Letter brief submitted by TIS Morris County Fair Housing Council in support of their application for imposition of conditions upon COAH transfer

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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
DIRECTOR
TEL: 609-292-1693

April 17, 1986



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. (Randolph Township)

Dear Judge Skillman:

This brief is submitted by plaintiffs Morris County Fair Housing Council et al. in support of their application for imposition of conditions upon the transfer of this case involving Randolph Township to the Council on Affordable Housing. Plaintiffs seek interlocutory restraints against Randolph Township and also against the Rockaway Valley Regional Sewerage Authority, Randolph Township Municipal Utilities Authority, the Randolph Township Planning Board and the Randolph Township Zoning Board of Adjustment. Pursuant to the procedures set forth in Hills Development Corporation v. Township of Bernards, Docket No. A-122-85 (February 20, 1986) (hereinafter Hills Development), plaintiffs seek through such restraints to preserve "scarce resources" pending the final disposition of this matter by the

Council on Affordable Housing so as to "protect and assure the municipality's future ability to comply with its Mount Laurel obligations." Hills Development, slip op. at 88.

Specifically, plaintiffs seek preservation of the following resources:

1. Vacant developable land
2. Public sewage treatment

Randolph Township has previously represented to the Court that the limited availability of each of these resources places constraints upon the municipality's ability to satisfy its constitutional obligations under the Mt. Laurel decisions. To preserve these resources, plaintiffs seek imposition of the following conditions upon transfer of this case to the Council on Affordable Housing:

1. Neither preliminary nor final approval may be given to any site plan or subdivision application for development of vacant land for any purpose (including, but not limited to, residential, commercial, industrial, public or nonprofit uses) or for redevelopment or conversion of any existing vacant or unused land or structures.

2. No additional connections into the public sanitary sewage collection system or increased usage by any existing user may be permitted, except by order of this Court to meet compelling health or safety needs of residents of dwelling units which were existing and occupied as of the date of application by

the municipality for transfer of this case to the Council on Affordable Housing.

3. The Rockaway Valley Regional Sewerage Authority, if it does not adopt a regionwide system giving preference to residential developments which include lower income housing, must preserve a reasonable ~~proportion of its sewerage capacity for~~ the development of low and moderate income housing in ~~Den~~ Randolph Township.

4. Exceptions may be granted from any of the above conditions only for residential developments in which at least 20 percent of the dwelling units are affordable to, and reserved for, low and moderate income households, of which at least half of the dwelling units are affordable to, and reserved for, low income households.

To the extent that effectuation of these conditions requires the action of public entities other than the Township of Randolph, plaintiffs seek to join those entities as parties to this litigation and seek the imposition of interlocutory restraints against those entities.

Plaintiffs will first set forth the legal standards to be applied in this case and then will address each of the proposed conditions in turn.

## I. THE COURTS HAVE THE POWER AND DUTY TO IMPOSE CONDITIONS UPON TRANSFER OF A CASE TO THE COUNCIL ON AFFORDABLE HOUSING

In Hills Development, the Supreme Court held that L. 1985 c. 222 §16(a) generally requires that pending exclusionary zoning cases be transferred to the Council on Affordable Housing on the application of any party. The Court, however, held that one exception to this general rule is constitutionally mandated:

> There is one possible consequence of transfer, however, which we believe the Legislature did not foresee, one that it would have intended to constitute "manifest injustice," a consequence that would probably be constitutionally impermissible. We refer to a transfer that does not simply delay the creation of a reasonable likelihood of lower income housing but renders it practically impossible. That result would warrant, indeed, require, denial of transfer. Hills Development, slip op. at 77.

The Court, however, noted that the scope of this exception was limited by the fact that the courts (and ultimately the Council itself, when it is fully operational) have broad powers to impose conditions upon municipalities that seek to invoke the jurisdiction of the Council on Affordable Housing. Specifically the Court held that the trial courts have the power and duty to impose conditions so as to "protect and assure the municipality's future ability to comply with its Mount Laurel obligations" during the pendency of proceedings. Id. at 86-88.

Under Hills Development, a trial court has the power and duty to impose conditions upon transfer if it finds that three criteria are met:

(1) There exists a scarcity of resources that may potentially limit the ability of the municipality to satisfy its constitutional obligations;

(2) It is "necessary or desirable" to preserve those "scarce resources" to "protect and assure the municipality's future ability to comply with its Mount Laurel obligations.";

(3) It is "appropriate" for the court to impose conditions to preserve those "scarce resources."

