NEW JERSEY COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. 86-2

MORRIS COUNTY FAIR HOUSING COUNCIL, et al., Plaintiffs, v. BOONTON TOWNSHIP, et al., (DENVILLE TOWNSHIP), Defendant.	Civil Action OPINION
MORRIS COUNTY FAIR HOUSING COUNCIL, et al., Plaintiff, v. BOONTON TOWNSHIP, et al., (RANDOLPH TOWNSHIP), Defendants.	
RANDOLPH MOUNTAIN INDUSTRIAL COMPLEX, Plaintiff, v. BOARD OF ADJUSTMENT OF THE TOWNSHIP OF RANDOLPH, et al., Defendants.	

This matter comes before the Council on Affordable Housing on the application of plaintiffs Public Advocate and Stonehedge

Associates, Inc. that the Council preserve from exhaustion certain resources alleged to be necessary for the municipalities to address their obligation under the Mt. Laurel doctrine. In sum, the Public Advocate seeks an order restraining development and preserving the following resources in Denville Township:

1. Vacant developable land; and
2. Public sanitary sewage treatment capacity; and
3. Public sanitary sewage collection; and
4. Public water service.

The Advocate also seeks preservation of the following resources in Randolph Township:

1. Vacant developable land; and
2. Public sewage treatment capacity; and
3. Public potable water supply.

Plaintiff Stonehedge Associates petitions the Council to preserve sewage treatment capacity in Denville Township. All motions request that any restraints imposed be continued in effect until the Council completes its administrative review of the municipalities' housing element and fair share plan.

Intervenor, Sisters of the Sorrowful Mother Primary Care Corporation and the Sisters of the Sorrowful Mother Senior Services Corporation have filed a cross-motion requesting to be exempt from any restraints on development that may be imposed within the Township of Denville. Randolph Township has also cross-moved to dismiss the Randolph Township Municipal Utilities Authority, the Randolph Township Planning Board and the Randolph Township Board of Adjustment from this case. Lastly, the Public Advocate has peti-

tioned the Council to disqualify Council member Carol Rufener from participating in the Council's determination.

In The Hills Development Company v. Bernards Township, 103 N.J. 1 (1986), the New Jersey Supreme Court determined that the Council on Affordable Housing is empowered to preserve scarce municipal resources necessary to satisfy the community's Mt. Laurel obligation. The Court held:

> ... [T]he Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate measures to preserve 'scarce resources' namely, those resources that will probably be essential to the satisfaction of its Mt. Laurel obligation. [Id. at 61].

The Council has incorporated this authority within its procedural rules and regulations, N.J.A.C. 5:91-11.1, and has established a motion practice to consider applications that it exercise such authority. N.J.A.C. 5:91-13.1 et seq.

The Council is only empowered to require that municipalities preserve scarce resources or facilities upon a finding that "further development or use of these facilities is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." The Hills Development Company v. Bernards Township, supra at 62. The Supreme Court noted that restraints or conditions should only be imposed upon a thorough analysis of the record to determine what conditions would be "appropriate." In this respect, the Court determined that:

> "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 so doing, and the ability to enforce the condition. [Ibid.].

Moreover, the Supreme Court further prescribed the scope that any conditions or restraints should take, and concluded that any such measures should be designed to assure the municipality's future ability to comply with its Mt. Laurel obligation:

> Those conditions should be designed not for the protection of any builder, but for the protection of the ability of the municipality, pending the outcome of the Council proceedings, to provide the realistic opportunity for lower income housing, as it may be required to do in the near future. [Ibid.].

Hence, any conditions or restraints imposed by the Council must be limited both in nature and duration. The conditions should be imposed only where necessary to preserve resources which may otherwise be exhausted, and which are necessary for the satisfaction of the constitutional obligation. Such authority is analogous to the equitable powers of the courts to "prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case." Crowe v. DeGioia, 90 N.J. 126, 132 (1982), quoting Thompson, Attorney General v. Paterson, 9 N.J. Eq. 624, 625 (E.& A. 1854). In Crowe, the New Jersey Supreme Court noted four general principles which have traditionally guided the judiciary in determining whether to issue a preliminary injunction. The considerations set forth in Crowe largely parallel the criteria set forth by the Supreme Court in Hills.

