CH-Morris County Fair Housing Council 6/6/86
v. Boonton Twp (Denville Twp)

Letter brief on behalf of its Morris County Fair Housing Council to supplement its brief in support of their application for the impositions upon COAH transfer

p 7

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

ALFRED A. SLOCUM
PUBLIC ADVOCATE

RICHARD E. SHAPIRO
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June 6, 1986

RECEIVED AT CHAMBERS
JUN -6 1986
JUDGE STEPHEN SKILLMAN

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

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

Dear Judge Skillman:

I am writing on behalf of plaintiffs Morris County Fair Housing Council et al. to supplement plaintiffs' brief in support of their application for the imposition of conditions upon transfer of this case to the Council on Affordable Housing. I wish to address three points: (1) the scope of the proposed restraints; (2) the significance of the recent decision of the Department of Health v. City of Jersey City upon proposed restraints on sanitary sewer connections; and (3) additional evidence in support of the proposed restraints.

1. Scope of the proposed restraints - Based upon materials provided in discovery by Denville Township, plaintiffs propose to narrow somewhat their request for restraints. Specifically, as to restraints on municipal approvals of development of land in Denville plaintiffs seek the following restraint:

> Neither preliminary nor final approval may be given by either the planning board or the board of adjustment to any site plan or subdivision application for the development of vacant land for any purpose (including, but not limited to, residential, commercial, industrial, public, or nonprofit uses) or for the redevelopment or conversion of any existing vacant or unused land or structures except where (a) the development will not require connection with the public sanitary sewage collection system and either (b) the application involves a parcel of less than two acres in area or (c) the application is for a final site plan or subdivision approval for a site which is already subject to a valid preliminary site plan or subdivision approval issued prior to March 22, 1986 and which is within the statutory time period set forth in N.J.S.A. 40:55D-49(a). For purposes of this provision, the area of parcels in common legal or beneficial ownership which are contiguous or are parts of a larger parcel of land in the same ownership shall be

aggregated, regardless of whether the applications are filed or considered simultaneously or at different times.

As narrowed, this restraint would not affect property owners who have vested development rights under N.J.S.A. 40:55D-49(a). It would also eliminate much of the burden upon property owners who may wish to build private houses on isolated individual lots.

2. Impact of the decision of the court in Department of Health v. Jersey City - On May 9, 1986, the Chancery Division issued a decision concerning the terms of the final judgment lifting the 18-year old ban upon sewer connections in the Rockaway Valley Regional Sewerage Authority sewer service area. The court approved the plan proposed by RVRSA which would allocate specific amounts of gallonage to each municipality (previously submitted to this Court as Exhibit H to plaintiffs' prior letter-brief). The court made only one change in this plan. It extended the period during which the conditions would remain in effect from 1990 to 1993. The court expressly noted that it was not ruling on any issues concerning the preservation of scarce resources under Hills Development Corp. and that any such applications were properly within the jurisdiction of this Court.

The effect of this ruling is to place the responsibility for distributing sewerage in the hands of the member municipalities and MUA until 1993. In light of this ruling (which has not yet been reduced to an order), plaintiffs do not seek relief at the present time against RVRSA. They seek only a temporary ban on connections or increases in usage by existing users in Denville Township as set forth in paragraph 2 on page 2 of their prior letter-brief.

3. The need for limitations upon connections to the public sanitary sewage system is confirmed by factual representations made by Denville Township to Rockaway Regional Sewerage Authority - In response to a survey by the RVRSA, Denville submitted an analysis on May 20, 1985, to the RVRSA of its projected sewage needs. This letter is annexed. It shows that the short-term anticipated demand for additional sewerage capacity in Denville Township is 1.65 million gallons per day. This estimate, as the Township itself noted, understates the need. It only reflects existing residential development and new construction which has actually been approved by the municipal planning board. It does not include the additional 200 residential units for which applications are pending undecided, by the Planning Board, or for any additional projects that might be proposed.

By comparison, Denville has been allocated ~~a total of 564,234~~ gallons per day of additional treatment capacity under the allocation plan approved by the court in Department of Health v. Jersey City. This further confirms that sewerage is a scarce resource in Denville Township. If sewage treatment capacity is not preserved pending proceedings before the Council on Affordable Housing, it will be impossible to develop lower income housing in this municipality in response to the constitutional mandate.

For the above reasons, as well as those set forth in plaintiffs' prior brief, the Court should impose conditions upon transfer of this case to the Council on Affordable Housing.

Respectfully submitted,

ALFRED A. SLOCUM
PUBLIC ADVOCATE

By: Stephen Eisdorfer
STEPHEN EISDORFER
ASSISTANT DEPUTY PUBLIC ADVOCATE

SE/id

TOWNSHIP OF DENVILLE

JOHN C. O'KEEFFE
Mayor
THOMAS J. GRADY
Administrator
201-627-1234

May 20, 1985

Rockaway Valley Regional
Sewerage Authority
R.D. 1
99 Green Bank Road
Boonton, New Jersey 07005

Attn: John P. Whalen, Chairman

Re: Determination of Future Wastewater
Flows to the R.V.R.S.A.

Dear Mr. Whalen:

Attached please find an estimated report of future wastewater flows. I would like to point out that Category 3 is a changing item due to continuous new site plans before the Planning Board. Also, Category 3 and 4 do not account for 1 bedroom Townhouses, these are units sold to singles, widows, etc. In Category 4, alternate 1 and 2 are estimated at the present numbers we have which is the Mt. Laurel litigation figures.

If you need any further information please contact Tom Grady at 627-1234.

Thank you for your cooperation.

