of the Advocate to the contrary notwithstanding. Even if Judge Gascoyne's supplementation of the record on May 9, 1986 is read to somehow confer jurisdiction on this Court, it is well settled that the Court cannot grant unto itself or another Court subject matter jurisdiction which it does not possess.

In summary, therefore, it is respectfully maintained that Plaintiff has failed to meet his burden of proof in connection with this matter. Attempting to utilize Defendants' experts as proof of Plaintiff's position falls far short of satisfying the burden of proof that the Advocate must sustain. Nothing submitted even vaguely supports the proposition that there is insufficient vacant developable land in the Township to satisfy the Township's obligation. Moreover, nothing submitted in support of Plaintiff's application supports the proposition that public sanitary sewers is a resource which must be preserved in order that high density affordable housing be constructed within the Township of Randolph. Quite the contrary, it is maintained herein that alternate on-site systems can be utilized where public sanitary sewer capacity is unavailable in order to construct high density housing. This was (and apparently still is) the Advocate's position when the action was first instituted and Randolph was subject to a building ban with no end in sight. Finally, any attempt by this Court to modify the order of the Honorable Jacques H. Gascoyne entered in the building ban case constitutes an inpermissible exercise of jurisdiction. The Advocate's sole remedy, if he is dissatisfied with Judge Gascoyne's ruling which gave municipalities the gallonage without strings for new construction, is to the Appellate Division. Neither this Court nor Judge Gascoyne can confer jurisdiction which is not otherwise possessed.

POINT IV

PLAINTIFF'S OWN EXPERTS CONTEND THAT HIGH DENSITY AFFORDABLE HOUSING CAN BE CONSTRUCTED WITHOUT PUBLIC SANITARY SEWERS.

Plaintiff contends on Page 10 of his brief that he does not necessarily agree that public sanitary sewers constitute a resource which must be preserved in order for the Township to satisfy its obligation. To that extent, the Advocate has been consistent since the institution of this matter since 1978. Why we are here, therefore, is a mystery but nevertheless, let us perhaps expose the Advocate's position in full for the Court and the world to see.

One of the experts retained by the Advocate in this litigation was John D. Keenan, an Associate Professor in the Department of Civil Engineering at the University of Pennsylvania. Doctor Keenan's credentials are impressive, having a Bachelor's Degree in Biology from the State University of New York, a Master's Degree in Civil Engineering from Syracuse University and a Doctorate Degree in Civil Engineering from Syracuse University. His resume as of June, 1983 consists of 69 articles or research courses in which he has been involved over the years and cites at least six awards that he has received in his field.

Doctor Keenan prepared a report entitled "Water Supply and Pollution Control in Morris County, New Jersey" for the purposes of this litigation. A copy was served on Randolph Township in October of 1983.

A summary of the report is set forth on Page 25, a copy of which is attached hereto, wherein Doctor Keenan states:

> "In summary, package plants provide a small scale alternative which can be cost-effective under certain circumstances and which can achieve the same levels of treatment found in large-scale systems, provided that the commitment is made to ensure that they are operated and maintained properly."

On Page 30, Doctor Keenan states:

> "In some cases, it is appropriate that package sewage treatment plants be used in conjunction with housing developments. This would be in cases where sufficient capacity does not exist in the municipal system."

Again, at Page 31 it is stated:

> "Package treatment systems will undoubtedly be required to treat the sewage produced at a portion of the new housing developments. An attempt has been made here to provide an estimate of the costs of such treatment."

Finally, specifically with respect to Randolph Township, Doctor Keenan states:

> "The Randolph Township sewage, including low and moderate income housing, is projected to be 0.9 to 1.5 MGD (Table IV-1). This will be treated at the RVRSA plant, and at the Morris Butterworth plant (p.2 MGD).
>
> Those new housing developments placed in the southern part of the township may require package treatment plants because of the spatial distribution of interceptor sewers. As the streams are for trout maintenance and trout production, they are classified as category 1 (32), e.g., India Brook. Consequently, the plants should achieve high levels of removal of BOD and suspended solids

as well as nitrification. As indicated elsewhere, this would cost about $4000 per dwelling unit."

As can be seen from the foregoing, Doctor Keenan, as the expert for Plaintiff confirms that public sanitary sewers need not be supplied in order for a municipality to satisfy its obligation. This report was done at a time when the Advocate's number of low and moderate income units for Randolph exceeded 1200. It is now reduced by two/thirds and thus the impact is certainly much less. The point is, however, that the Advocate's own experts recognize that public sewage, although preferred, is not a resource without which a municipality cannot satisfy its obligation. Consequently, it is respectfully urged that this Court deny the application of the Public Advocate to impose restraints on the utilization of sewage gallonage because there is no indication that the gallonage will not at least partially be utilized for Mt. Laurel development and secondly, and most importantly, that the Advocate has failed to prove that public sewage treatment is a "resource" without which a municipality is unable to satisfy its constitutional obligation.