In Crowe, the Court recounted that an injunction should only issue when necessary to prevent irreparable harm, upon a balancing of the relative hardship to the parties in granting or

denying relief, and should not issue where all material facts are controverted or where the legal right to relief is unsettled. Supra, 90 N.J. at 132-134. Central to a determination under the standards enunciated in both Hills and Crowe, is the finding that absent the issuance of restraints, irreparable harm will occur which will unfairly prevent a studied determination and resolution of the matter. In sum, the Council must determine whether it is necessary and practical to exercise an extraordinary power to preserve the status quo pending the outcome of a final hearing.

In the instant matter, it is undisputed that sewerage treatment capacity is a limited resource in both Denville and Randolph Townships. Much of both Denville and Randolph are located in the service area of the Rockaway Valley Regional Sewerage Authority (RVRSA); due to a variety of environmental and funding problems connections to the sanitary sewer system now administered by the RVRSA have been enjoined since August 8, 1968. This "sewer ban" was administered by the Superior Court, through the Honorable Jacques H. Gascoyne, J.S.C., since 1974. The sewer ban was dissolved by court order on July 25, 1986 and Judge Gascoyne allocated sewer treatment capacity to the various member municipalities which formed the RVRSA. Department of Health, State of New Jersey, et al. v. City of Jersey City, et al., Docket No. C-3447-67, (Morris County).

Principally, under the terms of Judge Gascoyne's order, both Randolph and Denville Townships were allocated three categories of sewerage treatment capacity available from the RVRSA; the category most relevant here is the allocation for "new growth."

Under this determination Randolph Township was allocated 325,547 gallons per day (GPD), and Denville Township was allocated 215,547 gallons per day (GPD). The key question before the Council in determining whether to impose restraints on the allocation of sewerage capacity is how much of the available growth reserve is required to meet the probable housing obligation of the respective municipalities. The answer to this question lies in analyzing the best available estimates of the two communities' 1987-1993 pre-credited need and determining the sewerage gallonage capacity required to address that need, utilizing the appropriate standards promulgated by the New Jersey Department of Environmental Protection.

The pre-credited, unadjusted needs of Denville and Randolph are 413 and 448 respectively. See: Council on Affordable Housing, Municipal Present, Prospective and Pre-credited Need Estimates, May 22, 1986; see also N.J.A.C. 5:92-1 et seq. These fair share estimates consist of indigenous need, reallocated present need and prospective need which are summed to equal the total need. Ibid. This total need is then modified due to demolitions, filtering, conversion and spontaneous rehabilitation.

Indigenous need is defined as deficient housing units occupied by low and moderate income households within a municipality. The Council has estimated that some of the indigenous need will be spontaneously rehabilitated by low and moderate income households independent of any public action. See, N.J.A.C. 5:92-1 et seq.; Technical Appendix. Thus, the numbers corresponding to spontaneous rehabilitation should be subtracted from indigenous

need to determine how much of the pre-credited need obligation should be addressed by the municipality in a rehabilitation program. Under this calculation, Denville may rehabilitate 31 units, leaving 382 to be addressed through the creation of new units. Similarly, it may be assumed that Randolph is responsible for rehabilitating 99 housing units and creating 349.

It is possible that Denville and Randolph may alter their pre-credited need upon the completion of a housing survey. N.J.A.C. 5:92-51.3. It is also possible that either community may be able to reduce their pre-credited need number due to eligible credits N.J.A.C. 5:92-6, or through the adjustment process outlined in the Council's rules. N.J.A.C. 5:92-8. However, at this early stage of the proceedings, it would be inappropriate to speculate regarding either community's ability to amend or adjust its pre-credited need.