Very truly yours,

John C. O'Keeffe
Mayor

cc: James Dyer, Council President
All Council Members
Planning Board
Sewer Ban Committee
Lee T. Purcell Assoc.
Engineering

3-C

Rockaway Valley Regional Sewerage Authority

ORGANIZED 1971

R. D. 1, 99 GREEN BANK ROAD, BOONTON, NEW JERSEY 07005

CATEGORY 1: Existing Dwellings on Dry Lines

1.	60	Homes @ 300 gallons/day.	=	18,000 gallons
2.	N/A	1BR Apts. @ 110 gallons/day	=	gallons
3.	N/A	2BR Apts. @ 155 gallons/day	=	gallons
4.	N/A	2BR Townhouse @ 170 gallons/day	=	gallons
5.	N/A	3BR Townhouse @ 250 gallons/day	=	gallons
6.	Other, specify:		=	gallons
		Total	-	18,000 gallons

CATEGORY 2: Existing Dwellings on Septic Systems to be Sewered

1.	1440	Homes @ 300 gallons/day	=	432,000 gallons
2.	N/A	1BR Apts. @ 110 gallons/day	=	gallons
3.	N/A	2BR Apts. @ 155 gallons/day	=	gallons
4.	N/A	2BR Townhouse @ 170 gallons/day	=	gallons
5.	N/A	3BR Townhouse @ 250 gallons/day	=	gallons
6.	Other, specify:		=	gallons
		Total	-	432,000 gallons

CATEGORY 3: Number of units approved by Planning Board, not yet constructed Awaiting gallonage by Sewer Ban

1.	66	Homes @ 300 gallons/day	=	19,800 gallons
2.	N/A	1BR Apts. @ 110 gallons/day	=	gallons
3.	N/A	2BR Apts. @ 155 gallons/day	=	gallons
4.	N/A	2 BR Townhouse @ 170 gallons/day	=	gallons
5.	N/A	3BR Townhouse @ 250 gallons/day	=	gallons
				19,800
	*	Homes Under Review by Planning Board		

* This section can change daily. Suggest this section should be updated because we have under review approximately 200 homes ouside Mt. Laurel.

Rockaway Valley Regional Sewerage Authority

ORGANIZED 1971

R. D. 1, 99 GREEN BANK ROAD, BOONTON, NEW JERSEY 07005

CATEGORY 4: Number of Planned Mount Laurel II Dwellings

Alternate 1 - By Township * Estimated Builders Remedy 4,415 with 883 Court Order

1.	300	Homes @ 300 gallons/day	=	90,000 gallons
2.	93	1BR Apts. @ 110 gallons/day	=	10,230 gallons
3.	40	2BR Apts. @ 155 gallons/day	=	6,200 gallons
4.	400	2BR Townhouse @ 170 gallons/day	=	68,000 gallons
5.	50	3BR Townhouse @ 250 gallons/day	=	12,500 gallons
6.	Other, specify: 883		=	-0- gallons
		Total	=	186,930 gallons

* This report did not provide for 1 BDR Townhouse for Singles

Alternate 2 - By Builders Remedy

1.	2,650	Homes @ 300 gallons/day	=	795,000 gallons
2.	257	1BR Apts. @ 110 gallons/day	=	28,270 gallons
3.	350	2BR Apts. @ 155 gallons/day	=	59,500 gallons
4.	125	2BR Townhouse @ 170 gallons/day	=	31,250 gallons
5.		3BR Townhouse @ 250 gallons/day	=	gallons
6.	Other, specify: 3,532		=	-0- gallons
		Total	=	937,270 gallons

* This report did not provide 1 BDR Townhouse

Rockaway Valley Regional Sewerage Authority

ORGANIZED 1971

R. D. 1, 99 GREEN BANK ROAD, BOONTON, NEW JERSEY 07005

Township of Denville

May 7, 1985

CATEGORY 5: Total Existing Non-residential Wastewater Flows

Commercial Establishments	16,400	gpd
Industrial Establishments	12,500	gpd
Total	28,900	gpd

CATEGORY 6: Total Planned Non-residential Wastewater Flows

Commercial Establishments	18,000	gpd
Industrial Establishments	12,000	gpd
Total	30,000	gpd

* This changes if new applications are filed by applicants for Buildings or Conversions. Suggest a quarterly update.

Total 1,652,900 gallons

Morris County Fair Housing V. Boonton Township	Denville Township (Boonton)	06-30-1986

CH

CH0000052M

~~This brief was filed by the~~ Defendants in opposition to ~~a Motion by the~~ plaintiffs motion to impose conditions, ~~necessary to protect scarce resources which satisfies the defendants Mount Laurel obligation.~~ upon transfer to the council on affordable housing re scarce resources. (1 Exhibits)

Pages 66 cumulative (prior to elimination of duplicates)

33 pages post ~~elimination~~ elimination of duplicates.

~~There are two Ex~~ There are two identical copies of Exhibit A, which are both two pages in length, and are affidavits by the Secretary to the Township of Denville planning board.

Exhibit B is two pages long, there are two identical copies of Exhibit B, and Exhibit B is an affadavit by the Secretary of the Board of Adjustment.

There is an identical copy of the brief, both briefs are twenty pages in length.

there are two copies of Exhibit C ~~is~~ an affidavit by the sanitarian ~~Sanitation~~ of the Township of Denville, two pages in length, in opposition to the conditions, with an attached map - seven pages in length - depicting Septic tank failures.

CH000052M

Judge Stellman

FILED

JUN 30 1986

STEPHEN SKILLMAN, JSC

MORRIS COUNTY FAIR HOUSING COUNCIL, et al,

Plaintiff

v.

BOONTON TOWNSHIP, et al,

Defendant
(Denville Township)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS/
MIDDLESEX COUNTY

Docket #L-6001-78 P.W.
#L-59128-85 P.W.