POINT V

THE AFFIDAVITS SUBMITTED WITH THESE PAPERS CLEARLY SHOW AND DEMONSTRATE THAT NEITHER VACANT DEVELOPABLE LAND NOR PUBLIC SEWAGE TREATMENT CONSTITUTES A "SCARCE RESOURCE" WHICH IS TO BE PRESERVED UNDER THE HILLS CASE.

Attached hereto are Affidavits of Adrian P. Humbert, Township Planner, and Terrence Mattice, Manager of the Randolph Township Municipal Utilities Authority. Those Affidavits demonstrate beyond cavil that neither land nor public sanitary sewage constitutes a scarce resource to be preserved by this Court under The Hills case.

The Affidavit of Adrian P. Humbert first points out the fact that the excerpts from his deposition and from the master plan attached to the Advocate's moving papers in no way supports the proposition that the Township has insufficient vacant developable land within the growth area of the Township to satisfy its obligation. It must be recalled that the Advocate's initial moving papers were submitted on April 17, 1986 before the new figures were developed by the Council on Affordable Housing for a municipality's fair share. Those figures, which were available in mid-May 1986 made no difference to the Advocate in his revised position submitted by letter of June 6, 1986, but do make a difference in the ultimate obligation to be borne by the Township.

The Council on Affordable Housing has determined that a maximum 452 units of housing must be provided for

under Randolph's zoning ordinances. This is a reduction of almost one-third from the tenative settlement figure and, when the appropriate credits are given for the senior citizen housing of 100 units and the 32 units of family housing, the maximum net figure to be accommodated under the Township zoning ordinances is 320 units. On a mandatory set-aside basis, this would produce 1600 units and the affidavits demonstrate that the Township has three times the amount of land necessary to accommodate that development in its 480 acres of vacant developable land in the growth area, assuming a density of 10 units to the acre. If the maximum net figure is reduced in any way, the amount of land obviously proportionately decreases.

Based upon Mr. Humbert's Affidavit, it is clear that land within the Township of Randolph growth area is not a scarce resource in the sense that the Supreme Court intended. As stated by the Supreme Court, a scarce resource is one which will probably be essential to the satisfaction of the Mt. Laurel obligation and the use of that resource now will prevent the construction of low and moderate income housing. The Supreme Court illustrates their point by indicating that in some municipalities only one or several tracts of land are usable for lower income housing and if they are developed, the municipality will be unable to satisfy its Mt. Laurel obligation. The Hills Development Co. v. Township of Bernards, Supra. at 86. Thus, the term

"scarce resources" is meant literally by the Supreme Court. That is to say, a lack of that resource such that if the resource is presently utilized, it will no longer be available for Mt. Laurel development and that resource is essential for the development. Accordingly, reasonable men can agree that land is certainly a necessary resource for the satisfaction of a municipality's obligation and if there was a limited amount of land available, that could be considered a scarce resource. Although all municipalities have a finite amount of land, the question as to whether or not that resource becomes "scarce" must relate to the magnitude of the obligation which the municipality must shoulder. A municipality that has an obligation of 452 units, but has only 40 acres of vacant developable land within the municipality is certainly in a different position than a municipality that has an obligation of 452 units, but has 480 acres of vacant developable land available, or a municipality that has an obligation of 452 units and vacant developable land in excess of 4800 acres.

In the case at bar, the Township's obligation of 452 units is clearly reduced to 320 units which at the mandatory set-aside of 20% requires 1600 units. The Township has more than three times the amount of land which is necessary to accommodate those 1600 units on a 10 unit per acre density. Can a reasonable man consider land to be a scarce resource when you have three times the amount

necessary? Is that what the Supreme Court was thinking of when they talked about the utilization of this scarce resource which would prevent the satisfaction of a municipality's obligation? It is submitted that such a reading is beyond acceptance. A scarce resource is one in which there is so little of it and one that is so necessary to the ability of a municipality to satisfy its obligation, that to dissipate it would eliminate a municipality's ability to satisfy its obligation. Such is not the case in Randolph Township with respect to vacant land as supported by Affidavit of the Township Planner.

