

Hillsborough Lit.

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- Memo re: MS Future's likelihood of  
Success vs. COAH

ps. 7

HI000002D

## Introduction

The following will attempt to examine the relationship between COAH's rules, regulations, and decision-making and the SDGP, SDRP, and sound planning, as defined by the MLUL. The sources relied on include: statutory authority; legislative history; administrative history; administrative rules; agency decisions; and caselaw.

## Presumption of Validity & Judicial Deference

Basically, the court's grant a presumption of validity to both agency decisions and municipal land use ordinances. The presumption is stronger when the agency has been delegated rulemaking discretion. *Van Dalen v. Washington Twp.*, 120 N.J. 234, 245. The New Jersey Supreme Court has noted that "[i]t cannot be overstressed that the Legislature, through the FHA, intended to leave the specific methods of compliance with Mt. Laurel in the hands of COAH and the municipalities, charging COAH with singular responsibility for implementing the statute and developing the state's regulatory policy for affordable housing. 247 N.J. Super. 146, 170; *see also Hills Dev. Co. v. Twp. of Bernards*, 103 N.J. 1, at 46. "This principle of judicial deference to agency action is particularly well-suited to our review of administrative regulations adopted by COAH to implement the [FHA], 'a new and innovative legislative response to deal with the statewide need for affordable housing'." *In re Petition for Substantive Certification Filed by the Twp. of Warren, et al.*, 132 N.J. 1, 27 (N.J. 1983); quoting *Van Dalen v. Washington Twp.*, 120 N.J. 234 (1990).

While this standard may at first seem impossible to overcome, the cases from which the language derives ease the burden. In *Van Dalen*, the "rulemaking discretion" that is deferred to is itself controlled by the Court's holdings. First, the *Mount Laurel* decisions set out the policy requirements that COAH must address. Then, *Van Dalen* holds that COAH is to use the SDGP to guide its exercise of discretionary rulemaking. It is important to note, that in *Van Dalen*, reliance on the SDGP was established, while in *In Re Substantive Certification*, the agency action was actually declared invalid, as unconstitutional according to *Mount Laurel*.

## Standard of Review & Judicial Inquiry

An attempt to overcome the presumption triggers a difficult standard of review, as well as a limited judicial inquiry. "The agency's determination that the municipality's *Mt. Laurel* obligation has been satisfied will ordinarily amount to a final resolution of that issue; it can be set aside in court only by 'clear and convincing evidence' to the contrary." 132 N.J. at 27. The courts will not substitute their judgment for that of the agency absent a showing that the agency action is arbitrary or capricious. *Van Dalen v. Washington Twp.*, 120 N.J. 234, 244, citing *Newark v. Natural Resource Council*, 82 N.J. 530, *cert. denied* 449 U.S. 983 (1980). Further, "[i]n reviewing administration actions, the judicial role is ordinarily confined to three inquiries: (1) whether the agency's action violates enabling acts, express or implied legislative policy; (2) whether there is substantial evidence and records to support the findings upon which the agency based application of the legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors." 132 N.J. at 28. However, the New Jersey

Supreme Court has held that the "presumption of correctness" attached to COAH's fair share determinations "does not strip the judiciary of historic powers to invalidate illegal or unconstitutional actions..." 103 N.J. 1,(1986).

It is arguable that COAH's application is both unconstitutional, according to *Mount Laurel*, and arbitrary and capricious, in light of the three judicial inquiries. The failure in this case to fulfill the constitutional obligations of the Mount Laurel doctrine have been well documented by Prof. Payne. In addition, Court review may also invalidate the COAH grant based on the three inquiries. First, COAH's action violates express and implied legislative policy. It neither creates a "realistic opportunity" that affordable housing will be built, nor abide by "sound planning" principles, primarily "implementation of the [SDRP]". 52:27D-307. Second, it is clear that evidence existed supporting a conclusion exactly the opposite of the decision made by COAH. Finally, the presence of this evidence, when compared to COAH's failure to fulfill any legislative goals supports a finding of agency error and unreasonableness.