We shall first analyze the legal significance of each of these criteria and then demonstrate that they require the imposition of conditions in the present case.

1. Scarce Resources. The purpose of the imposition of conditions upon municipalities seeking to invoke the jurisdiction of the Council on Affordable Housing is to "preserve 'scarce resources.'" Hills Development, slip op. at 86. The Court has defined "scarce resources" as "those resources that will probably be essential to the satisfaction of [the municipality's] Mount Laurel obligation." Id. The Court gave examples of the types of "scarce resources" it had in mind: vacant land, sewerage capacity, transportation facilities, water supply and "any one of the innumerable public improvements that are necessary to the support of housing but are limited in supply." Id. at 86-87.

Availability of resources cannot be evaluated in the abstract, but only in terms of what is likely to be necessary to enable a particular municipality to satisfy its housing obligations under the Mount Laurel decisions. Until the Council on Affordable Housing itself formulates a statewide methodology for determining municipal housing obligations, Hills Development, slip op. at 40, the courts must determine for themselves what the municipality's obligation is and whether there is any likelihood that the scarcity of necessary resources may impair the ability of the municipality to satisfy that obligation. The Supreme Court specifically noted that one of the signal achievements of the trial courts under Mount Laurel II was the development of a methodology for determining the housing obligations of municipality that is both generally consistent throughout the state and satisfies the requirements of the constitution. Id. at 91. See AMG Realty v. Township of Warren, 207 N.J. Super. 388 (Law Div. 1984); J. W. Field Co. v. Township of Franklin, 206 N.J. 165 (Law Div. 1985); Morris County Fair Housing Council v. Boonton Township, Docket No. L-6001-78 P.W. (Law Div., Middlesex/Morris Ctys., Jan. 14, 1985). In determining whether the scarcity of resources may impair the ability of a municipality to satisfy its Mount Laurel obligations, the courts should look to determinations of municipal housing obligations made under this methodology.

Furthermore, in evaluating the possible scarcity of resources affecting a particular municipality, the factual

representations previously made by the municipality concerning shortages of resources that place constraints upon its ability to provide lower income housing are highly probative and, in some cases, dispositive.

2. Necessity or Desirability of Imposing Conditions. The Court is required to determine if the imposition of conditions is "necessary or desirable" to "protect and assure the municipality's future ability to comply with a Mount Laurel obligation." Id. at 88. In making this determination, the Court must consider a variety of factors. Id. The Court must determine whether the availability of any necessary resource is likely to diminish during the pendency of the proceedings before the Council on Affordable Housing and whether the diminution "is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." Id. at 87. The Court may also properly assess whether the municipality will "actively try to preserve" the necessary resources. Id. at 88-89. In considering this factor, the Court must also determine whether such municipal efforts are sufficiently likely to assure the provision of "realistic" opportunities for safe, decent housing affordable to lower income households and not mere hypothetical or theoretical opportunities. Mount Laurel II, 92 N.J. at 206-61.

Here, too, the previous factual representations previously made by the municipality concerning shortages of resources that

place constraints upon its ability to provide lower income housing are highly probative and perhaps dispositve.

3. Appropriateness of Conditions. Finally, the Court must determine what conditions are appropriate to protect the scarce resource whose preservation has been determined to be necessary or desirable. Hills Development, slip op. at 87. The Supreme Court has ruled that "appropriate" in this context "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 conditions." Id. at 87-88.

If the Court determines that it is "necessary or desirable" to preserve "scarce resources" but yet concludes that it is not practical to do, then the Court is constitutionally obliged to deny transfer of the case to the Council on Affordable Housing. Id. at 77. To avoid this outcome, the trial courts must be deemed to have the broadest possible power to grant interlocutory relief to preserve "scarce resources." This broad power necessarily includes the power to grant both relief against the municipality and against third parties. This view is consonant with previous holdings by the various Mount Laurel courts that they have the authority to grant interlocutory restraints against third parties to preserve their own power to vindicate the constitutional rights of lower income persons. See, e.g., Morris County Fair Housing Council v. Boonton Township, Docket No. L-6001-78 P.W. (Law Div., Middlesex/Morris Ctys., July 5, 1984)