Civil Action

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

HARPER, HANSBURY & MARTIN, P.A.
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Attorneys for Defendants,
Township of Denville, Denville
Township Planning Board and
Denville Township Board of
Adjustment

- On the Brief -

Stephan C. Hansbury, Esq.
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TABLE OF CASES

Hills Development v. Township of Bernards, (A-122-85) ___N.J.___(1986)

Department of Health, State of New Jersey v. City of Jersey City, No. C-3447-67

Mutual Home Dealers Corp. v. Commissioner of Banks & Ins., 104 N.J. Super 25 (Ch. 1968)

N.J. State AFL-CIO v. State Fed. of Dist. Bd. of Ed., 93 N.J. Super 31 (Ch. 1966) at 42-43

Machame v. Borough of Demaust, 162 N.J. Super 248 (Law 1978) at 266-267

Sheerr v. Evesham Township, 184 N.J. Super 11 (Law 1982)

City Council of the City of Elizabeth v. Naturille, 136 N.J. Super 213 (Law 1975)

Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543 (1975)

Troy Village v. Parsippany-Troy Hills Tp. Council, 68 N.J. 604 (1975)

15E. McQuillan, The Law of Municipal Corporations, Section 43.152 (3rd ed. 1985)

INTRODUCTION

The Public Advocate is seeking interlocutory restraints against Denville Township, Denville's Board of Adjustment and Denville's Planning Board. According to the Public Advocate, these restraints are necessary to protect scarce resources which may be necessary to satisfy Denville's Mount Laurel obligation. In particular, the Public Advocate seeks to preserve the following resources:

1. Vacant developable land;
2. Public sewage capacity;
3. Public water service; and
4. Municipal bonding capacity.

Originally, the Public Advocate sought to restrain preliminary and final approval from being granted to site plan or subdivision applications. Later, this request was changed to exclude certain types of property. The Public Advocate also seeks the restraint of hookups into the public sewer system and the public water system. The Public Advocate proposes the restraint on issuance of long term bonds for any reason. Stonehedge Associates seeks a restraint on available sewer gallonage. The other plaintiff-developers in this matter have not sought any restraints.

POINT I

THE COURT MAY ONLY IMPOSE CONDITIONS ON A TRANSFER WHERE IT IS APPROPRIATE. IT IS INAPPROPRIATE TO IMPOSE CONDITIONS IN DENVILLE UPON THE DEVELOPMENT OF VACANT LAND, PUBLIC SEWER USAGE, PUBLIC WATER USAGE AND MUNICIPAL BONDING.

In Hills Development v. Township of Bernards, (A-122-85) _____N.J._____ (1986) (hereinafter Hills Development), the New Jersey Supreme Court upheld the constitutionality of the Fair Housing Act. The Court also transferred all the matters before it, including those matters in which Denville is a defendant, to the Council on Affordable Housing. The Court found that such a transfer would not render lower income housing "practically impossible," which is the only time when transfer should be denied. Hills Development, (slip op. at 77). The issue of transfer was resolved, but the Trial Court could determine, upon application by any part to the action, whether any conditions should be imposed after transfer. Id. at 88. The Trial Court is only to determine whether the imposition of conditions is "appropriate." Id. at 87, and not, as the Public Advocate suggests, "deny Denville's application to transfer this case to the Council on Affordable Housing" if conditions are necessary and desirable but not "appropriate." Brief for the Public Advocate at 23, Morris County Fair Housing Council v. Boonton Township, No. L-6001-78 P.W.

In order for conditions to be imposed on a transfer, there must be "appropriate measures to preserve 'scarce resources,' namely those resources that will probably be essential to the satisfaction of its Mount Laurel obligation." Hills Development at 86. The Court further defined these conditions by stating, "those transfers, however, shall be subject to such conditions as the Trial Courts may find necessary to preserve the municipality's ability to satisfy this Mount Laurel obligation," (emphasis added). Id. at 30. "Appropriate" conditions refer to the desirability of preserving a resource, the practicality of preserving a resource, the power to preserve the resource, the ability to preserve the resource and the ability to enforce the condition. Id. at 87. The "appropriateness" of conditions depends on many factors, one of which may be the previous actions of a municipality and its officers. Id. at 89.

The conditions, in the form of restraining orders sought by the Public Advocate, are not a practical way of preserving resources. One purpose of the Fair Housing Act is to "permit us [the Court] to withdraw from this field [lower income housing], [which] is what this Court has always wanted and sought." Id. at 92. The restraints sought by the Public Advocate would have the opposite result. The judiciary would become involved in, and may have to take the place of any municipal entity affected by the restraints. If preliminary and final approval may not be given to any site plan on subdivision applications for developing vacant

land, the Court may have to hear claims of unconstitutional taking of property or other undue hardship caused by such an extreme measure. If there is a restraint on sewage use, the Court will have to hear endless applications of compelling health or safety needs as has Judge Jacques Gascoyne in the infamous sewer ban. "... I am incorporating by reference everything that has arisen out of this piece of litigation since its inception in August of 1968, some thousands of files, some hundreds of thousands of pages of transcript [,]...documents that I've had to review and I hope are still readily available, []...four file cabinets full of RVRSA files [,and]...reports...of what transpired during the course of congressional hearings in Washington. Department of Health, State of New Jersey v. City of Jersey City, No. C-3447-67, transcript p. 20 (N.J. Superior Court, Chancery Division, May 9, 1986).

The Public Advocate's proposed role for the judiciary ignores that "[t]he other branches of government have fashioned a comprehensive statewide response to the Mount Laurel obligation...[which] is potentially far better for the State and its lower income citizens." Hills Development at 92. It is an attempt to disregard the Act and encourage the continued supervision of the Court in these matters. It is clear that the Public Advocate disagrees that the Council is the best forum and wishes that the Court had retained this case and others.

POINT II

THE BURDEN OF PROVING THE APPROPRIATENESS OF CONDITIONS ON DENVILLE'S TRANSFER IS ON THE PUBLIC ADVOCATE AND STONEHEDGE ASSOCIATES AND THOSE PLAINTIFFS HAVE NOT SATISFIED THE BURDEN OF PROVING THAT THE IMPOSITION OF CONDITIONS UPON DENVILLE'S TRANSFER IS APPROPRIATE AND NECESSARY.