### **Reliance on the SDGP/SDRP**

The presumption of validity has an effect on what authority the agency or municipality relies on in their determinations, as well as how they rely on the authority. In the past, COAH relied on the SDGP, exclusively, in determining the location and size of growth areas. *Van Dalen v. Washington Twp.*, 120 N.J. 234, 244 (1990). The court emphasized the validity of COAH's reliance on the SDGP, especially until the State Planning Commission was able to complete the SDRP.

In *Van Dalen*, the New Jersey Supreme Court held that the SDGP was an adequate basis for COAH's fair share determinations. 120 N.J. at 246. The court found that the FHA had delegated broad powers to COAH, among them the substantive certification process. 120 N.J. at 245. The Court noted that COAH could "grant or deny substantive certification in a multitude of ways," but recognized that the methods used must further the *Mount Laurel* goals. 120 N.J. at 246. COAH's reliance on the SDGP was found "especially appropriate because the agency is charged with the implementation of the [FHA], a new and innovative legislative response to deal with the statewide need for affordable housing." 120 N.J. 246. In discussing the *Mt. Laurel II* examination of approaches to a fair-share determination, the Court "authorized reliance on the SDGP, 'the only official determination of the state's plan for its own future development and growth'," and the "blueprint for the implementation of the *Mount Laurel* doctrine." 120 N.J. 241, quoting 92 N.J. at 225-226. While the Court recognized that the Legislature neither explicitly authorized, nor mandated, conformance with the SDGP, it noted that the burden of persuasion as to the SDGP's applicability & non-applicability was on the party challenging the application. 120 N.J. at 242.

The Court deferred to COAH's exclusive reliance on the SDGP to determine the location and size of "growth areas," but only "until the SDRP has been adopted." N.J.A.C. 5:92-1.3. The growth area determination is not only a factor in a fair share determination, but is also an important element in deciding whether to grant a municipality's petition for substantive certification." 120 N.J. 244; N.J.S.A. 52:27D-314. The Council emphasized that Mount Laurel obligations will be re-evaluated when the SDRP was released. 120 N.J. 244.

The Court foreshadowed the replacement of the SDGP with the SDRP, and recognized that the new Plan was "designed for use as a tool for assessing suitable locations for infrastructure, housing, economic growth, and conservation," as well as "intended to further many objectives besides Mount Laurel housing, including the protection of natural resources, and the development of land 'in a manner consistent with sound planning.'" 120 N.J. at 243; N.J.S.A. 52:18A-196(c) & 200(a)-(f). Finally, the Supreme Court added that should COAH discontinue reliance on the SDGP, it would still be required to "determine the statutory fair-share obligation on the basis of other sound planning criteria." 120 N.J. at 247. It is arguable that the SDRP is the "other sound planning criteria."

The courts have supported a reliance on the SDRP and "sound planning" principles. In *Sod Farm Associates v. Springfield Twp. Planning Bd., et al.*, the trial court held, and the Appellate Division affirmed, that a municipality could change its Master Plan and zoning ordinance. The courts found that the changes represented a proper zoning purpose - to keep the municipality rural with an agricultural economy and was in conformity with the SDRP. The court's holding rested essentially on the record revealing there was a proper zoning purpose supporting the board's determination. The court noted that zoning purposes, clearly stated in the ordinance are objective evidence of intent.

Springfield Township's reasons for amending the Plan and zoning ordinance included the recognition that the development envisioned "cannot take place without public water and sewer," and "is not only inconsistent with the State Plan but inconsistent with its own stated goals..." The review of the Master Plan stated that one of the revisions goals would be to "ensure that future development ... is consistent with the goals and objectives of the [SDRP]." The report from the Planning Board to the governing body stated that the "Master Plan re-examination report adopts and incorporates the goals and objectives of the [SDRP] for this area..." The court, as is usually the case, deferred to the municipality's Plan, ordinance, and board decisions. For example, the court held that "given the Master Plan, denial of sewer access cannot be deemed unreasonable or arbitrary." Neither were changes either unreasonable or inconsistent with the Master Plan. The court stated that:

" [i]t is clear that inconsistencies thus created by the amendment process are not fatal to a zoning ordinance where they are adopted by an affirmative vote of a majority of the full membership of the governing body and reasons are given in the resolution and recorded in the minutes. N.J.S.A. 40:55D-62(a)."