(interlocutory restraints against preliminary approval of site plans and subdivision applications by nonparty municipal planning board and board of adjustment in the face of municipal contentions that shortage of vacant developable land limited ability of municipality to satisfy housing obligations); Davis v. Mt. Laurel Municipal Utilities Authority, Docket No. C-635 (Ch. Div., Atlantic/Burlington Ctys., March 8, 1983) (interlocutory restraints against granting sewer connections by nonparty municipal utilities authority in the face of evidence that shortage of sewerage would limit ability of municipality to satisfy housing obligations). It is an application of the well-established principle that courts have broad powers to grant ancillary relief against third parties to preserve their jurisdiction and their power to effectuate their decrees. See e.g., Fidelity Union Trust Co. v. Union Cemetary Association, 13 N.J. Eq. 254 (Ch. 1943), aff'd 134 N.J. Eq. 539 (Ct. of Err. & App. 1944).

Under R. 4:30, additional parties may be joined at any time on the motion of any party or the court itself. See Schnitzer and Wildstein, New Jersey Rules Services IV-1060-1063 (Sp. Reprint Ed. 1982). In appropriate cases, it is thus proper for the Court to join additional parties and enter interlocutory restraints agianst them to preserve "scarce resources."

In sum, where it is shown that (1) scarcity of resources may potentially limit the ability of the municipality to satisfy its constitutional obligations, (2) it is "necessary or desirable"

that these resources be preserved, and (3) it is "appropriate" for the court to impose conditions to preserve these resources, the Court has both the power and duty to impose such conditions. As we will explain in the next section, the facts of this case provide a compelling basis for imposition of the conditions requested by plaintiffs.

## II. CIRCUMSTANCES IN RANDOLPH TOWNSHIP REQUIRE IMPOSITION OF CONDITIONS UPON DEVELOPMENT OF VACANT LAND AND PUBLIC SEWER USAGE

Randolph has represented to the Court that the scarcity of two types of resources limit its ability to provide realistic opportunities for lower income housing. Each of these "scarce resources"[1] is, according to documents filed by Randolph, either

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1. 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.

Nonetheless, for purposes of this proceeding, it is appropriate for this Court to accept at face value defendant's representations as to the nature and extent of the limitations upon its ability to provide lower income housing and the expert testimony which defendant has offered in support of these claims. The Court must assume that these representations were made in good faith before this Court, that they embody the municipality's best judgment as to the extent of its resources, and that the municipality will make these same representations to the Council on Affordable Housing.

In addition, the Court's obligation in this proceeding is to determine what conditions are "necessary or desirable" to "protect and assure the ability of the municipality to satisfy its Mt. Laurel obligations." Hills Development, slip op. at 86-

(Footnote continues on next page)

already unavailable in sufficient supply to enable the municipality to satisfy its housing obligation as determined by this Court or is likely to diminish in its availability in the near future. Thus, it is "necessary or desirable" to preserve these resources to enable the municipality to satisfy its housing obligations. Finally, it is feasible and within the power of the Court to impose effective restraints to preserve these scarce resources, either through the imposition of conditions on Randolph or through restraints against third parties.

We address each of these "scarce resources" in turn.

1. Vacant Developable Land - According to documents prepared by municipal planner Adrian Humbert which Randolph has filed with the Court, there are only approximately 900 acres of vacant land in the "growth areas" as mapped by the State Development Guide Plan. (Humbert Fair Share Report, Oct. 1983; Exhibit A). Of this area, only approximately 400 acres are

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87. In such a determination, the risks all lie on the side of preserving too little, of permitting essential resources to be exhausted or dissipated during the pendency of proceedings before the Council on Affordable Housing, and thereby denying low income persons the opportunity to vindicate their constitutional rights. Under such circumstances, it is proper for the Court to err, if err it must, on the side of protecting too much rather than protecting too little. It is therefore appropriate for the Court to accept for purposes of this proceeding the representations of the municipality as the scarcity of essential resources, even if these representations ultimately prove to be somewhat exaggerated.

vacant and developable (Id.) In his deposition, Mr. Humbert estimated that providing 719 units of lower income housing -- which he estimated to be Randolph's fair share -- would require 500 to 1000 acres of vacant developable land. (Humbert Dep. at 53, Exhibit B).[2]

Court-appointed expert Carla Lerman, using the methodology approved in AMG Realty v. Township of Warren, 207 N.J. Super. 388 (Law Div. 1984), determined that Randolph's lower income housing obligation is 872 units. Adjusted in accordance with this Court's decision in Morris County Fair Housing Council v. Boonton Township, Docket No. L-6001-78 P.W. (Jan. 14, 1985), this methodology results in a lower income housing obligation of 840 units.[3] If this need were to be addressed through inclusionary zoning on terms typically utilized in Morris County (10 dwelling units/acre with 20 percent of the units set aside for lower income households), approximately 420 acres of vacant developable land would be required.

