letter in lieu of brief in opposition to:

- Public Advocate's motion for accelerated discovery
- motion of Randolph Mountain to add a party
  Δ, Randolph Twp Municipal Utilities Authority

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April 8, 1986

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

Re: Morris Fair Housing Council, et. al. v. Boonton Township, et. al., Docket No.: L-6001-78 P.W.
Randolph Mountain Industrial Complex v. Board of Adjustment of the Township of Randolph, et.al.,Docket No.L-59128-85 P.W.

Dear Judge Skillman:

Please accept this letter in lieu of a more formal Brief in opposition to A)the Public Advocate's ("Advocate") motion for accelerated discovery in connection with production of documents and other items and answers to Plaintiff's fourth set of Interrogatories and B)the motion of Randolph Mountain to add a party Defendant, to wit, the Randolph Township Municipal Utilities Authority. The Township vehemently opposes the entertainment of these motions as well as any favorable action thereon for the reasons as more specifically set forth below. This letter brief does not address the motion for the imposition of conditions brought by both parties Plaintiff as I understand the Court will schedule a separate hearing thereon.

Focusing for a moment on the Rules of Court, it must be noted that the motion to accelerate responses to Plaintiff's Interrogatories and Notice to Produce Documents are discovery motions being filed pursuant to Chapter III of Part IV of the Rules governing the Courts of the State of New Jersey. Chapter III deals with pretrial discovery, the time period of which is

governed pursuant to N.J.R. 4:24-1 which provides in pertinent part:

> "All proceedings referred to in R.4:10-1 to R.4:23-4 inclusive. . .shall be completed as to each defendant within 150 days of the date of service of the original complaint on him, unless on motion and notice and for good cause shown, an order is entered before the expiration of said period enlarging the time for such proceedings to a date specified in said order."

Thus, any such discovery motion is well out of time no matter what reasonable date is utilized for the obtaining of this information. The motion has not been made prior to the expiration of said period and it is respectfully maintained that the Court is not at liberty to entertain such a motion.

Similarly, the Advocate brings the motion to accelerate the time period within which to answer the Interrogatories propounded by him under N.J.R. 4:17-4b which provides in pertinent part:

> "The party served with interrogatories shall serve his answers thereto upon the party propounding them within 60 days after service of such interrogatories upon him. For good cause shown the court may enlarge or shorten such time upon motion on notice made within the 60 day period. Consent orders enlarging the time are prohibited."

Again, Plaintiff's motion is precluded under the Rules. Not only was it not made within the 150 day period within which discovery must have been completed under R. 4:24-1, but it was not made within the 60 day period.

As to Plaintiff's demand for the production of documents the same is unreasonable and unacceptable. N.J.R. 4:18-1(b) provides that the request shall specify ". . .a reasonable time, place and manner of making the <u>inspection</u> and performing the related acts." Plaintiff demands that the

documents be produced at his office when they are to come from the Planning Department in the Township. In order to eliminate problems and make the request reasonable, the Advocate should bring himself to the location of the documents and examine the same at that time in accordance with the intent of the Rule.

Perhaps most importantly, however, is the total disregard that Plaintiff shows for the scope of the Supreme Court ruling involving the transfer motions. The Supreme Court in The Hills Development Co. v. Township of Bernards (slip op.,A-122-85, 1986) permitted the filing of a motion within 30 days of their determination. Thus, the Supreme Court stated:

> "As to any transferred matter, any party to the action may apply to the trial court (which shall retain jurisdiction for this limited purpose) for the imposition of conditions on the transfer. Notice of such application shall be given within 30 days of today's decision." (slip op. at 88 emphasis added).

Plaintiff's discovery motion is not for the imposition of conditions.

The jurisdiction which is retained by the trial court is solely for the limited purpose of the imposition of conditions on the transfer, not on discovery motions. The judicial intervention in this case, except for the limited purpose of the imposition of conditions has been terminated by the Supreme Court. Most respectfully, this Court lacks jurisdiction to entertain and dispose of discovery motions in the underlying case. One of the reasons for the transfer of this case to the Council on Affordable Housing was to remove the judiciary from the matter except insofar as the imposition of conditions was concerned. Since Plaintiff's motion being now considered is not a motion to impose conditions but one for discovery, it follows that the motion must not be entertained, and if entertained, denied.

As above stated, the Advocate can only bring a motion to impose conditions on the transfer. As stated by the Supreme

Court in The Hills case, supra, the Court can only impose conditions designed to conserve scarce resources. The Supreme Court stated:

> "Since the Council will not be able to exercise its discretion until it has done the various things contemplated in the Act, for which a period of 7 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."

In determining the scope of the proposed condition, the Supreme Court cautioned the trial court to consider what conditions would be appropriate. In defining "appropriate", the Court stated:

> "'Appropriate' refers not simply to the desirability of preserving a particular resource, but to the practicality of doing so, the power to do so, the cost of doing so and the ability to enforce the condition." (slip op. at 87 and 88).

