

9/21/85

~~NRK~~ - Randolph

COAH Morris County Fair Housing Council

v.  
Beeton Twp

Response by TTS ~~Morris County Fair~~  
~~Housing Council~~ to motion by  $\Delta$   
~~Randolph Twp~~ to transfer case to ~~COAH~~  
~~Affordable Housing Council~~

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September 21, 1985

Hon. Stephen Skillman  
Superior Court of New Jersey  
Middlesex County Court House  
New Brunswick, New Jersey 08903

RE: Morris County Fair Housing Council v. Boonton Township, Dkt.  
No. L-6001-78PW (Randolph Township)

Dear Judge Skillman:

I am writing on behalf of plaintiffs Morris County Fair Housing Council et al in response to the motion by defendant Randolph Township pursuant to L.1985 c.222, s.16, to transfer this case to the Affordable Housing Council.

Plaintiffs oppose this motion on the grounds that such a transfer would result in a "manifest injustice" to lower income persons whose interests have been represented by plaintiffs through seven years of litigation to compel Randolph Township to comply with its constitutional obligations. Plaintiffs will rely upon their briefs filed in opposition to the similar application made by Denville Township. Plaintiffs will comment in this letter only upon the factual circumstances peculiar to Randolph Township which render transfer of this case unjust. We will

first set forth the facts of this case insofar as they relate to Randolph Township and then analyze those facts in light of the statutory criterion of "manifest injustice."

Statement of Facts

A. The history of the litigation

The general history of this litigation from its commencement in 1978 to the commencement of trial in 1984 is forth in plaintiffs' prior brief. MCFHCb 1-3. The history of this case vis-a-vis Randolph Township is essentially identical. Randolph is one of three municipalities against whom plaintiffs went to trial in July 1984. After completion of the testimony of the court-appointed expert and plaintiffs' expert but before Randolph presented any testimony, the parties entered into a tentative settlement agreement. The agreement is accurately summarized in the attachment to the affidavit of Edward Buzak, Esq. and the contemporaneous memorandum annexed to this letter as Attachment A. Based upon the representation of counsel that the parties had approved the tentative agreement and a finding by the Court that the agreement was likely to be finalized and secure approval of the Court, trial was suspended as to Randolph Township.

Counsel for Randolph Township drafted an agreement and ordinance, which plaintiffs found generally acceptable, except for a number of relatively modest points. At this point, however, problems began to develop, as set forth in the affidavit annexed as Attachment B.

First, Randolph unilaterally adopted an ordinance which, inter alia, rezoned a key site in the settlement agreement, the

so-called Randolph Mountain Ski Area site, with limitations upon development quite different from and inconsistent with the terms of the tentative agreement. The property owner, who had previously been amenable to development of the site for lower income housing under the terms of the tentative agreement, objected to these new limitations on the grounds that they made development of the number of units called for by the agreement impossible.

Second, the owner of a second site (described in the Randolph papers as the Mal, Inc. site), whom municipal officials had represented to plaintiffs as ready, willing, and able to develop lower income housing on the site in accordance with the terms of the tentative agreement, indicated to plaintiffs orally and in writing that it had no such intentions.

Third, the municipality declined to take any steps during the pendency of the negotiations to ascertain whether the so-called state inspection site, which the agreement called the municipality to purchase from the State for development of lower income housing, continued to be available or to take steps to negotiate an agreement with the State to acquire the site. Despite plaintiffs repeated urgings that these problems were potentially fatal to any settlement and had to be resolved before any agreement could be finalized, the municipality took no steps to resolve these issues.

As a result, no final agreement has been executed. On August 29, 1985, counsel for defendants advised plaintiffs by telephone that, instead of seeking to resolve these issues, the municipality would seek to transfer the case to the Affordable

Housing Council pursuant to L.1985 c.222, s.16, and would submit a proposed housing element to the Affordable Housing Council in accordance with the timetable set forth in that statute.