Similarly, it would be inappropriate at this stage to assume that either community will be able to finalize a regional contribution agreement with a willing receiving community, or will address the new construction component of their obligation in any way other than through zoning land at appropriate densities with a 20 percent set-aside. Thus, for purposes of this motion, the Council must assume that Denville needs sewerage capacity for at least 1910 units in order to address the 382 "new construction component" of its pre-credited need, and that Randolph must have the capacity for a total of at least 1745 units to accommodate its 349 unit new construction component.

The Council's proposed rule regarding bedroom distribution within an inclusionary development mandates that at least 35 percent of the housing units be two bedroom units, that at least 15 percent be three bedroom units, and that the remainder may be one bedroom housing units. N.J.A.C. 5:92-14.1. Although it cannot be assumed that this rule will be adopted as proposed, it is likely that some distribution of bedroom types will be required to meet the need within the townships. Consequently, the Council will rely upon the proposed distribution rule for the low and moderate income units only; the evidence indicates that, for the market units associated with inclusionary developments, fifty percent will be two bedroom and 50 percent will be three bedroom units.

Given this bedroom distribution, it is possible to apply the New Jersey Department of Environmental Protection (NJDEP) standards to estimate the gallonage required to satisfy the low and moderate income housing obligations of Denville and Randolph Townships. For their regulatory purposes, NJDEP requires sewage capacity of 75 gallons/capita, N.J.A.C. 7:9-1.106. This standard includes an allowance for infiltration. For planning purposes, NJDEP requires a reservation of 150 gallons/day for a one bedroom unit; 225 gallons/day for a two bedroom unit; 300 gallons/day for a three bedroom unit; and 400 gallons/day for a single family detached housing unit.*

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* Source: New Jersey Department of Environmental Protection, Bureau of Municipal Waste Management, Division of Water Resources.

Here, none of the housing associated with inclusionary developments will be single family detached dwellings. Thus, utilizing the bedroom destribution outlined above, and the DEP's formula, Denivlle would require excess sewerage capacity of 477,023 GPD to accomodate its housing obligation and Randolph would require 435, 814 GPD. This needed capacity greatly exceeds the allocation for growth of 215,547 GPD reserved to Denivlle and 325, 547 GPD reserved to Randolph.* Moreover, even were the inclusionary developments in Denville and Randolph comprised completely of single-bedroom units, the Denville development would require 286,500 GPD of capacity and the Randolph development 261,750 GPD, utilizing more than Denville's allocation and over 80% of Randolph's reserve. Therefore, the Denville and Randolph allocations of the RVRSA growth reserve are inadequate to satisfy the sewage demand of inclusionary developments.**

At argument on this motion, reference was made to the fact that at least a small portion of Denville Township lies within the service area of the Parsippany-Troy Hills Municipal Sewer Authority. No evidence was presented to indicate that any of Denville Township's low and moderate income obligation could be addressed with capacity available from the Parsippany-Troy Hills

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* See Appendix A to this decision.

** It is also quite possible that Denville and Randolph Townships may seek to exact financial contributions from developers in order to finance their rehabilitation programs. These contributions may or may not be in exchange for density bonuses. In either case, it is clear that funding a rehabilitation program could require additional non-inclusionary development that would further deplete available capacity.

Sewage Treatment Plant. Moreover, such excess capacity, if any, is limited and subject to nonexistent agreements and understandings, as well as a modification of regional sewerage and water plans. Thus, there is no evidence that further sewerage treatment capacity is available to Denville or that it is reserved to meet Denville's Mt. Laurel obligation. Therefore, it is apparent, under the precise factual circumstances presented by Judge Gascoyne's determination in the sewer ban case, viewed in context with both Denville's and Randolph's Mt. Laurel obligation, that sewerage treatment capacity is a scarce resource.