Similarly, the public sewage issue does not rise to the level of a scarce resource. To reiterate, a scarce resource is one which is necessary for the ultimate satisfaction of the obligation. Although reasonable men can again agree that it is preferable to have higher density housing on a public sanitary sewer system, there is not one shred of evidence presented which indicates that higher density housing cannot be constructed on on-site systems. If these on-site systems can handle the sewage flow which is generated from the development, then the public sewers become a luxury and not a necessary resource for the development of the housing. As pointed out in the Affidavit of Adrian P. Humbert, the senior citizen complex which has been developed through the Morris County Housing Authority in the Township f Randolph at a density of 11 units to the acre, is being done

with an on-site system. Is any further testimony needed to conclusively show that public sewage does not constitute the kind of resource without which a municipality can satisfy its obligation? We think not. This is not speculation or engineering opinion, but actual construction taking place, much of which the Advocate is familiar with as they have espoused that position in this case as set forth in Point IV of this brief.

Moreover, the Affidavit of Terrence Mattice shows that the amount of connection to the public sanitary sewer system in Randolph has not exceeded 100 units over the last five years. In fact, the most connections that were ever made were 77 connections in 1985. The Authority has gallonage for new construction which would accommodate almost 1200 single family homes for the next seven years. Even at 700 connections, there are still 500 additional connections which are unaccounted for. Moreover, any connections made must be within the RVRSA drainage basin and not within the Whippany Basin, the North branch of the Raritan River Basin or the Black River Basin, and which are prohibited from connection to the RVRSA system since they are outside the drainage basin. Any development in those areas would necessarily be on an on-site system, unless some other public system were available through Morris Township or Roxbury. The Township has experienced the growth set forth in the master plan revisions in spite of the lack of public sewers

and it is anticipated that the growth will continue irrespective of whether or not there is new gallonage. Does this support the proposition that sewage is a scarce resource?

In conclusion, therefore, it is respectfully maintained that neither vacant developable land in the growth area nor sewage capacity is a scarce resource which must be preserved by this Court. It has been demonstrated in the affidavits submitted herewith that the Township has three times the amount of land necessary to satisfy a maximum net number of units. It has been further demonstrated that higher density housing can in appropriate cases, be accommodated with on-site systems, a position which has been taken by the Advocate throughout this litigation. Accordingly, it is respectfully urged that this Court deny the application of the Advocate to impose conditions on the transfer.

POINT VI

NOTICE MUST BE GIVEN TO AFFECTED PROPERTY OWNERS OF ANY INJUNCTIVE RELIEF. THE CREATION OF A STREAMLINED PROCEDURE UTILIZING THE COURT AND A SPECIAL MASTER IS DIRECTLY CONTRARY TO THE INTENT OF THE SUPREME COURT IN THE HILLS CASE.

The parties were given to May 23, 1986 to advise the Court of their position relative to the requirement that notice be given to affected property owners of the requested injunctive relief by the Advocate. Defendants herein responded by letter dated May 21, 1986. As has come to be the norm, the Advocate has responded by letter dated June 6, 1986, received on June 9, 1986, 17 days later. Defendants shall respond thereto in this brief.

Plaintiff contends that there is no legal obligation to provide prior notice to persons who may be indirectly affected by the restraints imposed by the Court if this Court follows Plaintiff's requests. Defendants agree that those persons who might be indirectly affected by such a decision need not be notified prior to the request. Those persons, however, who are directly affected must receive notice. Plaintiff would have us believe that the property owners whose property cannot be granted a preliminary or final subdivision approval are indirectly affected by Plaintiff's requested conditions. Quite the contrary, they are directly affected. The people who might be indirectly

affected are those who might be interested in buying or renting units that would otherwise be constructed if the approvals were granted. Those persons are not entitled to notice since they are indirectly affected, but to say that a property owner who cannot receive final subdivision approval because his preliminary was approved subsequent to March 22, 1986, is not directly affected by the Advocate's request, is absurd.

Plaintiff's support for his proposition is misplaced. Plaintiff observes that where a litigant seeks the vindication of a public right, third parties who may be adversely affected by a decision favorable to the Plaintiff's, need not be joined as parties or given special prior notice. It is not being argued that every property owner in Randolph Township who might be affected by the ultimate outcome of Plaintiff's lawsuit should be joined in this litigation. What is being contended is that when Plaintiff attempts to impose interlocutory restraints during the pendency of the lawsuit, those persons who are directly affected by such interlocutory restraints should have the opportunity to be heard prior to the imposition of the same.

Plaintiff continues in his brief to again equate allegedly analagous situations to the situation at bar. For example on Page 4, Plaintiff states:

> "Moreover, it is well established as a matter of state law that in cases involving zoning challenges and the imposition of limitations upon connections

> to public sewer systems, prior notice and hearing are not required for persons who may be adversely affected but who do not already have legally vested rights."