B. Randolph Township's response to its constitutional housing obligation

As indicated in a 1979 report prepared by housing expert Alan Mallach for plaintiffs (Attachment C), four years after the Mt. Laurel decision, Randolph had essentially no undeveloped areas zoned for "least cost" housing--garden apartments, townhouses, single family houses on small lots, or mobile homes. In 1983, eight months after the second Mt. Laurel decision, Mr. Mallach prepared a new report and found no significant increase in opportunities for least cost housing and no provision in the zoning ordinance for low and moderate income housing (Attachment D). The lack of opportunity for least cost housing is corroborated by Randolph's answer to question 5 of plaintiffs' third set of interrogatories submitted in fall 1983 (Attachment E). The only provision made by Randolph since 1975 for affordable housing was the approval of 132 units of public housing and the grant of a variance for creation of eight units of housing by the Archdiocese of Paterson. Answer of Randolph Township to Plaintiffs' Third Set of Interrogatories (Attachment E).

Randolph's fair share housing obligation to 1990, as determined by its own expert, is 819 lower income units. As computed by the court-appointed expert, Randolph's fair share obligation is 872 units (Attachment F). Thus the 140 units which Randolph can arguably claim to have provided since 1975 represent

only a very small step toward meeting its constitutional obligations.

Randolph has no functioning plan for providing further lower income housing opportunities. Plaintiffs and Randolph agreed to a tentative settlement for 634 lower income units. Randolph, however, so eroded this settlement that in plaintiffs' opinion it no longer represents a fair and reasonable plan for compliance. Randolph has now abandoned this plan outright. It should be noted that although Randolph adopted a zoning ordinance embodying some portions of the tentative agreement, that ordinance never went into effect because it was conditioned upon approval of the agreement by this Court. Randolph continues regulate land uses in accordance with the ordinance described in Mr. Mallach's 1983 report.

In sum, despite the pressure of seven years of litigation and the ten-year-old mandate of the Supreme Court Randolph has done little to satisfy its constitutional obligations.

#### Manifest Injustice

Plaintiffs have analyzed the standard for transfer of cases to the Affordable Housing Council in their prior brief and will not repeat that analysis here. Plaintiffs' analysis indicates that six factors should be considered in determining whether lower income persons will suffer "manifest injustice" if the case is transferred. We discuss each of these factors briefly in turn.

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

As discussed in plaintiffs' prior brief, transfer of this

case would mean that lower income persons would receive no relief until June 1987, at the earliest. At that point, plaintiffs will have been engaged in litigation to compel Randolph Township to satisfy its constitutional obligations for nine years.

2. Increased complexity of litigation which significantly impedes vindication of the rights of lower income persons

When trial in this matter was suspended, trial was approximately half over. Plaintiffs had presented their full case. It may well be that, in light of subsequent decisions by this Court, this case is now ripe for summary judgment. By contrast, transferring this matter to the Affordable Housing Council will require plaintiffs to recommence proceedings from the beginning.

3. Diminished availability of effective mandatory remedies which significantly impedes the vindication of the rights of lower income persons

As discussed in plaintiffs' prior brief, the Affordable Housing Council appears not to have the power to award any remedies. If plaintiffs prevail, they will then be required to recommence litigation against the defendant two or more years from now.

4. Exclusive reliance for additional period upon voluntary compliance by the defendant municipality

The effect of transfer of this matter to the Affordable Housing Council is that lower income persons would be required to rely on voluntary compliance by Randolph Township for at least another two years. There is nothing in Randolph's past conduct that suggests that this will represent anything other than two more years of noncompliance with the requirements of the

constitution.

5. Builder's remedies

Not applicable.

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

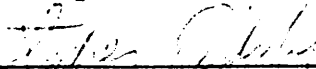
As discussed in plaintiffs' prior brief, provisions of the L.1985 c.222 make it almost certain that proceedings before the Affordable Housing Council will not result in adoption of a compliance plan by Randolph Township which provides "the substantial equivalent of the [municipality's] fair share," 92 N.J. at 216.

Considered separately or together, these factors demonstrate that transfer of this matter to the Affordable Housing Council would result in "manifest injustice" to lower income persons.

Conclusion

For the reasons set forth above, as well as those set forth in plaintiffs' briefs in opposition to the motion of Denville Township, plaintiffs respectfully urge that this case not be transferred to the Affordable Housing Council.

Respectfully submitted,  
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