However, no similar showing has been made with respect to the Public Advocate's assertion that other resources within these municipalities are equally scarce and may be exhausted before these municipalities can fashion a compliant housing element and fair share plan. Rather, the Advocate relies upon the assertions and defenses urged by Denville and Randolph throughout the Mt. Laurel proceedings in the trial court that inadequate resources exist for these municipalities to meet their Mt. Laurel obligation as determined by the courts. Conversely, the Public Advocate has asserted before the trial court that sufficient resources do, in fact, exist for these municipalities to comply with the Mt. Laurel obligation as determined by the court. Thus, as Judge Skillman noted in considering the motion for interim restraints in these cases, the parties have essentially taken the opposite position from that which they have assumed throughout the litigation, and rely upon statements made by the other side. While such a tactic is understandable, as Judge Skillman also concluded, "this approach does

not lend itself to making the most satisfactory record." Morris County Fair Housing Council, et al. v. Boonton Township, et al., Docket No. L-6001-78 PW, Docket No. L-59128-85 PW; (Tr. at 24).

Consequently, the Council cannot conclude, on this record, that resources other than sewerage treatment capacity are scarce and in danger of exhaustion. This determination is made without prejudice to any interested party demonstrating that in fact certain necessary resources are scarce, and should be protected.

Having determined that sewerage treatment capacity for new growth is a scarce resource, the Council must also consider whether the imposition of restraints is "appropriate". As explained by the Supreme Court in The Hills Development Company v. Bernards Township:

> "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 so doing, and the ability to enforce the condition.... Those conditions should be designed not for the protection of any builder but for the protection of the ability of the municipality, pending the outcome of the Council proceedings, to provide the realistic opportunity for lower income housing, as it may be required to do in the near future. [Supra, 103 N.J. at 62.]

In making these determinations the Council will also be guided by the standards traditionally relied upon by the judiciary in determining whether to grant an application for injunctive relief.*

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* The Council notes that Judge Skillman also looked to such guidelines in granting temporary injunctive relief in these matters:

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The Council is satisfied that it is empowered to require that both Denville and Randolph preserve scarce sewerage treatment capacity. No party disputes this authority. Moreover, the Supreme Court specifically envisioned that the specific resources may at issue here be preserved:

> [T]he Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate measures to preserve 'scarce resources,' namely, those resources that will probably be essential to the satisfaction of its Mt. Laurel obligation. In some municipalities it is clear that only one tract or several tracts are usable for lower income housing and if they are developed, the municipality as a practical matter will not be able to satisfy its Mt. Laurel obligation. In other municipalities there may be sewerage capacity that, if used, would prevent future lower income housing.... [The Hills Development Company v. Bernards Township, supra, at 61.]

The Council is also convinced that it is practical to require these municipalities to preserve sewerage treatment capacity for "new growth", and that the cost of doing so would not be burdensome. In this regard it is clear that the exhaustion of needed sewerage capacity will result in irreparable harm to the extent that no further allocations for "new growth" will be forthcoming from the RVRSA until 1993, at the earliest. Department,

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> "[T]he conditions that I am imposing this morning constitutes an interlocutory injunction of quite limited duration and are governed by the procedures and standards ordinarily applicable on applications for interlocutory injunctive relief." (Tr. at 12).

of Health State of New Jersey v. City of Jersey City, supra. Furthermore, based on this record, and the facts as they currently exist, most, if not all, of Denville's and Randolph's allocation for new growth are needed to satisfy their Mt. Laurel obligation.*

Finally, restraining Denville and Randolph from taking any action to allocate treatment capacity from the "municipal growth reserve" would not result in undue hardship to the municipalities. This restraint will not affect allocations from sources other than the "new growth" reserve, it will not prevent either municipality from accepting applications for sewerage allocations and processing them. The duration of the restraint imposed by the Council is relatively short, expiring upon the determination of the Council to grant substantive certification. The Council must decide whether to issue substantive certification within six months after the municipalities herein file with the Council a housing element and fair share plan. N.J.S.A. 52:27D-319; N.J.A.C. 5:91-1 et seq. Hence, the restraint will likely expire no later than June 1987, and perhaps earlier. Lastly, in oral argument on these motions, counsel for Denville Township acknowledged that the continuance of the restraint imposed by Judge Skillman will have no practical adverse effect within the municipality.