The question is, what does Hillsborough's Master Plan and zoning ordinance state, and what does it say about the State Plan, or a proper zoning purpose, if anything? The municipal master plan must incorporate "a specific policy statement indicating the relationship of the proposed development of the municipality as described in the master plan to ... the [SDRP]." N.J.S.A. 40:55D-28(d).

### **COAH's Regulations**

COAH is required to approve an RCA if the RCA provides a "realistic opportunity," and is "consistent with sound regional planning." *In Re Petition for Substantive Certification of Warren Twp.*, 247 N.J. Super. at 163; N.J.S.A. 52:27D-312(c); N.J.A.C. 5:91-12.3(c). (COAH is not required to or cannot approve plans that do not meet this two-prong test?) Judge Skillman emphasized the importance of "sound planning" by repeating the requirement five times in three pages, finally repeating the *Mount Laurel* principle that:

"The Constitution of the State of New Jersey does not require bad planning. It does not require suburban spread. It does not require rural municipalities to encourage large scale housing developments. It does not require wasteful extension of roads and needless construction of sewer and water facilities for the out-migration of people from the cities and the suburbs. There is nothing in the Constitution that says that we cannot satisfy our constitutional obligation to provide lower income housing and, at the same time, plan the future of the State intelligently." 247 N.J. Super. at 165; quoting *Mount Laurel II*, 92 N.J. 158, 238 (1983).

There are limits to agency discretion. In *In re Petition for Substantive Certification Filed by the Twp. of Warren, et al.*, 132 N.J. 1 (N.J. 1983), the Public Advocate challenged grant of substantive certifications to six municipalities, due to an occupancy preference. COAH's adoption of the occupancy preferences was invalidated because it was inconsistent with, and undermined "the methodology adopted by COAH for calculating and allocating regional fair share of low- and moderate- income housing." In *Warren, et al.*, the preference did not comport with the FHA's central purpose, "of providing affordable housing on a regional basis consistent with both sound planning concepts and the *Mount Laurel* doctrine. N.J.S.A. 52:27D-303." 132 N.J. at 28.

Because *Mount Laurel* implementation is an evolving process, "... COAH is entitled to a reasonable degree of latitude, consistent with the legislative purpose, in its effort to ascertain which planning and statistical studies best serve the long-term statutory objectives." 132 N.J. at 27; *Van Dalen*, 120 N.J. at 246. However, this discretion is not unlimited. "The breadth of COAH's discretion in selecting methodologies to implement the [FHA], however, does not dilute COAH's duty to adopt regulatory methods that are consistent with the statutory goals." 132 N.J. at 28. In addition, while the court has awarded COAH wide leeway in fashioning regulatory approaches, it has "insisted that COAH exercise that regulatory responsibility and do so in a reasoned and accountable way." *Holmdel Builders Ass'n v. Twp. of Holmdel*, 121 N.J. 550, 579-80 (1990).

The Appellate Division has held that amendments to "the master plan" and zoning ordinances, necessary to implement a housing element and fair share plan, "must not only be consistent with the FHA and COAH regulations, but with 'sound municipal land use planning'." *Mount Laurel II*, 92 N.J. 158, 211 (1983). Therefore, COAH *must* "focus on the 'suitability' of a site in its review of a fair share plan component, consistent with its own regulations and sound planning concepts." *In re Petition for Substantive Certification by the Twp. of Denville*, 247 N.J. Super. 186, 201 (App. Div. 1991). However, it must be remembered that "[i]n determining suitability of a site ... consideration must be given to presumption of validity of municipal zoning ordinance." 247 N.J. Super. at 201.

