

Hillsborough Litigation

Memo to Lloyd re: the applicability of NJAC 5:93-5.4(c) or NJAC 5:93-5.4(d) to the Hillsborough case.

2 pages

Confidential?

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TO: Ed Lloyd
FROM: Ron Cucchiaro
RE: Hillsborough Case
SUBJECT: Applicability of N.J.A.C. 5:93-5.4(c)

Issue:

Should COAH apply N.J.A.C. 5:93-5.4(c) or N.J.A.C. 5:93-5.4(d) to the Hillsborough case.

Argument

N.J.A.C. 5:93-5.4(c) is the appropriate regulation to be applied in the instant case. Respondent's reliance on N.J.A.C. 5:93-5.4(d) is flawed. N.J.A.C. 5:93-5.4(c) mandates that new construction of affordable housing in Planning Areas 4 or 5 be located in centers. N.J.A.C. 5:93-5.4(d) states that in municipalities divided by more than one Planning Area, the municipality must encourage and may elect, if it so chooses, to require the use of sites in Planning Areas 1, 2 and 3 prior to approving inclusionary sites in Planning Areas 4 and 5. This section of the regulation simply means that a municipality can prioritize which Planning Areas will be developed first. It does not relieve the municipality of the obligation to place new development in Planning Areas 4 and 5 in centers.

The legislative history of N.J.A.C. 5:93-5.4 echoes this view of the regulation. During the comment session of the readoption proceedings for chapter 5:93-5.4, COAH articulated an unambiguous intent to keep new development in Planning Areas 4 and 5 in centers. COAH stated:

... the center designation process is **critical** (emphasis added) in order to create infrastructure that is necessary to construct low and moderate income housing. To approve sites without the ability to extend or create infrastructure, would not be productive.

25 N.J.R. 5775, Comment 162, December 20, 1993.

COAH also stated that its decisions would be guided by the Memorandum of Understanding it entered into with the State Planning Commission. 25 N.J.R. 5775, Comment 166, December 20, 1993. The Memorandum of Understanding (See 5:93 App. F) states that when Planning Area 4 and 5 development sites are not located in centers, COAH must examine the municipality for sites with infrastructure in centers or other Planning Areas. If such a site is not available, COAH is to return the plan to the municipality directing it to identify centers and amend the SDRP. If an alternative site is available, COAH returns the plan and directs the municipality to more suitable sites. This Memorandum

of Understanding supports the position that new development in Planning Areas 4 and 5 be located in centers, and that N.J.A.C. 5:93-5.4(d) is optional.

The structure of N.J.A.C. 5:93-5.4 also indicates that the drafters intended that N.J.A.C. 5:93-5.4(d) be optional. N.J.A.C. 5:93-5.4(a) addresses the mandatory requirements in Planning Areas 1 and 2. N.J.A.C. 5:93-5.4(b) deals with the mandatory requirements which apply when placing new development in Planning Area 3. N.J.A.C. 5:93-5.4(c), the relevant section to this case, states the mandatory requirements imposed on new development in Planning Areas 4 and 5. After addressing the mandatory requirements in each Planning Area, the drafters next turned their attention to optional requirements. The optional requirements are embodied in N.J.A.C. 5:93-5.4(d). This section provides that after a municipality ensures that all of the mandatory requirements have been met, the municipality can prioritize its sites.

Both the plain language of N.J.A.C. 5:93-5.4 and its legislative history indicate a clear intent by COAH to place new development in Planning Areas 4 and 5 in centers. N.J.A.C. 5:93-5.4(d) would only be applicable if a municipality made the decision that new development should occur in Planning Areas 1, 2 or 3 before 4 or 5. The regulation does not relieve a municipality from complying with N.J.A.C. 5:93-5.4(c).

In the instant case, the proposed development is located within Planning Areas 2, 4, and 5. Since the vast majority of the development is located in Planning Areas 4 and 5, N.J.A.C. 5:93-5.4(c) is the applicable regulation. N.J.A.C. 5:93-5.4(d) has already been complied with since the municipality has opted not to prioritize which Planning Areas it will develop first. Further, even if such a plan were adopted, the municipality would not be relieved of the obligations mandated in N.J.A.C. 5:93-5.4(c). Compliance with N.J.A.C. 5:93-5.4(d), therefore does not alter the requirements of N.J.A.C. 5:93-5.4(c). The two regulations are not mutually exclusive, rather, they supplement each other and must be read to together.

Conclusion:

For the foregoing reasons, N.J.A.C. 5:93-5.4(c) is the appropriate regulation to be applied in the instant case.