Therefore, for the above reasons, the Council on Affordable Housing will require that Denville Township and Randolph

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* Of course, as was earlier noted, should the facts or circumstances which underlie this record change and it becomes apparent that further sewerage treatment capacity becomes

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Township refrain from taking any action which would utilize or diminish sewage treatment capacity in the "municipal growth reserve" allocated to either municipality under the terms of the court order entered in Department of Health, State of New Jersey v. City of Jersey City, Docket No. C-3447-67 (Ch. Div., Morris County).

Also before the Council is a cross motion on behalf of intervenor Sisters of the Sorrowful Mother Primary Care Corporation and Sisters of the Sorrowful Mother Senior Citizens Corporation to be exempt from any scarce resource restraints imposed by the Council in Denville Township. Intervenor indicates that it proposes to construct a medical office building and a life care center. However, as is clear from its motion papers, intervenor has not received approval for its proposed office building from the Denville Planning Board, and has not even made formal application for approval of its plans for a life care center. Consequently, it is unsettled as to whether either project will in fact be constructed or when. Hence, intervenor's application for an exemption from the restraints imposed by the Council is premature and will not be granted at this time.

The Randolph Township Municipal Utilities Authority (MUA), the Randolph Township Planning Board, and the Randolph Township Board of Adjustment, have all cross-moved to be dismissed

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available, or that Deville or Randolph have made other arrangements to meet their obligation, the terms or the restraint issued by the Council may be modified.

from this matter. Essentially, these entities argue that the Council has no jurisdiction or authority to issue orders which bind instrumentalities other than the municipality itself. These parties were joined by the trial court in an order issued on May 29, 1986 for the limited purpose of binding them to any order preserving scarce resources. These parties sought a stay of the order joining them to this matter and moved for leave to appeal the trial court's order. Both motions were denied by the Appellate Division.

The trial court in this matter concluded that the power to impose restraints as provided in The Hills Development Company v. Bernards Township extends not only to municipalities but also to those municipal agencies or entities which in fact control the resource which must necessarily be conserved. The Court determined:

> I am also satisfied that this power may be exercised by the issuance of orders which are binding not only upon the governing body of the defendant municipality but, also, upon the sub-agencies of the municipality, including planning boards or municipal utilities authorities. [Transcript at 10-11].

Moreover, as is clear from the Supreme Court decision in Hills, the Council is expressly empowered to issue orders which preserve resources that are effectively administered by sub-municipal entities. The Court specifically referred to such resources as land, water, transportation facilities and sewerage capacity as well as "any one of innumerable public improvements that are necessary for the support of housing but are limited in supply." Supra, 103 N.J. at 61.

Furthermore, during oral argument on this motion, counsel for Randolph Township and its sub-entities acknowledged that an order which restrained a municipality's authority to allocate a resource which was not under its control would be meaningless, and of no force and effect. Obviously, if the Council was not empowered to enjoin the exhaustion of necessary resources not under the direct control of a municipal governing body, but under the control of an agency created by that governing body, municipalities could very effectively avoid meeting their Mt. Laurel obligation by simply creating a variety of sub-agencies to oversee the allocation of necessary resources. The Council cannot assume that the Supreme Court intended such a result. In any event, the Council agrees with the determination of the trial court to join these parties and will not disturb that order and dismiss those parties from this matter.

Finally, subsequent to the Council hearing oral argument on these motion, the Public Advocate also petitioned the Council to disqualify Council member Carol Rufener from participating in the decision.* Ms. Rufener is a Morris County Freeholder and serves on

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* The Council heard oral argument on these matters on September 22, 1986, and the Public Advocate participated. It was not until October 9, 1986 that the Advocate sought to disqualify Ms. Rufener from considering these motions. The Advocate has attended meetings and public hearings of the Council in the past, and has met with members and staff individually, and is familiar with the members of the Council and their backgrounds. In short, the Advocate was aware that Ms. Rufener was a member of the Council before argument was heard on September 22, 1986. No objection was raised to her participation at that time. Nor was any objection made when Ms. Rufener was named, immediately after argument, in public ses-

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the Council as representative of the interests of county government. N.J.S.A. 52:27D-305. The Advocate maintains that Ms. Rufener should be disqualified from considering this matter essentially because of an asserted "appearance of bias or partiality" arising from Rufener's position as freeholder. The Advocate does not allege that Ms. Rufener holds a personal interest in these matters, nor does he suggest that she is in fact biased or ill-motivated: "Plaintiffs do not suggest that Ms. Rufener has any improper motive or that she has in fact been influenced by personal interests in these proceedings.... Plaintiffs assert that Ms. Rufener's interest clearly creates the potential for an appearance of impropriety and for a perception by the public and by the parties of the potential for bias or improper influence." Brief in Support of Plaintiff's Motion, at 11-12.