The burden of proving that conditions on Denville's transfer are necessary falls on the Public Advocate and Stonehedge Associates, the parties requesting the imposition for conditions, which is an equitable power of the Court. Mutual Home Dealers Corp. v. Commissioner of Banks & Ins., 104 N.J. Super 25 (Ch. 1968). The threatened harm must be likely to occur so that only the Court can prevent the harm from occurring. N.J. State AFL-CIO v. State Fed. of Dist. Bd. of Ed., 93 N.J. Super 31 (Ch. 1966) at 42-43. Plaintiffs have not met this burden of showing the likelihood of the depletion of resources. It is not alleged that Denville will attempt to dissipate resources nor that Denville has tried to limit its Mount Laurel obligation in this manner in the past. The Court should not determine the manner in which a governing body or municipal board may exercise its delegated authority unless there is a showing of bad faith, fraud, corruption, manifest oppression, as palpable abuse of discretion. Machame v. Borough of Demaust, 162 N.J. Super, 248 (Law 1978) at 266-267. The plaintiffs have not made any showing that would justify such an intrusion by the Court into an act of legislative control such as site plan and subdivision approval. In order for

the conditions to be imposed, it must be shown that Denville cannot protect and assure its future ability to comply with its Mount Laurel obligation. Hills at 88. The Public Advocate merely alleges that resources are scarce in Denville. However, the Public Advocate must show more than fear or apprehension of the depletion of scarce resources; he must show that harm is likely to occur and Denville intends the result. N.J. State AFL-CIO, Supra at 42.

The Public Advocate attempts to shift the burden of providing the necessity of conditions to Denville to show why conditions should not be imposed on the transfer. In his original brief, the Public Advocate requested broad conditions, having little or no effect on Denville's Mount Laurel obligation. For example, the Public Advocate requested that "neither preliminary nor final approval may be given to any site plan or subdivision application for development of vacant land for any purpose... or for redevelopment or conversion of any existing vacant or unused land or structures." Brief for Public Advocate at 23, Morris County Fair Housing Council v. Boonton, No. L-6001-78 P.W. Clearly, not all site plan or subdivision approvals will adversely affect Mount Laurel obligations. At least fifteen of the site plan applications brought before the Planning Board in 1985 involved five acres or less. (See Affidavit of Ann MacDonald, Secretary to the Planning Board of Denville attached hereto as Exhibit A). When the Public Advocate narrowed his request for

restraints in his supplement to his brief in support of his application for the imposition of conditions upon Denville's transfer, he requested that exceptions to the restraint on the issuance of preliminary and final approval be made for those applications involving a parcel of less than two acres. The Public Advocate gives no reason why any parcel of land greater than two acres should be restrained from development rather than five acres or even ten acres. Supplemental Brief of Public Advocate at 1, Morris County Fair Housing Council v. Boonton, No. L-6001-78 P.W. The burden of proof is then shifted to Denville to show why at least five acres are needed for Mount Laurel housing. (See Exhibit A to Public Advocate Brief at p. 2). Yet the Public Advocate never showed the likelihood that Denville's Mount Laurel obligation would not be satisfied if parcels of land greater than two acres were permitted to be developed.

That only one developer, Stonehedge Associates and only as to the sewer issue, has joined the Public Advocate in seeking broad restraints on Denville's transfer, suggests that the restraints are not really necessary. Mount Laurel builders and developers have a vested interest in protecting those resources needed for satisfaction of Mount Laurel obligations. If they believed that conditions such as those requested by the Public Advocate were necessary, they would join the Public Advocate in his request in order to protect that interest. That builders and developers have not joined the Public Advocate suggests that they

do not view conditions as necessary to ensure that Denville can satisfy its Mount Laurel obligation. In its brief, Stonhedge Associates requests only that restraints be put on Denville's sewage gallon growth reserve. Supplementary letter-brief of Stonehedge Associates at 2, Morris County fair Housing Council v . Boonton Tp., No. L-6001078 P.W. The Public Advocate requests that restraints be put on all three categories of sewage reserve certified septic failures, CP-1 approvals, and new users unless the Court deems that there is a compelling health or safety need for the use. The Public Advocate's lack of pinpointing potential scarcity shows that the restraints are overbroad and not really necessary.

POINT III

THE HILLS DEVELOPMENT DECISION REDUCES THE NECESSITY OF JUDICIAL INVOLVEMENT IN THESE MATTERS AND YET THE PUBLIC ADVOCATE URGES THAT THE COURT EXPAND ITS ROLE.

The conditions requested by the Public Advocate would place the Court in the field of zoning and its management. However, the purpose of the Fair Housing Act and Hills Development is to take the Courts out of the zoning process. Hills Development at 92. "The Legislature declares that the State's preference for the resolution of existing and future disputes involving exclusinary zoning is the mediation and review process set forth in this Act. [Fair Housing Act] and not litigation." Fair Housing Act, Ch. 222, 1985 N.J. Sess. Law. Serv. 7(W est). "The other branches of government have fashioned a comprehensive statewide response to the Mount Laurel obligation...It is potentially far better for the State and for its lower income citizens." Hills Development at 92.

If the Public Advocate's conditions are implemented, the Court would effectively replace Denville's Planning Board and Board of Adjustment. The Court would have to hear all applications before the boards to determine if approval for each application would harm Denville's Mount Laurel obligation. The Public Advocate, in his supplement to his brief, proposes "a streamlined procedure for consideration of individual claims that development of particular sites will not affect scarce resources

in the municipality." (Supplemental Brief of Public Advocate at 2). This "streamlined procedure" requires the applicant to submit, to a special master, a request for exemption from the restraint on a board's approval. The request is served on 11 parties and all parties have an opportunity to respond in writing. The master reviews all submitted material and makes recommendation to the Court. All parties have an opportunity to object to the master's report. The Court may also hold an evidentary hearing if it feels that the parties' exhibits and documents and the master's report are an insufficient basis for determining whether an exemption is justified. This procedure is similar to the procedure that the Courts imposed on municipalities before the Council on Affordable Housing was established. Mount Laurel II 92 N.J. 158, p. 284-5. However, Hills Development took the Courts out of the Affordable Housing field. Hills Development at 92. The outrageous complexity and expense of this process is unconscionable and entirely without justification.

POINT IV

THE RESTRAINTS THAT THE PUBLIC ADVOCATE SEEKS WOULD IMPOSE TOO GREAT OF A BURDEN ON JUDICIAL RESOURCES.