It is respectfully maintained that the discovery motion does not address the scope of the conditions which this Court could impose. Looking for a moment at the proposed Interrogatories, the focus of the same involves the availability of vacant land. Does Plaintiff contend that there is insufficient vacant land within the Township of Randolph to satisfy any obligation which it might have to construct or make realistically possible the construction of low and moderate income housing? How can the Advocate honestly say that when there was a tentative settlement entered into between the parties which zoned various areas for an amount of low and moderate income housing which was satisfactory to the Advocate? Since no interrogatories are directed toward the water supply situation or the transportation situation, I must assume that the scope of the intended conditions do not include those areas. A request in the production of documents involves correspondence between the municipality and the Rockaway Valley Regional Sewerage Authority

and therefore I assume that there is some concern regarding sewer capacity. The Advocate, however, is already involved in the disposition of any gallonage questions by his intervention in the case entitled, Department of Health, State of New Jersey, et. al. v. City of Jersey City, et. al., Docket No. C-3447-67 presently venued in Morris County, which has been traditionally known as the "Building Ban Case" and in which case the trial court is considering the allocation of gallonage among the various municipal entities making up the Rockaway Valley Regional Sewerage Authority. Ironically, at the March Building Ban Hearing, when the various parties were given the opportunity to make recommendations regarding the allocation of gallonage, the Advocate was silent and indicated that a position had not yet been formulated to the dismay and irritation of the trial court. Thus it appears that the Advocate now wants to bring the RVRSA and those issues into the exclusionary zoning case even though, when given the opportunity to make reasonable and solid suggestions as to the allocation of gallonage, the Advocate was unable to timely develop a position.

The lack of any affidavit supporting the need for the obtaining of this additional discovery should also result in the dismissal of the motion. There is no indication as to why the Advocate wants this discovery and whether it intends to utilize the same as the basis for the request to impose conditions filed by separate motion and not being considered at this time by the Court. This lack of support for the moving papers also ignores that exhortation by the Supreme Court:

> "Whether, and to what extent, such protection is necessary or desirable may depend on various factors, including the likelihood that the municipality will actively try to preserve -- or dissipate such scarce resources. Therefore, in determining the need for and scope of such conditions, the trial court may consider, among other factors, the previous actions of a municipality and its officials." (slip op. at 88 and 89).

The Advocate certainly has not indicated that there was any intent of the Township to dissipate any of the scarce resources which the Advocate apparently thinks exist although has not been able to identify them as yet.

In summary, therefore, the Township of Randolph opposes the motion for accelerated discovery filed by the Advocate. Not only is it totally out of time as contemplated under the Rules of Court, but it is also well beyond the scope of this Court's jurisdiction which was limited by the Supreme Court to the imposition of conditions. As detailed above, the motion to extend discovery and accelerate the time period within which answers need to supplied, is well beyond the jurisdiction of this Court which has been limited by the Supreme Court to only those factors relating to the requested impostion of conditions upon the transfer. This position makes sense because at this time, no one knows what type of arrangement will be made by the municipality concerning the satisfaction of its obligation nor what the magnitude of that obligation actually will be under the promulgated guidelines. Do we need land and infrastructure for 10 units or 10,000 units? Moreover, if a municipality intends to transfer 50% of its obligation to a receiving municipality, the need for available land, sewer capacity, water supply, or transportation routes is halved. Thus, Plaintiff has a significant burden in attempting to impose conditions or obtain additional discovery to impose conditions when the method by which a municipality will satisfy its obligation and the magnitude of that obligation has not as yet been determined.

If the Advocate is not in a position to demonstrate to this Court the need for conditions based upon the evidence that it has presently accumulated, then, it is respectfully maintained that the Advocate cannot now attempt to seek such information which has been available to it since the inception of this litigation. As I recall, all defenses of lack of infrastructure fell on the deaf ears of the Advocate during the eight years of trial proceedings. It is ironic that now the Advocate is implying that there may be an infrastructure problem. The Advocate should have all sufficient evidence available to make a decision on whether the conditions should be imposed.

The same reasoning applies to the motion of Randolph Mountain to add party Defendants. This motion is beyond the scope of jurisdiction granted to this Court by the Supreme Court. It must be denied.

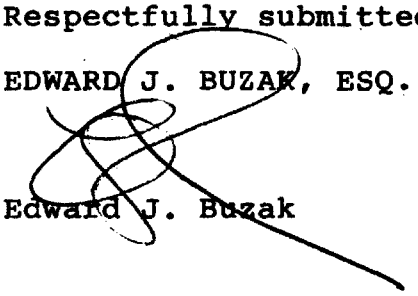
Finally, it is respectfully submitted that the intent of the Supreme Court in transferring these matters was to

eliminate the continuing judicial action except as to conditions. Discovery is beyond that limited jurisdiction. Also, to have a municipality continue to proceed judicially while simultaneously proceeding through the Council imposes an unfair burden on the municipalities. The case was transferred to curtail rather than increase the judicial activity. The Advocate's discovery motion ignores this concept and represents a failure to accept the fact that the "Court" on which this game is being played has shifted to the Council on Affordable Housing. There will be ample opportunity for the Advocate to critically examine the Township's compliance plan before the Council.

For the reasons as set forth above, the Township of Randolph opposes the motion for accelerated discovery and the addition of parties. Although alluded to in various portions of this Letter Brief, the foregoing is not intended to be a complete refutation of the Advocate's motion to impose conditions which, it is understood by the undersigned, will be handled at a different time.

Respectfully submitted,

EDWARD J. BUZAK, ESQ.



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