N.J.A.C. 5:92-1.3 defines suitable site as "a site that is adjacent to compatible land uses, has access to appropriate streets and is consistent with the environmental policies delineated in N.J.A.C. 5:93-4." Among the policies delineated in Subchapter 4, are adjustments based on a lack of land, or lack of water and sewer service. An adjustment for a lack of adequate water or sewer capacity is durational. The requirement is merely deferred until service is available, with priority granted to affordable housing. Suitability then, is a question of land use, traffic flow, and environmental protection.

ALJ's have looked at a variety of factors when determining whether a site submitted within a Petition for Substantive Certification is "suitable". These include whether the site:

1. is approvable, available, developable and suitable IAW N.J.A.C. 5:92-1.3;
2. may be developed for affordable housing in a manner consistent with the regulations of all agencies with jurisdiction over the site;
3. has access to appropriate sewer and water infrastructure;
4. is adjacent to compatible land uses;
5. has access to appropriate streets;
6. is consistent with the environmental policies set forth in N.J.A.C. 5:92.8;
7. avoids restricted agricultural lands;
8. avoids freshwater wetlands;
9. avoids reserved recreation, conservation, and open space areas;
10. has regional accessibility and proximity to goods and services;
11. satisfies the obligation to create a realistic opportunity to meet fair share needs;
12. will constitute a substantial detriment to the public good (40:55D-70(d); and
13. will be consistent with the intent and purpose of the MLUL (40:55D-2). *In Re Petition for Substantive Certification of Fanwood Borough*, 92 N.J.A.R.2d(CAH) 1.

In its grant of substantive review, COAH proposes that adjacent compatible land uses include the "municipal complex, library, police department, YMCA." The Hillsborough Environmental Commission notes that the adjacent land uses in question are actually the environmentally sensitive Sourland Mountain and the inventoried historic district. 7/31/96 Letter. "Suitable" vehicular access is allegedly provided by Amwell Road, River Road, and Mill Lane, although the Hillsborough Environmental Commission reports that even the Phase I submission, "fails to assess the full impacts of the proposed developments. 7/31/96 Letter. Finally, COAH believes that no environmental constraints would prohibit the development of 3,000 units. COAH Compliance Report, 3/4/96. Meanwhile the Hillsborough Environmental Commission asks, "Why is it suitable? How is it suitable? What are the negative impacts associated with development of this designated environmentally sensitive area?" 7/31/96 letter. In addition, the Commission believes that the Phase I EIS was woefully inadequate, and "unacceptable," failing to include streams, wetlands, and drainage. 7/31/96 Letter, 9/8/96 Letter.

N.J.A.C. 5:92-1.3 defined "growth area" as "lands so designated by the 1980 [SDGP] as updated by the [SDRP]..." However, this definition is absent from N.J.A.C. 5:93-1.3. 5:93-1.3 does include a definition of "center". "Center" is defined as "a compact form of development with

a core or node (focus of residential, commercial, and service development) and a community development area that ranges in scale from an urban center to a regional center, town, village, and hamlet." The definition is taken verbatim from the SDRP.

The SDRP contains no definition of "suitable" or "growth area", and contains a very different definition of "developable". In fact, COAH has renounced the term "growth area" as an "antiquated term" not used by the SDRP. 25 N.J.R. 5784, Response to Comment 295. COAH and SPC have entered into a MOU, under which SPC accepts COAH's definitions, and COAH accepts the SPC's SDRP definitions for infrastructure, centers and environs, identified and designated centers, and critical environmental/historical sites.

The SPA and the FHA both recognize the interdependence of planning for infrastructure and planning for affordable housing, and the importance of maximizing the use of existing infrastructure in determining locations for development. *Memorandum of Understanding between the SPC & COAH*, 25 N.J.R. 1212, Appendix F. A "developable site" is defined by N.J.A.C. 5:93-1.3 as "...a site that has access to appropriate water and sewer infrastructure, and has received water consistency approvals from the [NJDEP]..." N.J.A.C. 5:03-1.3. However, the SDRP contains a very different interpretation, defining "developable land" as "unimproved land exclusive of: (1) public open space; (2) land precluded from development due to deed restrictions; and (3) land deemed undevelopable by state or local regulation of natural factors."