The Public Advocate's proposed conditions would impose substantial burden upon the resources of the Court. The Court may have to hear applications for site plan and subdivision approval, sewer use and water use. The Court may also have to determine if Denville is using its bonding power properly. If the Court is to determine whether to grant sewer and water usage or uses with compelling health and safety problems, it will have to learn about the sewer and water business before it can make any determination and possibly appoint its own experts to assist in this process at great expense to some party.

In his supplement brief, the Public Advocate suggests that procedure to set up whereby applicants can petition the Court for exemptions on an individual basis, from the restraints on Denville's Planning Board and Board of Adjustment (Supplemental Brief for the Public Advocate at 2); his procedure would be extremely time consuming for the Court. In 1985, there were 29 applications for site plan approvals and 13 applications for subdivision approval before the Planning Board from January 1, 1986 to date, there have been 14 applications for subdivision approval and 17 for site plan approval before the Planning Board. (Anne MacDonald's affidavit - Exhibit A). The Board of Adjustment presently has 2 applications for site plan approval before it.

(Dolores Thornley's affidavit - Exhibit B). According to the Public Advocate's proposed procedure, each applicant is entitled to request an exemption from the restraint. "This type of procedure insures that individuals who have legitimate claims that their particular properties should not be covered by the interlocutory restraints imposed by the Court, have an opportunity to present those claims." (Supplement to Public Advocate's Brief at 12).

Hearings will also have to be held for those individuals who wish to hook up to the sewer and water facilities. The Public Advocate concedes that hookups should be permitted for compelling health and safety needs. Brief of Public Advocate at 12, 20.f Judge Gascoyne, in lifting the sewer ban, noted "...I'm willing to bet it has taken more than two years (of time of a) full-time Judge hearing nothing but (t)his [sewer ban litigation] when (you) accumulate all the hours." (sic) Dept. of Health v. Jersey City at 13. There are at least 250 septic tank failures presently in Denville and this number changes from time to time. (Herbert Yardley's Affidavit - Exhibit C).

If the Court becomes involved in a restraint on water and sewage usage in Denville, it will have to appoint experts to assist in this process at great expense before information is before the Court to rule on compelling health and safety risk requests.

POINT V

IMPOSITION OF RESTRAINTS ON DENVILLE'S PLANNING BOARD AND BOARD OF ADJUSTMENT MAY RESULT IN THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW UNLESS EACH APPLICANT BEFORE THE BOARD IS ALLOWED FULL ADJUDICATION OF A DENIAL OF THE USE OF PROPERTY.

Imposition of restraints on Denville's Planning Board and Board of Adjustment may bring the constitutional right to affordable housing into direct conflict with the constitutional right not to be deprived of property without due process of law or compensation. The Public Advocate makes an exception for those property owners who have vested development rights under N.J.S.A. 40:55D-49(a) or if the parcel of land involved is less than two acres. (Supplement to Brief of Public Advocate at 1). There is no exception if the development requires sewage system connections. Id. However, property owners have a vested right in property which is secured by both the federal and New Jersey Constitutions. Sheerr v. Evesham Township, 184 N.J. Super 11 (Law 1982).

Private property rights are not absolute; they are subject to control by a municipality's police power for the public good. City Council of the City of Elizabeth v. Naturille, 136 N.J. Super 213 (Law 1975). A taking occurs at the point where governmental regulation reaches a certain degree that constitutes a confiscation of private property. Sheerr at 24. There is no specific test for what constitutes a taking. Some Courts base the

test on diminution in value, others on a denial of beneficial use affecting market value. Id. at 54-56. The taking does not have to be of a permanent nature. Temporary takings (temporary denial of use in this case) are still full takings during the time period of this existence. Id. at 62.

Determination of the issue of taking require a case by case approach. Id. at 55. Any findings of a taking require compensation. Id. at 61. Condemnation is only appropriate when eventual acquisition is inevitable. Id. at 61. Monetary damages may be granted when other remedies are inappropriate so that an unconstitutional taking will not occur. Id. at 61-62. Yet, Denville should not have to pay such damages for a condition it did not cause.

Emergency conditions may call for the flexible applications of constitutional restrictions so that the government may deal with the emergency. Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543 (1975) (Rent control ordinances). However, confiscation is not permissible even during such emergencies. Troy Village v. Parsippany-Troy Hills Tp. Council, 68 N.J. 604 (1975) (rent control ordinance must give a landlord a just and reasonable return on property). No emergency has been acknowledged that would prevent Denville from protecting its resources to meet its Mount Laurel obligation. Even if this were not the case, property owners in Denville could not be deprived of just and reasonable use of their property without compensation. Id.

POINT VI

DENVILLE'S MUNICIPAL BONDING POWER SHOULD NOT BE RESTRAINED.

N.J.S.A. 40A:2-3 gives municipalities the power to borrow money and issue obligations for "any municipal improvement or property it may lawfully acquire or for any purpose for which it is authorized or required by law to make an appropriation." N.J.S.A. 40A:2-3(a) & (b). Although there is no relevant precedent in New Jersey, the general rule is that the issuance of bonds will not be enjoined unless it would be inequitable to allow issuance or where it appears the funds to be raised will be devoted to an illegal purpose. 15E. McQuillan, The Law of Municipal Corporations, Section 43.152 (3rd. ed. 1985). Generally, an injunction of bonding power will not be granted prematurely. The municipality must authorize or issue the bond first, the assumption being that a bond will not be authorized or issued if it is illegal. Id.

The Public Advocate requests restraints on Denville's bonding power in general. "[I]t is both necessary and feasible for the Court to enjoin issuance of any long term municipal bond." (Brief for Public Advocate at 21 bonding power in general). There is no showing by the Public Advocate that the issuance of bonds will adversely affect Denville's ability to satisfy its Mount Laurel obligation. Again, the plaintiff has not met its burden. If Denville does authorize as issued, a bond that

will harm the satisfaction of the Mount Laurel obligation, the Public Advocate may thus apply for an injunction as to that particular bond.

POINT VII

IF CONDITIONS ARE IMPOSED THEY SHOULD BE NARROWLY CONSTRUED.