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2. In answers to interrogatories, Randolph statedin 1983 that there were 980 vacant acres in the SDGP growth area, of which 484 acres are developable. Randolph Answers to Plaintiffs' Third Set of Interrogatories, question #5.

3. This Court held that indigenous need should be calculated on the assumption that 67.5% of substandard and overcrowded units are occupied by lower income households, rather than 82%, as used in Ms. Lerman's report. This reduces Randolph's indigenous need from 180 units to 148 units, and its total present and prospective need from 872 units to 840 units.

Thus, based on the analysis of Randolph's planner, vacant developable land is a scarce resource in Randolph. Any significant diminution in the availability of vacant developable land would impair the ability of Randolph to satisfy its Mt. Laurel obligations.

Furthermore, the available vacant developable land in Randolph continues to diminish. Although development in Randolph has been sharply limited by the court-imposed ban on new connections with the public sewer system (Affidavit of Thorsten Nelson, Exhibit C), building permits were granted for 107 new single family units in 1984, the last year for which full data is available (N.J. Dept. of Labor, N.J. Residential Building Permits - 1984 Summary, p. 32, Exhibit D). In 1985, for which only partial data is available at this time, building permits were granted for another 107 dwelling units (N.J. Dept. of Labor, Residential Building Permits, Feb., July, Aug., Nov. 1985, Exhibit E). If the sewer connection ban is lifted, as is likely in the next several months, development can be expected to accelerate rapidly.

Thus, in light of Randolph's factual representations to the Court, conditions and restraints on development of vacant land must be imposed to preserve and assure the ability of the municipality to satisfy its Mt. Laurel obligations. The Court can preserve this scarce resource only by enjoining the issuance of preliminary and final site plan approvals and subdivision approvals.

2. Public Sewage Treatment - Randolph has represented to this Court that scarcities in sewage treatment facilities limit its ability to provide housing opportunities for lower income persons. (Affidavit of Thorsten Nelson, Exhibit C).

The portion of Randolph located in the SDGP growth area is in the service area of the Rockaway Valley Regional Sewerage Authority (RVRSA). RVRSA has recently constructed a new 12 million gallon per day (mgd) sewage treatment plan that will serve nine municipalities, including Randolph. The new RVRSA plant was designed to accommodate population growth permitted by the zoning in effect in 1980.[4] No provision was made for the possibility of additional population growth as a result of zoning amendments or variances. Similarly, no provision was made for the possibility that 1980 municipal zoning might be found to represent unconstitutional exclusionary zoning.

RVRSA now projects that existing users will exhaust all but 3.7 mgd of the capacity of the new plant. (RVRSA Resolution, Exhibit F). Of this, RVRSA views .91 mgd as already committed through prior court orders and connection approvals already granted by RVRSA. This leaves 2.79 mgd for connections by new users and expansion of use by existing users.

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4. The design capacity of the plant was determined by calculating the total population that would reside in the RVRSA service area if all vacant developable land were fully developed in accordance with the then existing zoning.

Connections to the RVRSA facility are currently regulated by court orders issued in Department of Health v. City of Jersey City, Docket No. C-3447-67 (Ch. Div., Morris Cty.), which ban all connections except to meet compelling health and safety needs. Judge Gascoyne has advised the parties that this ban will be lifted in May 1986 or shortly thereafter. If the ban is lifted without conditions, the remaining capacity will, under existing agreements, be available to all potential users in the service area on a first-come, first-serve basis. RVRSA estimates that existing short term demand exceeds available treatment capacity by 2.53 mgd (Id. at Schedule A).

Thus if the ban is lifted without conditions,[5] it is clear that little or no treatment capacity will be available for the development of lower income housing by 1988. In that event, it is essential that this Court issue restraints against RVRSA to enjoin it from permitting additional connections without reserving adequate capacity for lower income housing in Randolph.

RVRSA, in response to an invitation by the court in the Jersey City case, has recently proposed a plan for allocation of available sewage treatment capacity among member municipalities.