The Advocate goes on to indicate that adjoining property owners objecting to a zoning variance need not be joined where the denial of the variance is being appealed. We agree that that is the law. But in the case at bar Plaintiff is seeking direct relief against the properties in the growth area within the Township of Randolph. His imposition of the injunction against the Planning Board does not make the property owners indirect negative beneficiaries of the Advocate's actions; they are directly detrimentally affected, no less than if the Advocate sought an injunction against the development of the property itself joining the property owner. His attempt to prevent third party governmental entities from granting statutory relief to applicants whose property is located within the Township does not constitute an indirect action against those property owners. It is as direct as it would be had he brought his application against the property owner himself. Additionally, in the instant case we are not talking about a challenge to a particular application but instead, speaking of a scope of relief which would prevent the Planning Board from granting preliminary or final approvals for applications which would otherwise be entitled to them, raising the entire specter of default approvals and the like.

Plaintiff cites the sewer ban requirements of the NJDEP in support of his proposition that prior notice need not be given. As usual, Plaintiff's analogy must fall. In the sewer ban case, there is an ascertainable finite determination that a treatment facility cannot handle any additional sewage flow. In such a case, physically no connections can take place without upsetting the treatment process. In the instant case, we are seeking an artificial restraint. The property could otherwise be developed but for the Advocate's argument that such property constitutes a scarce resource and therefore should be preserved for the purposes of permitting the municipality to fulfill its constitutional obligations under the Fair Housing Act. The restraint is artificial and not realistic and consequently to analogize this situation with that of a sewer ban, where the treatment plant cannot handle any further flow, is inappropriate.

Plaintiff argues that constitutional principles of due process do not require prior notice or an opportunity to be heard under these circumstances. Again, he argues that principles of due process do not require prior notice or hearing to third parties who are only indirectly affected by the governmental action at issue. As above stated, these property owners are not indirectly affected, they are directly affected. Those indirectly affected might be the potential owners or occupants of the units which would

otherwise be constructed. It is conceded that those individuals are not entitled to notice. Plaintiff's reliance upon Robinson v. Cahill, 62 N.J. 473 (1973) is similarly misplaced. There, the indirect parties i.e., the students were not given notice, but the directly affected parties i.e., the school districts, were given prior notice. In this case, the directly affected parties are the property owners, not the Planning Board or the Board of Adjustment. The indirectly affected persons, those who might occupy these units, are not entitled to notice if we follow the Robinson theory. Certainly, those persons whose property is affected, just as the school districts were affected, should receive proper notice.

Defendant is continually astounded by the Advocate's failure to acknowledge the existence of the Council on Affordable Housing. Rather than propose the utilization of the Council as the entity which might grant relief from conditions, the Advocate again relies upon the Court and now a new party, a "special master" citing Mt. Laurel II for the proposition that special masters should be freely utilized by the Court. The Public Advocate's view of the Council on Affordable Housing is distressing. For some reason, the Advocate would rather set up an additional entity and have the Court retain jurisdiction in a case in which the Court was not given continuing jurisdiction. As has been stated repeatedly in this brief and in these proceedings,

the trial court has a very limited scope of jurisdiction: to impose conditions to preserve scarce resources. To expand that jurisdiction to a continuing one where an applicant would have to apply to the Court and/or a special master to obtain relief from conditions as opposed to the utilization of the Council on Affordable Housing to make those determinations is illustrative of the Advocate's dogged determination to disregard the Supreme Court's dictate in The Hills case and the mandates of the Fair Housing Act.

In summary, therefore, it is Defendant's position that Plaintiff's support for his proposition that no notice be given to property owners directly affected is misplaced. Plaintiff clearly misunderstands that the direct target of his requests is not the Planning Board or the Board of Adjustment, but is the property owner who cannot proceed to obtain his statutorily granted right of approval, provided that he has complied with the requirements established by the Township. To call that party an indirectly affected party is a neat, but inaccurate, play on words and for this Court to accept that type of reasoning would be the height of judicial convolution. Let us all be serious: if the property owner is not directly affected, who is? The Planning Board? The Board of Adjustment? The individuals who would otherwise occupy the units? Let there be no mistake: the most directly affected person is the property owner and to simply say that he is "indirectly affected" does not make it so.

This Court should recognize that fact and require that the person seeking the restraints notify the property owners prior to this Court making a determination thereon. Plaintiff's audacity to suggest that the municipality should give notice to these individuals is similarly astounding. Plaintiff cites no support for his proposal that one seeking judicial restraints can shift the burden of notice to another party. The municipality is not seeking the judicial restraints, the Plaintiff is and therefore the Plaintiff should have the obligation to provide notice to those persons against whom he is truly seeking the restraints.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court deny the application of Plaintiff to impose any conditions on the transfer of this case to the Council on Affordable Housing.

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By _____
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