The Resource Planning and Management system establishes Planning Areas and centers, and is the "preferred mechanism of the [SDRP] to effectuate the [SPA's] mandates to provide a coordinated, integrated, and comprehensive plan for growth, development, renewal and conservation of the State and its regions, and to identify areas for growth, agriculture, open space conservation and other appropriate designations..." *Memorandum of Understanding between the SPC & COAH*, 25 N.J.R. 1212, Appendix F.

"Planning area" is defined by N.J.A.C. 5:93-1.3 as "an area defined by a set of common criteria which focus on the degree and type of development or natural resources. Planning areas serve as an organizing mechanisms for growth and development planning throughout the State." The SDRP defines a "planning area" as an "area ... that is described by the presence or absence of a set of existing conditions, such as population density, Urban or Community Infrastructure systems, level of development, or natural resources and sets forth policy objectives that guide growth in the context of those conditions." The SDRP also notes that the "Planning Areas" are intended to guide the application of the SDRP's "Statewide Policies," "as well as to guide local planning and decisions on the location and size of Centers within the Planning Area."

It is the SDRP's intent that non-farm development in Planning Area 4 be developed "at a density and in a manner that minimizes the potential for land-use conflicts," and envisions achievement "through the centers strategy" and "other kinds of sound land-use planning techniques." SDRP p.111. The same standard applies to Planning Area 5. In both Planning Areas, growth should occur in existing centers first, followed by new planned centers with private infrastructure investment.

The SDRP is intended to further many other objectives including "the development of land 'in a manner consistent with sound planning.'" *Van Dalen v. Washington Twp.*, 120 N.J. 234, 243 (1990). COAH has documented its belief that the SDRP and the State rules, e.g. DEP regulations, "are adequate in assessing specific municipal sites." 26 N.J.R. 2300, Response to Comment 17. COAH's regulations incorporate the SDRP in three ways. First, in Subchapter 5.4, COAH requires that new construction conform to the SDRP. Second, Subchapter 5.6 requires that the Council's review of municipal plans "*shall include* ... the site's conformance with the [SDRP] pursuant to N.J.A.C. 5:93-5.4..." (emphasis added). Third, COAH has referenced the SDRP in Responses to Comments.

N.J.A.C. 5:93-5.4, reinforced by 5:93-5.6, belies a preference for locating development in Planning Areas 1 and 2. The Council *shall encourage* development in Planning Area 3 within centers, but *shall require* development in Planning Areas 4 & 5 to be within centers. Municipalities may identify an expanding or new center, and submit to center to the State Planning Commission for designation. N.J.A.C. 5:93-5.4(c).

COAH's response to Comment 85, 25 N.J.R. 5783, states that "Municipalities *shall be required* to select sites that have water and sewer" before considering sites that do not have access. In addition, the Response notes that in order to permit development in a PA 4 or 5 area, the municipality first has to receive a center designation that identifies a geographic area that can be served by sewer and water. In a Response to Comment 119, COAH stated that the centers requirement is "clearly consistent with the policies of the SDRP," but noted that "[t]here are always exceptions to the rules, and the Council would not rule out creative approaches that result in a realistic opportunity." Finally, the COAH states emphatically in the Response to Comment 161 that "the center designation process is critical in order [to create] infrastructure that is necessary to construct [affordable] housing. To approve sites, without the ability to extend or create infrastructure, would not be productive."

New Jersey Future's prevails if the evidence shows that:

1. COAH failed to abide by COAH regulations;
2. COAH failed to abide by its legislative and constitutional mandates;
3. COAH and/or Hillsborough's decisions were arbitrary and capricious; or...