The Advocate contends that Ms. Rufener's position as freeholder generates an appearance of impropriety for two reasons: first, because the Advocate has instituted a legal challenge to an action of the Morris County Board of Freeholders adopting a solid waste management plan for the county, which provides that the county acquire land in Rockaway Township for use as a landfill

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sion, to a committee to draft a decision for the Council's review. Therefore, the Advocate's motion is not timely and perhaps should be dismissed on that basis. However, due to the seriousness of the ramifications which attach to the Advocate's motion, the Council will consider the application on the merits. We note, however, that the Council's rules, as well as reasonableness and a sense of fairness dictate that motions or applications should be complete in their request for relief made in a timely fashion.

which previously had been designated for Mr. Laurel housing; and secondly, because, as freeholder, Ms. Rufener is "accountable" to the voters in Morris County, which includes Denville and Randolph, and that the Mt. Laurel doctrine is "unpopular" with these voters. The Advocate also asserts that Ms. Rufener should be disqualified because she was once Mayor of the Borough of Mountain Lakes, a defendant in previous Mt. Laurel litigation.

Prior to the Council considering the within motion, Ms. Rufener sought the advice of the Attorney General with regard to her ethical responsibilities in considering this matter. Ms. Rufener was advised that she may properly participate in the Council's deliberations inasmuch as she held no personal interest in these matters which would disqualify her. We accept this advice, and note that the reasons advanced by the Advocate for disqualification are facially inadequate. Quite simply any interest Ms. Rufener may have in Mountain Lakes is irrelevant to these proceedings. Mountain Lakes is not a party before the Council. Neither is Rockaway Township. However of most significance, Ms. Rufener has no interest in Denville or Randolph Townships, nor is she responsible, as freeholder, for the implementation of the Mt. Laurel obligation in those towns. The obligation is a municipal one, to be fulfilled in the proper exercise of the zoning power delegated to the municipalities.

Lastly, the Advocate simply offers no facts or reasons to believe that Ms. Rufener is biased, or may reasonably be perceived as biased. Even the strict standard for evaluating a disqualifying interest applicable to the judiciary R. 1:12-1, and urged by the

Appendix A

Denville

Inclusionary Units	Mt. Laurel Units	Market Units
1910	382	1528

Bedrooms

	1	2	3	
Mt. Laurel	191 (150)	133.7(225)	57.3(300)	
Units 3.5	28,650	30,082.5	17,179	477,02
Market	-	764(225)	764(300)	
Units	-	171,900	229,200	

Randolph

Inclusionary Units	Mt Laurel Units	Market Units
1745	349	1396

Bedrooms

	1	2	3	
Mt Laurel	174.5(150)	122.15(225)	52.35(300)	
Units 0	26,175	27,483.75	15,705	435,75
Market	-	698	698	
Units	-	157,050	209,400	

Advocate, requires some showing that reasons exist which preclude a fair and impartial hearing.*

No such showing has been made here. Therefore, the Advocate's motion that Ms. Refener be disqualified from participating in the Council's deliberations in this matter is denied.

The Council has entered an appropriate order embodying these decisions. Council member Ara Hovnanian did not participate in these determinations.

New Jersey Council on Affordable Housing

By: _____
Arthur R. Kondrup
Chairman

Dated: 11/3/86

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* R. 1:12-1 provides, in relevant part:

> 1:12-1 Cause for Disqualification; On the Court's Own Motion
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> The judge of any court shall disqualify himself* on his own motion and shall not sit in any matter if he
>
> * * *
>
> (e) is interested in the event of the action; or
>
> (f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.