If the Court finds that the Public Advocate has proven that there are scarce resources which must be protected through conditions imposed on Denville's transfer, those conditions must be narrowly drawn so as to achieve preservation of resources with the least amount of harm to the Court, third parties, the municipality and the opportunity for affordable housing. Most of the individuals before Denville's entities will not be using resources needed for satisfaction for Mount Laurel obligations as the attached affidavits clearly indicate. There should be no restrictions on certified health hazards. Restraints should be narrowly tailored to fit the precise factual settings and not overly inclusive so as to do greater damage than good.

CONCLUSION

The Public Advocate has failed completely to show any necessity for imposition of any restraints. No factual affidavits have been submitted, no real evidence presented. Yet, he asks that the extraordinary remedy of restraints against a Governing Body and some of its Board's be issued. There is no basis or emergent necessity for this action. This application is an attempt to keep the matter sub judice in the forum the Public Advocate feels may be most beneficial to its position.

It is respectfully requested that no restraints be issued as to any party in this matter.

Dated: June 30, 1986

Respectfully submitted,

HARPER, HANSBURY & MARTIN, P.A.
Attorneys for Township of Denville,
Denville Planning Board and
Denville Board of Adjustment

By: Stephan C. Hansbury
Stephan C. Hansbury, Esq.

HARPER, HANSBURY & MARTIN, P.A.
736 Speedwell Avenue
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(201) 540-9500
Attorneys for Defendant Township of Denville

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MORRIS COUNTY

MORRIS COUNTY FAIR HOUSING COUNCIL	:	
Plaintiff,	:	Civil Action
DENVILLE TOWNSHIP	:	Docket No. L-6001-78 P.W.
Defendant.	:	AFFIDAVIT OF ANN MACDONALD

STATE OF NEW JERSEY:
:SS
MORRIS COUNTY:

I, Ann MacDonald, upon my oath do depose and say:

1. I am Secretary to the Planning Board of the Township of Denville and make this affidavit in support of the brief filed by Defendant for the Planning Board of Denville in the entitled case.

2. I have attached the log which I keep for the Planning Board to show applications made to the Planning Board for site plan approval and subdivision approval in 1985 and 1986.

3. Of the 14 applications made to the Planning Board for subdivision approval in 1986 to date, 3 applications have been

approved by the Board. 3 of the applications have received subdivision approval subject to certain conditions being satisfied by the developer. Some of these subdivision approvals have a signed developer's agreement between the developer and the Township of Denville.

4. Of the 17 applications made for site plan approval to the Planning Board in 1986 to date, 10 of those applications have five or fewer acres. Two of the aforesaid site plan applications have been approved by the Board.

5. In 1985 there were 13 applications for subdivision approval before the Planning Board. 7 of those applications have been approved with conditions.

6. In 1985, 29 applications for site plan approval were made to the Planning Board. Of those 29 applications, 13 applications have been approved with certain conditions. Some of these applications have obtained building permits and/or begun construction on the site. At least 15 of the site plan applications brought to the Board in 1985 involved 5 acres or less.

Ann MacDonald

Sworn to and subscribed
before me this 19th day
of June, 1986

Jacquelin P. Gioioso

JACQUELIN P. GIOIOSO
Attorney at Law of New Jersey

HARPER, HANSBURY & MARTIN, P.A.
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(201) 540-9500
Attorneys for Defendant Township of Denville

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MORRIS COUNTY

MORRIS COUNTY FAIR HOUSING COUNCIL	:	
Plaintiff,	:	Civil Action
DENVILLE TOWNSHIP	:	Docket No. L-6001-78 P.W.
Defendant.	:	AFFIDAVIT OF DOLORES THORNLEY

STATE OF NEW JERSEY:
:SS
MORRIS COUNTY:

I, Dolores Thornley, upon my oath do depose and say:

1. I am the Secretary of the Board of Adjustment of the Township of Denville. I make this affidavit in suport of the brief filed by Defendant for the Denville Board of Adjustment in the entitled case.

2. Of the cases presently pending before the Board of Adjustment, there are two applications seeking bulk variance relief, in order to add a second story or an addition onto an existing dwelling. The two "C" variance cases are scheduled for a public hearing before the Board of Adjustment in July of 1986.

EXHIBIT B

3. There is one case before the Zoning Board, on an "a" appeal, appealing a decision of the Township Construction Official that a newly constructed dwelling is encroaching upon the setback requirements of the Zone District.

4. There are 2 applications seeking use and bulk variance relief pursuant to site plan approval. One application involves three lots with a total area of 11,386 square feet. The second application is to build an office and retail building onto an existing business use where a billboard exists involving a total of 1.2 acres of commercial property.

5. Two applicants have been granted use variances by the Board and are seeking site plan approval in the second phase of the case. One application involves the conversion of the first floor of an existing residential home to a day care nursery. The second relates to the construction of a single family home on a newly subdivided lot.

6. There are also two applications seeking an interpretation of the Zone Ordinance and an application for use variance approval so as to place a karate school in the Central Business District.

Dolores Thornley

Dolores Thornley

Sworn to and subscribed
before me this 20 day
of June, 1986

Jacqueline P. Gioioso

Jacqueline P. Gioioso
An Attorney of Law
Of New Jersey

HARPER, HANSBURY & MARTIN, P.A.
736 Speedwell Avenue
Morris Plains, NJ 07950
(201) 540-9500
Attorneys for Defendant Township of Denville

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MORRIS COUNTY

MORRIS COUNTY FAIR HOUSING COUNCIL :

Plaintiff, : Civil Action

DENVILLE TOWNSHIP : Docket No. L-6001-78 P.W.

Defendant. :AFFIDAVIT OF HERBERT YARDLEY

STATE OF NEW JERSEY:
:SS
MORRIS COUNTY:

I, Herbert Yardley, upon my oath, do depose and say:

1. I am the Sanitarian of the Township of Denville and offer this Affidavit in opposition to the issuance of restraints in the entitled matter prohibiting the Township of Denville from permitting hookups to the sanitary sewer system and allocating sewer gallonage when a health hazard exists in the Township.