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5. Plaintiffs, over the opposition of defendants in this matter, have intervened in the Jersey City litigation for the purpose of urging the court to act aggressively to preserve sewerage capacity for lower income housing. A copy of plaintiffs' brief has been submitted to this Court under separate cover. Obviously, the proper course of action by this Court will depend upon Judge Gascoyne's decision.

(Id.). This plan would allocate 1.6 mgd for municipal growth in the nine member municipalities. This gallonage would be allocated among the nine municipalities by a complicated formula. The formula does not purport to reflect the relative additional need for sewage treatment arising from constitutional obligations of municipalities to provide lower income housing and does not in fact do so. (Id). Under this plan, Randolph would be allocated 325,547 gallons per day (gd) for additional connections (in addition to 466,807 mgd for connection of existing units which are on septic systems in areas which are unsuitable for such systems, and 60,731 gd for new users who have already received RVRSA approval or are entitled by previous court order to connect). Using the standards for household sewage flow utilized by the Department of Environmental Protection, this would permit connection of only approximately 1,450 additional residential units throughout Randolph Township.[6] By contrast, Randolph's

6. For purposes of designing small treatment plants and individual septic systems, DEP requires that sewage treatment needs be computed on the basis of 100 gallons per day/person in single family dwelling units and 75 gallons per day/person in multifamily units. N.J.A.C. 7:9-1.106, 7:9-2.6. This figure is lower than that commonly used for larger systems since it makes no allowance for inflow or infiltration. (See RVRSA Resolution, at Schedule A, Exhibit H). Assuming that households in Randolph continues to average 2.99 persons/households (as is presently the case, N.J. State Data Center, N.J. Population Per Household 1970 & 1980 (1981) (Exhibit G)), the need for sewage treatment for each additional housing unit will be approximately 224 gallons per day/dwelling unit. If the total new available treatment capacity is 325,547 gallons per day, then 1,453 additional dwellings could be accommodated.

unmet housing obligation to 1990, as determined by the methodology approved by this Court, is 840 units. If this obligation were satisfied through inclusionary zoning, a total of 4,200 additional units would have to be built.

Thus, if RVRSA and the court in the Jersey City litigation follow this course, it is critical that Randolph and RVRSA be enjoined from permitting additional connections in Randolph Township, except to meet compelling health and safety needs. Restraints must run against the Randolph Municipal Utilities Authority, which has actual responsibility for permitting connections to the sanitary sewer system.

In sum, Randolph satisfies all the criteria for the imposition of conditions upon transfer of the case to the Council on Affordable Housing. The scarcity of vacant developable land in the growth area and sanitary sewage treatment capacity, as well as their potential impact upon Randolph's ability to provide lower income housing have been strenuously asserted by Randolph and must be taken as admitted. Preservation of each of these resources is desirable, indeed necessary, to protect and assure the ability of the municipality to satisfy these constitutional obligations under the Mt. Laurel decisions. Each of these resources can be preserved through appropriate court orders, either against Randolph or other parties. Restraints upon site plan and subdivision approvals, must be imposed upon the Randolph Township Planning Board and the Randolph Township Zoning Board of Adjustment as well as against the municipality.

Restraints to preserve sewerage treatment capacity must be imposed upon the Rockaway Valley Regional Sewerage authority and the Randolph Township Municipal Utilities Authority.These restraints are both necessary and appropriate to "protect and assure the municipality's future ability to comply with its Mt. Laurel obligations." Hills Development, slip op. at 87.

## CONCLUSION

For all the foregoing reasons, this Court should grant plaintiffs' application to join the Randolph Township Planning Board, the Randolph Township Zoning Board of Adjustment, the Randolph Township Municipal Utilities Authority, and Rockaway Regional Sewerage Authority as parties in this matter and that the Court enter interlocutory restraints to preserve scarce resources so as to protect and assure the defendants' ability to satisfy its constitutional obligations.

If the Court determines that restraints to preserve scarce resources are necessary or desirable but are not "appropriate," the Court should properly deny Randolph's application for transfer to the Council on Affordable Housing.

Respectfully submitted,

ALFRED A. SLOCUM
Public Advocate of New Jersey
Attorney for Plaintiffs
Morris County Fair Housing Council,
et al.

BY: Stephen Eisdorfer
STEPHEN EISDORFER
Assistant Deputy Public Advocate

SE:id

cc: All Counsel