2. Attached to my Affidavit is a map entitled, "Existing Zoning and Development Map of the Township of Denville, prepared by Robert Catlin Associates for the Township of Denville" bearing the latest date of September, 1980 and with the latest revision date of

EXHIBIT C

July, 1981. The map was prepared by the Township Planner. I have used my copy of the map to show the septic tank failures that have occurred in the Township of Denville to date. Specifically, when my office receives a complaint regarding a malfunctioning septic system, I as Sanitarian, make an on site inspection of the system. If it is my determination that the system is not working properly pursuant to sanitary codes and regulations of Denville and the State of New Jersey I indicate on Health Department records that the septic system on the property has malfunctioned, requiring repairs. In addition I show the septic tank failure in question by coloring the subject property in red (black on the copies) on the aforementioned map.

3. I update the map from time to time as needed. Accordingly, the attached map depicts the septic tank failures that are known to the Township Health Department at this time.

Herbert Yardley

Sworn to and subscribed
before me this 18th day
of June , 1986

Anne M. MacDonald
Notary Public of New Jersey
My Commission Expires Mar. 15, 1989

1986

Subdivision

#	LOT #	BLOCK #	LOCATION	SUBDIVIDER	NO LOTS	ACTION TYPE	ACTION DATE	EXPIRATION DATE	FEE	Map Signed / Deed Signed	PUBLIC HEARING DATE	Acres.	
86-1 MBC	44-45 42-36	20801	Rt # 10	Union Hill Prop	4	Returned		3-3-86	140.00			181	Incomplete
86-2	6	31501	Sunderland Road	Premier Homes				3-3-86	100.00			12	P
86-3	3+30	50001 30101 30102	Pocono Rd	SSM Company	14			3-25-86	160.-			11	P
86-4	14/42.3	20002	Cooper Rd	James Conte				3-31-86	115.-			12	P
86-5	3	41208	Old Beech Glen	Mufson				4-7-86	350.-			68	CA
86-6	1	20301	Route 46	Luxury Inns	1	OK 5/1/86		4-30-86	550			5	P
86-7	1	40302	Canterbury Rd	Paul Sarno	1			5-6-86	250 100.-			5	CA
86-8	4	50803	Astro Place	Artam Assoc	2	Returned	0/0	5-7-86	500 100.-			15	CA
86-9	16 42-36 44-45	20801	Peace Pipe Golf	Peace Pipe		PB Bd Ac		5-12-86	450.-			1	P
86-10	431	10001	Rt 10	Union Hill Prop				5-23-86	140				Incomplete
86-11	5	10001 11505 [illegible]	Lelozzo	Canterbury Rd				6-3-86	135.-			27	P
[illegible]	[illegible]	40702	North Ridge Rd	Puddingstone [illegible]				6-29-86	1150.00			14	P
[illegible]	17		Cambridge Ave	Seminole Sect II				7-7-86	900.-			12	P
				Oxford Knolls								32	P

CA - Conditional Approval
P - Pending
A - APPROVED
D - DENIED
T - TABLED
W - WITHDRAWN

1986 - Site Plans

APPL #	LOT #	BLOCK #	LOCATION	SUBDIVIDER	NO. LOTS	ACTION TYPE	ACTION DATE	EXPIRATION DATE	FEE	Map Signed / Deed Signed	PUBLIC HEARING DATE	Acre.	
86-1	45.44 42+36	20801	Rt #10	Union Hill Prop.	4	Returned		80% 3-5-86	4746			18	Incomplete
SS 86-1	"	"	"	"	"	Returned		3-86	40			18	Incomplete
86-2	3+30	50001	Pocono Road	SSM Primary Care				3-25-86	6345			11	P
VSP 3 86-3	5	30704	Mennagh Road + Route 53	Macaluso/Campo	1			3-28-86	100 210			½	P
VSP 4 86-4	1+4 6	21001	Rt 10 + Franklin Rd	Bazaar	2			4-2-86	100 4868.24			8	P
VSP 5 86-5	8+14	50402	86 Diamond Spr Rd	Weninger/Sweeney	2	Returned	8/1/86	4-25-86	100 355				See 86-15
VSP 6 86-6	1	41208	Route 46	Luxury Inn	3			4-30-86	520 2937.00			5	P
86-7	17.1	40301	Stewart Ct	Bridgeview		CA	4/1/86	5-7-86	1190				CA
SS 86-8	16	50803	Peace Pipe	Peace Pipe	1			5-12-86	40			1	P
86-9	36.42 44.45	20801	Route 10	Union Hill Prop	4			5-23-86	40				
86-10	"	"	"	"	4			5-23-86	4746			18	Incomplete
86-11	8	50101	Rt 46 West	Castellano	1			5-23-86	100 305			3/4	P
86-12	1.3	30609	Rt 53 + Edwards Rd	Skol Assoc	1.3			5-27-86	1,266			2	P
86-13	6	21301	Mt Pleasant Tpk	Kelly	1			5-28-86	700 718.20			1	P

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1986 - Site Plans

MONTH	APPL. #	LOT #	BLOCK #	LOCATION	SUBDIVIDER	NO. LOTS	ACTION TYPE	ACTION DATE	EXPIRATION DATE	FEE	Map Signed / Deed Signed	PUBLIC HEARING DATE	Acre.	
7	86-14 V86-15	2	4402	Palmer Road	Mc Veigh	1			6-1-85	1565.-			2	P
7	86-15 final	8 & 14	50407	Diamond Mt. Road	Wenninger/Sweeney	2			6-1-85	100 355.-			1/2	P
28	86-16	17	40301	Stewart Ct	Bridgeview		C/A	5/5/86	6-27-86	632.00			3	CA

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'85 Site Plans

APPL #	LOT #	BLOCK #	LOCATION	SUBDIVIDER	NO. LOTS	ACTION TYPE	ACTION DATE	EXPIRATION DATE	FEE	Map Signed / Deed Signed	PUBLIC HEARING DATE	Acre.	
85-15	39	50304	Broadway	A & L Interior	1	CA 12/5		12-2-85	290.–				Withdrawn
85-16	14	50702	River Road	Lee	1			12-4-85	50.– 271.90			1	P
85-17	5	62101	Morris Ave	W. P. Realty	1			12-30-85	2,614.57				Dismissed
85-18	12.3	40301	Stewart Ct	GRL Dev.	1			1-6-86	730.36			3	P
85-19	6.01	51201	Old Boonton Rd	Howe	2			1-6-86	40			1	P
[illegible]	173	50601	Diamond Spr Rd	Sound / Blood	1				5614.85			26	P
[illegible]	12	61901	Kitchell Road	Alnor Bldr.	1	OA 4-17-86		1-13-86	40.– 50.–			1	CA
[illegible]	17.5	40301	Stewart Ct	Bridgeview	1	80% returned		1-20-86	100.– 2460.–			4	P
[illegible] FINAL	17.1	40301	Stewart Ct	Bridgeview	1	80% returned		1-20-86	100.– 1190.–			2	P
[illegible]	1	21202	Route 10	Joy-Lyons	1			1-31-86	730.–			4	CA
[illegible]	1	40817	Indian Road	Tamara	1	OA 4-17-86		2-4-86	853.–			5	CA.
[illegible]	3 & 4	50101	Route 46	Gearhart	1	OA 4-17-86		2-4-86	1430.00			6	CA
[illegible]	2	21401	Route 10	Jeff's Auto	1	10 Bo [illegible]		2-11-86	266.–			1	CA
[illegible]	5	30704	Menagh Road & Route 53	Macaluso/Campo	1	Returned 6/13		2-18-86	100 210			1/2	CA

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1985 - Site Plans

TH	APPL #	LOT #	BLOCK #	LOCATION	SUBDIVIDER	NO. LOTS	ACTION TYPE	ACTION DATE	EXPIRATION DATE	FEE	Map Signed / Deed Signed	PUBLIC HEARING DATE
	55-29	220	50202	Stonefield Ave	Hwa Sze-Chen	1	aff	3/3/86	3-3-86	475-		

P

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1985 Site Plans 1985

APPL #	LOT #	BLOCK #	LOCATION	SUBDIVIDER	NO. LOTS	ACTION TYPE	ACTION DATE	EXPIRATION DATE	FEE	Map Signed / Deed Signed	PUBLIC HEARING DATE	Acre.	
85-1	5	31301	Route 53	Hallmark Homes		Rel[illegible]	[illegible]	4-26-85	100.– 637.09				See 85-7
85-2	12	11203	3011 Route 10	Stephen Braun	1	[illegible]	[illegible]	Rejected 3-1-85	1,326.–				P
85-3	1	63101	Ford Road Bldg #1	W.P. Realty, [illegible] ~~[illegible]~~	1			(95 days) 5-20-85	1,316.68				Dismissed
85-4	12	11203	3011 Rt 10	Braun				4-1-85	100.– 1326.25			1	P
85-5	2,3	50306	6 Bloomfield Ave	Metropolitan Federal Savings and Loan Assoc.		Prelim	80%	4-29-85	278.09				See 85-8
85-6	27	20701	Route 10	Leo Construction		Prelim	80%	4-29-85	100.00 970.00				See 85-9
85-7	5	31301	Route 53	Hallmark		CA	8/[illegible]	7-1-85	100.– 634.49			1	CA
85-8	2,3	50306	Bloomfield Ave	Metropolitan Federal		CA	9/12/85	8-5-85				1	CARK
85-9	27	20701	Route 10	Leo	1	CA	10/1/85	8-5-85	100.– 984.30			1	CA
85-10	1+4	21001	Rt 10 + Franklin	Katouns	2	80%	Rejected	[illegible]85	5352.23				see 86-4
85-11 Final	1+2 2	50001 50002	Pocono Road	St Clare's Hosp.	3			10-1-85	4456.64			22	P
85-12	9	50412	Hinchman + Church	Dr Broas		CA	4/1/85		100.– 100.–			NA	
85-13	5	40102	Palmer Rd	Longo				11-11-85	1160.–			3	P
85-14	103	61302	Cedar Lk E	Dorne	2			12-2-85					withdrawn

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1.

985- Subdivisions 1985

APPL. #	LOT #	BLOCK #	LOCATION	SUBDIVIDER	NO. LOTS	ACTION TYPE	ACTION DATE	EXPIRATION DATE	FEE	Map Signed / Deed Signed	PUBLIC HEARING DATE	Acre	
M85-1	103	61302	Cedar Lk East	Dorne	2	Classified [illegible]		6-3-85	140.-				withdrawn
M85-2	12	21101	Cooper Road	Lindstrom	1	CA 8/8/85		8-5-85	140.-	YES		9	CA
ME 85-3	1	62101	Ford Road	[illegible] Park	1	CA 3/[illegible]/85		(95 days) 8-28-85	400.-			30	CA
M85-4	6	51201	Old Boonton Road	Howe	2	Classified [illegible]		11-4-85	140.-			4	CA
MF 85-5	2 3 4.5 6, 7, 11	31202	Station Road	(Station Park) Meola	7	A 9/5/85		11-11-85	650			1	CA
M85-6	16, 17, 18	20201	Rt #10 East	Witmondt [illegible]	3			11-25-85	160.-			3	P
MF85-7	103	61302	Cedar Lk East	Dorne	2	[illegible]						3/4	P
M85-8	6	51201	Old Boonton Rd	Howe	2				[illegible] 360.00			4	P
MF 85-9 / MF 85-10	4 / 2,3	62101 / 20001	(Motel) [illegible]	[illegible] Park Sec 2	1			(95 days) 2-26-86	450.-			39	CA
M85-10	2, 3, 18	20301	South Rocky Mill Rd	Knoll [illegible]	3			(95 days) 3-21-86	100 var 550			39	P
[illegible]-11	25, 17	61701	Meola [illegible] Morris Ave	Meola	2	CA 3/7/86		1-15-86	B/A 500			17	CA
[illegible]-12	25, 78	61301	Cedar Lk West	Paul Collins	2			1-17-86	50.- 600			80	P
[illegible]-13	1-5	20301	Charlottsburg Rd	(Crest Estates) Paul Sarno	8	Returned		(95 days) 3-24-86	800.-			13	CA

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